



Using the Other Side's Strikes: Regulating the Information Flow to Steer Your Opponent in Voir Dire

by Roy Futterman, Ph. D.

IT HAS LONG BEEN THE DAYDREAM of jury selectors: What if I could use not only my own peremptory strikes, but the strikes of the opposing side as well? This goal is, in fact, attainable by manipulating the information flow in voir dire to guide your opposing counsel's decision-making. This can be done in three steps:

1. Calculate the opposing side's optimal jury selection strategy to learn what information they need to make their decisions.
2. Read into the opposing attorney's idiosyncratic behavior during voir dire to get more information on their decision-making process.
3. Adjust your voir dire questioning based on this information to bait opposing counsel to strike your own unfavorable jurors.

Calculating The Opposing Side's Voir Dire Strategy

The first step in this process of steering your opponent is to understand the information that your opposing counsel will use to make peremptory strike decisions by calculating their optimal voir dire strategy.

Strategic voir dire is primarily focused on considering who opposing counsel's most favorable jurors would be, and how the opposing side will likely behave during voir dire ([Futterman, R. 2011](#)). To calculate opposing counsel's strategy, in advance of

trial, put yourself temporarily in their shoes to consider what types of jurors would be most responsive to that side's narrative, themes, and parties (for more explanation of this technique [listen to this American Bar Association sponsored podcast](#)). With this advance preparation, you can then plan how to have the types of jurors who are most favorable to the opposing side expose themselves during voir dire so that you can strike them. Usually, you would end there, but you can also use this method to go further.

This method also gives you an understanding of the opposing side's optimal jury selection strategy, and most importantly, the information that the opposing attorney will require in order to make decisions in voir dire. This is only the first step in steering your opponent, however, because your counterparty will rarely follow through on the optimal strategy.

The Opposing Side Veers

Attorneys for the opposing side veer from the optimal strategy for a variety of reasons. Often, for instance, the attorney has no real jury selection strategy at all. In state court voir dire, for example, many attorneys think very little about exposing and striking jurors for strategic reasons, and primarily use the more free-flowing question and answer period to merely ingratiate themselves with the jurors. Their voir dire strategy is only to arrange to be liked and trusted throughout the trial. The at-

torney will then strike any potential jurors who give social cues indicating that they are not responsive to the attorney during the ingratiation period. These social cues, however, are readily viewable to both side's attorneys, providing the same important information to both sides.

Another reason that attorneys veer from an optimal strategy is that attorneys often have idiosyncratic views of what types of jurors have responded to them personally in the past or stereotypical views about how certain demographic types respond to their cases. Attorneys will often explain this by saying something like "I had a plumber on a case once, and I'll never do that again". This is only natural. Generally, as attorneys gain more experience and wisdom from litigating, they also accrue more biases about juror types that tend to override the optimal strategy for the specific case at hand.

Observing The Opposing Side's Idiosyncrasies

Because of this, the second step in this process of steering your opponent is to watch the opposing attorney's behavior during voir dire to see how the attorney goes off course from the optimal strategy. Because you will have calculated the other side's optimal strategy at this point, you will readily see when and where the opposing attorney is veering from it.

From the start of the voir dire process, jurors will request to leave the pool due to scheduling issues and other reasons. You can most clearly see what types of jurors the opposing attorney sees as most favorable and unfavorable by watching the attorney's different reactions to each juror's request. The opposing attorney will clearly show which jurors they are steering in or out of the pool at this stage. In state court voir dire, attorneys will usually blatantly show that they are driving certain jurors on or off by their very pointed questioning that steers jurors' answers in various directions ("This doesn't seem like the kind of case you would be able to sit for, right?" or "This schedule would not be much of a hardship for you, right?").

By the end of this early stage of the voir dire, you will have a clear view of what types of jurors the opposing attorney is looking for as well as what information the attorney needs in order to make decisions, based on both the optimal jury selection strategy and the attorney's behaviors that show variations from that optimal strategy. With this knowledge in hand, you can use this information to alter the opposing side's use of its own peremptory strikes.

Using The Opposing Side's Strikes

The final step of this process of steering your opponent is to apply what you have learned to regulate the flow of information from each juror to set a trap for the opposing attorney. With your knowledge of what the opposing attorney considers favorable and unfavorable, you can take advantage of this information to adjust your own voir dire questioning to set out bait for the opposing attorney.

Every juror has both favorable and unfavorable aspects. This is the raw data that you have to work with as you turn the spigots to control the information flow. Your questioning can emphasize topics of your choosing. The trap is set by encouraging your unfavorable jurors to talk at length about topics that are unfavorable to the other side. This is done to encourage the opposing attorney to strike your unfavorable jurors.

As an example of this technique, in a recent dispute between two financial entities that took place in state court, we considered people in the financial industry to be unfavorable, but knew that the opposing side was concerned about financial industry people who were in compliance and regulatory areas. Because of this, our attorney questioned a finance person (unfavorable to us) at great length about his views on financial ethics and auditing (unfavorable to the opposing side). The opposing attorney was understandably concerned after the juror spoke at length on these issues, took the bait and struck our unfavorable juror. When opposing counsel took the bait, in effect, we had four peremptory strikes, and the opposing side had two.

But Does This Technique Work?

In voir dire, regulating the flow of information is the key. If you can guide the flow of juror information, you can affect your opponent's behavior.

In any strategy game, however, it is often more difficult to play against a less skillful player. It is always possible that the opposing side will fail to take the bait. If that happens, you have not lost anything by exposing more juror information, and you can always use one of your own strikes on the juror after all, so there is no harm in trying.

Meanwhile, the upside potential is high. It is always nice to have a few extra strikes.

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References

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