



Knowing When and How to Indoctrinate

by Alan Tuerkheimer

IT'S TIME FOR VOIR DIRE, but is anybody listening? Are jurors listening to attorneys? Are attorneys listening to jurors? More often than not the answer is no. Regardless of case type or jurisdiction, jurors are checking out. Their attention spans are flat-lining during a crucial phase of trial – voir dire.

At a critical time when jurors need to be particularly focused and engaged, they are losing focus and disengaging. Why is this happening? The reasons are varied and the problem is serious.

Sometimes, jurors are put off by an attorney's combative style or demeanor. Other times jurors are confused by awkwardly worded questions they do not understand, or by attorneys who seem more concerned with their next question than with listening to jurors as they respond to the question at hand.

Ironically, it is during voir dire that attorneys have their best chance to bond with the panel. Even if the jury selection is effective, it is during these early stages of voir dire that first impressions are being formed by jurors, and there will never be another opportunity to do just that.

Compounding the problem is that most attorneys say voir dire is their least favorite part of the trial process. Courtroom lawyers thrive on the adversarial nature of trials and have learned how to be effective advocates. However, achieving success during jury selection requires a somewhat different approach. Attorneys need to play by a completely different set of rules if they are going to conduct a successful voir dire. Combative, aggressive or argumentative questions will not help attorneys connect with the potential jury.

Get the Jurors Comfortable

Listening and getting jurors to feel comfortable enough to freely and openly express themselves is the key to success in jury selection. Jurors do not want to feel as if they are being prompted to say merely what the attorney wants to hear. The only answer counsel truly wants to hear during voir dire

is an honest one. While indoctrination is an important part of effective jury selection, juror responses during voir dire reveal more about who will determine your client's fate. Not surprisingly, the most useful information is gathered when jurors are the ones doing the talking, and speaking in their own words.

Of course attorneys want jurors to view the case in ways that are favorable to their client and will attempt to indoctrinate the panel to some degree. The trick is to know when to do it and how to do it effectively.

Generally, the use of indoctrinating questions should be modest and occupy no more than 25 percent of an attorney's total time and questions. Conversely, since 75 percent of voir dire questioning will consist of more open-ended, information gathering questions, it is imperative to pick and choose the most crucial topic areas for indoctrination. The attorney needs to prioritize which questions will be best suited for the indoctrinating approach since there should always be a finite amount of such "questioning" in voir dire.

Jurors should be reminded early on there are no right, wrong or unimportant answers, and then the open-ended phase of voir dire should commence. If indoctrinating questions are asked at the front end of voir dire, this will stifle candid responses important to subsequent open-ended questions. It is these open-ended conversations where the most information about the panel is learned, in what is often a limited amount of time. Three words should guide attorneys at the beginning of voir dire – let them talk.

It is also important to keep in mind that jurors are typically smarter than attorneys give them credit for. Jurors often realize as soon as an attorney asks an indoctrinating question that they are being forced and frequently manipulated into seeing things a particular way. This reality may cause a backlash.

Jurors want to see the attorney listening to them talk and being interested in what they have to say. They do not want to be

lectured to or forced to listen to something, especially from someone they have yet to connect with. At the right time, toward the end of voir dire, once rapport has been established with plenty of open-ended questions, some indoctrinating questions can be asked without risk of alienating the vast majority of the panel.

Attorneys sometimes have difficulties connecting with jurors because jurors may have firmly-held, preconceived opinions on topics such as tort reform, corporate mendacity, frivolous lawsuits, and the government's role in regulating corporations, among other interrelated "hot topic" litigation issues. These general beliefs help shape how jurors will view the evidence in the case, so counsel needs to choose which topics should be asked in open-ended fashion and which ones would be more effective in the indoctrination format later on in the process.

Either way, voir dire is the opportunity to get answers to questions that will help determine whom you do not want sitting on your jury, and it also enables you to start framing the case in a jury-friendly way that is most beneficial to your side.

Set the Tone First

What is the best way to identify and then strike someone who believes all plaintiff lawyers are "money hungry" and will not give your client a fair shake and keep an open mind? How do we identify someone who believes corporations are the root of all evil, and despite pledges to follow the judge's instructions, will expect your corporate client to prove it did nothing wrong? How do plaintiff attorneys differentiate, in the eyes of the jury, between the substance underlying their client's claims and those "other" frivolous lawsuits? How can corporate counsel distinguish between its C.E.O. and those seen on the nightly news being dragged away in handcuffs?

As previously noted, open-ended questions are the best way to get jurors to express themselves candidly and empower them to talk earnestly about their experiences and world views. This is a universal perspective on jury selection, regardless of whether you are working for the plaintiff or the defense. Therefore, all lawyers should always begin with the "easy" open-ended questions first. There are no right, wrong or unimportant answers to these simpler questions, and this approach will often yield valuable information. Additionally, it gets the jury to open up for subsequent, more penetrating questions. These are by no means throwaway questions, but ones that set the tone for the remainder of voir dire.

Say that an attorney begins the voir dire process by immediately pressing jurors on how they feel about a paraplegic's chances of living a happy life as a result of a horrific accident caused by an unstable load on a truck. If the attorney is not careful and sensitive, jurors will (rightfully) check out of the process, harbor some resentment toward the attorney, and likely not communicate their true beliefs on the subject and probably other subjects delved into down the road. Warm-up questions

for a case like this one might include questions such as:

- *"Does anyone know someone who is a paraplegic?"*
- *"How do you know that person?"*
- *"What kind of life does this person live?"*
- *"How long has s/he been a paraplegic?"*

Attorneys must not forget that the jurors are real people they are conversing with, so genuine expressions of sympathy, or reactions such as "I am sorry to hear that," will keep jurors listening. If a juror talks about a car accident and the lawyer doesn't follow up by asking whether anyone was hurt as a result of the accident, it will reinforce for jurors that attorneys are self-absorbed and only interested in winning their case. In addition, long lectures about the importance of jury duty and constitutional rights as an American are not recommended. Plaintiff and defense perspectives differ from this point forward, as each side is looking at things through a different lens and playing a different set of cards altogether. However, the proportion and timing of open-ended versus indoctrinating questions is universal.

Defense counsel often has to counteract the plaintiff's painted picture of their client as a distant, unconcerned, profit-driven corporation that will cut corners to save a buck. Receiving answers to the following open-ended question will go a long way toward ascertaining crucial information:

- *"Compared to an individual who has filed a lawsuit, what kind of standard should the defendant corporation be held to?"*

Or, if your client has received some bad publicity, important information and credibility can be attained by asking the following:

- *"Decisions should be based on the information presented to you here at trial. Therefore, how would you react if, during deliberations, someone makes an argument either for or against my client based on pre-trial media and television?"*
- *"How reliable is information you get from television news?"*

Jurors will provide crucial information to these questions and will become more comfortable and willing to further engage in conversation. As a result, they will candidly answer more probing questions that follow.

In voir dire, the plaintiff has an opportunity to begin to illustrate the contrast between the behavior of their client with that of the defendant corporation. In many cases where the defense does not admit liability, jurors will put themselves in the plaintiff's shoes and wonder if what happened to the plaintiff could have happened to them or someone close to them. The defense will focus on the plaintiff and build a psychological barrier

around the plaintiff so jurors do not “connect” and come away thinking this could have been them. Plaintiffs, on the other hand, want jurors to be thinking about how this could have been them. Voir dire should be structured with this in mind. Defense counsel, for example, should ask jurors about their thoughts on how far a corporation needs to go in ensuring its product is used in the proper manner, hoping to lead jurors to the conclusion they would not have done what the plaintiff did or did not do.

Timing is Key

Plaintiff lawyers will find dimensions that enable them to characterize the plaintiff as “any of us.” If these are the “key” questions that require indoctrination, counsel better be sure the timing is right to ask these questions. If counsel wants feedback on these issues but does not feel the jury is ready for these questions, it is wise to take the more open-ended approach.

- *“What is a corporation’s responsibility to the public at large?”*
- *“What can citizens of this county expect when they walk along XX path near YY river?”*

In many cases, questions should be asked that get at a sense of jurors’ global views on personal responsibility.

- *“Juror 21, have you ever been in a car with someone who was so careless and so reckless that you thought at the time this person shouldn’t be driving?”*

Of course the last thing counsel wants to do is appear to be blaming the victim, so proper wording is key to finding the right balance between planting a seed that will germinate into doubt about the plaintiff’s claims on the one hand, and flat out blaming him for the accident on the other. Plaintiff lawyers should ask about whether, as a consumer, when a company manufactures something, a certain “margin of misuse” should be factored in. Take the following indoctrinating question as an example:

- *“Juror 23, do you believe that a product should be dangerous if it is properly used for its intended purpose? Why/why not?”*

The obvious answer is no but there will be major differences in how jurors respond to this question depending on when it is asked in the voir dire process. If other, more pressing indoctrinating questions are more of a priority, this information can be gleaned early on simply by asking it in a more open-ended way.

Discussing Damages

It is important to be up front with jurors about damages. Plaintiff and defense perspectives differ here as well. The

defense will want to receive commitments from jurors that arguing about lesser damages is not any kind of admission on liability or mean-spiritedness. Jurors should be told the client is not negligent, nor did it cause damage to the plaintiff, but in the event the damage phase is reached, the plaintiff’s amount is unreasonable and here is why.

Plaintiff lawyers need to be looking out for something else. Jurors are typically more comfortable discussing a total damage amount than determining how much each facet of damages is worth. It becomes important to explain to jurors how this tendency is understandable but that fairness requires them to consider each question discretely. Even if this commitment is ignored during deliberations, the strongest pro-plaintiff supporters will use it to increase damages.

Overall, because the discussion of damages is something counsel often wants to “control,” the indoctrinating approach seems best and most comfortable, but in the end this is not true. Determining juror bias is critical during voir dire and the indoctrinating approach does not let jurors with the greatest amount of bias against your case reveal such a bias if you are the one doing the talking. A good open-ended question during this phase is:

- *“How do you feel about pain and suffering?”*

Once jurors answer this question and provide insights into their biases, indoctrinating questions may follow that teach the jurors about pain and suffering. A supplemental jury questionnaire is ideal under this circumstance, but again, attorneys need to fight the urge to indoctrinate in a supplemental jury questionnaire – it never works and can even ruin a certain area of inquiry for oral voir dire.

Open-ended questions in a jury questionnaire are ideal for eliciting candid responses that are windows into juror bias. If lawyers must indoctrinate during oral voir dire, the open-ended information from a questionnaire will pave the way for the indoctrinating questions to be asked orally.

No matter what attorneys are told, they will always want to do some degree of advocating. The challenge is to accept this and then determine how and where this advocating should take place, and when it needs to take a back seat to the less confrontational approach of asking jurors open-ended questions. The key is to ask indoctrinating questions at the right time, and to follow proper sequencing during the voir dire process. If the proper balance is struck and attorneys shed the mold they’re so accustomed to, the jury will find it easier to tune in, connect, open up and talk honestly, and as a result offer the most useful information needed to make intelligent decisions during jury selection. 📌

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