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Voir Dire in a Post-Coronavirus MDL World

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VOIR DIRE IN A POST-CORONAVIRUS MDL WORLD

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INTRODUCTION

A small analogy: I had a brand new, No. 2 pencil. Unable to find a sharpener, I used a pocketknife to whittle a writing edge. I learned three things: (1) the pencil's wood tip does not have to be pretty to work; (2) if you whittle one side too much, the pencil will lose its point; and (3) each time I sharpened the lead, I got better at getting it right.

Having tried over a dozen MDL cases around the country, all but two as plaintiffs' counsel, I have found *voir dire* analogous to my pocketknife pencil sharpening. Certain approaches, though not always pretty, work well. Other approaches have not worked so well, and the jury is still out on questions that only more time and experience will answer.

I. WHAT WORKED

Evaluating what has and has not worked must begin with an understanding of what it means to "work" in the sense of effectuating a successful *voir dire*. Mark Twain once said:

> We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.[1]

Twain's humor and cynicism misses the beauty and efficacy of both the jury system and the selection process. A successful *voir dire* should never be measured by finding people who know nothing and cannot read. To the contrary, a successful

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[1] John Greenman, Recording of Mark Twain's After-Dinner Speech at the Meeting of Americans in London (July 4, 1873), https://ia801604.us.archive.org/7/items/twainsspeechesv2_1704_librivox/twainsspeechesv2_015_twain_64kb.mp3.

voir dire is one that empanels a jury who can set aside what they may know, base their decision upon evidence, follow the instructions of the court, and read!

> The test for determining juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.[2]

But I would suggest that a truly successful *voir dire*, especially in the MDL context, entails not only finding competent jurors, but also *doing so in an efficient manner*. Efficiency in the *voir dire* context should be measured in regard to the court's time, the lawyers' work, and the imposition on the venire panel.

Recognizing the obvious, courts have different *voir dire* practices, with state courts generally leaning more heavily on lawyer *voir dire*, while most federal judges conduct the preponderance of the *voir dire*. However, both state and federal courts are becoming much more attuned to the advantages of using questionnaires before jury selection. When I began trying cases, a juror questionnaire was a card filled out just before jury selection. The card asked only a few questions aimed at securing rudimentary information, such as prior jury service, marital status, and current employment. Courts typically handed the cards to the trial lawyers as venire members were coming in to be questioned. Over time, judges began to allow fuller questionnaires, typically prepared by the lawyers. These questionnaires often required agreement between counsel; absent agreement, the judge would "old-school" it, relegating the attorneys to primitive juror information equivalent to the old cards.

Although lawyers petitioned judges for more time to examine the fuller questionnaires, some judges were loath to give the time. These judges thought the time (generally a day, but at least an afternoon) a deterrent to efficiency. In the smaller "who ran the red light?" cases, these judges were likely correct. But MDL cases are almost always cases of a different ilk. MDL cases are often tried as bellwethers. The trials impact broader litigation for numerous plaintiffs. That numerosity makes the stakes high for both plaintiffs and defendants.

MDL jury questionnaires became a mini-practice area. I have had cases where the questionnaire was nineteen pages, and cases where it was the front-and-back of one page. Should the questionnaire be agreed to by the parties and rubber-stamped by the court? Or should the court adjust the questionnaire? A few courts have developed their own questionnaires to be used as templates by the parties, allowing for modification as a particular case might dictate.

We live in an information age. Not only is our access to information exploding through the Internet, but our hunger for information has exploded, as well. Lawyers and clients want and need that information to select juries in an optimal fashion because today's jurors will often have significant pre-existing opinions that are best revealed without having to orally state these opinions before a crowd of strangers. That makes questionnaires an efficient and even necessary tool, but they need to be used properly.

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[2] Ault v. State, 866 So. 2d 674, 683 (Fla. 2003).

In one case, the court told the parties to agree on a questionnaire, but we were unable to do so. Defendants had built into the questionnaire several loaded questions. We did the same. We believed Defendants initiated the loaded question approach; Defendants said we had. In the furor of escalating drafts, who had begun the war of loaded questions became untraceable. In the end, the judge allowed both sides' questions, except those that seemed too intrusive.

That particular *voir dire* had our team muttering, "be careful what you ask for" more than once as we read through 2,500 cumulative pages the day before jury selection, trying to glean useful information from many inane, loaded questions that no juror would have answered with any useful information.

Recently and very efficiently, an Ohio MDL judge sent the questionnaires with the jury summons, and lawyers received them a week before jury selection. This enabled all legal teams to thoroughly review and analyze the questionnaires, eliminate veniremembers who would likely be struck for cause, and then sit with the judge in court, *before the entry of the venire*, and excuse the members who were disqualified based on their answers to the questionnaires. The apex of efficiency, this set up a lean *voir dire*.

That said, we still learned how to improve the questionnaire. The case was incredibly complicated, and the list of witnesses consumed three pages of the questionnaire. We learned that no veniremember had ever heard of any of the nearly 200 potential witnesses, but we were stuck carrying a bunch of unnecessary pages of questionnaires for the entire trial. In the next trial's questionnaire, we moved the three pages of questions about witnesses to the end of the questionnaire. Our plan was to verify that the venire people have no witness knowledge, and then tear those three pages off the back of the questionnaire, making it easier to use the rest.

In addition to the jury questionnaire, I have seen the continuum of the *voir dire* process; some are handled by the judge, others by the lawyers. As a lawyer, I always prefer to conduct personal *voir dire*, although my proficiency may permanently be in doubt after a federal court trial in Louisiana. The judge there refused lawyer *voir dire*, insisting that all we needed to know about the veniremembers would be elicited by the questionnaire and the judge asking three simple questions: (1) who are you?; (2) what do you do?; and (3) can your mother make a roux?

In that case, one venireman particularly caused me heartburn, but I did not have enough strikes to excuse him. His questionnaire answers indicated that he would be cynical on the issue of damages. I implored the judge to allow me individual *voir dire* in an effort to get the venireman's commitment to be fair or to show cause for striking him. The judge finally agreed. But during individual *voir dire* I was unable to get the venireman to admit to a bias against damages that would cause him to be unfair or disregard the judge's instructions. To my temporary dismay, the man made the jury. Three months later, that same juror

became the foreman and led the jury to assessing nine billion dollars in punitive damages. I should add, his mother could make a roux.

II. WHAT DID NOT WORK

In every one of my MDL trials (those I've won and lost), the courts have always ensured a fair jury was empaneled. So, if that metric determines what works in *voir dire*, I can move on to the third section of this article. However, by my metric of efficiency as well as fairness, there are a few items of note where selection has not been so successful.

Parties need at least one full day to examine questionnaire answers. In one case, where the court gave the parties two hours to look at seventy-five answers, the process lost a great deal of efficiency. None of the lawyers could adequately digest the answers, much less discuss whether we could agree on dismissals. The parade of jurors seeking to be excused was long, and the unwinding of their individual reasons before the bench took much longer than if the parties had been allowed time to digest the answers and try to arrive at agreements on hardships or fairness.

In another trial, one in which no lawyer *voir dire* was allowed, a federal judge conducted the full examination from her bench and was thus unable to readily see each juror. The process was conducted almost perfunctorily, rather than carefully and in a probative manner. *Voir dire* only took a couple of hours, but several days into trial a juror informed the court that she could not read or write English, and she was having difficulty understanding the lawyers and witnesses. The global *voir dire*, during which some jurors never had to express more than a few words, missed that disqualification. Fortunately, there were an excess of jurors, so the trial was able to continue.

I have only had two MDL trials where the judge permitted unlimited lawyer *voir dire*. With no time restrictions, we–the lawyers–had full opportunity to use *voir dire* to examine each veniremember exhaustively. The selection process took several days. We used the time to ferret out bias, begin bonding with jurors, and even subtly argue our cases. The judge viewed it fair because each side had the same opportunity. The case worked out well for my client, but with an eye toward the ethical obligation of "candor toward the tribunal,"[3] I confess that the process failed my metric of efficiency. We lawyers could have been just as effective at empaneling a fair jury had we been given four hours per side.

In subsequent conversations with the court, I discussed whether the judge was bothered by lawyers using *voir dire* to begin bonding with jurors. The judge was nonplussed. He saw the entire trial as one where lawyers would be seeking to bond with jurors. He saw no reason to wait for that to occur in opening statements. He further believed that if lawyers were allowed to begin that process in *voir dire*, those jurors who might readily and quickly succumb to one lawyer's charms would more quickly be struck and never make it to the panel.

[3] MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

In a subsequent case, the federal judge allowed limited attorney *voir dire*, and was clear: "I do not want to see you lawyers use this process to try and bond with the jurors. That is *not* why I am allowing you to voir dire." I urged the federal judge to adopt the view of my prior trial, setting out the prior judge's reasoning. The federal judge at least smiled as he replied: "Nice try."

III. ADDITIONAL CONSIDERATIONS

Abusing a bad pun, where do I find the jury still out on issues of conducting an MDL *voir dire*?

Most critically, in a post-coronavirus world,[4] the need for efficiency in *voir dire* is magnified. Exposing large numbers of veniremembers to unnecessary contact in enclosed spaces can be life-threatening. Taking wise precautions can minimize the risk, but part of those wise precautions should include how *voir dire* is conducted.

More than ever before, questionnaires that are filled out at home, before jury service, can minimize the need for veniremembers to attend court only to be excused because of reasons that could have been reasonably determined before coming to court. For some courts, the process of sending out questionnaires in advance is no challenge. For other courts, it is. The court staffs need to determine what can be done to get the questionnaires sent and returned in a timely fashion. Once the questionnaires are returned, but before the venire panel comes to court, the parties can likely agree to some veniremembers who should be excused. The court can also devise criteria for objections based on the questionnaire's answers, but that still excuses veniremembers for bias or hardship. This should restrict the numbers needed to be in close contact for extended periods.

Questioning potential jurors on concerns about the virus, wearing masks, and social distancing also poses competing concerns. The parties and court need complete information; yet, asking too many questions might unnecessarily feed concerns over the virus and result in losing a number of veniremen that could otherwise serve effectively. Similarly, objections may arise from questioning potential jurors about wearing masks because some people view mask-wearing as a political issue. Nevertheless, mask-wearing, social distancing, and other means of showing consideration towards others are important safety issues. When discussing the mask issue, a lawyer friend told me about one of his trials, in which a juror, who was a veteran of war, suffered such debilitating claustrophobia that he was unable to sit in an enclosed jury room. If that ex-war veteran had been required to wear a mask, there is no telling what would have happened. So, should potential jurors be questioned about masks? Or is that too political? Can one ask whether the veniremembers has been vaccinated against COVID-19, and if not, why not? That information is highly personal, but that will likely reveal important information about one's views of pharmaceutical companies.

Masks or no masks, I have learned that more information is always better in jury selection. Before any evidence is presented, the information might indicate

[4] The term "coronavirus," as used in this article, refers to Coronavirus Disease 2019 (COVID-19).

that jurors are, perhaps even unconsciously, leaning my way or against me. Either way, gaining insight from jurors is the most important goal for me as a trial lawyer.

What else can be done to isolate the veniremembers from each other during selection? Courts will need to experiment with taking hardships first in the process, excusing *before voir dire proper* for those who cannot sit because of one reason or another. Courts will also need to determine how many extra jurors will be necessary because of certain potentialities. The potentialities would include not only ones already present—sickness, accidents, or matters not picked up in voir dire—but also some disease-specific concerns, including sickness of others that might require quarantining.

All of these factors will modify the future usage of questionnaires. Concurrently with writing this article, I am working on the questionnaire for an upcoming MDL trial. Some questions about the coronavirus epidemic will need to be asked. But there is a real debate over what is sufficient and what is too much. Too many questions about the virus might unduly increase the potential jurors' focus on hazards and cause them to unnecessarily seek excuse from service. Yet not enough questions about the pandemic might fail to find the potential jurors who will need to be excused once *voir dire* commences in person.

CONCLUSION

As I sharpen my pencil to prepare for my next *voir dire*, my attention is pointed in multiple directions. I always seek to increase my own skill set, but I also recognize the importance to the court and the venire that the system works to produce not only a fair jury, but that it does so in an efficient manner. So, my eye focuses on what can increase efficiency and drive able, fair jurors into the box.

I take offense with Mark Twain's semi-autobiographical work, *Roughing It*. He totally misses the mark in writing:

> The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system . . . I desire to tamper with the jury law. I wish to so alter it as to put a premium on intelligence and character, and close the jury box against idiots, blacklegs, and people who do not read newspapers.[5]

The great process of *voir dire*, at least in the form in which it is used today, demonstrates the fallacy of those concerns; a panel of qualified, unbiased jurors far surpasses the intelligence and abilities of each individual member. Those who challenge the jury system should remember that the Founding Fathers, in setting out the Declaration of Independence, pointedly explained that treason against the Crown was appropriate because *inter alia*, King George was "depriving us in many cases, of the benefits of Trial by Jury."[6]

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[5] MARK TWAIN, ROUGHING IT (American Publishing Co. 1872).
[6] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Good and effective *voir dire* assures a fair jury, and juries continue to be the backbone of the American form of government. President Lincoln explained it best:

> Let reverence of the laws, be breathed by every American Mother, to the lisping babe that prattles on her lap – let it be taught in schools, in seminaries, and in colleges; – let it be written in Primers, spelling books and in Almanacs; – let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.[7]

[7] Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838, in* THE COLLECTED WORKS OF ABRAHAM LINCOLN, Vol. II, 112 (Roy P. Basler ed. 1953).