Voir Dire in a Civil Case

By Deborah Gordon

Rules—State and Federal

In Michigan, MCR 2.511 sets forth how a jury is impaneled. Section (C) states that "[t]he Court may conduct the examination of prospective jurors or may permit the attorneys to do so."

MCR 2.511(D) has a prescribed list of 12 "challenges for cause." Sections (E) and (H) define the system for exercising peremptory challenges. The challenges are exercised by each side one at a time. Once one juror is excused, another juror fills the seat and the process continues. A "pass" is not counted as a challenge but is a waiver of further challenge to the *panel as constituted at that time.*

In federal court, FR Civ P 47 gives the court the discretion to examine prospective jurors, but adds that if it does so, "it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper."

There is no list of challenges for cause in the federal rules. Importantly, there is support for the position that "a juror who admits to possible prejudice should certainly be excused."[1]

Unlike the state rules, there is no required procedure for exercising peremptory challenges in federal court, and different judges use different systems. One that has become somewhat popular in the Eastern District is the "strike" or "blind strike" method, where 16 prospective jurors are seated in the box, passed for cause, and the attorneys simultaneously mark the clerk's jury sheet with their desired three peremptory strikes. The attorneys have no knowledge of the other side's strikes until the process is complete.

Check the United States District Court website for each judge to learn which system is used in each courtroom. Judge Cleland has posted a detailed explanation of the blind-strike method for those not familiar with it; Judge Cohen has provided the detailed voir dire questions asked by the court.

"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

Voir Dire Conducted by the Court Only

Standard questions posed by the judge and designed to elicit a range of basic information are a welcome addition to the voir dire process. As the judge covers his or her list, attorneys have the opportunity to absorb the answers as observers. While the jurors' attention is focused on the judge, attorneys can observe the jurors' reactions, level of engagement, and attention. Attorneys have a few minutes of relative peace to double-check their juror lists for pertinent information, listen closely, and make notes on areas needing follow-up.

If all goes well, the judge turns voir dire over to the attorneys, who can then delve into key areas of concern and get a more personal feel for each juror. However, the process may stop there without attorneys having an opportunity to participate in voir dire because the decision is within the sole discretion of the judge—which is truly unfortunate, and needlessly so. When a judge refuses to allow attorneys to participate directly in the process, the message received is:

- This case (and by extension, the justice system itself) is not worth much time.
- What's important is moving as quickly as possible; I am more interested in saving 30–45 minutes than in a full, participatory process.
- I don't trust the attorneys to conduct themselves as professionals; they must not have direct access to the jury.

I have been in courtrooms where the judge was so determined that attorneys not have contact with the jury that follow-up questions, required under the federal rules, had to be put to the judge, who then posed them to the jurors. Years ago in Oakland County Circuit Court, a judge, on his own, selected a jury in a complicated employment case in approximately 10 minutes. I settled the case as quickly as I could. Trials are risky enough; neither side felt comfortable presenting the case to a jury whose beliefs and interest level were essentially unknown.

The reality is that voir dire conducted by attorneys is a huge asset to making the best use of peremptory challenges and ferreting out the truth. The judge, elevated on the bench and wearing a dark robe, is less likely to elicit completely candid answers from the jurors. Who wants to tell a judge he or she can't be fair in spite of the judge's instructions? The judge and jurors are much less likely to engage in meaningful discussion of a point that has been raised. I have observed that most voir dire by judges consists of closed-end questioning, which provides limited information. The judge does not have the same grasp of the facts or hot-button issues as the attorneys do; nor has the judge given much thought to the type of bias or prejudice that will be of concern in a particular case.

If you know you will have little or no ability to ask your own questions, submit your proposed voir dire to the court in advance and follow up to be sure the judge

has a copy in hand when the jury selection begins. Take the fluff out of this list; each question should be well thought out and important to you. If you submit a long list covering every possible point, the judge may pay less attention to it than to a well-tailored list of 12 questions.

It's Your Turn

Assuming all goes well, the moment will come when you will be on your feet directly facing the people who will decide your fate. If you are new to this, understand and accept the fact that other than waiting for the jury to return its verdict, the moments between the time when prospective jurors enter the courtroom and the announcement, "We have a jury" are the most nerve-racking of the trial. You may have dotted every "i" and crossed every "t" in preparation, but you cannot predict or control who enters the courtroom and the experiences and belief systems they bring with them. The jurors are also walking into a new experience in an intimidating atmosphere. Your carefully chosen favorite jurors can be quickly dispatched by your opponent's challenges; during the voir dire process you will have to think on your feet, make decisions quickly while working with limited information, and trust your instincts.

The time you spend engaging with the jury is invaluable. You are about to get to know the new, most important people in your life.

Your Time is Limited; Use it Wisely

It is important for prospective jurors to know enough about your case and theory so your questions make sense. This can typically be done in a handful of sentences. After that, it is important to get right to the point. My job is to glean as much information about each person as possible. I do not waste time trying to argue my case (the judge won't let me, anyway) or ingratiate myself. I am of the firm belief that jurors really do decide cases based on the evidence—not on a lawyer's personality or presentation. What I hope for is the respect of the jurors and that they can rely on what I say as truthful.

Along the same line, do not be overly concerned if a juror you are questioning says something you feel may poison the others. Jurors likely come into the courtroom with their own strong belief systems; a comment by a stranger is not going to change that.

Have a plan. With all that has to be done to prepare for trial, it is tempting to wing it when it comes to voir dire. Think creatively about what information you really want from a prospective juror and ask open-ended questions that can get jurors talking. If you represent the plaintiff, be sure to include a few questions about the issue of damages; e.g., the big picture question—"Do you believe juries should not award money damages or a large amount of money?"—and a more direct question tailored to the nature of the damages in your case.

The single most important thing you can do during voir dire is listen. This is easier said than done given all you are mentally juggling at the podium. The whole point of the process is to determine whom you do not want on your jury. To do that, you must secure useful information. Too many attorneys don't want to learn anything from the jurors; they only want to tell them things, such as "Voir dire is a French term meaning 'to see to say'" or "You can set aside your sister's experience, can't you?" It is essential to let prospective jurors finish their thoughts and sentences. Attorneys should not interrupt the flow of ideas. But when you have enough information to decide you want to keep a particular juror, quickly move on.

Do not let a very quiet juror slip through the cracks. You will have to press forward to get a feel for this person. When trying a case in federal court a few years ago, I asked very little of a young, working-class juror in a national origin discrimination case. The jury could not reach a verdict and a mistrial was declared. We learned afterward that this particular juror was the holdout against us. I should have drawn him out more in voir dire.

Who I Am Looking For

Here, I speak as a plaintiffs' attorney who has the luxury of selecting cases I believe in. I want a juror who has some life experience, common sense, understands the values of our community and system of government, and is intelligent. And I want someone who can work with others. Remember, you are selecting a group that will be greater than the sum of its parts. You will not find six perfect jurors. But you can end up with a balanced, sensible group that is good at problem solving.

Over the years, I have learned that the old unwritten rules trial lawyers lived and died by concerning juror demographics—gender, age, occupation, economic level, class, marital status, ethnic and religious background—are simply not useful.[2] Suffice it to say that times have changed and a good voir dire should render these rules meaningless.

Unfortunately, there are no magic rules. It's up to you to come prepared with creative, thoughtful questions, listen intently, think quickly, then make individual judgments based on what you have learned and observed. Trust your instincts and be sure to sneak a peek at who is left in the back of the courtroom before you use your last challenge. ■

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ENDNOTES

1. O'Malley, Grenig & Lee, Federal Jury Practice and Instructions (5th ed), § 4.08, p 155; *Vasey v Martin Marietta Corp*, 29 F3d 1460, 1467 (CA 10, 1994) ("[A] court must grant a challenge for cause if the prospective juror's actual prejudice or bias is shown…."); see also *Hughes v United States*, 258 F3d 453, 460 (CA 6, 2011) (finding that "I don't think I can be fair" is sufficient to show juror bias).
2. See Darrow, *How to Pick a Jury*, Esquire Magazine, May 1936 (Clarence Darrow outlines some of the outdated stereotypes of his era in jury selection).