

PRAISE FOR *CONDUCTING VOIR DIRE*

“*Conducting Voir Dire* is a first-rate primer that helps with the basics, from how to write your notes (though I hope you won’t write them yourself) during voir dire, to the most advanced steps of deciding peremptory and cause challenges. The book draws on a long, rich tradition dating back to the legendary Cathy Bennett, who was one of the great originators and guides of trial consulting. *Conducting Voir Dire* is truly from the wellspring. It has been energized and modernized by Lisa Blue and Bob Hirschorn, among the greatest teachers of how to make voir dire a process—instead of a gamble.”

—David Ball, trial consultant and author of *David Ball on Damages* and *Theater Tips and Strategies for Jury Trials*

“I have been listening to Lisa Blue and Robert Hirschorn give presentations on voir dire and jury selection for over twenty-five years. Although their first book, *Preparing for Voir Dire* was seemingly exhaustive on the subject, they have brought fresh and insightful thoughts about the new vistas of trial after the social media explosion. Their ideas on how to engage your judge in voir dire are incredibly helpful. This is a book I will pick up and study before my next trial.”

—Mary Alice McLarty, past president of the American Association for Justice and the Dallas Trial Lawyers Association

“This little book is chock-full of big ideas—practical ways to ramp up your jury selection skills to get your trial off to the right start. This masterly, but accessible, advice from two of the best helps turn a difficult and awkward process into a thing of beauty. I read every word and learned a lot.”

—Pat Malone, member of the Inner Circle of Advocates, coauthor of *Rules of the Road*, and author of *Winning Medical Malpractice Cases* and *The Life You Save*

“This ‘little blue book’ is a treasure. It’s a quick read, but you will want to have your highlighter and tabs ready! It’s full of practical tips that can benefit even the most experienced trial lawyer.”

—Charla Aldous, member of the Inner Circle of Advocates and listed in *Best lawyers in America* each year since 2003

THE LITTLE BLUE BOOKS

By LISA BLUE AND ROBERT B. HIRSCHHORN

Preparing for Voir Dire

Conducting Voir Dire

ALSO BY LISA BLUE

Jury Selection and Psychology (CD/DVD)

THE LITTLE BLUE BOOKS

CONDUCTING
VOIR DIRE

LISA BLUE AND ROBERT B. HIRSCHORN



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To Larry Hagman, who in real life was the antithesis of J. R. Ewing. Thank you, J. R., for teaching me about kindness and compassion.

—Lisa Blue

I dedicate this book to the love of my life, who has stood by and supported me despite my many flaws, frailties, and failures. Thank you, Kelly, for being my Rock of Gibraltar.

—Robert B. Hirschhorn

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PUBLISHER'S NOTE

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INTRODUCTION

Just think about the awesome power and beauty of jury selection. Six or twelve people are going to decide your client's fate. But before they do, you get to ask them almost anything you can think of to try to figure out which way their votes will go. It is a remarkable opportunity that many lawyers fail to take advantage of.

If you've already read *Preparing for Voir Dire* in The Little Blue Books series, you know there are no shortcuts to an effective voir dire.¹ To prepare to select your jury panel, work first to master important psychological principles to guide you along the way. Then identify and explore the basic truths underlying your client's position, including both their strengths and weaknesses. Use that knowledge to craft simple voir dire questions directed to your panel members' own core beliefs and values. Crystallize the essence of your case in a memorable *power statement* that defines a key issue. Prepare a PowerPoint presentation to help prospective jurors focus and understand the issues covered in voir dire. As soon as you are able, learn all you can about the jury panel with a concise and targeted juror questionnaire. Then check the Internet to find out everything you can about your potential jurors.

All that, and you haven't even spoken a word to the panel yet!

¹ Lisa Blue and Robert B. Hirschhorn, *Preparing for Voir Dire*, The Little Blue Books (Portland, OR: Trial Guides, 2014).

In *Conducting Voir Dire* we show you how to use everything you've prepared in a way that makes your prospective jurors feel comfortable in publicly disclosing their innermost thoughts, feelings, and biases. We demonstrate how to use a combination of creative open-ended, closed-ended, and scaled questions to encourage prospective jurors to tell you willingly what you need to know. We also discuss how to inoculate favorable panel members to thwart your opponent's attempts to challenge them for cause. When you've exposed your unfavorable panel members, guide them into saying just what the law requires for the court to excuse them for cause. If anyone undesirable is left standing, you can take advantage of the peremptory strikes you've strategically planned or negotiated. Now, that's an awesome and beautiful way to pick a winning jury.

1

THE JUDGE'S VOIR DIRE

First up, you need to know that as with many other aspects of life, it's not about you. Most trial judges conduct some portion of voir dire on their own. What judges say to potential jurors and the way they say it sets the stage for how the jury panel views its participation in the trial process. Prospective jurors generally believe that the person in the black robe at the center of the action is something of an oracle: honest, unbiased, and there to ensure that all parties receive a fair trial. When the judge who will be hearing your case instructs the jury panel, those instructions carry much more weight than if they came from you.

Different judges have different styles and techniques for conducting voir dire. Some judges prefer to handle a lot of the preliminary matters themselves in an effort to expedite the jury selection process. Other judges turn the entire voir dire over to the lawyers, choosing not to question the panel members at all. Become familiar with your judge's approach to voir dire long before you show up for jury selection.

It's best when judges do get involved, especially at the start. The process is particularly effective when judges come down off the bench and conduct voir dire from the well, because it brings the judge physically, emotionally, and psychologically closer to the potential jurors. Every juror we have ever spoken with on the subject has

told us they appreciated the judge's making the effort to address the panel up close. Potential jurors also are impressed when the judge addresses them without wearing a robe. The bench and the robe are artificial barriers between the judge and the jury panel. Jurors consistently tell us that without the bench and the robe, the judge is more likable, more approachable, and more human. The jury panel is much more likely to respond well to a judge who approaches them in this way.

If you are comfortable offering suggestions to the court, or if your judge solicits your comments, recommend that the court address the jurors at their eye level. In jurisdictions where judges run for reelection, they may be open to approaches that make them seem friendlier and less threatening. Every potential juror, after all, is a potential voter. Judges also may benefit from giving each potential juror a business card with the bailiff's telephone number written on the back, to be used in case of an emergency. These cards supply potential jurors with information that they may need during trial and that the court may want them to have during the next election. Jurors are not inclined to throw away a business card the judge gives to them, at least until the trial is behind them.

TOPICS BEST COVERED BY THE COURT

Your judge should always conduct part of the voir dire in the beginning so that the potential jurors will become accustomed to being questioned and feel somewhat comfortable about speaking up in the courtroom before the panel is turned over to you and the other lawyers involved in a case. Several important issues are simply better addressed by the court than by counsel.

Honesty

Someone needs to remind the nervous panel members to be truthful, and that message is much stronger when it comes from the judge. The court needs to encourage the panel members to be completely honest and forthright in response to the questions. If

they disagree with the law or don't like one of the parties, that's fine as long as they say so.

Panel members need to know that there are no right or wrong answers so long as they are always honest. Ideally the judge will say to your jury panel, "Please don't tell me what you think I want to hear or what you think is the 'right' answer. What I, the judge, want to hear from you is what you honestly think or feel about the issues we will discuss here today."

Juries Are Important

The judge should also stress the important role juries play in our legal system. Many judges convey the message by explaining to the jury panel that a citizen's highest civic duty or calling is to serve in the military, but the second highest is to serve on a jury. If the potential jurors understand the importance of their service, they are more likely to pay attention and participate during voir dire and throughout your trial. Encourage your judge to tell the panel members that although it is honorable to serve as a juror, it is equally honorable *not* to serve if this is not the right case for them. You might ask the judge to give an example of a situation where a prospective juror was not right for a particular case. For example, consider the case of Carol Parker we discussed in *Preparing for Voir Dire*. Ms. Parker was a passenger on an intercity bus traveling on an icy road in January. The bus was going the speed limit—60 miles per hour—when a car stopped up ahead. The bus driver applied the brakes but hit a patch of black ice. The bus skidded, flipped, and landed on its side in a ditch. Ms. Parker suffered broken bones in her arms and back.

Your judge might explain that a potential juror who had been a school bus operator driving on icy roads for thirty years would likely have difficulty being fair and impartial in a case involving circumstances that he frequently faced in his own job; he might be empathetic toward the bus driver right from the start. The same could be true for a woman whose daughter was killed in a car crash; the panel member might be biased against the bus driver or sympathetic toward the plaintiff, given her own

personal loss.¹ These potential jurors might be extremely honest, civic-minded individuals, but they might not be able to be objective about Carol Parker's case involving a tragic bus crash on an icy road. When your judge explains that impartial juries are critical to our civil justice system and uses examples the panel members can understand, it is easier for potential jurors to admit that their life experiences make a particular case unsuitable for them. And when the message comes from the judge instead of the lawyers, the jury panel understands that the issue is a larger one about the importance of juries and the jury system, not just the narrow question of your particular lawsuit.

One last note before we move on: notice our consistent use of the word *crash* to describe the events of Ms. Parker's case. Avoid using the word *accident* to describe the circumstances that led to your client's injuries. For many people an accident is something that happens when no one is at fault. This is not true of a crash. Use psychological principles to select every word you use so that you frame the issues as you choose to present them.²

Be Positive

By telling the jury panel that the case they'll be hearing will be interesting and that the lawyers conducting the trial are excellent lawyers who are well prepared, your judge sets a positive tone for the trial. The court should avoid making counterproductive, negative comments like "I understand that you don't really want to be here today." The panel members are much more likely to be

¹ If these potential jurors appeared on your panel in the bus crash example case, you would not decide to eliminate them based on the few facts recited above, of course. Instead, you would ask them a series of questions to understand their value systems and core beliefs before making that determination. A very cautious bus driver with a perfect driving record might take a dim view of a driver going the speed limit in icy conditions; he could be biased against the driver instead of toward him, for instance. We discuss how to determine whether these particular panel members should be eliminated from Carol Parker's jury in the section titled "Elimination Questions Next" in chapter 3.

² We discuss the topic of word selection further in the section titled "Smart Word Choices" in chapter 4.

interested and committed to performing their service to the court and to the country if the judge acknowledges that the potential jurors are valuable and that their service is greatly appreciated.

All of this assumes, of course, that you suggest what you'd like the judge to say to set a positive tone and that the court astutely follows your recommendations. But what if your judge is cantankerous, dictatorial, or just negative by nature? Despite your best efforts, suppose your judge opens with: "I know you folks don't want to be here, and to tell you the truth, I wasn't really looking forward to starting a trial today myself." What then?

Use your best judgment. Was the judge simply trying to ingratiate herself with the panel? If so, you might respond to the comment during your voir dire: "I know the judge mentioned that some of you might not want to be here today. But I can tell you two people who really do want to be here—my client and me. This is our final and only day for justice." In this way you can bring home to the panel members the importance of the journey ahead. And many judges would understand that you are just doing your job, advocating on behalf of your client.

What if you have the sense, however, that your judge would feel challenged or provoked by a statement like that? If your judge is the type who is likely to view any commentary from you as an assault on the court's authority, you are better off letting the comment slide. You don't want the court dressing you down in front of the panel at the beginning of jury selection. This is an example of why it's helpful to watch your judge in advance during at least one jury selection if it's at all possible.³ The more information you have about your judge, the better the decisions you'll make during voir dire and throughout the trial.

Length of Trial and Hardship

Your judge should let the prospective jurors know the anticipated length of the trial, taking into account the days that court will

³We discuss this further in the section titled "Inspire Confidence" in chapter 1 of Lisa Blue and Robert B. Hirschhorn, *Preparing for Voir Dire*, The Little Blue Books (Portland, OR: Trial Guides, 2014).

not be in session and the time necessary for deliberations. If the trial will take more than a few days, the court ought to address the matter of hardship at the very start. This is typically the issue about which panel members have the greatest concern: they wonder how much time the case will take and how disruptive it will be to their daily lives. Until the judge discusses the subject, many panel members will be distracted as they wait for the judge to consider the difficulties and conflicts in their schedule.

Some judges, of course, worry that if they excuse panel members for hardship right away, they'll create a stampede to the courthouse door as people become aware of excuses the court considers sufficient to relieve someone of jury duty. If this is a concern, it's better for the court to address the issue of possible trial length early on, even if it waits to excuse anyone based on hardship until after voir dire. At least you will know which panel members are likely to be excused for hardship, and you should not spend much time talking with those potential jurors during your voir dire. However, if the court waits until the end of the process even to raise the issue of hardship, you will waste a lot of time talking to and learning about panel members who will ultimately be excused from service.

If your trial will be a lengthy one, the percentage of people excused for hardship generally will be rather high. In that circumstance it's best if the court excuses potential jurors as soon as they disclose their hardships. This approach allows the court to bring in additional panel members from the jury pool if necessary. You need to know your judge's predisposition on this matter. Some judges are quite liberal in granting excuses for hardship; other judges rarely grant a hardship challenge. Why should you care about this?

Here's why. You want to save the court and yourself some potential trouble. There are two problems related to voir dire that trial judges want to avoid like a plague of frogs. One is getting reversed on appeal because of a jury selection issue. The other is what we call in Texas a "busted panel"—where so many panel members are excused for cause or hardship that you don't have enough qualified people left to seat a jury. If you already know

that your judge traditionally allows a lot of hardship excuses, consider asking early on for a larger than normal panel. An alternative solution is for the judge to alert the jury commissioner that more potential jurors may be needed for the case. If the court excuses a lot of potential jurors for hardship, the jury panel could start to look a little sparse. You don't want your judge to start fretting about losing even more people, or you could face some tough opposition from the judge when you argue your cause challenges. Help your judge not to worry about a busted panel, and help yourself not to be shackled with jurors who should have been excused for cause, by trying to start with a larger panel or reserving an additional pool of potential jurors.

Internet Warnings

Finally, except for the occasional technophobe, everyone on your jury panel is probably an active user of the Internet. It's critically important, therefore, that your judge address early and often the absolute prohibition against panel members and jurors conducting any form of research or investigation into the case. This means a complete ban on Google searches, texting, tweeting, or blogging about the case during voir dire and throughout the trial. The panel members need to hear from the court that during the trial all information they receive to evaluate the case must come from the evidence presented in the courtroom. It is forbidden for jurors, or potential jurors, to conduct their own research outside of court.

Some panel members are well-intentioned; they don't want to subvert justice, they're just the type of people who feel compelled to gather every scrap of information they can about something before making a decision. Make sure your judge explains to the well-intentioned panel members exactly *why* research of any kind, including Internet research, is improper.⁴ The judge should explain that the Internet is full of unreliable information. Witnesses to car crashes and industrial explosions are not under oath when they are describing what they saw to a Fox News

⁴We discuss the concept of "explaining why" in greater detail and in another context in the section titled "Explaining Why" in chapter 7.

reporter. Neither is Facebook the most accurate source of information. In the courtroom, however, every witness is sworn to tell the truth. And both sides have the opportunity to cross-examine each witness to test his memory, analysis, or version of the events. Jurors can assess the likely truthfulness of a witness by judging her demeanor. When jurors do their own research outside of court, however, they deprive the plaintiff and the defendant of the opportunity to confront the witnesses and challenge the evidence. They subvert the applicable rules of evidence that have been adopted to ensure that juries decide cases based only on credible, reliable evidence. For many potential jurors, when they understand why they are prohibited from conducting their own research, they don't need further instruction. They get it.

Other panel members are more likely to follow the rules when they are threatened rather than informed. Such people are more likely to respond to an admonition something like this: "If the court finds that anybody has conducted any type of research on the Internet or otherwise, it could not only result in a mistrial but also lead to that juror's being held in contempt of court, which would subject him to fines and possible confinement." A strong warning that includes the threat of incarceration will dissuade panel members and jurors, whether well-intentioned or devious, from conducting any kind of research outside the courtroom.

Another effective way for your judge to discourage panel members from conducting research or telling tales outside the courtroom is to share a short story about someone who violated a judge's instructions by doing some Internet research and then suffered the consequences. One story we've heard, for example, involved a juror who researched a defendant corporation's stock price online and then advised a friend to short the stock before the jury awarded a large verdict against the corporation. When this conduct was revealed, the juror suffered dire consequences. Your judge might use an account like this one as an illustration of prohibited conduct and as an example of the type of penalties that can flow from a violation of the court's admonition. People almost always relate to stories and recall them as they consider a course of action they know to be improper.

No matter what the court says, however, some panel members will ignore the admonition. As a result, make certain that the content on your own professional website and social networking pages is current, accurate, and in compliance with all the applicable ethical rules imposed by the state bar in the jurisdictions where you are licensed. Many law firms include information on their websites about verdicts or clients in other cases. That's well and good. But be sure not to include information on any of your sites about ongoing litigation, such as the case for which you're currently conducting voir dire. The panel members will see it; your opposing counsel will see it; and the judge will see it. In addition, your state bar ethics committee will see your website and then you!

ENTIRE VOIR DIRE CONDUCTED BY JUDGE

In federal courts and in some jurisdictions, your judge will handle not just preliminary issues during voir dire; the judge will conduct the entire voir dire. In such circumstances you will present your proposed voir dire questions to the court. Don't submit thirty, forty, or fifty questions that the judge won't even read, much less ask. Submit at most eight to ten questions involving key issues in your case. The judge will be much more inclined to ask your questions if you keep them to a minimum. Every single question should be simple, proper, and designed to uncover information you genuinely need for your challenges for cause and peremptory strikes.

When the court will be asking all the questions, a juror questionnaire is even more important than usual. As discussed in *Preparing for Voir Dire*, a juror questionnaire should generally be no longer than one page and contain questions that bear an obvious relation to your case.⁵ Remember, your judge is more likely to allow the questionnaire if you and your opposing counsel are in agreement about its contents. Include one or two scaled ques-

⁵ Lisa Blue and Robert B. Hirschhorn, *Preparing for Voir Dire*, The Little Blue Books (Portland, OR: Trial Guides, 2014), chapter 3, "Juror Questionnaires."

tions. For the court's and its staff's convenience, prepare the questionnaire on triplicate carbonless paper with a cardboard backing so that it is easy for the jury panel members to complete it and for the court officer or bailiff to tear apart the copies, giving the original to the judge and the copies to the parties. This approach expedites the jury selection process and saves the court's time and resources by eliminating the need for photocopying the completed questionnaires.

SUMMARY

Regardless of the extent of the judge's participation in voir dire, the court's impact will be enormous. At the outset, only the judge can ensure that your panel is large enough to leave you with sufficient jurors and alternates at the conclusion of your voir dire. The judge is also in the best position to address several issues with the panel, including:

- ◆ Honesty during the voir dire process.
- ◆ Importance of juries in the American system of justice.
- ◆ Positive aspects of serving as a juror.
- ◆ Expected length of trial and who may be excused for hardship.
- ◆ Refraining from Internet research.

In federal court, where the judge conducts the entire voir dire, the impact is even greater, of course. Given the court's prominent role in the process, be prepared to persuade your judge to ensure a sufficient number of potential jurors; to address the jury panel directly with helpful and positive admonitions; and to allow a brief, targeted juror questionnaire to expedite the voir dire process. Help the judge to help you and your client.