

PRAISE FOR *PREPARING FOR VOIR DIRE*

“When I ask lawyers what they think is the most difficult part of a trial, the most common answer is jury selection. Here is a step-by-step explanation for doing it right that every lawyer, plaintiff or defendant, will want to own.”

—Paul Luvera, member and past president of the Inner Circle of Advocates, member of the American College of Trial Lawyers and the International Academy of Trial Lawyers

“America’s two best jury experts have written a short, easy-to-read guide that makes jury selection as simple as 1, 2, 3. I have conducted many, many trials over fifty years and would not leave home without it.”

—Morris Dees, founder and chief trial counsel,
Southern Poverty Law Center

“Combine key psychological principles with over sixty years of jury selection experience, and you have *Preparing for Voir Dire*. This book concisely guides lawyers through the emotional, practical, and legal stages of preparing for jury selection and trains them to start mentally picking a jury as early as the first client meeting. You will never approach jury selection the same after reading this invaluable guide, and you will quickly realize the first and last words that you say to a jury aren’t necessarily the ones that you think you spoke.”

—Kurt Arnold, co-owner and founder of
Arnold & Itkin, LLP, a civil trial law firm that has achieved
record-setting jury verdicts in multiple states

THE LITTLE BLUE BOOKS

PREPARING FOR
VOIR DIRE

LISA BLUE AND ROBERT B. HIRSCHORN

EDITED BY JANICE ROBINSON PENNINGTON



TRIAL GUIDES, LLC

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ALSO BY LISA BLUE AND ROBERT B. HIRSCHHORN

Conducting Voir Dire

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 Hirschhorn

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PUBLISHER'S NOTE

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

The cases described in this book are actual cases, and the names and other identifying details of participants, litigants, witnesses, and counsel have not been fictionalized except where otherwise expressly stated.

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FOREWORD

I was thrilled when I was asked to teach a law school course on voir dire. An entire course taught to seventy-two second- and third-year law students. Immediately, I decided that we would have only one text: *Preparing for Voir Dire* by Lisa Blue and Robert Hirschhorn.

Let me be blunt: I am the president of the Lisa Blue/Robert Hirschhorn Fan Club, an exclusive group of anyone who has had the pleasure and benefit of working with these two super-gurus in the arena of voir dire. This is a pleasure I have had repeatedly, and look forward to having in every one of my future trials.

In 2005, during voir dire in the much-publicized first Vioxx case to be tried, Lisa and Robert were instrumental in assembling the jury that awarded my clients \$253 million in damages. I chose Lisa and Robert because of what was at stake. I needed the very best, and along with Dr. Robert Leone, they are the winning triumvirate for me every time!

Lisa has been named one of the Top 100 Most Influential Lawyers in America, one of the Top 50 Women Litigators in the United States by the *National Law Journal*, and Trial Lawyer of the Year by the Texas Chapter of the American Board of Trial Advocates. She is now the president-elect of the American Association for Justice (formerly the Association of Trial Lawyers of America). A trial lawyer with a PhD in psychology, Lisa speaks around the nation on voir dire. I attend every time I can, always picking up some new idea or instruction.

Robert has deservedly been a legend in the field for decades. He has picked a number of juries for plaintiffs that have returned substantial awards, including a \$157 million verdict in a deceptive trade secret case, a \$461 million verdict in a fiduciary duty case, and, most recently, a \$117 million verdict in a single plaintiff catastrophic injury case. He also has experience picking juries for defendants, with favorable results. He has likewise assisted lawyers in many high-profile criminal cases resulting in acquittals,

including the recent 2013 George Zimmerman trial in Sanford, Florida; the 2003 murder trial of Robert Durst in Texas; the 1994 ethics trial of former U.S. Senator Kay Bailey Hutchison of Texas; and the 1991 William Kennedy Smith sexual assault trial in Florida.

I hesitate to tell anyone the secret truth about working with Lisa and Robert. They do not just swoop into town for a day or two of showmanship with the panel and then pack up their tricks and go home. As jury consultants, Lisa and Robert begin by learning everything they can about your case—why you should win and how you could lose, the qualities that make your client unique and the ones the jurors will recognize in themselves. Unless you truly understand the issues that will make jurors feel right about siding with your client, according to Lisa and Robert, you don't have a clue whom you'd like to see on your jury, or whom you want to avoid.

Lisa and Robert teach you that when you are conducting voir dire, your purpose is not simply to choose the jury; you are there to get to know the jury. That's why, six weeks into the Vioxx trial, Lisa was still poring over twenty-page juror questionnaires and the voir dire transcript to make sure she hadn't missed anything to help us understand how the jurors thought. Lisa and Robert unlock the secrets to voir dire as a way to discover what the jurors want and need, and then they make certain the jurors get that in your case.

Follow Lisa and Robert, read what they write, hear them lecture, and see how it changes your entire trial skill set. In addition to learning their basic philosophy on jury selection, you will learn great practical rules for voir dire. These phrases will become mantras:

- ◆ “Plan your first line—you never get a second chance to make a first impression!”
- ◆ “Be yourself.”
- ◆ “The preponderance of the evidence requires just 51 percent; you can have 49 percent doubt and still vote for my client!”

Even if you do not have the benefit of working with Lisa and Robert live, you still have the opportunity to benefit from their

experience, creativity, intelligence, and compassion. In *Preparing for Voir Dire*, Lisa and Robert teach you everything you need to know about how to ready yourself for one of the most important moments in your case: getting to know the often radically different individuals who will come together to decide your client's future. And they do it in a concise, practical, how-to format that you can read quickly in five-minute intervals or all in one sitting.

I'm reminded of something else I learned from Lisa. It's her way of giving advice. It begins with her innocent question, "Hey, can you do me a favor?" Anytime she asks that, she is about to give you some priceless nugget that is going to help you in your case, so make sure you take her up on it. In that spirit, I now ask you to do me a favor! As you prepare for your next trial, read Lisa and Robert's book well in advance. Try out their methods. And get to know the jury that's going to do the right thing by your client and make you look like a hero in the process. (But remember, this is a secret! Pass it on only to those who want to be the best they can be.)

—Mark Lanier
September 2013
Houston, Texas

ACKNOWLEDGMENTS

LISA BLUE

My first acknowledgment is to the tens of thousands of jury panel members who show up for jury duty in courtrooms throughout our country. Without them, there would be no civil jury trial system.

To the best jury consultant in the world, my dear friend and advisor who has taught me more about jury selection than any other person on the planet: thank you, Robert, for your wisdom and insight about people.

To Janice Robinson Pennington, the most talented writer and appellate lawyer, who writes with great style and humor.

Thank you, Tina Ricks and the staff at Trial Guides, for your enthusiasm for this project.

A special thanks to a member of Robert's team: Alexandra Figari, who is smart, hardworking, and creative in her approach to jury selection.

An acknowledgment from the heart to my true family, Vicki Martin and Daniel Ambriz, who have both worked with me for decades. They have worked so hard as part of the team and deserve credit for any success that I have been blessed with. Thanks to both of you for allowing me to lead a wonderful life.

To my close friends, who have been my mentors since the death of my husband, Fred Baron: Mark Lanier, Steve Malouf, Mike Kaeske, Shepard Hoffman, and others too numerous to name who have shown so much kindness to me. Thank you all for being surrogate "day husbands" and willing to talk anytime I call.

To my psychologist brother, Dr. Rick Blue, my mentor in the game of life.

Finally, to the loves of my life, my four daughters, Courtney, Alessandra, Nathalie, and Caroline, who have brought me so much joy as a mom.

A deep bow and to all I say, "*Namaste*" (a Buddhist greeting meaning "from my divine heart to yours").

ROBERT HIRSCHHORN

First, I want to thank, from the bottom of my heart, my best friend and coauthor, Lisa Blue. Having her as my friend and believer has made me a better person.

I want to next thank our friend and the person who edited our book and made it come alive, Janice Robinson Pennington. Janice, your voice is loud and clear and you are the glue that kept our book together.

Next, I want to thank Daniel Ambriz. Daniel kept us organized and on track, but more importantly, Daniel has always helped and taken care of Lisa. You are a dedicated, honorable, and noble man, Daniel.

I want to thank Tina Ricks and the folks at Trial Guides for believing in us.

Next, I must acknowledge and thank my team at Cathy Bennett & Associates, specifically Jennifer Lapinski, Alexandra Figari, Monica Campbell, and Jessica Hogan, who have done the lion's share of the jury consulting work at our shop so I could pursue my dreams and my passions. Thanks, Cathy E. Bennett & Associates team, for always being there for me. Now stop reading this and get back to work. I'm kidding.

Next, I want to thank the person who keeps the train from constantly falling off the tracks, my assistant and my friend, Robin Schagen. Robin works around the clock, and that fact has not gone unnoticed. Thank you, Robin, for always going that extra mile and taking such good care of the office, Kelly, and me.

Finally, I want to acknowledge the greatest contributors to this book: my kids. There have been too many nights when I was tapping keys on a keyboard instead of tucking you in bed. Too many nights where I have been away from home working on a case. Too many weekends when I missed your sporting events because I had to do a focus group or mock trial to help a client who really needed me too. My kids have always been there for me, even though I have often not been able to be there for them. I love you, Matt, Troy, Micki, Damian, and Jayden, and thank you for never giving up on me.

INTRODUCTION

We can sum up everything we know about voir dire in three sentences:

1. Work hard from day one to understand the beliefs and values at the core of your client's case.
2. Use that knowledge during voir dire to help prospective jurors feel comfortable in disclosing their innermost prejudices and biases.
3. Once you've got those covered, picking a good jury is like magic.

Of course, this is a trick that took us about sixty years combined to master. But that's why we love voir dire. And no part of your lawsuit is more important.

When thinking about voir dire preparation in particular, we're reminded of a lawyer we know who tacked a saying over his desk that reads: "The will to win is almost as important as the will to prepare to win." This sentiment is as true for lawyers as it is for athletes or anyone else. And it's certainly true for conducting an effective voir dire. The actual questioning typically lasts thirty to ninety minutes, but the preparation should begin on the day you first meet your client.

Why so early? Because jury selection is not science. You can never predict with scientific certainty how specific demographic groups will decide a particular case. Rather, jurors make decisions based on their own individual life experiences and core beliefs. Right from the start, then, begin thinking about the moral underpinnings of your case. What are the fundamental values that bolster your client's position? Work to understand your case well enough to know whether it is firmly rooted in—or abhorrent to—a particular view of morality or set of core beliefs; that's half the battle.

The rest is just preparing to coax a group of total strangers into spilling their core beliefs and fundamental values to a couple of trial lawyers with a courtroom full of strangers listening. Relax. The whole point of the voir dire books in our series *The Little Blue Books* is to give you a short, helpful, and easy-to-read road map for conducting a meaningful and effective voir dire the next time you prepare for a jury trial. This volume, *Preparing for Voir Dire*, outlines what you need to know to prepare for jury selection. *Conducting Voir Dire* guides you through the process once you're actually in the courtroom.

Once you understand the core values driving your case, preparing for voir dire can be fairly straightforward if you're willing to take the time to do it. Get to know your judge and the precise rules for voir dire that will govern your case. Next, distill the essence of your case into a persuasive power statement¹ that you can use during voir dire to frame the issues. Draft short, simple questions to ask the prospective jurors. Practice with an audience until you have narrowed down the content enough to present it efficiently in the specific amount of time you will have for jury selection. Prepare a PowerPoint presentation to help the panel members see and understand the concepts you are referring to. Many jurors are visual learners and will be able to retain the information for a longer period of time if they both see *and* hear the concepts. Find out all you can about the jury panel in

¹We discuss power statements in detail in chapter 1, "Psychology and Voir Dire Preparation."

advance with a brief, carefully crafted juror questionnaire. When you learn the names of your potential jurors, mine the Internet to discover everything you can. And through it all, keep in mind a few useful psychological principles to guide you along the way. Indeed, stick with us and we'll even tell you when to wear your power suit to court.



This book is accompanied by a CD that contains additional resources, including juror questionnaires, a sample voir dire outline, challenge for cause charts, sample PowerPoint slides, a scaled questions chart, and examples of index cards Lisa used during actual trials to keep her voir dire organized. For more information on what is included on the disc, please see the “CD Content” section at the end of the book.

1

PSYCHOLOGY AND VOIR DIRE PREPARATION

Voir dire is about seven parts psychology, two parts luck, and one part law. (We'd go even heavier on the psychology, but it makes our appellate lawyers feel bad.)

- ◆ First you have to analyze your client and your case to identify the issues that jurors may have trouble with.
- ◆ Next you analyze everything you can find out about your prospective jurors to see what their hot buttons may be.
- ◆ Then you conduct a massive group therapy session where you try to coax the entire jury panel into spilling the beans on their innermost thoughts and feelings right there in open court.

Not surprisingly, it doesn't hurt to use a little psychology as you go along. The importance of first impressions, the value of a captivating power statement, the use of primacy and recency, and the art of inspiring confidence—all of these psychological principles are vital to preparing for an effective voir dire.

FIRST IMPRESSIONS COUNT

First impressions matter so much because they stick with us; hence the saying “first impressions are lasting impressions.” If you start a relationship with an initial negative impression, you’ll have to make up for it with several separate and distinct favorable impressions just to get back to even. That’s why it’s critical that the first impression you make with a jury is a positive one.

You can make a first impression before you’ve uttered a word. Others can form an impression about you based on what you are wearing, your demeanor, your body language, your posture, or your facial expressions.

In fact, you can make an impression on people you don’t even see. Part of our job as jury consultants is to train you to become sensitive to the likelihood that you are making an impression on your potential jurors when you least suspect it. From the time you approach the courthouse, work to make a positive impression.

A classic example involves a metropolitan-area courthouse where lawyers use an access card that allows them to bypass the security line. Members of your jury panel who are waiting in that long line may well be offended by what they view as you cutting in line. They had to wait; why didn’t you? Therefore, we strongly recommend that whenever you are trying a case in the courthouse, you wait in the same lines that the jurors do.

You could also make a first impression in the parking lot. Jury panel members nearby may judge you by the make of your car or whether you’re a courteous driver. Honking the horn or cutting past cars driven by folks who aren’t as familiar as you are with the courthouse lot will not win you any friends in the jury pool.

You may also make an impression while you’re crossing the street. You could be running late, ignore the crosswalk sign instructing pedestrians to wait, and your potential jurors may be right there watching. If you then tell those same panel members a couple of hours later that people who don’t follow the rules should be held accountable, you will have begun with a negative impression. Those potential jurors will assume that you talk the talk, but you don’t walk the walk (literally).

The point is that you don't necessarily make a first impression when your panel members see you as they walk into the courtroom, or when you first introduce yourself. They could very well form their first impression of you before you step foot in the courtroom that day. And your mother was right when she warned that you never get a second chance to make a first impression.

RASHOMON: VIEW YOUR CASE THROUGH THE JURORS' EYES¹

The lawyers we consult with always ask us: When should I begin preparing for voir dire? The answer is: start preparing for voir dire the day your client comes into your office, because the day you take a new case is the time you're seeing the case the way your ultimate jurors are going to see your case.

For example, let's say your new client 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. Your client, Carol Parker, suffered broken bones in her arms and back.²

When you hear Ms. Parker's story unfold for the first time, listen for what's going to be important in voir dire. This is the only time the case will be as fresh for you as it will be for the jury. The questions you have for Ms. Parker are likely to be the same questions the jurors will have. Write them down along with her answers. What issues will strike a hot button—not from a legal perspective, but from the jurors' viewpoint? What issues will they see as important? At that initial meeting with your client, think

¹The Rashomon Effect is the way in which different people observe the same event in different ways.

²The names and identifying information for all people and companies involved in this specific case example, which is used throughout this book and on the accompanying CD, have been fictionalized.

about the types of questions you can ask in voir dire to hone in on those particular issues.

After you take off your lawyer hat and really listen to your client's story from a layperson's point of view, ask yourself: What was my immediate reaction when I heard each point for the first time? Did you envision the mayhem of a large passenger bus lying crumpled on its side, with passengers' belongings strewn about the roadside, and the people themselves trapped in the bus, bleeding, stunned, helpless to get out of their seats, to walk, or even to crawl to safety, unable to help a screaming baby just two rows back, or the child's terror-stricken mother? So what if the speed limit was 60 miles per hour; what was the bus driver, Marvin Ross, thinking by going so fast on an icy road?

And what about Carol Parker's injuries? She is lucky to be alive, yes, but as a steak house waitress in her late forties with broken bones in both arms and in her back, she couldn't work at all for months. She'd never be able to return to a job that required her to lift heavy platters and stay on her feet for hours at a stretch. Yet that was the only work she'd ever known, and the tips made the work far more lucrative than a minimum wage job that doesn't require heavy lifting.

Whatever reaction you had is likely to be the jury's reaction. So by all means, write it down, whether your feeling was anger, distrust, pain, or something else. As we shape and build a case through discovery, we tend to forget the initial impact the story had on us because we've heard it so many times. Or our own opinions of the case may change over time, blinding us to the way in which we first saw it—the way jurors will see it. The only way to preserve your initial impression is to record it.

Once you've made note of your initial gut reaction to your new client and his or her story, take some time to analyze the entire case right there at the start. What first impressions have you formed about issues in the case and the probability of winning? For example, will jurors excuse On Time Bus Line because icy roads are an act of God? Strip away the lawyer veneer and think about the issues the way jurors would sort through them. Will they blame the uninsured driver of the vehicle stopped ahead of the bus, Jason Dangerfield, who stopped his car to fish his iPhone

out from under the seat after he dropped it while texting his girlfriend about the icy road? Imagine how a nonlawyer you know well and respect would view the case. Days, months, or years down the road when you finally meet your panel, the memory of your own initial assessment will serve you well. Your first analysis of the case will likely be similar to your jury panel's view of it.

IDENTIFY WHAT'S APPEALING

As you analyze a new case and think up front about the issues that will affect voir dire on down the road, ask yourself a few fundamental questions about your new client:

- ◆ Do you like her?
- ◆ What kind of impression will she make with the jury?
- ◆ Was she actually harmed?
- ◆ Is she the kind of person you feel is entitled to a favorable verdict?
- ◆ Do you blame the plaintiff in any way for her own injuries?
- ◆ Is there anything about her that makes you feel uncomfortable or unsure?
- ◆ Do you trust her?
- ◆ Is she telling the truth?
- ◆ Are there any skeletons in her closet?

The answers to these questions usually present themselves right away as part of your first impression. Maybe Carol Parker sings in the church choir and sews charity quilts for children at the local cancer center. On the other hand, Carol Parker may have hair as big as a lampshade with a spandex wardrobe, and may actually have tried to hit on you the first time you met her. Or perhaps Carol Parker was taking the bus because her driver's license had been revoked after one too many DUI convictions. If your initial gut reaction is unsettling, you may want to explore

your impression with a focus group or mock trial.³ If things still don't sit right with you, continue to gather additional information until they do. Anything that seems off to you at the beginning will be troubling to your future jury panel as well.

We were recently hired, for example, to conduct a focus group to help a lawyer decide if he should even accept a case. It was a death case where a woman was run over by a truck. The entire unfortunate incident was captured on a nearby gas station video camera. The focus group participants believed that the woman either was on drugs or had something wrong with her. As a result of the focus group, the lawyers immediately checked to see if she had a criminal record. They learned that she had a lengthy rap sheet, including a number of convictions for prostitution and drugs. The focus group was money well spent. This is an excellent example of a lawyer who trusted his instincts and used the tools available to discover why something about the case just wasn't sitting right.

As your new client is there with you, ask yourself: What facts, damages, or emotions make this a strong case? Ask your client that same question. Find out, from the perspective of the person sitting across from you in your office, what's important about this case. Does Carol Parker support two kids on her own after her husband left her for another woman? Was she returning back home on the bus after visiting her elderly parents? Or was Ms. Parker outraged because the man in the third row had asked Driver Ross to slow down and the driver seemed to ignore him? Why are justice and fairness on Carol Parker's side?

It's also important to ask yourself: Why should I take this case? What are the top three unique and concrete reasons for investing your time and efforts in representing this client? Money, justice, and publicity don't count. Obviously, making a living is always a reason to take a case, for lawyers from both the plaintiff's and the defense bar. Similarly, motives such as avenging justice are not

³With a focus group, you present only arguments for both sides of the case to a group of people who demographically match a jury panel in the venue where the case was filed. In a mock trial, you present arguments along with vignettes of witness testimony.

useful for this particular analysis because we must always strive to do justice. From a psychological perspective, these answers are too general; you need to explore to the depths of your being why a particular case is right for you.

Does the case contain an issue about which you feel strongly? Does the case call for righting a clear wrong? Is it a type of case in which you have expertise? Is this “the” case you’ve been waiting to see walk through your door? Maybe you’ve learned in previous litigation that the bus company has a bad safety record. Or you concentrate on cases in which bad tires or faulty brakes are at issue. Have you represented clients with similar injuries? Is there something in particular about Carol Parker that evokes your sympathy or compassion? Once you understand why the case is vital for *you*, you’ll be able to explain to your eventual panel members why it should be important to them as well.

CONFRONTING THE WARTS

On the flip side, one essential element to successful voir dire is to understand the case’s weaknesses early in the process. Let’s face it; very few perfect cases ever make it to jury selection. What are the top five reasons you could lose this case? Ask yourself early on; that’s the moment in time when you’re the most realistic about all the flaws you’ll spend the next two years working with. Every time you think of a reason you may lose the case, write it down. You can then turn this into the preliminary list of voir dire elimination questions that you will ultimately use to identify unfavorable panel members.

In Carol Parker’s case, for example, you could be derailed by any of the following defenses:

- ◆ Icy roads are an act of God.
- ◆ The driver was going the speed limit.
- ◆ Bus drivers have to act like reasonable professionals; they don’t have to be perfect.
- ◆ Carol Parker knew what the weather was like; she could have postponed her trip.

- ◆ Ms. Parker’s injuries aren’t all that bad considering what might have happened.
- ◆ Her injuries are from a prior car crash she had five years earlier.

Your own self-critical analysis is crucial; to “deselect” a jury, you have to understand the deficiencies in your own case. If you can turn those weaknesses into question form, you can discover which prospective jurors have difficulty with a particular issue. Then you know whom to strike.

For example, if Ms. Parker does have a prior DUI or drug conviction, it may be distressing for some panel members, even though the drug conviction or DUI is completely irrelevant to your case. Still, this will matter to many members of your jury panel. Voir dire is your opportunity to determine who among your panel could not set aside a DUI or drug conviction and who would inevitably be biased against your client.

As lawyers, we tend to be myopic, to see only the strong parts of our cases, because that’s simple. As jury consultants, we have to challenge you to look beyond your case’s strengths, and see the weaknesses as well. No client or case is flawless. But if you see the imperfections as fatal and try to hide them during voir dire, the jury will see them as fatal too.

By contrast, acknowledging your case’s deficiencies allows you to incorporate them into your story and introduce them to the jury panel in the way that best serves your client. The ideal opportunity to begin defusing the challenges in your case is not in direct examination, cross-examination, or even your opening statement. The best time to address the challenges in your case is in your voir dire.

How do you accomplish that? As jury consultants, we require lawyers to provide us with a written list of what they believe to be the case’s top five strengths and weaknesses. From there, we begin to form our voir dire by finding belief systems that will either support or undermine the client’s case. Remember that the point of voir dire is never to change someone’s mind or sell your case; the goal is to discover each panel member’s beliefs and value systems.

This ties in to our fundamental message that jurors make decisions based on their life experience, their core values, their

sense of what's right and wrong, and what the law forces them to do. If you understand your case's weaknesses, you can present them in a way that allows you to explore whether those issues would so violate the panel members' core values or fundamental principles of right or wrong that they could not see past them, regardless of the applicable law. With an effective voir dire, you can use your case's weaknesses to your advantage; think of them early and often throughout the case.

CREATE A CAPTIVATING POWER STATEMENT

One of the most effective psychological devices for any voir dire or trial is a short, simple power statement. A power statement anchors the jury panel to certain beliefs about your case and illustrates why the prospective jurors should embrace your client's position. The power statement must not require that the jurors analyze it; it should imprint a picture that will last in the panel members' hearts and minds. An effective power statement is one that will stay with the jurors when they ride home at night during trial and still be there when they wake up in the morning and return to court. The jury should easily understand, remember, and accept your power statement.

Make it short, compelling, clear, and true. You've done it right if you can put your power statement on a bumper sticker. For example, in 2013, two decades after the criminal trial of O. J. Simpson, many of us still recall Johnnie Cochran's succinct, compelling power statement: "If the glove doesn't fit, you must acquit." That's a classic example of a one sentence, easy-to-understand, easy-to-visualize power statement that not only stood out in the minds and hearts of the jurors in that case, but also still serves for the general public as the quintessential synopsis of the O. J. criminal trial.

The jury panel must easily understand your power statement. Imagine sharing your power statement with a teenager. You must continue to hone the theme of your case until a restless, ADHD

teenager could understand it at once and remember it long after the trial is over.

An effective power statement also has to be something with no easy rebuttal from your opponent. If you rely on a power statement that the evidence or law doesn't support, then you'll be stuck with a *powerless* statement. A power statement has to be more than pithy and vivid; it has to be true.

A power statement is so important that it is often worth the money to hire a jury consultant to help you develop one. If you are going to invest in a focus group or mock trial, test out your power statement to determine whether it's truly effective or needs further revision. Often, the best power statement actually comes from research participants in focus groups and mock trials.

An effective power statement takes time and work to develop, of course. In the O. J. Simpson criminal case, because Johnnie Cochran baited the prosecutor into having Simpson try on the glove during trial, the jury didn't hear the power statement until closing argument, but it was so dramatic that it still worked. That case was the exception to the rule.

Ideally, begin thinking about your power statement from the very beginning so the eventual jurors have a point of reference, or, as we refer to it, a safe harbor, from which to view everything that happens in the case. Refer to your power statement at every step along the way—in voir dire, in your opening statement, when you examine witnesses, and in your closing argument. That repetition will work best if your power statement is accurate, brief, and compelling.

DEVELOPING A POWER STATEMENT

The process for developing your power statement starts with this question: Why should the jury find in your favor? From there, come up with the short, simple, and easy-to-remember words to anchor this idea in the jurors' minds.

In Carol Parker's icy road case, for example, the message you want to convey in your power statement is this: "Sixty miles per hour is too fast to drive on an icy road." Simplify that to "driving

too fast on an icy road.” Or you might distill it even further to “driving too fast” and use that as your power statement.

Trilogies are often quite powerful, though not always necessary, in a power statement. Trilogies are ingrained in our culture—in religion, art, and political rhetoric. If you pay attention, you’ll be amazed at how often advertisers use trilogies as well. Not surprisingly, the power of trilogies is just as effective in the courtroom. For whatever reason, people seem to learn in threes. Drawing on this knowledge, then, try to incorporate a trilogy as part of your theme or power statement. Obviously, a trilogy is not always necessary, as Mr. Cochran showed by successfully using a different model.⁴ As a general rule, however, the trilogy is an effective tool for communicating with jurors.

Many lawyers combine acronyms or alliteration when using a trilogy in a power statement. For example, in a medical malpractice case where a doctor’s failure to diagnose was the proximate cause of the plaintiff’s injury, you might use a power statement such as “doctor didn’t dig” or “didn’t dig deep” (DDD) to illustrate quickly and graphically what the physician failed to do.

Power statements that use ABC words are also quite effective. If your power statement uses words that begin with A, B and C, the jurors can use the acronym as a mnemonic device to remember the primary theme of your case. For instance, a common theme in many of the asbestos cases Lisa has tried is the fact that asbestos causes cancer; thus, the power statement for these cases is “ABC: asbestos, breathing asbestos, cancer from breathing asbestos.” (In closing argument, we can even add D to the power statement: death.) This power statement is short, easy to remember, compelling, and true. It also employs a trilogy and the ABC theme. It’s a power statement concerning issues that will arise repeatedly in the case, and the ABC format works well in a PowerPoint presentation during voir dire. Former jurors have told us that even years after a case in which one of the sides used a power statement, they can still remember it.

⁴ Even so, Robert would argue it *was* a trilogy: If the *glove* doesn’t *fit*, you must *acquit*.

If you're lucky, you may have the opportunity to use an opponent's own name or branding as part of your power statement. In one of Robert's cases, the defendant was 3M. To drive home one of the central themes in the case—that 3M placed profits above safety—Robert made the best of 3M's name by developing the following power statement: “make more money.”

In a different case, this time against Bristol-Myers Squibb, a key theme involved the safety of Bristol-Myers Squibb's products. Again, Robert used the company's own initials, BMS, in the power theme for the case: “better make safe.” Every time the jurors heard “BMS,” what they thought was: better make safe.

You will not always be able to combine a company name or handy acronym with a power statement trilogy. In the icy road case, for instance, you might use “driving too fast,” “slow on ice,” or “icy road danger” as your power statement, but the acronyms for these three-word phrases—DTF, SOI, and IRD—lack the added appeal of ABC or a company name. You might choose to go with the trilogy anyway. Or you might change your trilogy so it does work in the ABC format. For this case, the ABC would stand for “a bad crash.” Finally, you might opt for a different approach entirely, as Johnnie Cochran did so successfully in the O. J. criminal trial.

Remember that it takes time to distill the essence of your case into a compelling power statement like these; you can't do it overnight. The answer is likely to strike you during a traffic jam, at 3:00 a.m., or in the shower. Plan ahead if you want to activate this effective psychological tool during your voir dire.

One final note before we go further: notice our constant use of the word *crash* to describe the events in Carol Parker's icy road case. Avoid using the word *accident* to describe the circumstances that caused your client's injuries. For many people, an accident is something that happens when no one is at fault; not so for a crash. Use psychological principles to select every word you use so you frame the issues as you choose to present them.⁵

⁵We discuss the topic of word selection further in The Little Blue Books series, in *Conducting Voir Dire*, at chapter 4, “Plaintiff's Voir Dire: A Tool Kit,” in the section titled “Smart Word Choices.”

PRIMACY AND RECENCY

A psychological principle to consider for jury selection and in all aspects of the trial is known as *primacy and recency*. People remember the first thing and the last thing they hear or see in a presentation. To apply the primacy and recency principle to voir dire, begin with a strong statement rather than the customary courtesies. Though it may seem polite to begin by introducing yourself or by thanking the panel members for their participation, you will lose the powerful impact of primacy if you do. Instead, start out strong. Lead with your power statement or theme, and then take time afterward to thank the panel for their time and sacrifices: “Driving too fast. That’s why Carol Parker is in this courtroom today, because an On Time Bus Line bus was driving too fast down an icy road in January. Good morning, ladies and gentlemen of the jury panel. I’m Carol Parker’s attorney . . .”

The concept of primacy and recency should permeate every aspect of your trial, not just voir dire. For every critical part of the trial, think about starting strong and ending strong. In your opening statement, for example, lead with your power statement, and close with your power statement. Those are the only two points in your entire opening at which you will have the jury’s complete attention. Take advantage of the opportunity; it occurs infrequently. When planning cross-examination, ask yourself: How can I make the biggest impact at the start of my cross and at the end of my cross? At all phases of the trial, including voir dire, opening statement, direct, cross, and closing, strategize to make the most of the psychological principle of primacy and recency.

As jury consultants, we find that the concept is so important that when we’re working on a case, we start out by creating the first forty-five seconds and the last forty-five seconds of voir dire. These are the most difficult (and the most important) parts to create. We focus on forty-five-second intervals because primacy and recency have a short shelf life—about thirty to sixty seconds. That’s all the time you have to convey your power statement before the prospective jurors start disengaging or daydreaming. Be concise or you’ll exceed their very short attention span.

Use primacy to make a big impact on the jury panel right at the very start. Use recency to make another powerful point at the end. Different approaches work best in different cases, so long as you finish strong. You could accomplish this by empowering the jury panel. Using the concept of trilogy we discussed earlier, you might impress upon the potential jurors the powerful role they play in the important task before them:

You, members of the jury panel, are so powerful that in our state, jurors can do three things. Number one, juries decide whether a person lives or dies for a crime committed. Number two, juries decide whether to take away a child from an abusive parent. And number three, as in this case, you can decide that in the future, X Corporation will no longer be able to hurt people with its dangerous products.

Another option is to convey your power statement once more in the last thing you say to the jury panel. In this approach, your strong start and finish work in tandem to make the same point. During voir dire, opening statement, or closing argument, you would start, for example, with the ABC power statement we discussed earlier. You would conclude voir dire by saying: "I want to end at the same place where I started, and that is that this is a big and important case, but it's a simple case. It's as simple as ABC: asbestos, breathing asbestos, and cancer from breathing asbestos."

Use recency to close the circle. Jurors like to hear a story, a compelling and simple-to-understand story, but they also want closure. Beginning. Middle. End. Where you start and where you end should essentially be the same place. Recency allows you to complete the circle and bring closure for the jury.

DEVELOP YOUR OWN STYLE

Imitation may be the sincerest form of flattery, but an important psychological principle to keep in mind is that your prospective jurors demand authenticity. Jury panel members will never trust, believe, or follow a person they think is phony. While it is great to study with master trial lawyers, you must incorporate the lessons

you learn from them into your own personal style. For example, if your mentor is gregarious or even loud, but that's not your personality, then pick out the substantive techniques that appeal to you and find a way to make them your own.

A handful of lawyers we have worked with have the ability to memorize the name of every juror. If you can master this technique, it can be very effective when you do it properly (though beware: it can be disastrous when you make a mistake). Another tool that the late John O'Quinn used effectively in every part of the trial was eye contact. It's easy to look at the jury during voir dire, opening statement, and closing argument. John stayed riveted to the jury during the cross-examination of key witnesses, as well. This technique takes practice, but it's profoundly effective.

If another lawyer's technique fits with your personality and talents, by all means, emulate the masters. But it has to feel right for you. You can only expect the jury panel members to show you who they really are if you let them have an honest look at you. When Lisa wears her immaculately tailored bright red suit, or Robert shows up in Texas boots instead of Italian shoe leather, we are letting the jury get a glimpse of who we really are.

INSPIRE CONFIDENCE

Inspire confidence with the judge and the jury panel by learning everything you can about the court before voir dire begins. Prepare yourself by becoming familiar with the judge's rules, pet peeves, and routine. You will appear knowledgeable and you won't waste the court's or the jury panel's time. For example, if you learn in advance that your judge only allows thirty minutes for voir dire, you will avoid being cut short in the middle of a sixty-minute voir dire. And you won't appear disorganized and potentially unsure of yourself in front of the panel.

If you've never tried a case in front of your judge, the ideal way to avoid any pitfalls is to take the time to go down to the courthouse yourself and watch the court's voir dire in another case. In addition to that, check the court's local rules. Ask the

court clerk or the judge's law clerk whether the judge has specific rules governing voir dire. Find out if the judge has a web page that discusses the issue. See if a local attorney organization devotes space on a website or blog to anecdotal information from lawyers describing voir dire experiences in different judges' courts.

As you prepare, look particularly for information concerning the following:

- ◆ What size panel the judge typically uses
- ◆ Whether you must stand behind a lectern
- ◆ How much time the judge allows
- ◆ Whether the judge allows a short questionnaire
- ◆ Whether the judge requires you to submit proposed questions for the court to ask
- ◆ How and when the judge handles challenges for cause
- ◆ Whether the judge permits PowerPoint or other visual exhibits during voir dire
- ◆ Whether the judge requires you to show PowerPoint slides to opposing counsel and the court before you use them
- ◆ Whether the judge requires you to fully develop cause during your voir dire
- ◆ Whether the judge allows attorneys to question a potential cause juror further

Know these details before you enter the courtroom, and the jury panel will view you as a competent advocate right from the beginning.

Indeed, that's why we include this point with the other psychological principles. If you don't know how the court will control the voir dire process, the jury panel's first impression may be that you are unprepared or ill equipped to try the case. It's frustrating to the jury when the judge interrupts you during voir dire to correct you or shut you down when you are unprepared. Most jurors will believe that the judge—the authority figure in

the room—is right, and that you are wrong. This will start you off on the wrong foot with the panel members, who will have an initial negative impression. A little preparation on these seemingly mundane issues will make you look smart from the start.

PLAN B: A LIFEBOAT

Always have a plan B lifeboat in case you hit an iceberg. Think in advance about all the things in voir dire that could go wrong, and then plan for them.

If the court requires you to cut your time short, be prepared to quickly prioritize the most important questions, leaving the less important to the end. In case your PowerPoint malfunctions or, as has happened to us, your computer crashes, you should have an Elmo or overhead presentation prepared. If all else fails, use a handwritten flip chart. Just make sure to write neatly and mind your spelling. Be prepared for teachers on the jury panel who can be quite unforgiving when it comes to misspelled words.

Plan B is what happens when opposing counsel objects to your question and the court sustains the objection. If you simply move on to another topic, the jury panel may view it as a sign of weakness. The prospective jurors won't understand that your question may have been unartful, but not improper. On critical topics, then, prepare alternate questions designed to elicit the same information in a way that your opponent is less likely to object to.

For example, let's say your question is: "If supported by the evidence, could you award \$10 million or more in damages?" If your opposing counsel objects, your plan B question might be: "If supported by the evidence, could you award millions in damages?" This will prevent you or the panel members from becoming frustrated with the process. And instead of perceiving you as weak for having to turn tail and run to a different line of questioning, the jury panel will see you as smart and tenacious for succeeding simply by asking the same question in a different way.

Use your plan B when the judge or your opponent has already asked many of the questions you prepared. If they already covered

the topic adequately, be ready with a few additional areas of questioning that you planned to pursue only if you found yourself with additional time.

If others didn't sufficiently address the topic with the questions they already asked, be prepared to explain to the panel and the judge why you need to ask related questions from a different perspective. Then ask the questions in the way you feel is most advantageous to your client. For example, the judge and the plaintiff's counsel often cover the issue of burden of proof. If you represent On Time Bus Line in Carol Parker's case, then you would prepare burden of proof questions educating the panel on the concept that Ms. Parker begins her case against the common carrier at line zero. She must prove every single step of her case.

When challenges present themselves, the worst thing you can do is to stall, waste time, or appear unprepared or unsure of yourself in front of your prospective jurors as they sit waiting for you to make an alternate plan. Trust us, we know the feeling. Come to the courtroom with your plan B already prepared, and prepared correctly.

SUMMARY

From the first day you meet your new client straight on through to the day you meet your prospective jurors, keep in mind the importance of psychology in preparing to select your jury:

- ◆ Focus on making a good strong first impression on the jury panel even before you step into the courtroom for voir dire.
- ◆ Evaluate your client and your lawsuit at the very beginning, when your view of the case is as close to the jury's view as you will ever get.
- ◆ Hone in on what's compelling about your client and what makes her case important to you.
- ◆ Be brutally honest with yourself about your client's failings and the weaknesses in her case.

- ◆ Use your own first impressions to create a short and true power statement that obliges the jury to embrace your client's position.
- ◆ Start strong and end strong with a unifying theme that the jurors will remember throughout the trial.
- ◆ Be yourself: if you're honest with the jury panel, they'll tell you what you need to know.
- ◆ Build the jury's confidence in you by being prepared.
- ◆ Confirm that confidence by having a contingency plan ready for the inevitable challenges from obstreperous opposing counsel, bewildering rulings from the judge, or simple technical difficulties.