The following materials are primarily sourced from:

NATIONAL COLLEGE OF DISTRICT ATTORNEYS

***INTRODUCTION TO JURY SELECTION***

**I. INTRODUCTION TO JURY SELECTION**

Successful *voir dire* results from the art of successful persuasion. A presentation of artful persuasion is far more important to an ultimately successful prosecution than the very uncertain exercise of deciding who is or is not a good juror for the State.

A. PERSUASION

Persuasion in jury selection has three general goals. You should persuade

1. The jury to like and trust you,

2. The jury to accept your view of the problem issues in the case, and

3. Individual jurors to honestly express their views so that you can make an informed decision about which persons to strike

B. STRIKING A JURY

Deciding who to strike and who to leave on is an inexact process, more akin to a crap shoot than a science. No matter how hard we try, every jury has unknown personalities who may or may not be appropriate for a given case. Because of this high degree of unpredictability, it is a mistake in *voir dire* to primarily focus on deciding what types of people you want on the jury. While you must consider what the appropriate type is, it is better to view *voir dire* as a vehicle for persuading the jury panel to trust you and your case. If a prospective juror reacts favorably to you and the issues you present, you can make up for a multitude of sins regarding jurors you left on the jury mistakenly.

**II. INDOCTRINATION OF JURORS**

A. **JURY** COMPOSITION

Every jury panel potentially contains people with problem attitudes. However, most groups contain some members who will be acceptable State's jurors, if the prosecutor appropriately addresses their preconceptions and tendencies. A non­ exclusive list of these include:

**1. The Silent Majority:** Most members of the public called for jury service are more predisposed toward law enforcement than toward the defendant. They will naturally support the State's case, if the prosecutor does not offend them or make them uncomfortable. However, these people need to believe that what the prosecutor asks them to do is right and honorable, not merely a mechanical chore done on behalf of the government. Members of this group also need to believe their representative (the prosecutor) is fair, concerned with justice, and someone they feel comfortable supporting whenever there is a close call.

**2. The Skeptical Juror:** Some potential jurors distrust government and its representatives. These people will be skeptical of the prosecutor, the police, and perhaps the victims and witnesses appearing on behalf of the State. In spite of the inherent problems created for the State, do not automatically strike these persons. Some are capable of .being persuaded to the State's side, IF they like and trust the prosecutor. These persons should be closely examined to· learn if their natural biases will be reinforced by issues in your specific case *(i.e., heavy reliance on police officer or accomplice testimony.)*

**3. The Indecisive Juror:** Some panel members will simply be unsure of their ability to make important decisions. They frequently frown or look worried during questioning or explanation of legal issues. Identify these people immediately; persuade them to admit they just could not sit in judgment of another. Regardless of their answers, these people should never be left on a Jury.

**4. The Bored Juror: S**ome jurors appear bored or uninterested in the proceedings. They will reveal themselves by sleeping, looking down, looking around, or appearing generally uninvolved. You would rarely leave such a person on the jury *(i.e. only if you drew the world's worst jury panel.)*

**5. The Situational Juror:** Some jurors will be pro-State in most cases, but inappropriate in some instances. They may be bothered by some types of evidence, certain types of prosecutions, or be sympathetic to particular defendants. For example, while they might convict on aggravated robbery, they might be overly sympathetic to the young, middle-class bomber of an abortion clinic. Members of this group may be swayed by a defendant's age (at either end of the spectrum) or they might look askance at accomplice testimony. It is important to persuade these people to speak out so that you can identify them during *voir dire,* and make an informed decision about them.

**6. The Anti-State Juror:** These people are so rabidly anti-State that there is nothing you can do to convince them to convict. They are easy to make a decision about, but sometimes hard to identify. It is very important to persuade these people to reveal themselves.

**B.** INTRODUCTION OF *VOIR DIRE*

Creating the atmosphere and attitudes described below should take no more than 5 minutes, but it may be the most important 5 minutes in the entire trial. The juror panel's initial impressions may color their reaction to you and your case throughout the trial. Once you have created the right atmosphere, you are ready to move on to substance.

1. Introduce yourself, ask them to relax and put them at ease.

2. If Court has not, introduce the defendant, his attorney and other court personnel. Explain how the trial will proceed, so they know what to expect. Your demeanor and presentation should reflect a relaxed command of the courtroom and the events to come.

3. Tell them that you simply want to discuss some principles of law with them and learn their views and attitudes toward these principles. Tell them that you want to get to know a bit about them.

4. Tell them that it isimportant to the entire jury selection process to volunteer their feelings and attitudes. Tell them up front that you are not looking for any particular answers, but are simply looking for an accurate picture of how they feel.

5. Tell them that it is important for them to share their true feelings. Give examples, first from the defense side and then from the State's view, about how one side or the other might be deprived of a fair trial by juror's failure to state his or her true feelings.

6. Tell them to think in terms of giving both the State and the defense a fair trial. Unless the potential jurors' true feelings are known, this could occur.

7. Tell them to think in terms of giving the State a fair trial as frequently as they do for defendant. Tell them that it is easy to remember to give the defendant a fair trial because our system is geared to protect the defendant's rights, and he/she is the only witness who is in the courtroom during the entire trial. The victim, the police officers, and other witnesses are only in the courtroom during their testimony.

*Example: "If you are not careful, it is easy to forget these other persons and think only of the defendant. Can you promise me that each time you think of the defendant and think of being fair to him/her, that you will also think of the victim(s) and be fair to them? Will you promise to give the State and its witnesses just as fair a trial as the defendant?"*

8. Be relaxed and interested in them. ·If they think you like them and care about what they say, you are halfway there. Be an attentive listener.

9. Be organized. Develop a cohesive order in which to cover things.

10. Use an outline as little as possible. Instead, naturally and spontaneously respond to the jurors.

11. Eliminate as much boilerplate as possible. Move directly to the issues that matter -the issues in your case.

12. Create an atmosphere where a potential juror will feel guilty for not volunteering information that might make it difficult for them to give you, a person they like and trust, a fair trial.

13. Appear fair and trustworthy. The public has media-influenced, unrealistic pre-conceptions about prosecutors. They assume prosecutors are either mindless, nose to the grindstone, colorless drones, or zealots who want to lock up everyone. Members· of the public may wrongly believe that prosecutors are concerned only with ·getting convictions· and moving up the office ladder. Thus, it is vital to dispel this view as soon as possible.

Accomplish this by projecting a relaxed, caring demeanor and avoiding legalese or hyperbole in your speech. Help the jury like and trust you, and feel comfortable about what you are going to do.

14. Always show fairness toward the defendant and his/her attorney. While some prosecutors believe that you should never call the defendant "Mister" or use his/her name, consider calling the defendant "Mr. X" or "Ms. Y" instead. Most jurors don't want most defendants to be depersonalized. They appreciate the sense of fairness projected when you refer to the defendant properly. The jury is not going to acquit the defendant simply because you referred to him/her as "Mr. X" or "Ms. Y."

**C**. LEGAL ISSUES IN THE CASE

1. Explain the Law – Use PIK

Explain the law in your case to the jury panel. Make sure they understand the law AND what the State does NOT have to prove.

**2**. Explore Anticipated Problems in the Case

Sell them on your view of the anticipated problem areas m the case. Follow this 5-step process:

a. Explain what the law is

b. Find out the panel's initial reaction to the law

c. Explain why the law is what it is, and make it seem reasonable

d. Determine who can and who cannot follow the law

e. Recommit jurors who say they can follow the law even if they

don't like it

**3**. Explore Juror Attitudes Toward "Unpopular" Prosecutions

*Voir dire* is essential in unpopular prosecutions. These include cases of "victimless" crimes (i.e., small amounts of drugs for personal use, pornography, sanctuary cases, prostitution, etc.), crimes against unsympathetic victims (i.e., the rape of a prostitute, the murder of a drug king pin, the vehicular homicide prosecution of a parent who drove drunk with his/her child in the car and ended up causing that child's death), and prosecutions of sympathetic victims.

After explaining the law of the case, explore each juror's attitude toward this type of case. Ask questions in an open-ended manner. Don't lead.

(*i.e., the only possible answer a juror can make is "yes" or "no."*) Do not ask "*Can you follow the law?"* Instead, ask questions like the following: *"How do you feel about prosecuting people for having pornography?" "What do you think about the sanctuary movement'?" "How many of you have reservations about prosecuting people for possession ·of small amounts of narcotics?" “How many of you might' have driven after having a few drinks?"*

If no hands go up in·- response to the questions above, ask the group and then individual jurors, *"Oh, come on, you mean out of 40 people, no one has reservations about prosecuting for small amounts of drugs...for pornography...for prostitution…for drunk driving?"* or *"How about you, Mr. X. What do you think about prosecuting for · a 'small amount of drugs?"*  When one person admits reservations, ask the panel as a whole, *"OK, now that Mr. X has been kind enough to express his reservations, how many of you have similar views? Good - Mrs. Z, what do you think?" ·*

As jurors respond, decide if you want to strike them for cause or if you want to talk them into following the law, even when they do not like it. For jurors you do not want, consider saying, *"And in fairness, Mrs. Z, that dislike for obscenity prosecutions would get in the way of being fair to the State, wouldn't it?"* or *"Regardless of the evidence, asking you to convict someone for possession of a small amount of marijuana would be asking you to violate your personal beliefs, wouldn't it, Mr. B?"* Continue along this way until you get the juror to admit he/she could not be fair to the State in this type of prosecution.

If you want to try to retain a juror, you might try, *"Ms. A, can you see how we would all be in trouble if juries were free to rewrite the laws in the jury room? Can you promise me that if you are on the jury, and believe that the defendant is guilty, that you will find him/her guilty, even though you do not like the law he/ she has violated? Can you promise me that if you disagree with the law, you will take that up with the legislature, and not let it affect your deliberation in the jury room?"*

**4**. Explain Circumstantial Evidence

The goal: convince the jury panel that circumstantial evidence is actually more reliable than direct evidence. Point this out using the "snow on the ground" example (*i.e., the fact that there is snow on the ground when you wake up is more reliable evidence that it snowed than a stranger telling you he/she saw it snow.)* Mention that physical evidence is neutral, whereas direct evidence can be subjective. Identify jurors who are bothered by circumstantial evidence before you begin to persuade the panel of its reliability.

Some panel members must be convinced that they could never convict on circumstantial evidence; others can be rehabilitated and persuaded of its value. You might tell the jurors that if people could not convict on circumstantial evidence, all a criminal would have to do is kill all the witnesses. Note also that you only have to exclude all *reasonable* hypotheses, not all hypotheses.

**5**. Explain Accomplice or Immunized Witnesses

First, explain the law of accomplices to the panel. Give an example of what makes a person an accomplice to a crime. Then, if the accomplice in your case received a deal, state that up front. If the accomplice has been immunized, explain the law of immunity (make sure you know it and are correct). Then, elicit the panel's feelings and opinions about using one guilty person to convict another. You might begin by asking,

*"How many of you dislike the idea of one criminal getting a reduced sentence in return for helping to convict another criminal? All right, Ms. D, how about sharing your feelings with us? What do you think? Now, how many of you agree with Ms. D? Mr. E, how about you? For those of you who have not raised your hand, how many of you feel at least a little uncomfortable about the whole process of one person getting a break for testifying against another?"* and *"Does anyone feel that no matter how undesirable this is, that it is nevertheless necessary on some occasions? All right, Ms. G, why do think it is necessary sometimes? Thank you. How many of you agree with Ms. G that sometimes this is the only way the more guilty person can ever be convicted and punished for what he/she did?"*

Let the jurors, through a conversation among themselves, come to the conclusion that brokered or purchased testimony is sometimes the only way a case can be made. You want them to ultimately conclude that it is the lesser of two evils, and a distasteful process that they can tolerate. You might also ask,

*"Suppose Bob commits a murder that Joe planned and set up. Let's say Bob gets caught, confesses, and you have him dead to rights. But suppose Joe was smart enough to insulate himself from the crime, so that the only way you can convict Joe is with Bob's testimony. What do you think we should do in that situation? Bob knows the only way we can get Joe is through his (Bob's) testimony, so he wants something in return for his cooperation. Should we simply try Bob and let Joe go? Or should we strike an agreement with Bob, and use his testimony to get Joe, also?"*

Determine earlier if the panel members would be able to objectively consider an accomplice's testimony, or if they would automatically reject such testimony because the accomplice has something to gain. Ask, *"How many of you think an accomplice might tell the truth even though he/she has something to gain from his/her testimony? All right,\_ Ms. M, do you think you could listen to an accomplice, decide whether he/she was telling the truth, consider his/her testimony, even though you did not like the accomplice, did not approve of his/her arrangement with the State, and wanted to punish the accomplice about ten times more than the agreement would allow?"*

**6**. Explain Creepy or Distasteful Witnesses

Prepare the jury for witnesses who are not accomplices but who bring credibility problems such as prior convictions or unattractive personalities. Telling the panel that the State must sometimes rely on unsavory characters because one cannot pick and choose who sees or knows something about a crime. Ask, *"How many of you feel that a person is unbelievable about a particular event simply because they have been in trouble before? Mr. T, how do you feel? All right, it may be that in this case the State will rely on witnesses that have either been convicted of crimes before, or that simply do not present a very pleasing personality. Who may feel they would disbelieve these witnesses just because they have been in trouble before, or because you don't like them or what they do?"*

Once the panel's true feelings are known, commit the ones you want to listening and fairly assessing these witnesses, even if they don't approve of them. You might conclude with*, "Can each of you assure me that if you are a juror in this case, you will listen to all the witnesses, even those you do not approve of? Can you assure me that you would fairly consider their testimony, and base a verdict of guilty on the testimony of a witness who has previously been convicted of a crime or that you do not like, if you feel he is telling the truth?"*  If it is important enough to your case and you have time, commit them individually; if you do not have time, commit them by row.

**III. ELICITING JUROR INFORMATION**

A. Introduction

If time constraints allow, *voir dire* should be split evenly between lecture and individual questioning. As the preceding discussion makes clear, however, you should be doing a great deal of eliciting information during your discussion of the legal and factual issues in your case. You do that by directing your questions concerning the principles covered to specific jurors. By the time you begin questioning individual jurors, you should already know a great deal about many of their individual views.

The two most important things to do when questioning a jury panel are: (1) ask open-ended questions, and (2) listen to the jurors' responses.

B. Ask Open-Ended Questions

*Voir dire* is almost worthless if you do not ask your questions in a way that lets the jurors talk to you meaningfully. Never ask, *"Can you be fair?"* They will usually always say "Yes", and the answer tells you nothing. Instead, review the suggested ways to ask questions below:

1. "Mr. W, what do you think about relying on the testimony of one witness to make a decision on whether someone is guilty of a crime?" Again, the answer leads to the next question.

2. "Ms. S, how do you react to the suggestions by some that the State should never make deals with accomplices in return for their testimony?" Follow this with the question "Why?"

3. "Mrs. T., what was your initial reaction when you learned you might be a juror in a murder case? What was the first thing that popped into your mind?"

4. "Ms. L, how do you feel about being asked to sit in judgment of another person's conduct?"

In each example, HOW the person answers the question is as important as WHAT they say. Watch how the panel reacts to you. Can they articulate their feelings? Do they seem worried or assured? Does the prospect of jury service seem to intimidate them?

C. LISTEN TO JURORS' RESPONSES

Trial lawyers commonly fail to listen to the answers that jurors give. Jurors frequently communicate concerns or reservations that you need to follow up on; just listen to what they say and how they answer your questions. If you are committed to covering a specific area with them, but you mindlessly ask the same questions regardless of the answer, you. will miss valuable clues that would save you from frustration and heartache later.

If you get an answer that sounds okay but is delivered with a quizzical look, follow up with, *"You seem a little bothered by the question, Mr. J. What were you thinking when you answered?"* They tail off at the end of their answer with a "but...", ask them, *"But what?"* Never leave anything dangling. It will jump up and bite you later.

D. SPECIFIC INFORMATION TO OBTAIN

1. Do they rent or own their own home?

2. How long have they lived in the community?

3. How are their spouses employed?

4. Have they, or their family members, or persons they are close to, ever had an unpleasant experience with law enforcement?

5. Do they supervise others in their job?

6. Do they ever make decisions to hire or fire others?

7. What are their hobbies, how do they like to spend their spare time?

8. How do they feel about the criminal justice system in general? Do they

view it favorably or unfavorably?

9. Have they, or anyone close to them, ever been the victim of ·a crime?

Some prosecutors do not usually ask this question, but leave it for the defense instead because when the State asks, it targets persons for the defense to strike. But, if the defense asks, note the answers.

10. Most importantly, ask each of them whether they or anyone else close to them has ever had a prior interest in a criminal case. Try asking, "Have you, a member of your family, or a close friend ever been arrested for, charged with, or convicted of a crime?" Lead into this question by explaining why it is necessary. Point out that, *"Obviously, if you or someone you love has ever been involved in the criminal justice system, that experience might affect how you view the State's evidence in this case."* Explain that, *"If a police officer treated me badly on some occasion, that might affect how I looked at other police officers. Similarly, if I felt someone was unfairly treated by the system in the past, that might affect my views as a juror in someone else's case."*

Tell them that if their answer to this question is something they are uncomfortable talking about in front of others, they can ask to approach the bench and discuss it privately. Make sure they understand the question, and the importance of answering it fully.

**IV. EXERCISING YOUR STRIKES**

A. BE GUID E D BY YOUR INSTINCTS

When in doubt about a potential juror, strike. A jury should consist of people you are personally comfortable with, regardless of whether they fit the standard attitudes toward jury composition. You won't be able to decide who good or bad State’s jurors are. Instead, choose people you like and think will respond favorably to you. This is why it is critically important that you take the opportunity to personally exchange at least a few comments with each individual juror.

Consider striking:

1. The bored juror

2. The indecisive juror

3. Lawyers

4. Jurors who constantly volunteer during *voir dire.* No one fondly remembers the kid who always had his/her hand up.

5. The rabidly pro-State juror. He/she will often offend others' sense of fairness.

6. A person who you judge will not get along well with others, regardless of their views.

7. The situational juror. (For example, an engineer or accountant might be good for a direct evidence robbery, but a problem for the circumstantial burglary. However, don't always rely on stereotyped views of persons in particular professions.)

8. Anyone you are uncomfortable with, regardless of their profession or

station in life.

B.BE GUIDED BY STRATEGY

When you suspect a juror might be a problem for you, but you are still unsure, ask specific questions to him/her in order to make up your mind. However, use strategy; do not go directly to him/her. This will telegraph your concern to both the juror and the other side. First, ask the question of concern to a couple of safe jurors, then go to the person that bothers you. You never want a juror to think you are singling him/her out for special treatment or scrutiny. ·