

Voir Dire

By

GUS J. SOLOMON INNS OF COURT

JANUARY PUPILAGE GROUP

[ADD: INTRO RE VOIR DIRE TRAINING ACADEMY—SET THE STAGE]

TYLER: Hey Kim. Sorry I had to cancel our meeting earlier. I was assigned some last-minute research for a case. I hear that today we're going to be learning about Voir Dire.

KIM: No worries. It gave me a little more time to look at the Federal Rules of Civil Procedure and the local rules. Here are my notes on the Civ Pro rules. But Voir Dire? Is that French for jury selection?

TYLER: Kind of. The word is derived from Latin and French and literally means, "To Speak the Truth." It is the preliminary phase of a civil or criminal jury trial when the Court and litigators decide who will be on the jury to decide the case.

Both the civil and criminal procedure rules have detailed instructions on how to conduct voir dire. Here are my notes for Criminal Procedure side. I can do a quick run through. The rules for Voir Dire in a federal criminal proceeding are in Rule 24 of the Federal Rules of Criminal Procedure.

Rule 24 says that the court may examine prospective jurors or may permit the attorneys to do so. Especially in Federal Court, the Judge can put a lot of limits on the jury selection process. Attorneys can ask jurors questions that the court deems to be "proper" and are given a certain number of peremptory challenges to dismiss jurors.

KIM: Right, so preemptory challenges are when the lawyers on each side of a case kick a juror off the case. It happens in civil and criminal trials. With a preemptory, the parties don't have to give a reason as to why they are striking a potential juror.

Jurors can also be removed for cause. That's excusing a juror who does not appear capable of rendering a fair and impartial verdict. The parties can request a juror be removed for cause or a judge can do it on their own. Judges can also excuse jurors for hardship, right?

TYLER: Right. There are religious exemptions as well. Typically the court may excuse someone from jury duty if it is against their faith to stand in judgment of others or otherwise take an oath.

KIM: Ok. So that's same concept the civil side. When looking at the Federal Rules of Civil Procedure, we'd be looking at Rule 47. Main difference is that in federal civil cases, each side is only entitled to 3 peremptory challenges and there are no alternate jurors.

TYLER: Yes, that's the same on the Crim Pro side. It is important to try and get the Court to weed out jurors who indicate they have an actual bias or implicit bias by removing them for cause, instead of with a preemptory challenge. Actual bias is when a juror admits his inability to be impartial. Implicit bias is when the juror has a relationship, connection, interest, or past experience, whether positive or negative, with any of the parties.

KIM: It seems really hard to strike a juror for cause. Did you see the 8th Circuit Case, *Allen v. Brown Clinic*, that said knowing a distant relative of one of the parties, witnesses, or attorneys wasn't enough?

TYLER: Yeah. I saw that, too. I guess that's why the firm wants us to go to the Voir Dire Training Academy. The partners want to make sure we know how to best utilize our peremptory challenges.

KIM: In criminal cases, isn't there one other way to challenge the jury selection process, on constitutional grounds? That is under *Batson v. Kentucky*, right?

TYLER: Right. Opposing counsel may object to the validity of a peremptory challenge if it appears to be motivated by discriminatory grounds, such as striking a juror because of their race. That's a Batson challenge. I bet it would be hard to raise a Batson challenge though. Attorneys will likely be able to find some other explanation for the peremptory challenge.

KIM: Going back to the rules though, the rule says, "the court may examine prospective jurors or may permit the attorneys to do so." The "may" that had me stumped. Can you think of cases that wouldn't have a juror selection process?

TYLER: Sure. If it is a bench trial. That means there's no jury. And in some federal courts, the judge handles all the voir dire questions and does not let the attorneys ask any questions. It is up to the judge.

KIM: Ah. Got it.

TYLER: No worries. I had to look that up. I guess we're used to seeing TV courtrooms. Oof- looks like class is starting earlier-

(KIM & TYLER take their seats at a table with the audience.)

TEX: Good evening class. I'm Tex Clark. I am the senior litigator at the Federal Public Defender's Office. Welcome to the Voir Dire Training Academy

LEA: I'm Lea Schneider. I am a civil litigator from Snell & Wilmer. Today, we will be sharing our tips and tricks to help you prepare for jury selection. To start off, let's survey the class- how many of you tried 25 or more cases in front of a jury? How many have tried 10 or more cases in front of a jury? How many have tried at least one case in front of a jury? And how many have never tried any cases before a jury?

(KIM & TYLER raise their hands)

LEA: This is great, we have a variety of skill levels in the room. We'll try to make sure that we have something helpful for everyone.

TEX: Well, let's get to it. You all should have received our brief introductory handouts to Voir Dire and reviewed the relevant Federal Rules of Civil Procedure and Criminal Procedure. The rules tell us the number of peremptory challenges we get, and we'll help you figure out how to use those challenges.

The purpose of voir dire is to learn as much as you can in a short period of time about the prospective jurors for your trial. Using a combination psychology, common sense, and attentive listening, we will try to find a fair jury to decide our client's case.

Before we start, there are some techniques that Judges use to run their voir dire process. One of these is called the Struck Jury method and another is the Jury Box Method. Can anyone summarize *how* a jury is selected when using the Struck Jury Method?

(KIM raises her hand.)

TEX: Yes, go ahead.

KIM: In the Struck Jury Method, the court randomly selects and seats jurors based on the number of jurors required for the case, plus the number of preemptory challenges available to each party. The final jury is made up of the remaining jurors after the preemptory challenges have been made.

TEX: Excellent. And who can tell me about how a jury is selected when using the Jury Box Method?

(Tyler raises his hand.)

TEX: Yes?

TYLER: In the Jury Box Method, the court randomly selects jurors. The attorneys are given the opportunity to ask questions. As jurors are dismissed for cause or a peremptory challenge is exercised, a new juror replaces the dismissed juror. The process repeats until the attorneys have no peremptory challenges left.

TEX: Here's a graphic of the two methods. The Struck Jury method allows counsel to be more informed with exercising peremptory challenges. However, the Jury Box method allows an attorney to focus on a smaller number of individuals at a time.

LEA: Now that we've talked about how the jury is seated, let's talk about what happens before the attorneys have the opportunity to ask questions. Have any of you ever been called for jury duty? Served on a jury? If you've been called for jury duty, you may remember there is a video that all jurors watch before they even enter the courtroom. [SLIDE] The orientation video provides a very high-level overview of the important role jurors play, and more recently, some Courts have started including a section on implicit bias. After the orientation video, a potential juror may be called to a courtroom.

TYLER: That's when we get to start asking the jurors questions, right?

LEA: Not quite, first the court may ask the jurors general questions. To help us understand what that process looks like, Judge Beckerman is with us today. Judge Beckerman, can you walk us through the court's role in jury selection?

JUDGE BECKERMAN: Yes! First, someone from the clerk's office leads the prospective jurors into the courtroom after they watch the juror orientation video down in the jury assembly room on the second floor. Before they enter, the lawyers have a list of the individuals who showed up for jury duty that day, with their county of residence and occupation.

When the prospective jurors enter, the lawyers and parties are already seated at counsel table and I am sitting up here. They sit in the back of the courtroom at first, but then the CRD calls up the first 14 names to sit in the jury box. I welcome them, explain how long I expect trial to last, how many jurors we will select, and I thank them and try to appeal to their patriotic spirit and civic responsibility. I then read a carefully curated "statement of the case," to which the parties have either stipulated or litigated prior to trial. And I administer the voir dire oath to all prospective jurors in the courtroom:

Please stand and raise your right hand: **"Do each of you solemnly swear or affirm that you will answer truthfully the questions put to you concerning your qualifications to sit as jurors in this cause now before the court?"**

After the oath, I begin the court's voir dire, or questioning of the panel. Then I allow the attorneys to ask questions, and I usually set a time limit (usually 15-20 minutes, which I have discussed with counsel at the pretrial conference). After attorney voir dire, the lawyers may raise challenges for cause, and argue why a prospective juror may have a bias that would interfere with their ability to remain impartial. We usually have that conversation outside the presence of the jury. If I strike a juror for cause, we call up the next juror on our list to take the excused juror's seat and ask the same questions to that individual.

After challenges for cause, it is time for peremptory challenges, also usually outside the presence of the jury. In civil cases in federal court, each side gets three peremptory challenges, in which they can strike a juror without providing any reason. We typically use a sheet of paper

with all of the juror names and numbers, and the CRD brings the sheet to the plaintiff's counsel, then the defendant's, and the lawyers indicate quietly on the sheet who they are striking. The sheet goes back and forth until there are up to six jurors stricken, but sometimes it is less than six because you are not required to use all of your peremptory challenges. Then we all return to the courtroom, and I announce who will be serving on our jury—we started with 14, so 14-6 is our 8-person jury.

I ask them to stand and I administer yet another oath: “Do each of you solemnly swear or affirm that you will well and truly decide the issues now pending between the plaintiffs and the defendants and render a true verdict according to the law and the evidence given you in this trial?”

But let's back up:

The first question I ask during judge voir dire is if anyone is unable to serve on the jury. And I interview each of the individuals who have raised their hand to suss out whether they have a valid hardship.

I then ask case-specific questions, like do you know any of the lawyers, parties, or witnesses?

I will typically also ask legal system questions, including:

- Has anyone served on a jury before today? For those of you who served, did you find your prior jury service to be a positive experience or a negative experience?
- Have any of you, anyone in your immediate family, or anyone who is a close friend, ever been a participant in a civil lawsuit to the best of your knowledge, either as a party (a plaintiff or defendant) or as a witness?
- Does anyone here have any particularly strong opinions or feelings, positive or negative, about lawsuits generally?

- Does anyone here or any of your family members or close friends work in the legal system or in any job that brings them into contact with the courts or lawyers?
- Has anyone received any legal training or education on the law?
- Is there anyone who would not be willing to follow my instructions and apply the law as I give it to you if you personally disagree with those instructions or the law?

At the end, I will also ask

- From what you have heard about this case so far, does anyone here believe that you might not be able to be a fair and impartial juror in this particular case?
- Is there anything about you or your experiences or your personal beliefs or opinions that you believe this Court or the parties to this case should know before you are selected to be a juror in this case that you have not already told us?

TEX: Thank you, Judge Beckerman. In addition to the questions the judge may ask, the lawyers are also provided with information contained on a Juror Information Form. **[SHOW**

POWERPOINT?] That may include basic information like the name, age, education, current and former employment, place of birth, current and prior residences, immediate family members ages and employment, and membership in any social, civic, professional organizations or clubs, hobbies, and sources of news.

In criminal cases we usually want the court to include a question about whether any person has worked in law enforcement or has a family member who works for law enforcement. We want the judge to ask if the juror or members of their family have been the victim of a crime.

LEA: Whether it is a civil case or a federal case, it is important for the lawyers to have a plan when it comes to voir dire. Each juror comes into Court with their own history, experiences, attitudes and beliefs. People are not likely to change their belief system just because they have

been called for jury duty. The lawyers need to ask the right questions pertinent to their case so they can find out what some of those juror attitudes and beliefs are before they are empaneled as jurors.

TEX: That's right. Especially in federal court, the judge has the authority to limit questions so knowing what beliefs and biases you are looking out for and having a clear, time-efficient plan to question the jurors is important.

LEA: The first step to having a plan for voir dire is knowing your theory of the case and what facts that jury has to decide in your favor to arrive at to decide the case for your client. The theory of the case is, in a nutshell, the reason you win.

TEX: Every question you ask should be zeroed in on learning how the jurors are going to respond to the theory of your case. What preconceived beliefs do your jurors bring to the process? No matter how persuasive you think your arguments are, you need to know your juror's baked-in beliefs because it is highly unlikely what you say during a trial is going to change those beliefs.

If it is a criminal case that involves firearms, for instance, I may want to ask questions about negative juror experiences with guns or strong feelings about gun rights. If my case is about a plea to not guilty by reason of insanity, I want to ask about attitudes the jurors have about psychologists. And I want the jurors to out themselves and get off the jury if they know their beliefs are going to be too biased to keep an open mind.

Let me show you an example.

[TEX DOES DEMO HERE WITH OUR AUDIENCE JURORS IN BOX.]

-who am I, this is my client. This is a very important day for him because he is on trial and seeking justice and fairness in this courtroom.

-The Court is allowing us to ask questions so we ensure that if you are on the jury, you will be able to follow the court's instructions. Most people have fundamental beliefs. No one should be put in position of not being able to follow judge's orders or the law because of a fundamental belief or bias.

I'd like to talk about how you view psychology and psychiatrists.

Juror __, you may know this case will probably involve testimony my psychologists or psychiatrists. What do you think about the field of psychiatry, psychology, and the like?

Some people believe that psychiatry and psychology is not an honorable profession. That it isn't based in truth or science. Who feels that way? Has anyone ever heard that opinion in from family or acquaintances? What did you think when you heard that?

(Pass it back to LEA).

LEA: Great, now that you've seen an example, think about voir dire and the three primary goals 1) gathering information, 2) eliciting bias, and 3) protecting your favorable jurors from challenge by the other side. The best way to do that is with open ended questions.

Here with us today, we have Josh Olmsted from the Multnomah Defenders to discuss open ended questions. Josh, thanks for joining.

JOSH: You bet.

TEX: They teach lawyers a lot about cross-examination, Josh, but what about preparing open ended questions for voir dire?

JOSH: Open-ended questions are great for voir dire because the goal is to find out as much as you can from the jurors in a short amount of time. Yes or No questions do not give us much information about the juror.

Some examples of good voir dire questions are:

- *What was the first thing that came to your mind when...?*
- *What do you feel when you hear.....?*
- *What was your gut reaction..... why?.....*
- *Have you ever heard others say.....?*
- *Have you ever heard of instances when...?*
- *Could you share some examples?*
- *What do you think about what you heard?*

JOSH: Another important thing to learn in voir dire is about group dynamics. How, in *this* particular group of people in voir dire, how are *these* people going to interact in deliberations? Do some people seem like they are going to be followers and people pleasers? Do some people seem like they are going to be leaders in discussion?

Here are some qualities to think of in figuring out who your leader jurors might be:

- Leader jurors are comfortable speaking in the court room, have a sense of humor and confidence, have convivial interests and activities.
- Leader jurors have served on committees or have administrative duties at work
- Leader jurors often have a higher level of education and are comfortable with systems
- Leader jurors often have prior jury experience.

LEA: Why does it matter if jurors have leadership qualities?

JOSH: Because if there's a leader type person in your jury pool that is not open to your theory of the case, you should strongly consider striking them. A leader type person who is hostile to your message can make it very difficult for the group to decide the case in your client's favor.

TEX: That brings us to the concept of De-selection!

If there's a juror who is not going to be down with your theory of the case, they need to go. There is a school of thought on jury selection that is completely focused on De-Selection. In De-selection, you aren't picking who will be on your jury. Instead, you are picking who needs to leave.

Rather than try to find jurors sympathetic to your cause, De-Selection teaches the more effective use of voir dire time is to identify those potential jurors who have had life experiences or hold attitudes that would make it difficult or impossible to see the case from your point of view. Who is not open to your theory of the case?

LEA: De-selection. It is not the same as finding jurors who are good for you. Don't! Look for the ones who are bad for you. Plan to use all your preemptive strikes. So how do we deselect a jury?

TEX: Well, you want to let the jurors know you have established a free-speech zone, and there are no wrong answers or offensive answers, that this is a Court room where they can air their opinions, but that they should get off this jury if their fundamental beliefs are going to get in the way. I can lead by example:

Through its questions, the Court has let you know that not every person is going to be the right fit for every jury? For instance,

"I would be the wrong person to be on a jury for a fraud case because someone in my family had a great deal of money stolen from them in this way and it is very emotional for the people in our family" I would be a very good juror for another kind of case, but not for a fraud case because it is too emotional for me.

Let's say this is a DUI case. Juror # __ can you think of an example of a person who would be too emotional if we were deciding a DUI case today?

Another way to de-select jurors is with a spectrum question: Let's say my theory of the case requires the jurors to believe science, and to believe the doctors who are testifying.

Some people think western medical science is not reliable. Who feels that way on a scale of 1 to 10. One is that you highly skeptical and distrustful of so called “medical science” and 10 is that you always trust and believe doctors as highly trained medical professionals? Trustful or distrustful?

[Tex voir dire the audience using a spectrum question] After going through that spectrum I now have a very good idea of who might need to get deselected from this jury.

TEX: What is another example of a deselection question?

JOSH: That is also a great open-ended question!

BRIAN: What would you suggest?

JOSH: Great!

KRISTEN: How do you ask about the tough stuff? Like how would you ask a question regarding racial feelings; on drugs, etc.?

TEX: I recommend asking questions like: I am concerned that...(my client’s Latino ethnic background) may affect how someone would view the evidence in this case. Why do you think I may feel that way? Do you think this is a legitimate fear? How many people are reluctant to talk about (racial issues) in front of strangers about themselves?

KRISTEN: Oh, that’s clever.

JOSH: It can also be very effective to **tell the jurors why you are asking a particular question:** *“I am trying to see what your feelings are about people who drink alcohol.”* Other techniques include asking headline questions, like:

- Some people may think that someone who has a breathalyzer that is positive for alcohol doesn’t need to have a trial, that it would be a waste of time.. what do you think?

[Pause for audience response] [Allow time to get it and spread it]

- Some people may think that medical science is not reliable and that a lot of doctors do not know what they are talking about. Who feels that way?

[Pause for audience response] [Allow time for response]

TEX: Once you get the jurors talking, you can start to ask **jurors about each other’s answers** and how they would explain how their own experience or opinion compares. This is called ‘get it and spread it’. *Demo that based on an audience answer. Perhaps use a beach ball.*

LEA: Now that we’ve discussed how to ask questions, let’s talk about **10 Questions never to use in voir dire:** [This would make a good PowerPoint]

Notice these are all yes or no questions that do not inspire normal people to speak up.

Demo these on crowd to show they don’t work:

10. Do you understand the law says...?

9. *I take it from your silence that no one disagrees with the proposition that...?*
8. *Does anyone have a problem with...?*
7. *Will you keep an open mind and not decide this case until you have heard all of the evidence?*
6. *Can you set aside your biases and decide the case on the facts?*
5. *Has anyone formed an opinion about...?*
4. *To every one of you be fair and impartial juror in a case like this?*
3. *Will you promise me that...?*
2. *I trust you will agree...?*
1. *Do any members of the panel have any feelings about...?*

JOSH: The better way to ask a question it is to directed it to a particular juror. For example:

(juror's name) what feelings do you have about...?

LEA: Okay, we've been digging into this issue pretty deep. Let's take a quick break, we'll be back in a few minutes.

KRISTEN: (Turning to Brian). All this voir dire stuff is interesting, but can't I just hire one of those fancy jury consultants to craft my perfect jury for me? I've seen that show on CBS, Bull, where the jury consultant Dr. Bull does what he calls "trial science" to predict what the jury is going to do. There was one episode where he told the lawyer to ask during voir dire "why do you catch a cold?" and used it to determine the jurors' worldviews.

BRIAN: That's a really interesting voir dire question. Hey, did you know that Bull was loosely based upon the early jury consultant work of Phil McGraw, Phd, known as Dr. Phil on TV? He shot to fame because he consulted on a trial for Oprah.

KRISTEN: I didn't know that Dr. Phil was a jury consultant back in the day. Wait, they turned this man [show picture of Dr. Phil] into this man [show picture of Bull]? That's hilarious.

BRIAN: That's not the only creative editing they did with the show. The tv character Dr. Bull apparently has a 400+ factor analysis of each potential juror, informed by extensive background and social media research on each potential jury, which he then uses to assemble a near perfect mirror jury that watches the whole trial from the gallery and comments on the effectiveness of the narrative as it develops, using high tech devices to monitor their reactions.

KRISTEN: Okay, okay, that is definitely some television exaggeration. But it's not all a made for tv concept. I read that social science methods to select jurors goes back to the 1970s (which in my mind was just 30 years ago, but really is more than 50 years ago).

In what is known as the trial of the "Harrisburg Seven", seven Vietnam war protestors were charged with conspiracy to pillage draft boards and kidnap Henry Kissinger. The defense team hired a sociologist – Jay Schulman – who administered a rigorous community survey to create profiles of desirable and undesirable jurors. The defense team got a hung jury and laid the foundation for the use of social sciences in jury selection. Schulman also worked on trials from the Wounded Knee Incident in 1973 and used community surveys to show that three quarters of the citizenry followed the case in the media. When only 40% of potential jurors said they followed the case in the news, defense attorneys inquired further and found they lied to be on this high-profile case. Without that survey, the defense team may have taken the potential jurors at face value. In related Wound Knee cases, Schulman conducted state-wide surveys to show that there was no location where defendants would receive a fair jury. They got the charges dismissed.

And the first high profile civil litigation to use a jury consultant was the antitrust case brought against IBM in 1976. A professor, Donald Vinson, relied on survey research and focus groups to help defense lawyers pick a jury that found in IBM's favor.

BRIAN: Although it has its roots in criminal trials, modern jury consultants are more often involved in civil litigation, particularly tort litigation, where corporate defendants fear an enormous monetary judgment for the plaintiff or where plaintiffs' attorneys have invested large sums of money on a contingency basis. Since the 1980s, large jury and trial consultant firms have emerged, mainly involved in high-stakes civil litigation. As of the early 2000s, trial consulting was a \$400 million industry.

KRISTEN: Big bucks! You know, the tv show Bull isn't entirely off the mark as to what jury consultants can do. One study that I read showed that jury consultants primarily rely on two methods – phone surveys and mock trials. Mock trials help lawyers test and tailor trial themes and see how different types of jurors react and assess the predictive effect of certain juror traits – Bull does a lot of those on the show.

The phone survey is probably the grunt work that led to that 400+ factor analysis that Bull brags about. A phone survey generally consists of polling the community where the trial is to take place asking about three things: (1) background characteristics of the jury pool like sex, race, income, education, job, age, marital status; (2) questions about beliefs and attitudes likely associated a favorable or unfavorable verdict; and (3) reading a summary of the facts of the case and ask what verdict they would give. The jury consultants then compare these data sets to figure out which characteristics correlate to favorable attitudes and verdicts. That information is then used to help select a jury.

BRIAN: Unfortunately, the effectiveness of scientific jury selection is questionable at best.

Some researchers who have studied scientific jury selection indicate that the model employed (demographic factors predict attitudes that predict verdicts) has empirical weaknesses. Specifically, demographic characteristics used to predict juror attitudes and juror verdicts may not hold true across all types of cases. For example, men convict more frequently than women in some types of criminal trials but less frequently in others.

In fact, one research concluded that the actual efficacy of jury consultants may not be very important because the demographic composition of the jury has little effect on the verdict it renders, usually causing only a 5%–15% variance in verdicts.

KRISTEN: I'm familiar with that research. There do not appear to be any reliable predictive demographic variables – juror occupation, gender, income, religion and age have not been found to have consistent effects across cases – In short, demographic characteristics are often less predictive than the attitudes jurors hold; for example, attitudes towards rape are better verdict-predictors than gender in rape trials.

BRIAN: The research shows that some personality traits can predict juror decision-making fairly consistently. For example, the presence of an authoritarian personality, defined as a strong preference for order, for clearly articulated rules, and for powerful leadership, is modestly related to individuals' likelihood to vote for conviction in criminal cases.

But it has not been possible to identify a personality type or combination of types that can predict juror decisions across criminal or civil cases. In general, personality traits are not valid predictors of jurors' voting predispositions.

And preconceived attitudes and biases may generate more accurate predictions than will personality types, but people are often able to conceal such biases, especially when they may reflect negatively on the bias-holder.

KRISTEN: It appears that the influence of scientific jury selection is situational – One study has identified several instances in which SJS is more likely to have an effect on the outcome of a trial. [Show slide]

- when cases are publicized
- when the evidence is ambiguous and does not favor one side more than the other
- when juror views are related to demographic characteristics and personality attributes that can be directly observed
- when the predictors of juror voting are not immediately obvious to either attorney

- when attorneys are permitted to conduct a thorough voir dire;
- when the court is liberal in its allowance of peremptory challenges
- and when the budget for the trial allows for extensive pretrial research

BRIAN: It really comes down to the evidence. When the evidence is strong, nothing else matters much, and even when the evidence is ambiguous, demographic characteristics of jurors are a relatively minor influence. Several empirical studies of traditional jury selection (by attorneys acting alone) have indicated that it and scientific jury selection are about equally effective. Another study found that scientific jury selection only works better than traditional jury selection when juror characteristics are highly related to a specific verdict—for instance, a person who has had a family member die in a car crash may be more partial to car crash victims.

KRISTEN: Maybe using a jury consultant does not fix a loser of a case, but in my experience jury consultants can provide important insights into the process, like helping developing and using themes effectively at voir dire and trial. And if the case has ambiguous facts, I'll take any advantage possible. Even a 15% leg up could make the difference. Oh, it looks like class is starting again.

LEA: Okay I hope everyone was able to enjoy the quick break to stretch their legs. Let's get back to it! We've got a couple more very important topics to discuss. Next up, ethical considerations. Alright, let's try a demonstration. Let's see...looks over class. Lewis, you've tried a few cases, right?

LEWIS: Yes!

LEA: Great, and in your experience was there a juror type that you tried to strike?

LEWIS: Oh yes, I ALWAYS strike the frat bros. I always check their clothes, hair and ask them a question to elicit a frat bro response. If I see a frat bro, not on my jury!

TEX: Oh, um, well that's an interesting position. Why don't you show us that in practice.

LEWIS: Sure, (turns to the prospective jurors). No. 4, sir, when was the last time you drank a beer with ice in the name?

JUROR NO. 4: (bro-y) Saturday night bruh..., uh, sir.

LEWIS: See, got him! Then, I'd turn to the judge and inform her that I use my peremptory strike on Juror No. 4!

TEX: Have you ever had opposing counsel ask why you're striking men from the jury?

LEWIS: Nope, my plan is full proof, I just can't stand frat bros. I won't have them on my jury!

JUDGE BECKERMAN: Your practice may be subject to a *Batson* challenge and could get you into ethical trouble.

LEWIS: Ok, I guess frat bros are necessarily all male, or male perceived. Let's move on. One of the best tricks I have learned is to do a lot of research on your potential jurors. Once you really know who they are, you can tailor your presentation to them. Of course, this only really works in Oregon in federal cases where you learn the names of your potential jurors.

LEWIS, turning towards Student: Some jurisdictions have regulated the practice of juror investigation and there is a split on whether an automatic notice that an attorney has viewed a juror's social media, as can happen automatically on LinkedIn, for example, is an unethical juror contact. In Oregon, accessing public information is not a contact.

STUDENT: What if the juror's social media profiles are all private?

LEWIS: Just asking as yourself is very likely to spook your jurors. In Oregon, we have the 2016 revised Formal Ethics Opinion 2013-189 which covers accessing information about third parties on social media in general. Oregon's rule is more nuanced than most, providing the potential for an ethical supervision of covert activity in the investigation of violations of civil or criminal law or constitutional rights provided the lawyer is otherwise compliant with the ethical rules. However, I am not aware of any test of this rule and I would be extremely careful in employing any such tactics. They certainly wouldn't make any sense regarding jurors unless you had evidence of juror misconduct. Some jurisdictions have also found that a failure to investigate juror misconduct and bring it to the attention of the Court prior to a verdict was not cause for a new trial. However, Oregon RPC 3.5 prohibits a lawyer from communicating with a juror or prospective juror on the merits of a cause during a proceeding and prohibits contact after the discharge of the jury if the communication is prohibited by law or order, the juror has made it known that the communication is not desired or the communication involves misrepresentation, coercion, duress or harassment.

STUDENT: So, besides the selection process itself and setting aside issues of juror misconduct, are there ethical issues implicated by attempts to influence a jury during voir dire?

LEWIS to Student: I'll try and demonstrate where some of the guardrails are.

LEWIS (to jurors): Who amongst you have been wronged and ended up having to deal with cutthroat insurance attorneys?

JUDGE BECKERMAN: (almost snide): You know I would sustain an objection to that one, right? You generally can't bring up insurance coverage at trial or even in voir dire.

LEWIS to Judge: But, your honor, I am trying to find out which, in any, of these jurors may have had similar experiences in dealing with nasty insurance companies!

JUDGE BECKERMAN to **LEWIS:** Fortunately, this is just practice, because if you're not careful, you may find yourself with a mistrial and an ethics complaint!

LEWIS: There are not a lot of clear ethical guidelines and boundaries out there for what you may or may not bring up to a potential jury in voir dire other than following orders of the trial judge and not raising inadmissible evidence, such as a defendant's insurance policy. Preserve and save your arguments. If you disagree with the trial judge, preserve and save your arguments but comply; you don't want to find yourself on the wrong end of a disciplinary action because you couldn't follow the direct orders of a judge. You are always free to argue for a new trial or appeal.

JUDGE BECKERMAN: Following the judge's order is always good advice.

LEA: Ok, a lot of what we've been talking about is focused on dealing with criminal cases. For our last of our time today, we're going to spend some time on tips for jury selection in civil matters. We're lucky to have Melissa Hopkins with us today to demonstrate voir dire in a civil case.

To set the scene: Plaintiff, Danica Patrick, was severely injured after a collision with Smash Bros. Trucking, LLC. Ms. Patrick is seeking \$4 Million in damages for her injuries that have effectively ended her racing comeback that she planned for 2024. In this demo, Kim, you will be representing Ms. Patrick and Tyler, you will be representing the defendant, Smash Bros. Trucking. Are you ready? Listen carefully to the questions Melissa asks and think about which jurors you would want to strike. Ready?

Melissa, I will let you take it from here.

[MELISSA'S DEMO]

[. . . Melissa, when your done, turn it back over to Judge Beckerman with a cue]

JUDGE BECKERMAN: Now that we have heard from the jury pool, I am going to invite the student attorneys to sidebar to see if there are any challenges we should know about.

KIM: Thank you your honor. I think we should strike Juror ___ for cause. Based on their answers, it does not appear they will be able to overcome their bias and emotion for this case and follow your instructions.

JUDGE BECKERMAN: Any objections?

TYLER: No objection your honor. But I also think that Juror ___ indicated they would not be a biased juror because _____. Can we strike that juror for cause as well?

KIM: We object! We like that juror.

JUDGE BECKERMAN: I don't see removing that Juror for cause, Tyler, but you could choose to use one of your preemptive strikes instead.

Now for the purpose of this exercise, each side may preemptively strike three jurors.

JUDGE BECKERMAN: Thank you for your patience. I am now going to let the jury pool know which jurors are excused for today. [Judge tells which jurors to leave].

JUDGE BECKERMAN [thanks the jurors excused and swears in the remaining jurors].

THE END