



# Voir dire: The right preparation allows you to be “in the moment” with jurors

*A successful voir dire environment allows the attorney to be genuine and jurors to share themselves openly.*

## JOANE GARCIA-COLSON

The lawyer, with sweaty palms and shaky knees, stands before a jury ready to begin jury selection. Anxiety boils in the stomach leading to great discomfort. The questions are *where* and *how* to start?

Jumping into an *issue* or the *substance* of a voir dire exam without a warm-up will make it very hard to form a group with the jury. The warm-up builds trust and credibility and creates an environment where the jury is willing to listen. If there is no warm-up, the jurors will not feel safe or trust the lawyer enough to be open and honest about the lawyer, the client or the issues in the case.

Prior to beginning the voir dire, it is critical for the lawyer to engage in a process of warming-up to the task. We do not traditionally equate “warming-up” with our work as lawyers but generally understand the process as it relates to athletic performance. For example, a person would not set out to run a marathon without any prior preparation for such a task. On the morning of the race, the runner does not simply leap out of bed, dress and approach the starting line. Long before the race begins, the

athlete engages in a course of training to prepare for the event. The runner slowly builds up physical endurance, goes on training runs and undertakes the task of getting in shape, becoming familiar with and expanding physical capabilities. It is a process that prepares the athlete for action: running of the marathon itself.

### Preparation

Similar to the process followed by the athlete, the lawyer must also engage in a warming-up process that begins long before entering the courtroom. For the trial lawyer, a critical part of the warm-up is preparation, of the case and of the self. The lawyer must do her own personal work regarding the client and the issues in the case so that she does not become stuck or emotionally hijacked by an unanticipated question or response from a juror that taps into the lawyer’s personal feelings about that particular issue. If the lawyer does not know *how* she feels about the issue, or *more importantly why* she feels the way she does, how can she possibly guide a discussion among the jurors?

Gerry Spence states repeatedly, “Everything that happens in the courtroom begins with you.” Thus, the

lawyer must prepare himself before voir dire begins. The first three steps of the TLC (Trial Lawyers College) Voir Dire Method focus on the lawyer’s preparation:

- 1) Identify the matter(s) in the case that trouble you.
- 2) Explore your personal feelings about the matter(s) that trouble you.
- 3) Determine why you are troubled.

These three steps must be completed before the lawyer ever sets foot in the courtroom. “Preparation of oneself to engage in [a sociometric test]...involves examining oneself for anxieties, fears, prejudices and covert issues which might inhibit the confidence and honesty with which one handles the exploration.”<sup>1</sup> If you do not know how you feel about the issues in the case, it will be difficult for you to address these issues with the jury either confidently or honestly.

Preparation also includes “anticipating group concerns and reactions and being ready to confront these concerns directly and confidently.”<sup>2</sup> Knowing how you feel about the issues will help you respond honestly and in the moment to questions and concerns raised by the panel. If you have engaged



OCTOBER 2007

in thorough preparation of yourself and the case, you will see everything a juror says, as a gift. This preparation begins and takes place long before the lawyer faces a potential panel and is the key to a successful voir dire.

Gerry Spence recently highlighted the need for preparation when he said that two things are required to conduct a successful voir dire: the ability to hear beyond what is being said, and the ability to respond honestly in the moment.

Preparation is the key to gaining these abilities. If you are struggling with your own feelings about an issue while you are conducting your voir dire, you cannot possibly be emotionally available to tune in to the feelings that lie underneath a juror's words. If your mind is doing mental gymnastics to find a persuasive response to something a juror says, you are not in the moment. Despite what you may have heard, being in the moment does not mean flying by the seat of your pants. Being in the moment means you are in tune with how you are feeling, can tune in to how the venire are feeling and are able to respond spontaneously and honestly to any issue they raise. Personal preparation is the key to voir dire and the ability to respond spontaneously. There is no shortcut.

### **Creating the environment**

The next phase of the warm-up involves the creation of the environment in which the jurors are willing to listen to the lawyer, and the lawyer is willing to listen to them. This is where the lawyer facilitates the jury's warm-up. When such an environment is successfully created, the lawyer can be himself, genuine and real and the jurors feel safe sharing their honest feelings with him. This is a vital step and must occur before a discussion of the issues will be productive. How is this environment created?

A number of ethical principles form the underlying basis upon which an effective voir dire is undertaken:

- 1) Give truth and receive truth.
- 2) Give love to the group and it will return love to you.
- 3) Give spontaneity and spontaneity will return.<sup>3</sup>

This sounds remarkably similar to the message that Gerry Spence imparts when he talks about and demonstrates the Trial Lawyers College Method of Voir Dire which he sums up as: "I'll show you mine if you show me yours." In the TLC voir dire process, the goal is not only to find jurors most likely to be favorable to your case, but to form a group among the jurors, of which the lawyer is a member and ideally, the leader. This requires honesty on the part of the lawyer, a sincere interest and caring about the jury, and a willingness to be in the moment.

The jury selection begins with the creation of connections between the lawyer and potential jurors and between the jurors themselves. Before addressing any of the issues in the case, the lawyer should tune in to herself and determine how she is feeling in that moment: Frightened to be in front of the panel; anxious; excited to finally have people to whom she can tell her client's story; overwhelmed with responsibility? Before speaking, the lawyer should do an internal soliloquy to tune in to how she is feeling. She may need to take a mental step back, going deeper to get at the core of what she is feeling.

That is where the voir dire should begin – by sharing with the jurors the honest feeling the lawyer has in that moment. In doing so, the lawyer reveals a truth about herself and creates an environment in which the jurors feel safe and free to share their own truths. This process increases the participants' willingness to share rather than inhibiting it.

The jurors, if the lawyer has been real, begin to see the lawyer as a human being who is no different than they. When the lawyer takes the time to be fully present, to listen to the jurors and

respond sincerely and genuinely without an agenda, an environment is created in which an open and honest discussion of the issues can take place.

### **Listening**

One of the most important skills a lawyer should develop is the ability to listen with the third ear, or as John Nolte says, the heart. This skill is not only critical to the ability to conduct a productive voir dire, it is useful in every phase of the trial, with witnesses, opposing counsel and the judge. It is the ability, as Gerry Spence puts it, to hear beyond what is being said.

Most of us have participated in the "listening" or "doubling" exercise that takes place at every TLC program and experienced how it feels to really be heard. The key to this exercise is for the listener to abandon his problem-solving agenda, the chatter or self-talk that takes place in his mind and tune in to the talker, to what is underneath the words being said with the focus on what is not being said. In other words, the listener must tune in to the emotions of the talker. This is counterintuitive to the lawyer who has been trained to analyze and solve problems.

We listen with an agenda in our heads, a checklist of elements and causes of action. When a client tells us his problem, we are looking for a wrong and a remedy. We rarely, if ever, listen to the emotional context surrounding the event that brings the client to us.

### **Seek and destroy? Wrong.**

Generally, when we approach voir dire, we have an agenda – seek out and dismiss those jurors who do not see things our way or who we fear will harm us and our clients. We want to manipulate the potential jurors and frequently cross-examine or argue with them when we disagree with their point of view. Isn't that the best way to show them that they are wrong and we are



right? This is opposite of what the TLC approach advocates.

At TLC, the paradigm is shifted from that of exclusion to that of inclusion. The importance of truth, honesty and love is the foundation of the TLC approach.

When we abandon our agenda and listen to the jurors without judgment and let them know we have heard them, we create a bond with the jurors who risk sharing a part of themselves with us and create an environment where everyone is free to share feelings. When we allow ourselves to be real, open and honest, we create an environment in which the jurors feel trusted and in turn trust us. When we open our hearts and souls to the jurors, when we truly listen to them and they feel heard, they respond in kind and magic happens. As we have seen from the listening exercise, when someone cares enough to really listen to and hear you, you become bonded with them, trust them and are open to them and their point of view. On the other hand, when you and your feelings are not valued and you are not heard, you become defensive and angry and often shut down.

Who would you rather help: the person who cares enough to listen to you or the person who shuts you down and makes you feel unimportant and stupid?

### **Abandoning the agenda**

After creating an environment in which the participants are free to share themselves and their honest feelings, a productive exploration of the issues can take place. One of the goals of voir dire is to gain insight and understanding of the people who will decide your client's fate. Before this goal can be obtained, and before a jury will be motivated to act on behalf of a particular client, the lawyer must address and deal with the jurors' personal obstacles to doing so.

In order to openly and honestly explore the feelings that may prevent the jurors from giving a specific client justice, the lawyer must be willing to abandon his agenda and explore the

issues of the case with the jurors in the moment, meaning in the here and now. If the lawyer shuts the jurors down or has a pre-ordained plan of questions or follows a script without being in the moment and adapting the questions to fit the situation and the needs of the potential jurors, the opportunity is lost, and the lawyer may end up with a jury that cannot be trusted or is not known. Joshua Karton frequently says, "Follow the line the jurors give you." If the jurors want to talk about a particular issue but the lawyer's "script" calls for questions on an entirely different topic and the lawyer follows the script, it is likely the jurors will shut down, feel disrespected and that what they have to say is not important. In short, they will not feel heard or safe enough to share their thoughts and feelings. This is the opposite of what a lawyer wants to accomplish in voir dire. If the lawyer is to form a group with the jury, the lawyer must be willing to abandon the script and his agenda, no matter how frightening, and follow the jurors' natural lines of curiosity or concern. When the lawyer has thoroughly prepared himself on each issue in the case that troubles him, it is much easier to follow the jury's line.

This is exactly what Gerry Spence does during voir dire. He takes care of the jury's needs by accepting without judgment their comments and responds honestly, in the moment, to every issue they raise. He reverses roles with them to view the issue from their vantage point and to get in touch with their feelings. He accepts whatever the potential jurors say, both positive and negative. Doing so creates an environment in which an exploration of the potential jurors' feelings and thought processes can take place. The TLC Method of Voir Dire seeks to maximize spontaneity, openness and honesty, both on the part of the lawyer and the potential jurors, each of which are necessary for a successful voir dire.

Encouraging an open and honest discussion of all the issues and honoring

every response a juror gives, whether positive or negative, results in an environment where every member of the group is valued and included in the process of creating the group. If the jury is to work together, they must be given a choice as to whom to work with. Through the TLC voir dire process, the members of the group help the lawyer choose the members who will compose the jury panel. Rather than the lawyer imposing the structure of the group from the outside, the lawyer needs to become a member of the group and let the group form its own structure.

### **Conclusion**

To be viewed as a leader, the lawyer must become a participant in the voir dire process and not just an observer. The lawyer should not remain "objective" or at a distance from the persons she is studying.

She needs to identify herself with their situations thereby becoming an extension of their own egos, thus becoming a subjective participant. If the lawyer "succeeds in becoming less and less of an observer and more of an aid and helper to every individual in regard to their needs and interests, the [lawyer] undergoes a transformation...from observer to auxiliary ego. The observed persons, instead of revealing something, more or less unwillingly, about themselves and one another, become open promoters of the project; the project becomes a cooperative effort." The lawyer cannot do this successfully if she has an agenda and attempts to manipulate the jury into her way of thinking or viewing the case. When the focus is on the agenda, the lawyer can-not be a subjective participant fully present in the moment. If, on the other hand, the lawyer has thoroughly prepared the case, has a deep understanding of the issues and her personal feelings about them, she will be able to be present in the moment, respond spontaneously and address the jurors' concerns as they are raised facilitating a discussion among the group.



OCTOBER 2007

Similarly, the lawyer must take the time to listen to the jurors and discover their feelings about the issues in the case so that those matters can be discussed openly and honestly and hopefully resolved through this process. Being in the moment and responding to jurors' questions and concerns is vitally important to group formation and the building of credibility. Through the use of the process described in this article, the lawyer will be more likely to form and be a part of a group that he can trust.



Garcia-Colson

Preparation, however, is the key.

*Joane Garcia-Colson is Executive Director of the Trial Lawyers College, founded by Gerry Spence. Previously, Ms. Garcia-Colson was a trial lawyer in Palm Springs. In 1998*

*she obtained a \$62 million verdict in a wrongful termination/breach of oral employment contract case and, in 2003, Ms. Garcia-Colson and co-counsel Matthew C. Bishop*

*obtained one of the first verdicts in California for Financial Elder Abuse. Ms. Garcia-Colson has been on the faculty of the Trial Lawyers College since 1998 and the Executive Director since 2000.*

**Endnotes:**

- <sup>1</sup> Conducting Clinical Sociometric Explorations, Ann Hale, p. 31
- <sup>2</sup> *Ibid.*
- <sup>3</sup> Who Shall Survive, Student Edition, J.L. Moreno, Royal Publishing Company, 1993, p. 86
- <sup>4</sup> *Id.* at 75.