

The Games Attorneys Play in Jury Selection

By Thomas M. O'Toole, Ph.D.

Some attorneys openly admit that they are “scared to death” of jury selection. No part of the American justice system is more shrouded in mystery, gimmicks, pop psychology, and other clever theories that give attorneys a sense of control over this intimidating process. The theories vary. Some argue that cases are won in jury selection. Some see it as a time to build rapport with potential jurors. Some see it as an opportunity to “sell” the case.

With the wide spectrum of views about the importance of jury selection and what can be accomplished during the process comes a variety of common “games” that attorneys often play during the process. The purpose of this article is to take a look at three of the common games that are played in jury selection and discuss the merits of each.

The first and perhaps most common game in jury selection is the game of trying to sell your case in voir dire. A lot of attorneys like this strategy. They will speak with great pride about how they have a particular technique for this that gives them that early and critical edge over their opponent. The reality is that this strategy is not only ineffective, but it is also counterproductive. Jurors are not persuaded during voir dire. Most of them do not even remember this part by the time the trial is over. This should not be a surprise because jurors are typically in “cognitive shock” during the jury selection phase. They have just learned that they might miss a substantial amount of work (at least it feels that way to them). They are realizing they may have to reorganize their entire life during this period. On top of that, they are sitting in an intimidating environment (attorneys are used to it and sometimes forget this), and they are getting bombarded with a bunch of technical and legal terms they have never heard, may not fully understand, and might not even be able to pronounce. They know almost nothing about the case and probably do not understand why the attorney is asking the questions he or she is asking. None of this is conducive to persuasion and I am aware of no research that has demonstrated jurors are persuaded in voir dire. It certainly would be inconsistent with the feedback I have received from shadow jurors and actual jurors that were interviewed after trial.

Trying to sell your case in voir dire is counterproductive as well, in two different ways. First, it wastes critical and limited voir dire time, especially in federal court. Most judges typically have attorneys on some sort of time limit in voir dire. Unless an attorney is lucky enough to have a judge who provides each side with substantial amounts of time for questioning, everything in voir dire is a trade-off. If an attorney is spending time on one thing in voir dire, he or she is losing time for something else.



Second, efforts to sell your case in voir dire reveal your “good” jurors to the other side. While the idea of selling your case in voir dire may sound good in theory, the practical reality is that this invites jurors with favorable dispositions to “out” themselves, whether that be through supporting comments or simple nonverbal behavior such as nodding along as you sell your case.

The reality is that there is only one thing within an attorney’s power in voir dire and that is eliminating adverse members of the jury through cause challenges and peremptory strikes. Consequently, the focus needs to be on identifying candidates for these, not selling the case.

The second game that I often see attorneys try to play in jury selection is trying to predict and counteract the other side’s strategy for jury selection. I often have attorneys turn to me during the other side’s voir dire, express concern about something the other side is doing, and ask whether or not they need to address it in their follow-up voir dire. This might be followed by some predictions of who the opposing counsel likes and does not like on the jury.

While it can be useful to know if there are potential jurors that both sides are interested in striking, attorneys should generally not concern themselves with the other side’s strategy. In jury selection, attorneys have two jobs: to identify venire members with high-risk attitudes and experiences and to eliminate the most concerning ones from the group. Nothing about the other side’s strategy is going to change this and attorneys already have enough information to manage during the process that they should not waste time focusing on (and being distracted by) what the other side is doing.

The final game I regularly see attorneys play in jury selection is what I call “hyper-generalizing.” “Over-generalizing” does not adequately capture what is happening with this game. For many attorneys, a jury represents a loss of control over the case. In other words, while the attorney may have spent months or years in discovery exerting control over every thing that happened, he or she now has to hand it over to a group of strangers for final judgment. This is a scary proposition. Consequently, it is best to know everything you can about the people who will sit on that jury. However, this can go too far. More information is not always better. Internet research comes to mind here. Attorneys will often ask me if I can perform internet research on the jurors. I usually try to discourage this, but will certainly do it if the client insists. The results are almost always underwhelming. If I discover any information about a juror at all, it is information that tells me little about whether or not he or she would be a good juror in the case.

A few months back, I picked a jury for a patent case out on the east coast. During the lunch break, we discussed how we wanted to use our strikes. A paralegal had taken the list of juror names and conducted Google searches. She found very little, but one thing she found was a Catholic Church newsletter that had a picture and an article on the choir that sings at each Sunday morning mass. One of the jurors in the box was a member of the choir. This discovery led to five minutes of



speculation about how a Catholic might view a patent case. Some theories were interesting, but none were reliable. Instead, we wasted five minutes on efforts to “hyper-generalize” about Catholics. In fact, we could not even safely assume she was the kind of Catholic we were trying to “hyper-generalize” about. Perhaps she is one of the Catholics that think very little about her religious beliefs outside of Sunday mass. Maybe she sent her son to the Catholic school because she thought it would give him a better education and consequently, had service hour requirements she had to fulfill. Maybe she just likes to sing and, while she is not very religious, choir is one of the only opportunities for her to sing with a group of other people. There are just too many assumptions that need to be made in order to link this finding to the case in a way that provides meaningful information.

In conclusion, attorneys do not need games or tricks for jury selection. When the process of jury selection is broken down into its essential elements, the most important and effective jury selection strategy becomes apparent and simple. Jury selection is about de-selection. Attorneys do not “pick” their jurors as if it were the NBA draft. Yet, this remains the focus for many attorneys. Perhaps it’s the psychological appeal of focusing on “good” jurors. However, the only thing attorneys have control over is who does not make it onto the jury. Consequently, the focus should always be on identifying the individuals an attorney does not want on the jury, developing cause challenges, and prioritizing peremptory strikes.

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