

# IF I KNEW THEN WHAT I KNOW NOW: JURIES

BY HON. RANDY WILSON

**WHEN I WAS A TRIAL LAWYER, I WAS CONVINCED** I knew all I needed to know about how to try a case and how to persuade a jury. One area where I thought I was on top of the learning curve was voir dire. Jury selection always seemed to be easy for me, primarily because it was yet another opportunity to argue my case. At some time, I read psychology studies that emphasized the concept of “primacy”—that audiences will remember and be influenced by what they hear first. As a result, I believed that lawyers should argue their case early and often. Voir dire was merely another opportunity to argue my case to the panel as much as the judge would allow.

I’ve now been a judge for over 12 years and watched literally hundreds of trials and jury selections. I’ve seen great voir dire and I’ve seen lawyers fail hopelessly in jury selections. Additionally, I’ve talked to juries and learned the land mines that lawyers failed to uncover during voir dire. As a result, I’ve completely changed my view of how voir dire should be conducted. Rather than argue the case, a good voir dire should be focused on one primary goal—identify potentially bad jurors so they can either be struck for cause or with a preemptory challenge.

Too often, lawyers launch into voir dire by describing the good facts of their case and then asking the occasional question. I now appreciate that a good voir dire is exactly the opposite—you should be describing the other side’s good facts and asking which panel member cannot put that aside but rather would automatically rule against you based on that fact. For example, if there are warts in your case, and, let’s face it, every case has them, now is the time to talk about them with the panel. If your client was intoxicated, or has a criminal record, or operates a potentially unsavory business, voir dire is your only opportunity to talk to potential jurors and find out who has strong feelings about that issue. For example, if you represent an insurance company, you need to discover who hates insurance companies, who has had a bad experience with insurance companies, or who is in negotiation with an insurance company over some issue. The last

thing you want to do is ask who likes insurance companies because then you are merely flagging a venireperson to be struck by your opponent.

If a lawyer begins the voir dire by describing how great his case is, then panelists are less likely to reveal their underlying biases and opinions. One of the best voir dire I ever saw was in a personal injury case with extremely good liability facts and the plaintiff was horribly injured. Rather than describing all the reasons why this was an excellent case, the plaintiff’s attorney began by merely saying, “This is a case where my client was injured in an automobile accident. What do you think about such cases?” Now the attorney is going to get unvarnished opinions about personal injury automobile cases. As the jury selection continued, the lawyer began unfolding

the good facts of his case, so that by the end the panel appreciated that the case had considerable merit. However, by starting slow, the lawyer was able to learn a great deal from the answers he got.

I now appreciate that voir dire is counter intuitive. I shouldn’t be arguing my case in voir dire. Rather,

the truly good voir dire lifts up the facts that the other side might like and focuses on those issues. For example, in my example where the plaintiff was horribly injured, the defense lawyer will focus on that fact and ask questions such as, “The judge will instruct you that you are not to decide this case based on sympathy. The plaintiff was badly injured and is sympathetic. Who here cannot follow the judge’s instruction and cannot put sympathy aside?” Now you are holding the warts of your case up for the jury to see and ask them about that problem fact.

Take another example. Suppose this is a breach of contract case based on an oral, unsigned agreement. As plaintiff you desperately need to know who is unable to enforce an oral agreement. Talk to the jury about it. One of the first words out of your mouth ought to be telling the jury that you are suing on a verbal contract and asking who just cannot enforce such an agreement regardless of the facts. As I said, I

**Rather than argue the case, a good voir dire should be focused on one primary goal—identify potentially bad jurors so they can either be struck for cause or with a preemptory challenge.**

now appreciate that a good voir dire doesn't emphasize your positive facts, but rather asks about your problems and the good facts of the other side.

If I ever go back to trying lawsuits, my whole approach to jury selection will be different.

One final point of change with respect to juries. I have both presided over hundreds of jury trials and hundreds of bench trials where I am, in effect, the jury. I now know something about juries and how jurors think. I wish I had treated my juries better in cases that I tried in the past. I now appreciate that jurors have their own concerns and that my case is not the most important thing going on in their lives. In the past, I took their time for granted and needlessly extended the length of the trial. I now understand that jurors are sacrificing their valuable time and giving it to the parties to decide their dispute. I now see that juries grasp and understand the issues a lot quicker than I used to give them credit for. The collective wisdom of 12 jurors is much greater than I used to appreciate. Juries get it and they get it quickly.

If I ever go back to trying lawsuits, I will be a lot more efficient in putting on my case and using the jury's time wisely. I promise.

*Judge Randy Wilson was partner at Susman Godfrey for 23 years and has been Board Certified in Civil Trial Law since 1988. He has been the judge of the 157<sup>th</sup> District Court since 2003 and twice selected as Trial Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists. ★*