

## Editorial

# Sham Peer Review: The Importance of Voir Dire at Trial

Lawrence R. Huntoon, M.D., Ph.D.

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After typically waiting for years, the victim of sham peer review finally gets his day in court. As he eagerly anticipates the opportunity to hold his attackers accountable, it is a time of high anxiety and uncertainty.

The information presented below is intended to help physicians better understand the legal process and to encourage thoughtful consideration of the process known as voir dire as it pertains to sham peer review cases. The information is derived from my experience as an expert witness in sham peer review, from my discussions with attorneys who represent physician victims of sham peer review and from my intense study of the topic. I am not an attorney and do not provide legal advice or opinion. Physicians are encouraged to consult their attorneys for legal advice and opinion.

According to the *Legal Dictionary*:

Voir dire [pronounced vwahr dire except in Texas, where it is pronounced "vore dire"<sup>1</sup>] is the process by which potential jurors are chosen from a pre-selected jury pool. During this phase of jury selection, the attorneys for each party, as well as the judge, ask questions of each potential juror to determine whether he or she has any bias regarding the case, or other reason he or she should not be chosen. This French term literally means "to speak the truth," and is used in the U.S. to determine the truth of whether jurors are able to fairly judge a legal case.<sup>2</sup>

Like medicine, conducting voir dire is both art and science.<sup>3</sup> There are jury consultants, trial consultants and companies that specialize in jury selection. They employ psychology, sociology, empirical research, and data analysis, as well as experience to assist clients in choosing a favorable jury. But, unless the client has a surplus of funds to hire these consultants, in most cases voir dire is mainly art based on the experience of the attorney representing the physician.

There is a lot of truth to the adage that cases are often won or lost in voir dire. A law review article noted:

In the words of one trial tactics manual, it is "a very obvious fact: the people who constitute the jury can have as much or more to do with the outcome of a trial as the evidence and arguments."<sup>4</sup>

And, according to a former president of the American Trial Lawyers Association:

After decades of trials – and tribulations – I am convinced that the major factor determining the outcome of a jury trial is the prejudice that jurors bring with them to court.<sup>4</sup>

The law review article went on to say:

Indeed, jury simulation studies and research on

actual jurors indicate that people routinely differ in their orientation to cases, and that these differences are translated into different initial preferences for verdicts.<sup>4</sup>

## Origin of Voir Dire in Anglo-American Law

The origin of voir dire predates the landmark *Commentaries on the Laws of England* by Sir William Blackstone in the late 1760s, which describe the bedrock principles of Anglo-American law.<sup>5</sup> In his chapter on "Of The Trial by Jury," Blackstone wrote:

A juror may himself be examined on oath of *voir dire, veritatem dicere* [speak truly], with regard to ... causes of challenge] which are not to his dishonor [as long as the juror is not compelled to self-incriminate as to a criminal offense].

Interestingly, Blackstone listed as examples on which a juror could then be challenged and removed from a jury for unsuitability to include if he has been:

branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or has been attainted of false verdict, *praemunire* [obeying a foreign court rather than the Crown], or forgery; or lastly, if he has proved recreant when champion in the trial by battle, and thereby has lost his *liberam legem* [free law].<sup>5</sup>

## Goals of Voir Dire

The primary goal of voir dire is to exclude potential jurors who will be biased against the physician's case. Beyond that, it represents a valuable opportunity for the physician's attorney to get to know the jurors and for the jurors to get to know the attorney. The attorney needs to establish a connection with the jurors.

From the minute potential jurors are first ushered into the courtroom for voir dire, they are judging the attorneys and their clients. There is no second chance to make a good first impression, an impression that will stay with the jurors for the entire trial. Both the physician and his attorney should dress in professional business attire—no flashy three-piece suits, flashy jewelry, expensive shoes or watch.

Trials are all about credibility and persuasion—persuading jurors that the plaintiff's presentation of the facts is the true and correct version of the facts. The attorney must be likeable. A likeable attorney has a distinct advantage over an attorney whose appearance, demeanor, and style remind jurors of Ebenezer Scrooge.

Whenever possible, the physician's expert witnesses

should be present for voir dire. Knowing the background, education, opinions, values, and beliefs of the jurors is a tremendous advantage for the expert witness whose job it is to help jurors understand the nature of the evidence so jurors can determine the facts.

## The Process

The process of voir dire varies widely from federal court to state court, from state to state, county to county and sometimes among judges in the same courthouse.<sup>3</sup> As one law review article noted:

In the United States, a voir dire questioning period is routine, but the manner in which it is conducted varies tremendously. In some jurisdictions, the judge alone conducts the voir dire, while in others, attorneys participate in some or all of the questioning of prospective jurors.<sup>4</sup>

It is therefore imperative that the attorney learn the process in the specific jurisdiction where the case will be tried. And, it is important for the attorney to learn as much as possible about the judge and how the judge handles voir dire.<sup>6</sup>

Some courts will provide attorneys with cards containing basic biographical information about each prospective juror just prior to voir dire. Judges may place a time limit on voir dire, often limited to 30 minutes per side. If an attorney believes that more time is needed for voir dire a motion for additional time can be made. If the motion for extension of time is denied, a motion for a juror questionnaire can be made. Both parties need to agree on the content of the questionnaire, and the judge has final approval of the types of questions that can be asked.<sup>6</sup> Experts recommend that questionnaires be no longer than one page.<sup>6</sup> In cases where the judge conducts voir dire, the judge may consult with the attorneys and accept or reject suggested questions.<sup>4</sup>

Some courts designate jurors by number instead of using their names.<sup>3</sup> But, when juror names are known, they should always be addressed by name during questioning. Experts advise conducting voir dire directly in front of potential jurors with no barrier (e.g., podium) in between.<sup>3</sup> Experts also recommend that the attorney not carry a legal pad and read questions from it. Others, co-counsel, paralegal, secretary or assistant, can record and analyze juror responses. This leaves the attorney free to fully focus on communicating and connecting with potential jurors. Voir dire should be conducted more like a conversation as opposed to a cross examination.<sup>3</sup> Experts also recommend avoiding legal jargon so as not to embarrass potential jurors, potentially causing resentment not only by the affected juror but other jurors as well.

As voir dire is the first opportunity that potential jurors have to learn about the case, experts recommend a five-minute mini-opening statement where each attorney briefly states the nature of the claim(s) or defense and what the attorney intends to prove.<sup>6</sup> Where a mini-opening is not formally scheduled, a request can be made to the judge

for each side to be allowed five minutes for that purpose.<sup>6</sup> Some courts actually require a mini-opening statement prior to starting voir dire.<sup>6</sup> Although a brief statement about the nature of the case can be done as part of voir dire, a separate mini-opening statement preserves precious time needed for questioning.

## For Cause and Peremptory Challenges

As an initial matter, the judge will rule on exemptions from jury service based on undue hardship (e.g., issues involving child care, elder care, medical or disability issues, financial and other issues).<sup>6</sup> In some cases, there are specific statutory exemptions which allow a person to be exempt from serving on a jury.<sup>6</sup>

One potential undue hardship, which should be called to the judge's attention if the juror himself does not do so, is that a potential juror works a night shift and generally sleeps during the daytime. A trial involving sham peer review involves complex issues (medical staff bylaws, peer review process, National Practitioner Data Bank, Health Care Quality Improvement Act, and breach of contract/tort claims), which are outside the knowledge and common experience of most jurors. Jurors may find it challenging to stay alert during the presentation of evidence that they find tedious and boring. Jurors who work a night shift and who normally sleep during the daytime may find it especially challenging to stay awake during the trial. In one trial I participated in as an expert witness in sham peer review, I observed one of the jurors soundly sleeping while the physician's attorney was presenting important evidence in the case. When the attorney called this to the judge's attention, the judge immediately called a brief recess so that the juror could return to wakefulness. This serves as a reminder to attorneys and experts that they need to do whatever they can to maintain the interest and attention of jurors.

Following dismissals due to hardship, grounds for excluding potential jurors fall into one of two categories – *for cause* and *peremptory challenges*.<sup>2</sup>

A challenge for cause generally involves an obvious conflict or bias such that the individual could not be impartial. Those who hold strong opinions about the subject matter of the case, who have personal knowledge of the case or personally know the attorneys or their clients, or have some bias for or against either party are typically dismissed for cause.<sup>2</sup> Attorneys typically argue to have a potential juror dismissed for cause where possible so as to preserve their limited number of peremptory challenges.<sup>6</sup> In this regard, it helps to know the "magic language" in the specific jurisdiction so as to tailor the questions to get a juror dismissed for cause.<sup>6</sup>

Peremptory challenges allow each side to dismiss potential jurors without having to state a reason. The *Legal Dictionary* defines peremptory challenges as follows:

In a legal context, the term *peremptory* refers to a decisive challenge with no opportunity given for debate, denial, or refusal. A *peremptory challenge* may

be used by either party to a legal action in the jury-selection phase, to dismiss a potential juror without stating a reason.<sup>7</sup>

The *Legal Dictionary* also states:

Each attorney is allowed a specific, limited number of peremptory challenges to use on each case, though this number varies by jurisdiction. Because they can dismiss only a small number of people, it is not uncommon for attorneys to wait until the end of voir dire to dismiss individuals on peremptory challenge.<sup>2</sup>

Although the number of peremptory challenges allowed can vary by jurisdiction, most allow only three strikes based on peremptory challenge.<sup>8</sup>

Attorneys are not allowed to use a peremptory challenge to exclude even a single juror based on race or ethnicity. Equal protection of laws is guaranteed under the 14th Amendment of the U.S. Constitution. Citing the U.S. Supreme Court landmark case of *Batson v. Kentucky* (1986) 476 U.S. 79, the Supreme Court of California wrote:

Peremptory challenges are a longstanding feature of civil and criminal adjudication. But the exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment of the federal Constitution. (*Batson, supra*, 476 U.S. 79; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315.)<sup>9</sup>

The Court found that the improper peremptory challenge also violated the California State Constitution:

Such conduct also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. (*Wheeler, supra*, 22 Cal.3d 258, 276-277.)<sup>9</sup>

Other states may have similar provisions in their state constitutions.

## Preserving a Favorable Jury

After the attorney achieves what he believes to be a favorable jury, the attorney should request that the judge instruct the jurors that they should not make jokes or condescending comments about the parties or claims inside or outside the courtroom. A juror who engages in that type of impropriety can be dismissed from the case at any time based on bias, up to and including during deliberations. At the deliberation stage, such a dismissal could result in a mistrial.<sup>10</sup>

## Voir Dire Questions in Sham Peer Review Cases

Like a master chef, most attorneys likely have their own "secret sauce" when it comes to specific voir dire questions. In addition to the primary goal of excluding bad (biased) jurors, an attorney should attempt to identify jurors with favorable characteristics where possible. This would include fairness,

justice, attention to detail, ability to reason/problem solve, and willingness to follow the law.

The attorney also needs to exhibit an aura of fairness himself—not asking questions that would appear to be oriented toward biasing the case in his favor. Not only could that have an unfavorable impact on the jurors, but it likely would result in a for-cause challenge or peremptory challenge by opposing counsel. The physician's attorney needs to protect favorable jurors by not exposing those who may have a favorable, but unspoken, view of the case.

The attorney also needs to be in listening mode as opposed to teaching mode, and most importantly not in cross-examination mode.<sup>6</sup> Jurors should always be thanked for their response prior to moving on to questioning the next juror. Jurors should also be informed at the beginning of voir dire that there are no right or wrong answers. The goal is to get to know the jurors better to make sure they are a good fit for the case. If one is not a good fit for the case, that does not mean that person is a bad person.

Experts recommend asking mainly open-ended questions as this allows jurors to expand upon their responses.<sup>6</sup> Most of the talking should be done by jurors as opposed to the attorney. Experts also recommend using the techniques of looping and deconditioning.

Looping is a technique whereby an attorney asks one potential juror a specific question and the juror responds. The lawyer then uses the juror's name, repeats the juror's exact words, and then asks another juror for a reaction to what the first juror said. A third juror is then asked to respond to the answers given by the first two jurors, repeating their answers exactly and always using their names.<sup>6</sup>

The deconditioning technique is a technique that reinforces whatever response the juror provides even if it is not favorable to the attorney's side. The juror should be thanked for his candid response, noting that everyone is entitled to his own opinion, and you respect that. The looping technique can then be used to find out if other jurors feel the same way. [6]

The attorney also needs to assess nonverbal cues of jurors that might indicate the juror is not being completely honest and forthcoming in providing responses. One expert recommends that the attorney:

Look for such visual cues as body movement, body orientation, body posture, shrugs, eye contact and facial expressions. Also look for auditory cues, including voice pitch, tone, vocal hesitancy and word choice.<sup>11</sup>

The expert also recommended doing an internet search on prospective jurors when time permits. The expert stated:

There is a lot to be gained from such searches and all parties are moving toward making this a common practice.<sup>11</sup>

The expert noted, however, that there may be only a limited amount of time to conduct such searches as jury lists may be made available only a few days before voir dire, and sometimes not until the beginning of voir dire.<sup>11</sup>

## Examples of Specific Questions

The voir dire questions below are offered as examples that attorneys might consider in voir dire.

### For Cause Challenge

Does anyone here work a night shift?

### Bias

Have you ever filed a malpractice lawsuit or had a bad experience with a doctor?

Do you believe that doctors make too much?

Have you ever served on a jury? Was it a good experience or a bad one?

Have you ever been a party to a lawsuit? Was it a good experience or a bad one?

### Willingness to Follow the Law

At some point, the judge will give an instruction as to the standard of proof we will need to meet to prove our case. That standard is called preponderance of the evidence, which means that we will need to have about 50.1 percent of the evidence on our side to prevail. It is sometimes also referred to as the “more likely than not” standard. Are you comfortable with that standard? Does anyone believe that you would like to see more than 50.1 percent of the evidence favoring our side to make a decision in this case?

### Justice/Fairness

Do you have any favorite TV shows? Potential jurors who watch TV shows in which the bad guy always gets what is coming to him by the end of the show may make good jurors. Some examples would include: The Equalizer, FBI series, NCIS series, Monk, Walker Texas Ranger, S.W.A.T., Chicago P.D., Blue Bloods, Law and Order series, Bull, and I survived (on Crime TV).

### David v. Goliath

Physicians who file lawsuits against hospitals are facing a David v. Goliath battle. The attorney needs to find those potential jurors who identify with David.

Have you ever experienced any issues at school with other students, with co-workers at work, or on social media? Bullying has a lot in common with sham peer review. Victims of bullying may have a better appreciation for what was done to your client.

Have you even been involved in a job action (strike)?

Do you have any hobbies? Fishing, bird watching, crocheting, sewing, cooking as opposed to social activism.

In addition, information about residence and occupation may be supplied by the court on juror cards. Those living in rural areas, farmers, and small independent businessmen may have a more favorable view of your case.

### Ability to Reason/Problem Solve

Anyone have any experience doing jigsaw puzzles? During a trial, both sides will be offering various pieces

of evidence for jurors to consider. The juror’s job is to see which pieces fit together best, and after putting the pieces together, what picture is revealed.

## Conclusions

Voir dire is the most important part of any trial. It requires thoughtful strategy and planning. Attorneys who conduct voir dire in an impromptu or off-the-cuff manner will likely lose. The attorney must be likeable, use a conversational style in conducting voir dire and take full advantage of the opportunity to connect with jurors. The more that physicians and their attorneys know about the voir dire process in sham peer review cases, the better chance they have of winning their case.

**Lawrence R. Huntoon, M.D., Ph.D.**, is editor-in-chief of the *Journal of American Physicians and Surgeons*. Contact: editor@jppands.org.

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