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Voir Dire: The First Brick in Your Trial Foundation

By Major Jeremy Scholtes

Voir Dire means to speak the truth the prospective juror's opportunity to speak the truth about his or her life experiences, biases, opinions, and ability and willingness to follow the law as the judge directs. Many new trial attorneys, myself included, had little or no appreciation early in our careers for this initial opportunity to engage with prospective jurors. Many of us were taught in law school advocacy classes or litigation courses that our opening statement is our first chance to make an impression on the jury—that we can make or break our case in those opening minutes. However, voir dire is truly our first opportunity to make relationships (or burn bridges) with those men and women who will sit in judgment of the defendant or accused throughout trial. Voir dire is the critical beginning stage of trial because we get our chance to seat the best jurors for our cases who will then hear our well-prepared opening statements. It is the first brick in the foundation of a successful trial.

New trial attorneys, both criminal and civil, might consider the following points when preparing for that first voir dire in order to effectively lay a solid foundation for their trial.

- 1. Understand the purpose of voir dire. The technical purpose of voir dire according to the rules in most jurisdictions is to identify "veniremen," or more appropriately, prospective jurors, for causal or peremptory challenge. Your focus in this respect is to tease out bias based on a person's life experience or inflexible attitudes regarding issues relevant to the case. You can also identify challenges based on other local rules, established case law, and other common sense bases. Case law often identifies additional advocacy purpose for voir dire, such as building rapport, pitching your theme, and introducing key points of law paired with relevant facts.
- 2. General rules of your jurisdiction and controlling case law. To ensure that you understand the purpose and limits of allowable voir dire in your jurisdiction, you must read your

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local rules and familiarize yourself with controlling case law. Thorough command of the voir dire road map allows you to focus on juror responses, decisions about how to exercise challenges, and rapport building.

- 3. Process—know your judge. While the rules and case law provide you most of your substantive parameters, you must also take the time to ensure that you understand the process or mechanics dictated by your particular judge. Most jurisdictions provide judges broad latitude and great discretion in the actual conduct of voir dire. One judge will differ from the next regarding requirements of early submission of questions to the court, whether questions go to the opposing party or judge alone, who will actually ask the questions during voir dire, whether conversation or dialogue is authorized in open session, limitations on recalling for individual sessions, the process of actually challenging, and finally how that judge exercises his or her discretion in granting or denying challenges.
- 4. Resources. Get out ahead of your first jury trial. In criminal law practice, we often spend so much time in motion practice andtrying guilty pleas that we can fail to properly prepare for voir dire in contested jury cases. Spend time talking to experienced litigators in your office and professional associations as well as reading articles and texts to pick up practical pointers, generic stock questions, and useful templates. You need time to digest and then tailor your questions to the specific theory, theme, law, and facts of your case.
- 5. Rehearsal. To the extent possible, rehearse your voir dire. The people sitting in the jury box expect to see and hear professionalism. At minimum, rehearse in front of a mirror, a colleague, or a friend to work through your jitters and to get feedback on your questions. If time permits and resources allow, actually place 6–12 attorneys, paralegals, and non-law educated folks in the box. Never underestimate the value of working through the logistics of moving about the courtroom, asking questions while maintaining a connection with prospective jurors, recording responses, and anticipating how to respond to the unexpected. Some of the best recommendations I have received on changing the form of questions, flow or order of questions, and segues between blocks of questions have come from junior paralegals.
- 6. Co-counsel coordination. It is nearly impossible to ask questions, maintain eye contact, record responses to your own and opposing counsel's questions, and work through the thought process of challenges all at the same time. I recommend ensuring you have a co-counsel or paralegal assist you with observing juror demeanor; recording responses on a prepared chart, table, or diagram; and finally, offering insights on recommended challenges during a recess. Having a system of color coding, symbols, or other quick reference markings is particularly important in courts where judges want to move quickly through voir dire.
- 7. Other pretrial preparation. If your jurisdiction uses questionnaires or any sort of pretrial information collecting mechanism, ensure that you review the juror information prior to trial in order to educate yourself and save the court time. Also, organizing all of your voir dire references—generally and case-specific—into a quick reference binder or folder system provides a professional appearance and facilitates execution on trial day.

8. *Synchronize with opening, closing, rebuttal, and sentencing.* While not the primary purpose of voir dire, a secondary benefit is to indoctrinate prospective jurors with your theme. Use some of the same phrases or terms you plan on using throughout the trial and incorporate fact references to the extent your judge allows.

Remember that while significant preparation will go into preparing for voir dire in your first few jury trials, once you develop the fundamentals, you will use that foundational knowledge going forward, and subsequently, you will be able to focus more on case-specific issues. Anything worth doing is worth doing well—so prepare, prepare, prepare!

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Health Care Reform and How It Will Affect Your Business By Todd Page

Have you ever wondered how health care reform may affect your and/or your family's health insurance? Will your rates go up or down? When will everyone be able to get coverage? How will you shop for your health insurance? Will you have to buy a certain type of policy or face a penalty? Will you qualify for any subsidies on your premium?

Portions of the Patient Protection and Affordable Care Act have already become effective, and more changes will take place in 2013 and 2014. Below are the major changes that may particularly affect solo and small firm lawyers.

Guaranteed Issue Clause

Guaranteed issue, which prohibits insurance companies from asking any questions to discover preexisting health conditions, is a very hot topic. On one hand, this clause prevents an insurance company from declining coverage for an individual on the basis of a preexisting condition. On the other hand, this provision may cause insurance premiums to increase, perhaps substantially. How? Currently, insurance companies ask health questions to determine whether the applicant has any preexisting health conditions. If so, the company can assign a premium increase to counter potential risk. This means that healthy people pay less and those with preexisting conditions may pay more to help offset the financial risk to the carrier. In 2014, everyone will be guaranteed coverage, and all premiums will be the same. This means that the carrier needs to build into the premium the financial risk they are taking on by accepting individuals with preexisting conditions.

Individual Mandate Clause

The individual mandate clause of the law requires all individuals to purchase health insurance or face a fine/penalty. This concept goes hand-in-hand with guaranteed issue and prevents people from signing up for coverage only when they have a specific need. Some argue, however, that it is unconstitutional to force individuals to buy insurance coverage. The Supreme Court will consider the individual mandate in late June of this year.

Minimum Essential Coverage (MEC)

When this portion of the law takes effect in 2014, each individual will need to buy a health insurance plan that qualifies as "credible coverage." It is believed today that in 2014 the highest deductible medical plan available for purchase by an individual will be \$2,000 and for a family may be \$4,000. This means that a \$5,000 or \$10,000 deductible medical plan may not qualify as credible coverage and such policy holders could face a fine/penalty. In addition, there may be significant increases in premium amounts if Americans are required to switch from a \$10,000 deductible medical plan to a \$4,000 deductible plan.

Health Insurance Exchanges

Starting in 2014, each state will be required to have a health insurance exchange available so that individuals can shop for medical insurance from multiple insurance companies. Each insurance company will be required to provide premium subsidies based on income. As an example, families of four that earn less than \$80,000 per year will receive some subsidy. The subsidy is reduced as family income increases. http://www.lawyerhealthplans.com/

Minimum Loss Ratio (MLR) Clause

Since 2011, each insurance carrier has been required by law to pay out 80–85 percent of premiums paid in claims. If the carriers do not pay out at least these amounts, they will be required to refund premiums. In theory, this will help to reduce and control rates; however, if the insurance companies end up paying out more than the minimum required by law, they may ask for rate increases.

Want to learn even more about the Healthcare Reform Legislative Update? For a timeline of events and more specific details, visit the <u>ABA American Bar Insurance</u> page or call (888) 623-5793.

Todd Page is the vice president of JLBG Health—administrator of ABA/ABI Member Health Plans.

Careers in Legislative Affairs

By Kevin Hull

In the 12 years since I was an assistant counsel to the Speaker of the Illinois House of Representatives, I have been continually amazed that more practitioners don't include the legislative-analysis arrow in the quiver of skills they provide in their practices. Changes to legislation at the federal, state, and local levels affect your clients. The accomplished attorney who follows legislation and offers options through legislation ensures every avenue of advocacy is considered for his or her clients.

Job Opportunities in the Legislature

Once you enter the legislative arena, you'll find a wide range of staff positions for both entry-level and lateral attorneys. It's best to review these by level of government.

Federal

Most advice for positions in and around Capitol Hill centers on moving to Washington, D.C., to be as current as possible on available staff positions. Opportunities include working for a member of Congress as a "legislative aide," usually assigned to tracking specific Executive Branch agencies (e.g., Department of Defense, Veterans Affairs). Another option is to serve as a staff attorney to a standing committee or subcommittee. Other positions include working for individual federal agencies as an analyst or in the office of regional counsel in cities throughout the nation. Some recent graduates find employment in advocacy groups or so-called "think tanks" to position themselves within the Beltway for a federal position. Note that these positions are not only difficult to secure but also take a prolonged period of time from initial application through your first day on the job.

Resources:

Senate positions
House of Representatives positions
Federal agency positions

State

State government is a very attractive option because it presents opportunities to work on a wide range of subject matter while also seeing how federal, state, and local laws interplay. Employment opportunities on the state government level are similar to the federal options and include working as a governor's attorney or as a liaison from state agencies, with the legislature, or with advocacy groups.

Resources:

State government websites should feature information and an online process to apply. Research state political party websites for any information on possible positions within the legislative leadership. Advocacy groups will have their own webpages for information.

Local

One of the least familiar, yet most rewarding, opportunities for the graduating student is a practice that involves municipal law at the local government level. Attorneys at the municipal level enjoy the wide range of issues they are able to address while working with local council members on changes to administrative code. Attorney positions exist both in working for the unit of local government and for the local law firms that usually help to manage its legal affairs.

Resources:

The adage "all politics is local" applies to securing a position in local government legislative affairs. Interested YLD members should visit webpages for their local municipality for information as well as research what law firms handle the legal work for that locality.

Lobbying

The above discussion focuses mainly on jobs in the public sector. Another option is to pursue a position in a lobbying firm that handles client issues at each government level. In the federal system, the Senate and House of Representatives both have specific websites devoted to listing lobbying entities registered with the government; most state systems have similar tracking services, usually through the secretary of state.

As you can see by this brief overview, staff attorney positions in legislative affairs are available at the federal, state, and local government levels. Moreover, with a relatively high turnover rate of staff attorneys in this sector, both recent graduates and experienced young lawyers have meaningful opportunities to find and secure such positions.

Checklist

Strategic networking is the best way to become aware of opportunities and present your best candidacy for any of the positions described here. It's helpful to always be reviewing this quick checklist:

- Is my elevator speech tailored to my audience? Can I present my background, skills, and aspirations in a concise and compelling way to engage people in conversation?
- What venues will introduce me to people who can advance my career aspirations?
- Am I regularly tracking my network to ensure that I am engaging every relevant contact to advance my plan? Am I updating my contact list to reflect people I've recently met?
- If you don't have a plan, visit your school's career services office and your local ABA affiliate's practice committee on the subject area of interest.

Helpful Skills

No matter how much experience one has in legislative affairs, there are a few key skills that are needed to successfully advocate for your client:

- Be a leader of good character—nothing matters more than your word in the legislative arena.
- Be concise—brevity controls when you are advising legislators.
- Be comprehensive—both for assembling written analysis and advising during legislative session.
- Have courage—political winds can be fierce, requiring you to summon belief in yourself to chart the right course toward success.

Kevin M. Hull is founding principal of Hull Partners, Ltd. in Chicago, IL.

Graduating Online Can Provide Marks of Distinction

By R. Scott Akin

Graduates from Internet-based law school programs, like new lawyers everywhere, need to apply their legal analysis lessons to the job market and distinguish themselves from their competitors.

Practical Considerations

First, go back to the beginning: Why an Internet-based law program?

Most students graduating from such programs are non-traditional students, often older with concurrent responsibilities of ongoing careers, families, or both. Perhaps jobs abroad or requiring frequent travel simply preclude traditional study at fixed-facility law schools.

For such non-traditional students, emphasizing their dual career orientation may be a key tactic when seeking their first job in the law, according to Richard L. Hermann, author of *From Lemons to Lemonade in the New Legal Job Market*, Lawyer Ave. Press (2012). "The fact that they've had a significant career, that's a critical point for them to play up," Hermann says.

Students agreed. "I had a substantial background in real estate so that's where I focused my job search as well," said Charles P. Katz of Routh Crabtree Olsen, P.S. in Seattle, a firm that specializes in the representation of financial institutions. Katz, a 2005 graduate of Los Angelesbased Concord Law School, is licensed in both California and Washington and now litigates mortgage issues, making excellent use of his past career experience.

Power to Persevere

On a motivational level, completing a JD program concurrent with equally, or even more, demanding real-world career responsibilities illustrates ambition, discipline, commitment to personal development, and even possibly the passion that so many employers say they look for in prospective associates. "It shows motive, initiative, perseverance," said Conan Higgins, a 2010 graduate of Concord Law School who now works as in-house counsel for California-based TSI Legal Enterprises, P.C., which specializes in international business.

The level of self-discipline and perseverance necessary for success in an online program—evidenced by passing the bar—may be one distinguishing characteristic that goes beyond that of

full-time students at brick-and-mortar institutions who have yet to take on those other responsibilities.

Reality Check

Juggling law school and a career may also develop time management skills and the ability to work on multiple projects while remaining professionally focused on each.

Hermann acknowledged that maintaining a career while attending law school may be more impressive to the business world than to law firms, depending on the individual law recruiter.

Katz said he agreed that top-tier firms were likely out of reach for online graduates because those firms recruit almost exclusively from ABA-approved law schools. Additionally, Katz, noted the ongoing phenomenon of "job discrimination against older people."

Still, the self-discipline needed to complete an online program might be a good match for the drive and initiative needed in a successful law practice, whether solo or in a firm. "[Second career law students have] been in the working world and understand the marketplace," Hermann said.

Heads Already in the Cloud

An ability to work online and remotely is another distinguishing skill/asset for graduates of online programs. "Telecommuting is growing rapidly because it's a money saver," Hermann said, noting that the U.S. Patent and Trademark Office employs attorneys living in 37 states who work remotely full-time.

This may be one of the most effective selling points as law practices increasingly migrate to web-based practice management, client management, and communications applications through cloud computing. "We're learning those things that make us more marketable, like time management, working remotely in asynchronous environments, and having to do all our research by computer," said Higgins, who said he is now studying online for an LLM in international business law from the University of Liverpool.

Katz said technology was so pervasive at his office that it is "nearly paperless" and that his experience working online during law school "was a perfect fit" for the technology-savvy firm.

Graduates can emphasize that online programs, out of necessity, specialize in training students in electronic legal research because brick-and-mortar libraries are often out of reach for students who live in rural areas, who live and work abroad, or who are on the road for business so much that finding and spending significant time in a fixed law library is out of the question. Obviously, Lexis and Westlaw are the primary electronic research databases, but Concord Law School also offers course work that covers less expensive databases such as HeinOnline, Versus Law, and Find Law, as well as free online research and learning resources from brick-and-mortar law school libraries like Cornell and George Washington. Associates familiar with these free or less expensive online research resources may fit into a law firm looking to cut back on expensive toptier subscriptions.

It's about Education

Graduates should capitalize on the academic advantages their particular program offered. Concord Law School lectures are often presented by nationally recognized legal scholars. For example, Concord Law School recently featured a Civil Procedure series of lectures, presented by the lawyer who literally wrote the book: Arthur R. Miller of New York University School of Law. Miller is recognized as the leading scholar on civil practice and is a principal author of the multi-volume *Federal Practice and Procedure* and the textbook standard *Civil Procedure: Cases and Materials*.

"I think it's important that so many of Concord's professors are also professors at ABA-approved brick-and-mortar schools," said Hermann, who teaches an online course in legal career management at Concord Law School.

R Scott Akin graduated from Concord Law School in 2011 and is a member of the State Bar of California.

Coupons for Lawyers?

By Dolores Dorsainvil

There was a time, not so long ago, when lawyers were prohibited from advertising their services in any medium. Those restrictions have eased, and with the drastic change in technology and the advent of the Internet, lawyers are constantly presented with new avenues to market their legal services as well as a host of ethical implications that can arise from such use. In addition to several social media websites such as LinkedIn, Facebook, and Twitter, lawyers are now looking to "daily deal" websites, such as Groupon, as a creative way to advertise their legal services. The daily deal website offers services and/or products at a discounted rate and offers the user the option of purchasing a coupon voucher for the discount to be subsequently redeemed by the merchant. Because website companies like Groupon collect the advanced payment upfront from the consumer and retain a portion for themselves and then turn over the remainder of the fee to the merchant, the real question is: Can a lawyer ethically use such a website to advertise their legal services, or is it a violation of Model Rule of Professional Conduct 5.4, which prohibits an attorney from splitting a fee with a non-lawyer? Or, in the alternative, is this simply the cost of advertising?

A handful of jurisdictions, including New York, North Carolina, South Carolina, and Missouri, have considered this issue and decided in favor of the lawyer advertising (under their respective ethical rules) with special considerations and warnings for lawyers who choose to use these website services. Lawyers who decide to use these websites as a marketing tool must still comply Published in The Young Lawyer, Volume 16, Number 6, April 2012. © 2012 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

with the advertising rules that prohibit false or misleading statements regarding their services. Next, lawyers must remember that in acting as a fiduciary, they must treat unearned fees as property belonging to the client pursuant to Rule 1.15 and maintain such fees in an attorney trust account until earned. Likewise, if an attorney is unable to undertake the representation due to a conflict of interest or in the event that the client never actually engages the lawyer's services, the lawyer must return any unearned fee to the client pursuant to Rule 1.16(d), which deals with termination of representation.

Because the issue of lawyer advertising on daily deal websites is a relatively new phenomenon, it is hard to predict all of the ethical quandaries that one might face. Time will tell whether this approach to lawyer advertising comports with a lawyer's ethical requirements under the rules of other jurisdictions and whether, as a business model, it is even practical. Until then, lawyers who choose the wait-and-see approach when it comes to Groupon advertising can still snatch up last-minute deals on spa treatments, restaurants, and tickets to museums.

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