

# THE RIGHT TO A FAIR AND IMPARTIAL JURY UNDER MODERN VOIR DIRE METHODS

*By Janet Lee Hoffman*

*In preface, I want to point out that, when I wrote the following article, the voir dire concepts I discuss were more in their infancy. Now, having becoming institutionalized, these concepts are lacking in the sort of novelty that the article conveys and are less of a vanguard of voir dire practices in Oregon. Regardless, the case law and legal authority supporting this article remain sound support for my discussion.*

## I. INTRODUCTION

Since its emergence in Multnomah County courtrooms in the late 1980s, many Oregon judges have adopted a method voir dire which differs from the traditional "individual" voir dire method in at least two respects. First, before counsel poses any questions to the venire, the trial judge typically instructs the venire members to in turn answer eight to ten standard autobiographical questions. Second, in most instances, counsel is required to address the members of the prospective panel seated in the box and all potential panel replacements under preset time limits insufficient to allow in-depth individual questioning. Attorneys typically ask questions of the entire venire, request a "show of hands, and, as the clock counts, question individual venire persons,

Unfortunately, the modern approach, when coupled with pre-set time limits, impinges upon voir dire's traditional functions, namely to elicit sufficient information to allow the attorney to intelligently and effectively use peremptory challenges and to establish a basis for cause challenges. See, *State v. Nefstad*, 309 OR 523, 526 (1990). Pre-set time limits require attorneys to give up probing inquiry, attorneys should be prepared to challenge such limitations and thus, should be aware of the underpinnings of the right to conduct adequate voir dire.

## II. SOURCE AND SCOPE OF THE RIGHT TO ADEQUATE VOIR DIRE

An effective voir dire protects the litigant's right to trial by fair and impartial jurors as guaranteed in criminal and civil cases by Article I, sections 11 and 17 of the Oregon Constitution. The right to a fair and impartial jury is a right that "is and should be guarded zealously by the courts." *Lambert v. Sisters of St. Joseph*, 227 Or 223, 230 (1977).

The scope of the voir dire examination is placed within the court's discretionary power to efficiently and expeditiously conduct the trial. *State v. Barnett*, 251 Or 234, 237 (1968). However, the court's discretion is counterbalanced against counsel's right to engage in relevant inquiry. *Barnett*, 251 Or at 238. Thus, a litigant is entitled to inquire into a venire person's qualifications, including case-specific issues and individual predispositions or biases, *Barnett*, 251 Or at 238, or any interest or matter that may affect a the verdict because the right to an impartial jury means an impartial jury with relation to the actual issues litigated. *Leishman v. Taylor*, 199 Or 546, 556-57 (1953). Although counsel bears the burden to demonstrate that a particular inquiry is relevant, *Johnson v. Hansen*, 237 Or 1, 4-5 (1964), case law supports a diverse inquiry.<sup>1</sup>

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<sup>1</sup>Racial Bias - *Ham v. South Carolina*, 409 US 524 (1972)

Organizational Affiliations - *State v. Dixon*, 5 Or App 113 (1971)

Religious Beliefs - *State v. Barnett*, 251 Or 234 (1968)

Status as Children as Alleged Victims - *State v. Elam*, 37 Or App 365 (1978)

Jurors' Occupations - *Parks v. Cupp*, 5 Or App 51 (1971)

Attitudes Towards Employment - *Morford v. United States*, 339 US 258 (1949)

Attitudes Towards Insanity Defenses - *State v. Wallace*, 170 Or 60 (1942)

Concepts of Self-Defense - Even the court's instruction on burdens of persuasion does not preclude counsel's discussion of burdens during voir dire. See Legislative Commentary to OEC 306. *Everly v. State*, 395 NE2d 254 (Ind. 1979)

Mental Concepts of Deliberateness and Premeditation - Counsel's use of hypothetical questions

Counsel's inquiry is not necessarily limited by a venire person's answers. *Barnett*, 251 Or at 237. Indeed, counsel may inquire as to particular beliefs so that the parties may make their own determination whether a venire person will be impartial and accordingly exercise peremptory challenges. *Barnett*, 251 Or at 237. However, to challenge for cause, there is a well established need for counsel to develop a record:

The court in exercising discretion must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously. A mere statement by the juror that he will be fair and afford the parties a fair trial becomes less meaningful in light of other testimony and facts which at least suggest the probability of bias.

*Lambert*, 277 Or at 230.

Venire persons are excused for bias if they have "such a fixed attitude of mind that it would control [their] actions in some appreciable degree" when they assume the position of trier of the fact. *State v. Humphrey*, 63 Or 540, 548 (1912). Before a venire person is impaneled, the court must be convinced in the exercise of its discretion that a probability of bias does not exist. *Lambert*, 277 Or at 230.

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concerning deliberateness and premeditation used by court to show effective probing of juror's bias. *State v. Humphrey*, 63 Or 540 (1912)

Jurors' Opinions on State Policy - *State Highway Commission v. Hewitt*, 229 Or 582 (1962)

Defendant's Prior Convictions - *State v. Ziebert*, 34 Or App 497 (1978)

Prior Litigation Experience - *State v. Nagel*, 185 Or 486 (1949); *State v. Miller*, 10 Or App 636 (1972)

Exposure to the Case - *State v. Humphrey*, 63 Or 540 (1912); *State v. McDonald*, 231 Or 24 (1962)

Jurors' Attitudes Towards Types of Witnesses - *State v. Hoffman*, 85 Or 276 (1917)

In addition, the presence of a biased juror is presumptively prejudicial. If after reviewing the voir dire record the appellate court determines that the trial court abused its discretion by failing to excuse a biased venire person and the litigant had exhausted all peremptory challenges, reversal and remand for a new trial is mandated. *Lambert* at 231.

### III. EFFECTIVE VOIR DIRE TAKES TIME

The modern voir dire method coupled with pre-set time limits is antithetical to the very process of eliciting information from individual venire persons regarding their potential biases. The time limitations, either explicit or implied, unduly restrict counsel's inquiry. Simple math demonstrates that counsel's voir dire time is extremely limited, rendering probative individual questioning impossible. Under the modern method each attorney has at his or her disposal less than a few minutes per venire person.

However, for a satisfactory inquiry, counsel needs the same flexibility available in a witness examination. Counsel must be free to proceed slowly, ask open ended questions, follow up on hedge words, and accurately mirror given answers to allow a juror to comfortably disclose feelings and experiences. Practical experience dictates that once counsel detects a suggestion of bias, they will need at least 10-20 additional minutes to develop the record. Throughout this process, counsel must simultaneously build trust with the venire to obtain necessary candor. This relationship cannot be built by rushing answers. See *Jurywork: Systematic*

*Techniques* § 17.01[2] (Nat'l Jury Project 2d ed. 1996); *Jury Selection Procedures in United States District Courts* (Fed. Judicial Center 1982).

Furthermore, because of the limits on information, counsel will obtain a time constrained voir dire. Peremptory challenges must now be exercised to remove venire persons who, had time been allotted, may have demonstrated sufficient bias for challenge for cause. Peremptory challenges may no longer be reserved to remove venire persons whose undesirability does not rise to the level of actual bias. Time constrained voir dire forces counsel into the dilemma of choosing between developing one or two challenges for cause or superficially chatting with the venire and thereafter solely exercising peremptory challenges in the dark.

These principles are demonstrated in the following hypothetical in which a patron leaves defendant's restaurant and is involved in an automobile accident leaving a pedestrian dead. Counsel asks the venire for show of hands if they are social drinkers. Observing that a venire person did not raise her hand, Counsel proceeds:

Attorney: Mrs. Smith, I observed that you did not raise your hand.

Mrs. Smith: No, I didn't. I personally don't care who drinks, but I don't drink.

Attorney: Mrs. Smith, would you share with me your feelings about alcohol?

Mrs. Smith: Well, I think it's a free world. Some people drink, others don't. It's fine with me.

In time-limited voir dire, counsel simply does not have time to develop the record to support a challenge for cause and might instead earmark a peremptory challenge for Mrs. Smith or accept her answer on face value. Had time been available, counsel may have determined that Mrs. Smith's view of alcohol is based on a fixed religious belief that biased the juror against the defendant and thus should be excused for cause. Alternatively, counsel may have determined that Mrs. Smith merely does not like the taste of alcohol and thus may be a qualified juror. However, under the modern method, counsel either has one less peremptory challenge or risks allowing a biased venire person to be impaneled.

In *State v. Williams*, 123 Or App 546, 860 P2d 860 (1993), the Court of Appeals considered whether the a trial judge had abused her discretion in arbitrarily limiting defense counsel's voir dire to forty minutes. Although the Court did not reject the notion of preset time limits, it adopted a test for determining whether the use of a time limit is an abuse of discretion in a particular case:

In considering whether the trial court abused its discretion in limiting *voir dire* in this respect, we consider, among other factors, (1) the extent of the court's initial examination of the venire panel; (2) whether defense counsel attempted to prolong *voir dire*; (3) whether the questions defense counsel was not permitted to ask were proper voir dire questions; and (4) whether defense counsel was permitted to examine prospective jurors who actually served on the jury.

*Id.* at 551 (citations omitted). The Court held that because the trial court's initial questioning provided only general background information, counsel had not abused or prolonged the voir dire process, and most importantly, because counsel had been

precluded from adequately questioning jurors about racial bias, the time limitation did not adequately provide defense counsel with "the opportunity to ascertain the existence of grounds of a challenge for cause or to obtain enough information to make an intelligent decision about whether to exercise peremptory challenges." *Id.* at 552.

#### IV. CONCLUSION

In some instances, judges who impose fixed time limitations grant some latitude in questioning on request. However, the very existence of fixed time limits places a chilling effect on counsel's ability to effectively probe for actual bias and to intelligently utilize peremptory challenges. Instead of risking the court's disapproval, counsel will often fit voir dire within time limits, overlook potential juror bias and exercise peremptory challenges based on limited information.

A system with presumptive time limits that preclude sufficient inquiry into bias and prevents the intelligent exercise of peremptory challenges may violate litigants' constitutional and statutory rights to trial by fair and impartial jurors. Furthermore, counsel that fails to conduct a sufficiently probing inquiry, or alternatively, fully develop the record, and preserve issues for appeal potentially abandon duties owed to their client. As a matter of course, counsel should consider furnishing the court with a pretrial memorandum as to the issues of the case, areas of potential bias, and supporting law regarding challenges for cause to ensure adequate voir dire. Encouragingly, there is supportive case law in this jurisdiction and others against arbitrary limitation of relevant voir dire.

Instead of clock watching, justice would be better served if the court merely precluded counsel from asking irrelevant questions. Counsel has a right to meaningful inquiry of venire persons' relevant attitudes. We, as practitioners, should be prepared on case law and methodology to ensure that by inertia we do not allow voir dire's functions to be undermined.



## APPENDIX

Attorney: Mrs. Smith, this case involves alcohol. I hope you understand that I need to ask you a little more about your feelings and experiences. Could you share with me some considerations that have lead you personally not to choose to drink?

Juror: They come from my religious beliefs.

Attorney: Religious beliefs are very important and can help us all choose how to live our lives. Would you please share with me some of the religious beliefs that lead you not to drink?

Juror: My church just doesn't believe in drinking.

Attorney: I heard you say, Mrs. Smith, that your church does not believe in drinking. Could you explain to me the basis for your church's opposition to alcohol?

Juror: Well, we believe that drinking leads man astray.

Attorney: Would you explain to me what you mean by "leads man astray?"

Juror: Well, we believe that if you drink or give another person a drink, you are acting against God's will and bad things will happen.

Attorney: Well, Mrs. Smith, are you aware of the fact that a waiter in my client's restaurant served Mr. X a drink, and that after that, he drove in a car and killed an innocent pedestrian?

Juror: Yes.

Attorney: Well, under your religious beliefs, my client, by allowing the drink to be served, caused an evil thing to happen. Is that correct?

Juror: Yes, but that is only my religious belief. It would not affect my decisions in this case.

Attorney: In this case, do you understand that the plaintiff has the burden of proof and they have to prove that my client is responsible?

Juror: Yes.

Attorney: Well, Mrs. Smith, in listening to you, I hear you say that your religious beliefs would make my client responsible for the death of this pedestrian because he owned the restaurant that served the alcohol.

Juror: Yes, but I would follow the judge's instructions and it would not affect my decision.

Attorney: Mrs. Jones, how often do you go to church?

Juror: Every Sunday.

Attorney: And do you engage in Sunday school or other class teachings?

Juror: Yes.

Attorney: Would you describe your activities?

Juror: Yes, I teach religious studies every Wednesday and Sunday afternoon.

Attorney: In teaching religious study, what do you teach your students about alcohol?

Juror: That alcohol leads man into difficulties, and that a drinker acts against God's will. And that a person who gives another person alcohol is responsible for the problems caused by drinking.

Attorney: Well, Mrs. Jones, how would you set that belief aside in deciding this case?

Juror: I don't know.

Attorney: In comparing your religious beliefs, which are something you live with day in and day out and practice every day of your life, weighed against an instruction that the judge gives you in a single case, which would be more important to you?

Juror: My religious beliefs.

Attorney: Could you set aside your religious beliefs in deciding this case?

Juror: I suppose not.

Attorney: Mrs. Smith, I don't mean to put answers in your mouth. What do you mean you suppose not? If the judge instructed you that the plaintiff has the burden of proof in this case, the plaintiff has to prove my client in some way caused the injury. I also hear you say your religious beliefs would presume my client caused the injury. These beliefs are so important they are part of every single day of your life and you attend church every week and teach in Sunday school and special classes on

Wednesday nights. Would you be able to disregard your lifelong religious beliefs and follow the judge's instructions?

Juror: No.

Attorney: Would this be a case that you feel you would have a difficult time being fair to my client?

Juror: Yes.

## SAMPLE VOIR DIRE QUESTIONS

### A. Employment Background

1. What is your employment?
2. Exactly what is it you do there?
3. How long have you been at that particular job?
4. Do you have any supervisory responsibilities?
5. Have you ever received any special training or additional education that you have used in your work or career?
  - a. What type of training have you received?
6. How many of you have worked for or are currently employed by that State of Oregon?
  - a. When were you employed?
  - b. What was your job?
7. How many of you have ever worked for or are currently employed by the federal government?
  - a. When were you employed?
  - b. What was your job?
8. How many of you were in the military?
  - a. What branch?
  - b. How many years of service?
  - c. Did you volunteer or enlist?
  - d. Did you re-enlist?
  - e. What was your highest rank attained?

f. What were your duties?

g. Were you in combat?

**B. Burden of Proof**

1. Can anyone explain what they believe the differences are between a civil case and one involving a criminal charge?
2. In a civil case the requirement for the burden of proof is "by preponderance of the evidence." Can someone explain what that might mean?
3. This is a criminal case where the government must prove that the defendant is guilty, using the strongest test the law requires, which is "guilty beyond a reasonable doubt." Can someone explain what "guilty beyond a reasonable doubt" might mean?
4. In a criminal case like this, our system requires the government to prove the defendant's guilt. By a show of hands, how many of you feel that it is unfair to require the government to prove guilt?
5. As Mr. \_\_\_\_\_ sits before you today, the law says he is presumed innocent. That is, you must treat him as an innocent person, unless and until the government proves his guilt. Is there anyone who feels uncomfortable with that understanding?
  - a. If so, why do you feel that way?

**C. Attitude toward Government/Law Enforcement**

1. How many of you, members of your household or family members, have ever been in litigation with the federal or state government?
  - a. What was the nature of the litigation?

- b. What was the result?
  - c. How did you feel about the process?
2. How many of you, members of your household or family members, have ever been the victim of a crime?
- a. Who was involved?
  - b. What happened?
  - c. When?
  - d. How was the problem resolved?
3. How many of you, members of your household or family members, have ever been trained or educated in any aspect of the field of law enforcement, security or investigative work?
4. Some people believe that police officers are more likely to tell the truth while others feel that, to the contrary, police officers cannot be trusted to tell the truth. Please raise your hand if you believe that you would be suspicious of testimony by a police officer?
5. Raise your hand if you or any member of your family or household has ever been accused of a crime.
- a. Who was accused?
  - b. What were the circumstances?
  - c. How was the situation resolved?

#### D. Innocence and Guilt

1. I have already asked you about the burden of proof. One of the main principles in criminal trials is that an accused person, like Mr. \_\_\_ is

presumed innocent until proven guilty.

- a. Raise your hand if you have any thoughts about this burden of proof?
  - b. Does anyone have trouble with the idea that a person is innocent until proven guilty?
2. Our laws say that a defendant does not have to prove anything. That is, it up to the government to "prove" the defendant's guilt, whereas the defendant need not "prove" a thing.
    - a. How many of you, show me by a raise of hands, have a problem with this concept?
    - b. Why do you feel that way?
  3. How many of you think that the government would never have pursued this case against Mr. \_\_\_\_ unless he was indeed guilty?
    - a. Why do you feel that to be the case?

#### E. Accusations

1. How many of you, either as a child or an adult, have ever been accused of something you didn't do?
  - a. Please tell us what happened.
  - b. What was the outcome?
  - c. Do you have any feelings about that incident as you sit here today?
2. How many of you think that false accusations happen rarely?
  - a. Why do believe that is the case?
3. How many of you think that false accusations happen frequently?
  - a. Why do you think that is the case?

## F. Testimony

1. There are many things that people look for when they are judging the credibility of witnesses. I would like to ask the panel for some of the qualities and characteristics you might look for when judging someone's credibility. What are some of the things you might look for?
2. What do you look for when you suspect that someone is being less than honest with you?
3. Who knows of instances where two different parties both might be telling the truth but still disagree as to what happened?
  - a. How do think that is possible?
  - b. Can you give us an example of what you are thinking about?

## G. Case Specific Questions

1. Please raise your hand if you or any member of your family or household has had experience with a drug or alcohol addiction?
  - a. What type of drug or alcohol was involved?
  - b. What was your experience with the situation?
  - c. How did you drug and/or alcohol affect the individual's behavior?
  - d. How did the drug and/or alcohol affect the individual's credibility?
2. Please raise your hand if you or any member of your family or household has had mental health treatment?
  - a. Who was involved?
  - b. What type of mental health issues were involved?
  - c. How, if at all, did the mental health issues affect the individual?



3. Please raise your hand if you or or any member of your family or household has ever been divorced?

a. Who was involved?

b. Were custody issues involved?

(1) How were the custody issues resolved?

c. Was there litigation regarding the division of income or support payments?

(1) Who prevailed?

d. How did the parties feel about each other during the divorce? How did they feel after the divorce?

e. How did the parties feel about the fairness of the process?

f. If children were involved, how did they handle issues regarding the children?

g. Were they able to resolve their personal feelings toward each other sufficiently to work together regarding the children?

(1) How were they able to work together?

(2) If not, what precluded their cooperation?

4. Please raise your hand if you or or any member of your family or household have had experience with hearing impaired individual?

a. Who was involved?

b. What type of hearing impairment was involved?

c. How did the individual compensate for the lack of hearing ability?

d. Did the individual always understand what was said in the

conversations?

- (1) If not, what caused confusion?
- (2) Would others be aware that the individual was having difficulty understanding conversations?
- (3) Can you think of situations where the individual could not hear at all or misunderstood what was being said?
- (4) Would you please share such an experience?

**G. Length of Trial**

1. This will be a trial that will likely last up to \_\_\_\_ days/weeks. Because of that, I would like to know the following:
  - a. Please raise your hand if there is any reason why you could not stay with us for that period of time.
  - b. Will you be able to give us your full, undivided attention for the next \_\_\_\_ days/weeks?
  - c. Please raise your hand if the length of the trial will cause any hardship on your family or on your present plans.
    - (1) Is relaxing at the end of the day hard for you? If we have hard days here in the courtroom, will you find it so difficult to relax that you will not be able to pay close attention to the testimony?
2. Does anyone have reservations about serving as a juror in this case?
  - a. Please explain.