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The Art and Science of Voir Dire:
Empirical Research, Anecdotal
Lessons from the Masters, and
Illustrations Supporting the
Ten Commandments of Voir Dire

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The least examined aspect of trial is voir dire. Although numerous law review articles and textbooks have studied and analyzed opening statements, direct examinations, cross-examinations, and closing arguments, voir dire has largely gone undiscussed. This is, in part, because, with few exceptions, voir dire is the product of local customs and idiosyncrasies that vary not just from state to state, or even from county to county, but oftentimes from courtroom to courtroom within the same courthouse. Another reason for the relative paucity of voir dire research and examination is the freewheeling nature of voir dire itself. As the only aspect of trial where advocates directly interact with persons from outside the justice system, prospective jurors bring an element of uncertainty and unpredictability to voir dire that can defy efforts to suggest generalized approaches let alone specific rules. Yet, despite the somewhat chaotic and even messy nature of voir dire, some truisms can and will assist counsel. This Article speaks to those truisms. The ten commandments set forth in this Article instruct counselors how to effectively conduct voir dire.

INTRODUCTION

Voir dire is ostensibly about gathering information for selecting and deselecting jurors.¹ Accomplished trial counsel, however, know that voir dire should and must strive to accomplish much more.² Although recent studies question the traditionally held belief that most jurors form tentative decisions about their verdict by the end of jury

¹ 47 AM. JUR. 2D *Jury* § 160 (2019) (“One of the purposes of voir dire is to enable the court to select an impartial jury, by determining which persons harbor bias or prejudice against either party which would make them unfit to serve as jurors, as well as discovering if jurors will conscientiously apply the law as charged by the court.”); see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 50 (1988) (“The voir dire is designed by law to serve only one purpose: to enable counsel to probe jurors for information about their state of mind that might provide grounds for their removal.”); Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 928 (2015) (“The explicit purpose of voir dire in the American jury system is to determine if a prospective juror can be impartial.”).

² See Marder, *supra* note 1, at 932 (citing KASSIN & WRIGHTSMAN, *supra* note 1, at 50 (“[I]t is no secret that [lawyers] strive to obtain not an impartial panel, but a sympathetic one.”)) (describing how lawyers are usually looking for jurors who will be sympathetic, or at least not antagonistic, toward their client).

selection,³ it is beyond dispute that a successfully executed voir dire is an essential tool for lawyers to develop a rapport and gain credibility with the prospective jurors prior to moving into the next phase of trial.⁴ Jurors bring their life experiences, beliefs, biases, likes, and dislikes with them when they step into the jury box. And while well-intentioned jurors take an oath to be fair and impartial, that oath—no matter how sincerely uttered—gives way to the impressions formed both by their life experiences and by their interactions with counsel during voir dire.⁵ Accordingly, it is imperative that attorneys initiate a trust-building process with jurors while also creating an environment in which the

³ See Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 IND. L.J. 1297, 1298, 1304 (1993) (“[C]urrent work shows that jurors decide cases based on the evidence presented during trials,” but “[t]here is [still] a good deal of debate about whether jurors actually make up their minds right after the opening statements or remain open to evidence and arguments.”). *But cf.* MARGARET C. ROBERTS, TRIAL PSYCHOLOGY: COMMUNICATION AND PERSUASION IN THE COURTROOM 41 (1987) (“Approximately seventy percent of the jurors have reached a verdict by the conclusion of the *voir dire* [in those states that allow a full *voir dire* examination] and only rarely change this opinion.”) (alteration in original).

⁴ See Cathy E. Bennett et al., *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659, 665 (1992) (describing how lawyers must be “open, sincere, vulnerable, and receptive to the jurors” during voir dire because “[t]hey will respond to a gentle and sincere person whom they believe is interested in listening to them”); *cf.* Hans & Sweigart, *supra* note 3, at 1298 (asserting that lawyers who practice aggressive “Rambo” litigation tactics reduce their credibility).

⁵ See Bettina J. Casad, *Confirmation Bias*, ENCYCLOPEDIA BRITANNICA (Oct. 9, 2019), <https://britannica.com/science/confirmation-bias> [<https://perma.cc/J6NE-D77B>] (noting that all people are subject to interpreting information in a way that confirms their beliefs, expectations, and predictions); *see also* MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 100 (1978) (“Trial lawyers are, to a remarkable degree, professional applied social psychologists.”); Matthew L. Ferrara, *The Psychology of Voir Dire*, 22 JURY EXPERT 32, 32, 34 (2010) (describing a study where focus groups showed that “jurors don’t deliberate based on facts and argument; jurors deliberate based on their perception of the facts and arguments[,] and it is the juror’s belief system that accounts for the varying way that jurors perceive facts and arguments[,]” and therefore the goal of voir dire is to “identify[] jurors whose belief system would prevent them from a fair hearing of your case”); Robert F. Hanley, *Brush Up Your Aristotle*, 12 LITIG. 39 (1985) (“The advocate must be a psychologist. He must understand human nature, and he must know how his listeners think, their habits, desires, and emotions.”); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (stating how psychological research has shown that people create heuristics—simple decision models based on experience—and these decision models can assist a person on a daily basis but can also lead people astray, especially when addressing information outside the normal experiences).

attorneys can effectively discover and minimize unfavorable preconceptions about their client and their case.⁶

This Article will set forth the goals counsel should accomplish during voir dire—namely, to develop a positive working relationship with the jurors, to lay a partisan foundation for the case that will be built during trial, and to gather information necessary in deselecting jurors. This Article will also set forth ten commandments necessary to accomplish these goals, which are supported by empirical research, anecdotal lessons from the masters, and demonstrative illustrations. Those ten commandments are as follows:

1. Be personable and professional.
2. Personalize client and self.
3. Eliminate barriers.
4. Escalate gradually.
5. Use open-ended questions.
6. Initiate a group discussion.
7. Use disclosure to obtain disclosure.
8. Avoid blue-sky questions.
9. Prick boils.
10. End with a catchall question.

I

MECHANICS OF VOIR DIRE

Prior to discussing the commandments for optimizing voir dire, it is necessary to recognize that jury selection and the voir dire within jury selection can vary widely—not just from state to state but even from courtroom to courtroom within the same courthouse.⁷ With few

⁶ See Kent Madsen & Ulf Holmberg, *Interviewees' Psychological Well-Being in Investigative Interviews: A Therapeutic Jurisprudential Approach*, 22 PSYCHIATRY, PSYCHOL. & L. 60, 60–74 (2015). Researchers studied 146 individuals grouped into two groups: one group was interviewed with a “non-rapport approach” resulting in higher levels of anxiety, and the second group was interviewed with a “rapport approach.” *Id.* The second group was shown to have lower levels of anxiety and an overall improved psychological well-being. *Id.* See also Peter Perlman, *Jury Selection*, in MASTER ADVOCATES' HANDBOOK 48, 48 (D. Lake Rumsey ed., 1st ed. 1986) (advising that an advocate should not presume he can overcome a juror's “firmly rooted prejudices gained over a lifetime” but rather, the advocate must use his best efforts to uncover prejudice during voir dire); Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 484–85 (1995). Cammack observed that the notion of purely objective jurors has been proven false and that “[i]t now seems more plausible that all knowledge is shaped by interpretive perspective of the observer. . . . [W]e cannot see the world unclouded by preconceptions.” *Id.* at 484–85.

⁷ See, e.g., L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, *THE ART & SCIENCE OF TRIAL ADVOCACY* 75 (2d ed. 2011) (“No other aspect of trial has the

restraints, judges are free to mold the voir dire process at their discretion. Some courts—after asking each prospective juror for general biographical information—will turn over the questioning to the advocates.⁸ Other judges will conduct the entire voir dire themselves and may or may not solicit questions from the advocates for the judge to ask the jurors.⁹ Furthermore, for security reasons, some courts will use numbers to designate jurors rather than using their names. Prior to trial, if the opportunity presents itself, counsel should scout the judge by watching how she conducts jury selection and noting the limits she imposes on voir dire. Doing so will help the attorney tailor his voir dire to the specific character of that judge.

II

THE TEN COMMANDMENTS OF VOIR DIRE

A. Commandment One: Be Personable and Be Professional

First impressions harden like cement.¹⁰ And first impressions made during voir dire are no exception.¹¹ Voir dire is the first opportunity for the jurors to form impressions of the advocates, and those first impressions of the advocates will carry forth throughout the trial.¹²

variance of procedure that is encountered during jury selection.”); Marder, *supra* note 1, at 936 (describing how one D.C. Superior Court judge “conduct[ed] an individual voir dire of each prospective juror after the general prospective group voir dire,” thus demonstrating the difference in voir dire in his courtroom by adding individual voir dire versus how most courtroom solely conduct a group voir dire).

⁸ See ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS 217 (4th ed. 2011) (describing how the judge’s involvement varies but in a majority of state courts and some federal courts the judge and advocate share voir dire, with the judge asking the initial questions).

⁹ See *id.* at 207–08 (noting that in some jurisdictions “the judges ask all the questions . . . while other judges may ask many of the questions submitted by the attorneys”).

¹⁰ See MEMORY AND MIND: A Festschrift for Gordon H. Bower 31 (Mark A. Gluck et al., 2008) (“[F]irst encounters with new situations, people, events, objects, and facts have greater impact on subsequent thought and behavior than later encounters of similar kinds.”); see also ROBERTS, *supra* note 3, at 23–91.

¹¹ See Perlman, *supra* note 6, at 49 (emphasizing the lasting effect of the first impression of the lawyer, parties, and of the case that voir dire gives jurors).

¹² See HAYDOCK & SONSTENG, *supra* note 8, at 217; see also ROBERTS, *supra* note 3 and accompanying text; C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 95 (2000); Eric Rassin et al., *Let’s Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231, 242 (2010) (finding that initial beliefs of a suspect’s guilt or innocence affected the jurors’ attention toward subsequent evidence); Alexander Todorov et al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCI. 1623, 1624 (2005) (finding that a one-second

Advocates viewed as personable and professional to the jurors are deemed to be credible.¹³ Conversely, counselors who seem untrustworthy or insincere will be deemed less credible.¹⁴ There is no precise, quantifiable formula, however, for being perceived as personable and professional. In many instances, successful trial lawyers are blessed with charismatic qualities—gifts perhaps stemming from their personalities—that may partially explain their success at trial. For instance, one of America’s great trial lawyers, Gerry Spence, has the ability to build rapport with his jurors. Spence treats the jurors not as people sitting in judgment but as friends and neighbors.¹⁵ His ability to connect with jurors translates into

decision was sufficient to assess competence of a candidate, and that such assessments predict the outcomes of actual elections); Nicholas Rule, *Snap-Judgment Science*, OBSERVER (Apr. 30, 2014), <https://www.psychologicalscience.org/observer/snap-judgment-science> [<https://perma.cc/8KQ8-BH45>] (emphasizing studies where participants made accurate decisions on snap judgments made within seconds).

¹³ See CHARLES H. ROSE III, *FUNDAMENTAL TRIAL ADVOCACY* 100 (2007) (explaining that the way an advocate conducts himself during voir dire can enhance his credibility).

¹⁴ See Frank M. Eldridge, *An Advocate’s Use of Language*, in *MASTER ADVOCATES’ HANDBOOK* 15, 16 (1986) (“The credibility of the advocate, the client, and the cause must be paramount because in order to be persuaded, the jury must trust the advocate.”); GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* 6 (1995) (“If we do not grasp the incredible power of credibility or the magical power of listening we can argue with all the skill and artistry of the greatest orators ever spawned by history, but we will never win.”); see also THOMAS SANNITO & PETER J. MCGOVERN, *COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS* 169 (1985). As Santino and McGovern explain:

If the jurors like you, they unconsciously want you to win. The more they like you, the better your evidence sounds to them. As any good salesman can tell you, you sell yourself before you sell your product. Liking often produces a global impression of goodness, called a halo effect, in which an aura of goodness surrounds the individual. First described by Thorndike, the halo effect once formed resists change even in the face of contrary evidence The attorney who has the halo effect going for him can do no wrong.

Id.

¹⁵ See DAVID COHEN, *THE CRUCIAL 10% THAT REALLY COUNTS FOR TRIAL VICTORIES* 614 (1973) (“Do not try to impersonate another’s style or copy the substance of another argument. Be yourself, be natural, be original, be interesting, but most of all, be sincere, honest, and reasonable.”); MICHAEL S. LIEF ET AL., *LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW* 123–24 (1998); see also James C. Hill, *The Importance of Sincerity*, in *MASTER ADVOCATES’ HANDBOOK* 13, 13, 14 (1986) (“You can learn much about *what* to do from the great trial lawyers. Learn it all! But be careful that you do not adopt what, for you, would be an artificial manner of doing it.”); SANNITO & MCGOVERN, *supra* note 14, at 178 (“In general, the recommendation is: Be yourself in court, and avoid being phony at all costs. Jurors conclude that if you’re phony, so is your case. Try to be forthright in your demeanor whenever possible.”). Two master trial advocates, Clarence Darrow and Gerry Spence, agree that success in advocacy requires much more than mere imitation. CLARENCE DARROW, *THE STORY OF MY LIFE* 380–81 (1934) (“The truth is that in [speaking] as well as in everything else, one needs individuality

credibility, and a lawyer's credibility is the single most important characteristic that sets the stage for the trial that follows.¹⁶

Although few attorneys possess the charismatic magnetism of the masters, those litigating cases can learn to build themselves into successful trial lawyers. Developing a positive rapport and forming a favorable first impression begins by communicating professionalism, respect, and courtesy—both orally and through body language—to everyone in the courtroom, including the opposing counsel, the judge, the clerk, and the bailiff.¹⁷

One of the most basic, albeit difficult, skills an attorney can develop to make a favorable impression on the jury is careful management of

. . . . And every one is 'different' if he has ideas and has mastered a subject and learned to express himself well."); see SPENCE, *supra* note 14, at 171 ("If the argument is to be fresh, it cannot be a replay of the old, banal, expected arguments of others. The argument must be new, out of one's own creative cauldron where one's psychic witch stirs the magic brew."); see also JEFFREY T. FREDRICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 157 (1987) ("A second way of resisting persuasion is to derogate the source. If the source is perceived to be of dubious credibility, then there is no reason to accept the message."); MICHAEL T. NIETZEL & RONALD C. DILLEHAY, *PSYCHOLOGICAL CONSULTATION IN THE COURTROOM* 141 (1986) ("Of the communicator variables that are important in court, credibility is probably paramount."); see generally ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 167 (2007) (asserting that people are more likely to be influenced by someone they like).

¹⁶ See NIETZEL & DILLEHAY, *supra* note 15, at 141 ("Of the communicator variables that are important in court, credibility is probably paramount."); 1 HERBERT J. STERN, *TRYING CASES TO WIN* 13 (1991) ("The greatest weapon in the arsenal of an able trial lawyer is not the law, or even the facts. It is personal advocacy, coupled with personal standing with the jury."); see also Anneke de Graaf et al., *Identification as a Mechanism of Narrative Persuasion*, 39 COMM. RES. 802, 817 (2012); see generally CIALDINI, *supra* note 15, at 167 (describing how people are more likely to be influenced by someone they like).

¹⁷ See Martin S. Remland, Address at the Eastern Communication Association Convention: The Importance of Nonverbal Communication in the Courtroom 6 (Apr. 29, 1993) (discussing evidence from a 1994 study by Hatfield, Cacioppo, and Rapson that suggests that "various forms of synchrony and motor mimicry may be . . . either . . . a stimulant or consequence of positive feelings [among the jurors during voir dire]" because "rapport may be associated with interactant's adopting similar postures . . . , speech styles, facial expressions, and patterns of coordinated movement"); Jason Bloom & Karin Powdermaker, *Building Rapport in the Courtroom*, 69 TEX. B.J. 540, 543 (2006) (emphasizing how important it is for examiners to be prepared, organized, and succinct); see also Bennett et al., *supra* note 4, at 665 ("People, and especially jurors, who feel threatened will not respond to a frustrated, angry, and dominating personality. They will respond to a gentle and sincere person whom they believe is interested in listening to them."); Ronald J. Waicukauski et al., *Ethos and the Art of Argument*, 26 LITIG. 31, 33–34 (1999) (advising lawyers to demonstrate their sense of fair play and to "[b]e courteous and civil at all times").

his body language.¹⁸ Body language is integral to the way humans connect with and perceive one another. For instance, one social psychology study found that, when a sample of ninety-nine participants was shown two versions of the same short video of an interview, the interviewee's body language influenced the participants' perceptions of the interviewee's character.¹⁹ In the first version of the video, the interviewee was smiling and nodding; in the second, he was frowning and had crossed arms.²⁰ The participants were asked to rate the interviewees on a scale from one to eleven, with one indicating the interviewee was not at all similar to the participant and eleven indicating the interviewee was extremely similar to the participant.²¹ Not surprisingly, the study found that participants rated the interviewee

¹⁸ See SONYA HAMLIN, WHAT MAKES JURIES LISTEN 424 (1985) ("The amount of inadvertent communicating [lawyers] do non-verbally can markedly alter what the jury hears and thinks. . . . [B]etween 65 and 93 percent of the impact or meaning of a communicated message is carried by the nonverbal behavior that surrounds an oral message."); *id.* (observing that nonverbal communication is "much more powerful than words because. . . . [n]on-verbal language is much more physical and compelling"); see also Brian Collisson & Jennifer L. Howell, *The Liking-Similarity Effect: Perceptions of Similarity as a Function of Liking*, 154 J. SOC. PSYCHOL. 384, 388 (2014) ("Previous research has demonstrated that people can form liking or disliking evaluations of others based on nonverbal behavior."). See generally RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 125 (1990) (noting the important role of nonverbal communication between lawyers, witnesses, and jurors, and concluding that "[p]eople rely most heavily on nonverbal cues when assessing the veracity of others"); *id.* at 122 (observing that studies support the fact that "[c]redible communicators excel in making direct eye contact with listeners"). Rieke and Stutman summarize the five common classifications of nonverbal communication as follows: (1) "Paralanguage," which includes vocal and speech qualities; (2) "Facial expressions"; (3) "Kinesics," which includes movements and gestures of the body; (4) "Eye movement"; and (5) "Proxemics," which refers to the use of space "to increase or decrease distance." *Id.* at 121; RUDOLPH E. VERDERBER, THE CHALLENGE OF EFFECTIVE SPEAKING 92, 93 (4th ed. 1979) ("As a speaker . . . you maintain a certain amount of control over your listeners' attention simply by looking at them. . . . Not only does good eye contact help attention, it also increases audience confidence in the speaker."); SANNITO & MCGOVERN, *supra* note 14, at 89 ("Feelings, attitudes, and predispositions may be revealed in facial expression, posture, vocal intonation, eye movement, lines in the face, or type of smile."); Cynthia R. Cohen et al., *Demeanor, Deception and Credibility in Witnesses*, American Bar Association Section of Litigation Annual Conference 17, (Apr. 24–26, 2013), http://pgil.pk/wp-content/uploads/2014/04/33_demeanor_deception.authcheckdam.pdf [<https://perma.cc/66J7-JWGU>] (listing ways to increase credibility in the eyes of the jury during trial, including smiling whenever appropriate, maintaining eye contact with those to whom you are speaking, taking time to think before talking, using positive body language, such as upright body posture with straightened shoulders, and deflecting bad arguments without being argumentative, evasive, or defensive).

¹⁹ Collisson & Howell, *supra* note 18, at 388–89.

²⁰ *Id.* at 389.

²¹ *Id.*

in the first video as more likeable, more confident, and more similar to the study participants.²²

Sometimes trial lawyers are distinguished as masters of their art by the presence of an indefinable quality. More obvious, however, are the qualities an advocate should avoid during interactions with prospective jurors, such as appearing pretentious (e.g., wearing \$3,000 Armani suits or flashy Rolex watches)²³ or acting condescendingly.²⁴

There is certainly an expectation of formality during trial, but formality must be tempered with common sense and basic interpersonal skills. Thus, although it is expected that trial lawyers dress in a dignified and professional manner, that attire should be restrained.²⁵ A trial lawyer flaunting wealth will fail to generate the sought-after connection and can instead create distance between counsel and jurors.²⁶

Likewise, an advocate using language beyond the grasp of even one prospective juror may well create an intellectual gap with that juror, which the juror may resent.²⁷ Any jury venire will contain prospective jurors representing a wide cross section of the community, including varying levels of education and professional experience. Accordingly, lawyers must take care neither to speak over the heads of anyone nor to condescend them.²⁸ Throughout voir dire, a trial advocate must be

²² *Id.* at 391.

²³ See *infra* note 26 and accompanying text.

²⁴ See *infra* Section II.G.

²⁵ See Stephen D. Easton, *Truth in Trial: Overcoming Juror's Mistrust*, 53 BENCH & B. MINN. 23, 26 (1996) (“[I]t is important not to overdress and thereby distance yourself from the jurors.”); Steve M. Wood et al., *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, JURY EXPERT, 23, 24 (2011), <http://www.thejuryexpert.com/2011/01/the-influence-of-jurors-perceptions-of-attorneys-and-their-performance-on-verdict/> [<https://perma.cc/86CB-VJXH>] (noting that juries evaluate the “dress, demeanor, and personality [of attorneys], along with the case evidence”).

²⁶ See DONALD HAYWORTH & ROBERT B. CAPEL, ORAL ARGUMENT 372 (1934) (“[T]he appearance of the speaker is a matter of some significance in persuasion[, but it] is not necessary here to prescribe the kind of clothes to be worn or the kind of hair cut; it is sufficient to say that the debater should be well dressed without having an all-dressed-up-for-Sunday appearance.”).

²⁷ See *infra* Section II.C.

²⁸ See HAYDOCK & SONSTENG, *supra* note 8, at 359 (providing that jurors will better understand simple conversational words because jurors must commonly use them); Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 KAN. L. REV. 893, 904 (2013) (quoting IRIS MURDOCH, METAPHYSICS AS A GUIDE TO MORALS 164 (1992) (“The trial resists the . . . ‘language, not marred or corrupted by technical discourse or scientific codes . . . of which we are in need as citizens, and as moral agents.’”); Eldridge, *supra* note 14, at 15 (“Words should be intelligible to every juror. The simplest juror should grasp not only

mindful not to exclude or embarrass any prospective jurors. Even if an advocate inadvertently fails to question a prospective juror, resentment can build in that juror. Excluding a prospective juror from what is essentially a group exercise can prove harmful to forming a favorable impression, but embarrassing a prospective juror will prove even more disastrous. For instance, an advocate seeking information about levels of education may thoughtlessly ask a juror about his postcollege education. If that particular juror has none, he might well be embarrassed. An advocate should never put a prospective juror in a position to fail; instead, an advocate should accentuate the positive.

When exercising challenges, an advocate should always look the challenged juror in the eye and thank him or her for his or her service. Not only is that the right thing to do but it also has a strategic purpose. As prospective jurors sit in the juror staging area waiting to be called, they often visit with one another and form relationships. And if an advocate is disrespectful to an excused juror, then some remaining jurors may resent that lack of respect for one of their own.

B. Commandment Two: Personalize Client and Self

At the outset of voir dire, advocates must introduce and personalize both the clients and themselves.²⁹ People are hardwired to make quick judgments about others based on very little information.³⁰ Oftentimes, those first impressions are based on a sense of similarity or dissimilarity

the meaning but also the connotation of the words.”); Waicukauski et al., *supra* note 17, at 34 (advising lawyers to “[n]ever talk down to your audience”); *see also* ROSE, *supra* note 13, at 101 (explaining that it is best to use plain and simple words such as “car” instead of the word “vehicle”).

²⁹ *See* 5 AM. JUR. *Trials* § 285 (2019) (emphasizing the importance of humanizing the client and encouraging advocates to refer to their client by name); JAMES W. JEANS, *TRIAL ADVOCACY* 178 (1975) (noting that voir dire is the first opportunity to develop the relationship with the jury that can lead to more effective persuasion); Daniel G. Kagan, *Advocacy in Jury Selection*, in *A PRACTICAL GUIDE TO SUPERIOR COURT PRACTICE IN MAINE* § 19.2 (Mass. Continuing Legal Educ. Inc., 1st ed. 2015 & Supp. 2018) (noting that at the outset of the case, the jury forms impressions about the participants in trial); Michael J. McNulty III, *Practical Tips for Effective Voir Dire*, 48 LA. B.J. 110, 110–11 (2000) (explaining that a good first impression can establish rapport with the jury).

³⁰ Collisson & Howell, *supra* note 18, at 385 (“People’s need to make social inferences is so strong that it extends even to predicting the behavior of others that they know little or nothing about. . . . People anchor on their own preferences and traits and egocentrically infer what others are like.”); *see* Hazel Markus & R.B. Zajonc, *The Cognitive Perspective in Social Psychology*, in 1 *HANDBOOK OF SOCIAL PSYCHOLOGY, THEORY AND METHOD* 137, 180 (Gardner Lindzey & Elliot Aronson eds., 1985) (noting that research in impression formation suggests that our opinions of others are based on that information that we first receive about them).

that individuals feel toward another. Balance theory suggests that people prefer others whom they perceive as similar to themselves.³¹ Voir dire presents the first opportunity for advocates to introduce themselves and their clients and generate positive first impressions that will have a powerful and lasting influence on the jurors.³² Empirical data supports the idea that, once similarity is achieved, those first positive impressions translate into truth and empathy.³³

In essence, balance theory holds that people want to achieve cognitive consistency, so they monitor their attitudes to maintain balance, which “is achieved when people do not feel stress or pressure to change their attitudes.”³⁴ For instance, an individual “can achieve cognitive consistency by liking (disliking) another person who shares similar (dissimilar) attitudes as oneself.”³⁵ For a very rudimentary example, if a juror is an avid Los Angeles Lakers fan, and the juror discovers during trial that the defendant is also a Lakers fan, the juror can achieve cognitive consistency by liking the defendant. If the same juror discovers, however, that the prosecutor is a die-hard Celtics fan

³¹ Collisson & Howell, *supra* note 18, at 386 (“One of the prominent theoretical accounts for why people like similar others, and dislike dissimilar others, is balance theory.”).

³² PERRIN, CALDWELL & CHASE, *supra* note 7, at 73 (“[I]t is beyond dispute that the preconceptions jurors bring to the courthouse and their first impressions of the trial and its participants are monumentally significant factors in the decision process of every trial and need to be identified and taken into account by trial advocates.”).

³³ See CIALDINI, *supra* note 15, at 167 (“The main work of a trial attorney is to make a jury like his client.”). Cialdini notes that, “as a rule, we most prefer to say yes to the requests of someone we know and like.” *Id.* For example, “[b]y providing the hostess with a percentage of the take, the Tupperware Home Parties Corporation arranges for its customers to buy from and for a friend rather than an unknown salesperson.” *Id.* at 168. In the same way, advocates at trial must make friends of the jury before they can convince them to adopt the advocate’s position.

³⁴ Collisson & Howell, *supra* note 18, at 386; see CIALDINI, *supra* note 15, at 167, 173 (reporting that researchers have found that similarity is one of the most influential factors in causing a person to like and trust another, and that the similarity might be found in similar styles of dress or similar backgrounds and interests); RIEKE & STUTMAN, *supra* note 18, at 118–20 (noting that listeners tend to trust and believe speakers with similar backgrounds and experiences); Waicukauski et al., *supra* note 17, at 34 (“Psychologists have found that we trust and like people who are like ourselves.”). We are attracted to people we like, and we like the people to whom we are attracted. See JOHN C. BRIGHAM, SOCIAL PSYCHOLOGY 183 (1986). We assume that people we like share our attitudes and, conversely, we assume that people we do not like do not share our attitudes. See generally FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958) (discussing the balance theory, as developed by Heider); Fritz Heider, *Attitudes and Cognitive Organization*, 21 J. PSYCHOL. 107, 107–11 (1946).

³⁵ Collisson & Howell, *supra* note 18, at 386.

(one of the Lakers' oldest and bitterest rivals), the juror can achieve cognitive consistency by disliking the defendant.³⁶

Aside from the attorney presenting herself and her client as relatable, and thus similar to the prospective jurors, the attorney can also deploy additional techniques to increase trust and credibility with the jury. First, the attorney can enthusiastically expect that the jury is going to like her and her client.³⁷ Although liking is not always reciprocal, the more ardent the attorney is in believing that the jury is going to like her, the more likely it is the jurors will actually like her.³⁸ Second, the attorney ought to spend as much time in front of the jurors as possible because the more familiar the jurors are with the attorney and her client, the more likely it is the jurors will like the attorney and her client.³⁹

³⁶ See *id.* (describing how if someone likes an object, but a second person dislikes the same object, the first person may dislike the other person in order to create cognitive balance).

³⁷ See Cohen et al., *supra* note 18, at 16 (“The more positive you are in expecting to be liked, greatly increases the chance that you will be liked.”); see also HAYDOCK & SONSTENG, *supra* note 8, at 210 (affirming that a positive and likeable demeanor with the jurors can achieve the goal of a favorable impression of their client).

³⁸ See Cohen et al., *supra* note 18, at 16; see also VERDERBER, *supra* note 18, at 91 (“By far the single most important element of effective speaking is speaker enthusiasm.”). Clarence Darrow, discussing a case that involved a horse harness, said, “There was no money involved, and not much principle, as I see it now, but then it seemed as if my life depended upon the result.” DARROW, *supra* note 15, at 35; see FRANCIS P. BENDEL ET AL., PERSONAL INJURY PRACTICE IN NEW YORK § 9:215 (2019) (noting that a lack of confidence is harmful when attempting to persuade the trier of fact); NIETZEL & DILLEHAY, *supra* note 15, at 129 (“[A]lthough communicator confidence and factual accuracy were unrelated, impressions of confidence nonetheless accounted for 50% of the variance in decisions to accept what was said as true.”); RIEKE & STUTMAN, *supra* note 18, at 117 (noting that “dynamism” intensifies the advocate’s trustworthiness and expertise, as “high dynamism on the part of the speaker will intensify the evaluations of a speaker so as to make a communicator with moderate expertise appear more expert and one with moderate character appear more trustworthy”).

³⁹ See Cohen et al., *supra* note 18, at 16 (“[F]amiliarity leads to liking.”) (summarizing a study that found that college students associated those whom they dislike with words like liar, phony, and dishonest); see also JAMES W. MCELHANEY, MCELHANEY’S TRIAL NOTEBOOK 349 (3d ed. 1994) (“Generally speaking, the jury will be predisposed to believe whom they like and disbelieve whom they dislike.”); cf. Richard Elliott & Natalia Yannopoulou, *The Nature of Trust in Brands: A Psychosocial Model*, 41 EUR. J. MARKETING 988, 988–89 (2007) (finding that when risk is high consumers correlate safety with familiarity, confidence, and trust); Ranjay Gulati & Maxim Sytch, *Does Familiarity Breed Trust? Revisiting the Antecedents of Trust*, 29 MANAGERIAL & DECISION ECON. 165, 165–85 (2008) (discussing familiarity and trust in the context of economic exchanges and concluding that joint history is not, in itself, sufficient to create trust but may, nonetheless, serve as a prerequisite to trust).

For instance, after the court has gone through the basic biographical information with the prospective jurors and has turned voir dire over to the advocates, plaintiff's counsel might proceed as follows:

COUNSEL: Good morning, ladies and gentlemen. It has been a while since the court introduced me, so let me take this opportunity to reintroduce myself. My name is Butch Kennedy, I'm a local lawyer, and I've been practicing in the Bend community for about a dozen years. I represent Fred Akers [*moving behind Akers and touching his shoulder*]. Mr. Akers has been married to his devoted wife for thirty-three years. He and Joyce have three adult children, and they are all here today to support their father. As you can see, Mr. Akers is in a wheelchair. Up until three years ago, he was a building contractor and a robust and mobile man who did a lot of the construction work himself, and it was while he was doing his job that he developed back problems. Following physical therapy and other treatments, he was referred to the defendant for surgery. The evidence will show that the surgery went terribly wrong and left him unable to walk. To get a better sense of how each of you would fit into this trial, I would like to begin my questioning by asking each of you about medical procedures and surgeries you've had.

This introduction characterized the client as a devoted husband and father—both positive traits that establish similarity with the jurors. Although there is no ironclad method to ensure prospective jurors will like counsel and her client, the likelihood increases that jurors will like and therefore trust the attorney and her client when the attorney promotes perceived similarity, projects an expectation the jurors will like them, and increases familiarity with the jurors through maximum exposure to herself and her client.

C. Commandment Three: Eliminate Barriers

Voir dire should have the feel of a one-on-one conversation with each juror.⁴⁰ Voir dire is the only occasion during the trial process

⁴⁰ See MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 487 (1989) (“As you speak to the jurors, address them as you would any human beings during conversation, by making eye contact.”); HAMLIN, *supra* note 18, at 17 (“[G]ood communication means a dialogue between you and your receiver; a dialogue made up of telling *and* listening.”); HAYDOCK & SONSTENG, *supra* note 8, at 236 (noting the most effective question asking approach is “conversational style”); Cohen et al., *supra* note 18, at 16 (using plain language similar to what a juror would use in his everyday vocabulary is likely in an attorney’s best interest because “[s]imilarity is one of the most important factors affecting lik[ability]”); see also JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 169–70 (1987) (defining “[h]ypercorrect speech” as “excessive use of ‘bookish’ grammar, a vocabulary which is overly formal or too technical for the given context, or enunciation of words . . . to the point of incorrect pronunciation.”); *id.* at 170

when counsel can have a one-on-one conversational give-and-take with each prospective juror, and that opportunity must not be squandered.⁴¹ By looking each juror in the eye and engaging them in conversation, counsel optimizes her opportunity to evaluate whether that juror is or is not the best fit for counsel's case.⁴² The most effective communication is person-to-person without any barriers impeding communication between the speaker and her audience.⁴³ Podiums, legal pads, and high-sounding vocabulary are all barriers that impede effective interactions.⁴⁴

A lawyer standing behind a podium or lectern has imposed a barrier between herself and the people with whom she is trying to develop a relationship.⁴⁵ Likewise, a lawyer holding his legal pad and constantly referring to his notes comes off more like an automaton reading responses rather than someone attempting meaningful communication.⁴⁶ Some attorneys may voice a concern that without notes they cannot record juror responses, which, they maintain, is

("Research addressing the effect of hypercorrect speech indicates that it is disadvantageous."); FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 199 (1906) (repeating Lincoln's advice to law students that "[e]xtemporaneous speaking should be practised [sic] and cultivated," and that "[i]t is the lawyer's avenue to the public"); RIEKE & STUTMAN, *supra* note 18, at 156 (reporting that studies establish that jurors rate those who use standard speech "as significantly more convincing, more competent, more qualified, and more intelligent than those who used the hypercorrect style"); STERN, *supra* note 16, at 227 (explaining that reading before the jury destroys the advocate's credibility because the jury believes that "truth should flow without a script"); *id.* at 227–28 (noting that lawyers read their speeches because they are "afraid" and that lawyers sacrifice eye contact and the chance to be "in tune" with the jury when they read or excessively rely on their notes).

⁴¹ See PERLMAN, *supra* note 6, at 54 ("[T]his is counsel's only opportunity to establish any dialogue with the jurors; during every other stage of the case, the jury must sit and listen."); see also ROSE, *supra* note 13, at 296 (emphasizing the importance of voir dire as the last opportunity for the jurors to speak and interact before deliberations).

⁴² See HAYDOCK & SONSTENG, *supra* note 8, at 225 (stating nonverbal behavior might be something that the advocate relies on just as much as the information they communicate in conversation to assess their attitudes and feelings).

⁴³ See Radhika Kapur, *Barriers to Effective Communication 2–4* (Mar. 2018) (unpublished manuscript), https://www.researchgate.net/publication/323794732_Barriers_to_Effective_Communication [<https://perma.cc/7FNR-6PKV>] (describing how unwanted distance within the communication system is a barrier to effective communication).

⁴⁴ HAMLIN, *supra* note 18, at 160–61 (advising advocates to avoid the use of the podium because "the lectern carries many negative images").

⁴⁵ See *id.* (noting that the podium serves as a shield, suggests that the advocate is hiding from the jury, reduces the advocate's energy and movement, and elevates the advocate to a position of power over the jury).

⁴⁶ See ROSE, *supra* note 13, at 300 (noting how when an advocate looks at his paper more than the jurors it tells the audience that the advocate is "more interested in your written questions than their response to those questions").

essential in deciding which jurors to challenge.⁴⁷ However, the upside of engaging each juror and initiating the development of a positive relationship transcends the benefit of noting every juror response.⁴⁸ Furthermore, trial lawyers typically have cocounsel or a paralegal to record particular responses.⁴⁹

Another barrier to effectively communicating with jurors is polysyllabic words.⁵⁰ There is a time and place for displaying semantic brilliance, but voir dire is not that time. An unnecessarily complicated vocabulary can interfere with conversational dialogue by creating an intellectual gap between counsel and juror.⁵¹ *Bruise* is a better word than *contusion*, and *cut* is a better word than *laceration*. Leaving jurors to wonder at the meaning of some polysyllabic word does not enhance the conversational dialogue but rather courts confusion and perhaps even resentment.

Similarly, the use of legal jargon can act as a barrier.⁵² Some jurors may be confused about specific legal concepts vital to trial, such as contributory negligence, imperfect self-defense, or involuntary manslaughter. Using such terms of art without adequate explanation

⁴⁷ See Perlman, *supra* note 6, at 54 (raising concern that it is important to record juror responses in order to give reasons for exercising preemptory challenges); see also ROSE, *supra* note 13, at 300–01 (“[T]he best questions in the world are useless if you cannot, in the moment of group voir dire, record answers . . . consider asking a co-worker or other support personnel to sit in the gallery and take notes . . .”) (alteration in original).

⁴⁸ See HAYDOCK & SONSTENG, *supra* note 8, at 216 (note-taking may be an added distraction from effective and open communication because of the tendency to make jurors “suspicious, bothered, or offended”).

⁴⁹ See Perlman, *supra* note 6, at 55 (advising that cocounsel or a nonlawyer can easily record juror responses at counsel table).

⁵⁰ See DAVID L. HERBERT & ROGER K. BARRETT, ATTORNEY’S MASTER GUIDE TO COURTROOM PSYCHOLOGY: HOW TO APPLY BEHAVIORAL SCIENCE TECHNIQUES FOR NEW TRIAL SUCCESS 214–15 (1981) (“If we are to communicate on the jurors’ level, we must avoid the use of legalese.”); Eldridge, *supra* note 14, at 15 (“Words should be intelligible to every juror . . . Words must fit the common denominator of the jury.”); see, e.g., DARROW, *supra* note 15, at 42 (“I strive to use simpler words and shorter sentences, to make my statements plain and direct and, for me, at least, I find this the better manner of expression.”); see also ROSE, *supra* note 13, at 101 (explaining that it is best to use plain and simple words such as “car” instead of the word “vehicle”).

⁵¹ See *supra* note 40 and accompanying text.

⁵² See Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1106 (1993) (summarizing Professor Robert F. Forston’s jury comprehension studies from the mid-1970s, which concluded that the majority of jurors in any relatively complex case are generally confused, which, in part, is due to “the use of excessive and repetitive legal jargon”).

may also lead to confusion and diminish the effectiveness of the voir dire.

D. Commandment Four: Escalate Gradually

Occasionally, advocates must ask questions about jurors' personal circumstances—questions that jurors might view as unnecessarily intrusive. However, a juror's answer may be critical in determining whether that juror could fairly sit in judgment of the advocate's client. Delving into such areas without first establishing some rapport may place jurors in an awkward position, embarrass jurors, or tarnish the attorney-juror relationship. Advocates must earn the right to probe into such areas. Thus, voir dire should be undertaken as an escalating process.

Prior to wading into any sensitive or difficult topics, an advocate should first cultivate a relationship with jurors by personalizing herself and her client and by inquiring about generalized areas, such as each juror's background, previous jury experiences, and so on.⁵³ Once the jurors have an affinity for the advocate, the jurors will better receive any difficult or sensitive inquiries.⁵⁴ For instance, in an unlawful termination case in which the plaintiff is claiming he was terminated for his religious beliefs, it is necessary for advocates on both sides to probe into a juror's religious background. In such a case, failing to inquire into this personal concern would be foolhardy. But because of their personal nature, such inquiries should come later in the questioning process, after the advocate has built a relationship with the jurors. And, of course, as will be suggested below in Commandment Eight, such an inquiry would provide context for subsequent questions, thereby avoiding any "blue-sky" issues.⁵⁵

Using the scenario described above, in which the plaintiff is contesting the legality of his employment termination, defense counsel—after inquiring about the juror's background and other nonsensitive matters—may now inquire into the sensitive area of religion as follows:

⁵³ See MCELHANEY, *supra* note 39, at 353 (advising advocates to get the foundational facts and background out of the way before discussing any main points); Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 WASH. U. JURIS. REV. 131, 136–37 (2014) (discussing classic rhetorical theories on the value of personalization in light of modern theories of juror bias and witness credibility).

⁵⁴ See *supra* note 53 and accompanying text.

⁵⁵ See *infra* Section II.H.

DEFENSE COUNSEL: Mrs. Hampstrad,⁵⁶ as you know, this trial will be focused on whether Ms. Saks—in her role as supervisor of Gem Corporation—terminated the plaintiff because he practiced his religion in the workplace. Given that religion is an issue in this case, I need to ask about your views on religion and how your views might affect your ability to be fair and impartial in this trial.

PROSPECTIVE JUROR: I understand.

DEFENSE COUNSEL: Let's start with whether you have a religious preference.

PROSPECTIVE JUROR: I occasionally attend an Episcopal church near my home.

DEFENSE COUNSEL: You say occasionally—I take it you are not in weekly attendance?

PROSPECTIVE JUROR: No, mostly on the significant days.

DEFENSE COUNSEL: Do you consider it a part of your calling to share your beliefs with others?

PROSPECTIVE JUROR: No, I don't. I view religious matters as private. I am not comfortable talking about religion with others.

DEFENSE COUNSEL: Thank you, Mrs. Hampstrad, for your candor.

If such an inquiry had been made at the onset of voir dire, the prospective juror most likely would have resented the intrusion into her private life.⁵⁷ However, by providing context and reserving the inquiry until the advocate and the juror have interacted and built at least a minimal relationship, the juror understands that the advocate's question was relevant, well intentioned, and not unnecessarily intrusive.

E. Commandment Five: Use Open-Ended Questions

A surefire way to determine an advocate's effectiveness (or lack of effectiveness) during a voir dire examination is to gauge whether the lawyer is talking more than the jurors.⁵⁸ The lawyers already know what they know; voir dire should be about learning what the jurors

⁵⁶ This illustration assumes jurors are identified by names and not by numbers.

⁵⁷ See HAYDOCK & SONSTENG, *supra* note 8, at 238 (suggesting that when asking personal or potentially embarrassing questions attorneys should proceed in a manner sensitive to the juror's situation with questions intentionally worded and delivered to "minimize adverse reactions").

⁵⁸ See Bennett et al., *supra* note 4, at 665 (asserting that an attorney must be a superb listener in order to cultivate intimate relationships with the jurors that are necessary for an effective voir dire).

know.⁵⁹ Voir dire is an information-gathering tool and an opportunity to initiate the persuasive process. Voir dire questions must encourage jurors to open up and discuss their answers. Questions that call for jurors to offer only cryptic responses do little to provide information essential to the jury selection process.⁶⁰ The purpose of these inquiries is to understand why jurors feel as they do. Such questions are tools to allow jurors to open up and explain their answers. One-word answers typically fail to provide the insight necessary to effectively ascertain how a juror might engage the facts and issues to be encountered at trial.⁶¹ One commentator discusses how open-ended questions can deal with the four parts of an experience:

(1) An event or situation occurs . . . ; (2) The person forms a perception about that event . . . ; (3) Out of this perception grows a feeling (emotion) such as fear or hate; and (4) Out of this feeling comes a behavior, such as trying to get on the jury in order to convict.⁶²

If the attorney can get information on all four parts of the experience, she can get “as accurate a reading of the person as possible.”⁶³

Asking questions that call for open-ended responses will produce starkly different results as compared to asking close-ended questions that call for a simple yes or no.⁶⁴ For instance, a prosecutor might ask the jury panel as a whole, “If I prove beyond a reasonable doubt that the defendant is guilty of burglary, will you have any hesitancy in convicting him?” The prosecutor then asks each juror individually to respond. Upon receiving a chorus of “Nos,” he moves onto the next inquiry. The prosecutor’s close-ended inquiry accomplished nothing. The jurors most likely responded as they did not because each juror lacked any hesitancy toward convicting the defendant but because the form of the question led them there or because they were anxious not

⁵⁹ See Perlman, *supra* note 6, at 49 (going so far as to say that voir dire is more about elimination than “selection”; it is a time to discover the jury pool’s true feelings and biases).

⁶⁰ Bennett et al., *supra* note 4, at 668 (noting that close-ended questions have a purpose in voir dire, but “should only be used after the foundation for a challenge for cause has been developed”).

⁶¹ *Id.* at 666–68.

⁶² *Id.* at 667.

⁶³ *Id.*

⁶⁴ See generally *id.* at 666–68 (describing the differences in the types of responses elicited based on the different form and content of closed-ended versus open-ended questions during voir dire).

to embarrass themselves by looking ignorant.⁶⁵ The reality is that most prospective jurors do not grasp the subtleties of the state's burden of proof. Had a prosecutor proceeded along these lines, he should have followed up by discussing with the jurors that his burden is neither beyond all doubt nor beyond a shadow of a doubt but only beyond a reasonable doubt. Failing to clarify the burden of proof needed to convict was a missed opportunity to clear up any of the jurors' misconceptions and to engage the jurors in a dialogue that will provide a barometer for the prosecutor to better evaluate each juror.

For instance, in a medical malpractice case, a critical issue may be whether a physician thoroughly evaluated the plaintiff's medical history prior to surgery. Defense counsel might initiate questioning as follows:

COUNSEL: Ladies and gentlemen, an important issue in this case is whether the surgeon's presurgery evaluation of the plaintiff was thorough and complete. Did he do everything necessary to ensure a successful surgery? I'd like for us to discuss some of your experiences with doctors, whether good or bad or even indifferent. Mr. Brown, how about you, sir? What kinds of experiences have you had with doctors?

JUROR BROWN: As you can see, I'm a senior citizen and have seen my share of doctors over the years. Some were great, some were okay, and a couple just seemed in a hurry to finish with me and get on to the next patient.

COUNSEL: What do you mean in a hurry to get on to the next patient?

JUROR BROWN: Maybe because I was on Medicare and didn't pay like some of the others, I wasn't worth his time.

COUNSEL: How'd that make you feel?

JUROR BROWN: They're busy, and I understand that. Maybe they had an emergency or something. I don't know. I guess I felt like a second-class citizen.

COUNSEL: You indicated you've also had some great experiences with doctors. Given the number of doctors you've been treated by, what is your overall opinion of doctors generally?

⁶⁵ See, e.g., Sabrina Kuhlmann et al., *Impaired Memory Retrieval After Psychosocial Stress in Healthy Young Men*, 25 J. NEUROSCIENCE 2977 (2005) (explaining the method of study and subsequent results showing how psychosocial stress affects memory recall); see also Oliver T. Wolf, *Stress and Memory in Humans: Twelve Years of Progress?*, 1293 BRAIN RES. 142 (2009) (explaining that stress leads to an increase of cortisol, which has proved to have significant impacts on episodic long-term memory).

JUROR BROWN: Overall, I'd say pretty good. After all, I'm eighty-three and still alive.

COUNSEL: A lot of folks put doctors up on a pedestal because of their important work. How about you, Mr. Brown? Would you place more importance on a doctor's testimony than any other witness?

JUROR BROWN: I don't think so. After all, they put on their pants one leg at a time like the rest of us.

COUNSEL: Thanks for that response, Mr. Brown. [*Turning to Ms. Grisham, Juror no. 2*] Ms. Grisham, you heard Mr. Brown's responses. How do you feel about what he said, based on your own experiences with doctors?

Several aspects of these exchanges are noteworthy. First, the advocate never gave the prospective jurors the opportunity to offer a simple yes or no response, but rather encouraged—even urged—the jurors to talk and explain. Second, counsel used the exchange from the first juror to engage the second juror. In accordance with the following commandment, counsel initiated a group discussion that should encourage candid responses from the other prospective jurors.

F. Commandment Six: Initiate a Group Discussion

Many, if not most, people fear public speaking.⁶⁶ Consequently, many prospective jurors are reticent to speak in the unfamiliar and somewhat intimidating trial courtroom setting. If called upon, jurors often utter only short and typically uninformative responses.⁶⁷ Hence, the open-ended question strategy suggested in Section E offers sound advice to encourage more detailed responses.⁶⁸ Additionally, advocates may benefit by using a single juror's detailed responses to launch a group discussion. For instance, when asked about her prior experience with physicians, a juror revealed that her daughter had complications from surgery. The advocate can take that response and direct it to another juror and inquire, "How about you, Ms. Devos? Have you, your family, or your friends had a similar experience involving medical care?" Such a dynamic question may well elicit not just a response from her but could well ripple through the entire prospective jury. Note that the inquiry began with a single juror and then expanded to the group.

⁶⁶ See, e.g., C. Faravelli et al., *Epidemiology of Social Phobia: A Clinical Approach*, 15 EUR. PSYCHIATRY 17 (2000) (noting that over eighty percent of the population experiences communication anxieties in public speaking).

⁶⁷ See Perlman, *supra* note 6, at 56 ("The questioning of prospective jurors in open court and in the presence of their peers often serves to inhibit the juror's responses.").

⁶⁸ See *supra* Section II.E.

Some advocates mistakenly inquire of the whole group rather than directing their initial inquiry to an individual juror. Experience suggests that people are less likely to respond when asked questions as part of a group.⁶⁹ By contrast, if the initial question is posed to a specific juror, that juror is forced to respond.⁷⁰

G. Commandment Seven: Use Disclosure to Obtain Disclosure

One of the most daunting challenges attorneys face during voir dire is prompting prospective jurors to reveal difficult personal events or circumstances that could bear on the upcoming trial.⁷¹ Jurors are reluctant to respond to questions when the answer is socially unacceptable or exposes sensitive personal experiences.⁷² A juror's drunk driving conviction, a domestic abuse charge, or even a bankruptcy proceeding require difficult disclosures, yet these experiences could affect the juror's view of the forthcoming trial.

Although courts admonish jurors to supply truthful responses, few people will voluntarily disclose difficult facts about themselves—especially in a public setting such as a trial.⁷³ An advocate's challenge is to elicit a difficult fact from a reluctant juror without alienating that juror. Some studies, such as Dr. Brené Brown's, have concluded that if one discloses sensitive information about himself to another, there is a greater likelihood that the other person will reciprocate by sharing sensitive personal information about himself.⁷⁴ In the context of voir dire, Brown's study suggests that if the questioner (the advocate)

⁶⁹ See Marder, *supra* note 1, at 933 (“The prospective jurors are questioned as a group in open court; thus, it is easy for them to remain silent even if they hear a question that pertains to them.”).

⁷⁰ See *id.* at 936 (describing how one D.C. Superior Court judge “conduct[ed] an individual voir dire of each prospective juror after the general group voir dire” and found that the individual voir dire “yielded responses that the group voir dire had not” because the “[p]rospective jurors could no longer remain silent, as some had done in the group voir dire”).

⁷¹ See *id.* at 933 (citing Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials*, 78 CHI.-KENT L. REV. 1143, 1150 (2003)) (emphasizing the challenges inherent in the fact that the simple affirmations of “prospective jurors” of their ability to be fair and impartial should not be taken at face value).

⁷² See Marder, *supra* note 1, at 933.

⁷³ *Id.* Some judges allow a reluctant juror to disclose the information in chambers to avoid a public disclosure. However, many jurors will simply not disclose even with the promise of a nonpublic disclosure.

⁷⁴ BRENE BROWN, *DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD* 180 (2012).

appears vulnerable and shares sensitive information about himself, the person being questioned (the juror) will follow suit.

At the study's conclusion, Brown defined shame as "the intensely painful feeling or experience of believing that [one] is flawed and therefore unworthy of . . . belonging."⁷⁵ She discovered that everybody experiences shame and its detrimental effects on human connection.⁷⁶ She determined that one way people deal with shame is by "withdrawing, hiding, [or] silencing [themselves], and keeping secrets."⁷⁷ Some participants in Brown's study described that "[w]hen I feel ashamed, I check out mentally and emotionally. Even with my family."⁷⁸ Another said, "Shame makes you feel estranged from the world. I hide."⁷⁹ Brown also found that people disengage when they "feel like the people who are leading [them, such as politicians, employers, or attorneys in a trial] aren't living up to their end of the social contract."⁸⁰ Consequently, jurors will likely refrain from sharing sensitive information about themselves and keep secrets to avoid the discomforting experience of shame.

Brown determined there are several ways to combat shame's detrimental effects on human connection.⁸¹ One of the most effective ways a questioner can encourage disclosure is to first share a difficult personal experience about himself.⁸² A personal disclosure creates an environment in which a respondent feels more welcome to disclose sensitive information about herself without judgment or shame.⁸³

In Brown's study, one participant described the "'feelings first' ethic" she and her husband wanted to promote in their family.⁸⁴ When their son came home from high school basketball practice visibly upset, the father and mother stopped cooking dinner and followed him to his room.⁸⁵ The father found that when he shared specific stories about his

⁷⁵ *Id.* at 69 (emphasis omitted).

⁷⁶ *Id.* at 68. The only people who do not experience shame are those who "lack the capacity for empathy and human connection," also known as sociopaths. *Id.*

⁷⁷ *Id.* at 77.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 176.

⁸¹ *See generally id.* at 58–111.

⁸² *Id.* at 75.

⁸³ *Id.* at 176 (describing how "the disengagement divide"—the gap between a culture's practiced values and its aspirational values—is closed when leaders actually practice the values that they promote).

⁸⁴ *Id.* at 180.

⁸⁵ *Id.*

own difficult high school experiences, his son was much more candid with his parents about his current struggles in high school, which “really opened the relationship between them.”⁸⁶

How should this study instruct attorneys during voir dire? First, the attorney must disclose something personal and difficult about himself, which will increase the likelihood that the juror will disclose something personal and difficult about himself in response.⁸⁷ Second, if the juror begins sharing sensitive information about himself, the attorney must respond with empathy and understanding. The questioner’s sincere and empathetic response is not simply the right thing to do in the face of a difficult disclosure but may also encourage other jurors to disclose problematic information.

An example of disclosure begetting disclosure might arise when a prosecutor asks the jurors whether any family members or close friends have been arrested or convicted of a crime. Many people are unlikely to disclose such information—even when directly questioned during voir dire.⁸⁸ Yet from the prosecutor’s perspective, a juror or someone dear to him who has had such an encounter may harbor ill will toward the criminal justice system, which could affect the trial’s outcome. The prosecutor should begin such an effort as follows:

PROSECUTOR: When I was in law school, my younger brother, Jay, got mixed up with drugs and was arrested. He was understandably scared and asked for my help, but what could I do? I was not yet a lawyer, and I really had no ability to help him. He was eventually represented by an experienced public defender. I went to every hearing, and, along with my brother, I felt helpless and even felt some anger and resentment toward the whole criminal justice system. Things eventually worked out for Jay; he received probation and, from that point on, turned his life around. But, I have to confess, the experience of going through the process with Jay had a real impact on me, as someone who worried and fretted about a loved one. My perspective on this whole process changed. Now, here is what I need to know from you folks: Have any of you, your family members, or close friends been arrested, charged with a crime, or otherwise involved in the system? [*Receiving no response, counsel questions prospective juror Mr. Singleton.*]

⁸⁶ *Id.* (emphasis omitted).

⁸⁷ *See id.*

⁸⁸ *See* HAYDOCK & SONSTENG, *supra* note 8, at 239 (“People have difficulty publicly admitting their biases and prejudices, especially in a courtroom in front of strangers” and even if they believe they are giving truthful responses, they are often offering “half-truths.”).

PROSECUTOR: Mr. Singleton, have you ever had one of those experiences where a family member or friend was caught up in a difficult situation?

JUROR SINGLETON: My youngest son has had some problems with the law.

PROSECUTOR: I'm sorry to hear that. I take it he has been charged or convicted of something?

JUROR SINGLETON: Nothing real serious, but it weighed on me and my wife. But I can keep a clear head and not let that influence what's happening here.

PROSECUTOR: Mr. Singleton, thank you for being so straightforward. I know that that was not easy, but it is important for us to know. Are you concerned that you might harbor some ill will toward the criminal justice system or even the police because of that experience?

JUROR SINGLETON: I don't think so. My kid screwed up, and the experience straightened him out.

PROSECUTOR: Thank you, sir. How about any of the rest of you? Have any of you had an experience like Mr. Singleton's?

Mr. Singleton's response that he could remain impartial is quite typical for a juror. Jurors will likely answer that they can be impartial—not because they can be but because to answer otherwise would contradict socially accepted values of unbiased character, making them appear socially undesirable.⁸⁹

Advocates should question jurors as a group about sensitive topics rather than questioning them individually. Singling out one person and seeking sensitive information might appear accusatory to the juror being questioned. If, however, there is no response, the advocate should follow up with an individual juror. To be clear, addressing an inquiry *en masse* is generally a poor practice and, with the exception just noted, should be avoided.

H. Commandment Eight: Avoid Blue-Sky Questions

Asking a “blue-sky” question—a question without any apparent relevance or context—can be viewed as a lawyer trick or manipulation,

⁸⁹ Vidmar, *supra* note 71, at 1150 (“Some prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call ‘socially desirable’ responses.”).

which can prove harmful to the advocate's credibility.⁹⁰ Recognizing that lawyers as a group are not viewed favorably by the public,⁹¹ it is critical for advocates to not only disprove that they act manipulatively during voir dire but also to rectify that perception. For instance, if a prospective juror is asked early on in voir dire whether or not she reads the local newspapers, she will likely wonder, "What does that have to do with this trial and my fitness to serve in the jury?" Although the lawyer's inquiry might have a legitimate purpose—such as the lawyer probing whether that juror perchance read something about the events giving rise to the trial—that consideration may not be apparent to the juror. The juror, without any context or explanation for the question, is left to ponder the reason for that inquiry. Questions that appear to come out of the blue sky can puzzle the jurors and can build resentment toward the questioner. Questions that are not immediately understood as relevant should be contextualized so the jurors understand why those questions are being asked.

Consider the following question: "Has anyone here ever hired a contractor?" Without context or any reference point, this inquiry is a complete puzzle to the jurors. Their inclination is to speculate as to the reason for the question. As a result, a juror's answer may be guarded since he does not understand where the inquiry is going. Such a question could cause the jurors to view the questioner in a skeptical light, thus undermining the goodwill and trust the advocate has been working to establish. The proper way to make that inquiry is as follows:

THE ADVOCATE: This trial is about the Marrow family hiring a contractor to build their family home. The contractor did, in fact, build the home. But for reasons that will be set forth during the trial, he failed to use materials specified in the contract. Given the circumstances of this trial, it is important that we learn whether any of you has hired a contractor and what your experience with the contractor was like. Mrs. Smith, let's start with you. Have you had any experiences with a contractor?

⁹⁰ See Perlman, *supra* note 6, at 57 (suggesting that failing to create a "warm and comfortable atmosphere for the jury . . . is likely to put the individual jurors on the defensive.").

⁹¹ See Andrea Kupfer Schneider, *Perception, Reputation and Reality: An Empirical Study of Negotiation Skills*, 6 DISP. RESOL. MAG. 24, 28 (2000) (concluding at the end of her study that "the declining public perception of lawyers is mirrored in how lawyers view each other"). *But cf.* Hans & Sweigart, *supra* note 3, at 1299 (describing how many opinion surveys reveal that attorneys believe their public perception is far worse than studies show it actually is, which may cause lawyers during trial to behave negatively, according to how they think the public perceives them).

I. Commandment Nine: Prick Boils

Virtually every winnable case that goes to trial could be compromised or overwhelmed by problematic facts, such as a critical witness caught in a lie, forensic evidence with a chain of custody issue, or a defendant with a prior criminal conviction.⁹² The degree to which such negative facts, or “boils,” are confronted and mitigated may very well determine an attorney’s success or failure.⁹³ It is axiomatic that counsel, when confronted with a boil, cannot simply ignore the problem and pray that opposing counsel will not exploit it or that the jurors will view it as innocuous. There are two critical reasons why counsel must confront the problem before opposing counsel has the opportunity to raise it. First, by addressing the problematic boil before opposing counsel, the lawyer will gain significant credibility with the jury.⁹⁴ Second, in raising the problem before the opposition, counsel has the opportunity to address and frame the concern in a light most

⁹² PERRIN, CALDWELL & CHASE, *supra* note 7, at 135 (“Every litigated case has weaknesses.”).

⁹³ See STERN, *supra* note 16, at 171 (“It is vital that [the jurors] hear it first from you so that your credibility . . . is not undermined by the slightest suggestion that you attempted to conceal the unfavorable material.”); Waicukauski et al., *supra* note 17, at 32 (“[W]hen you disclose bad facts up front in the courtroom, you not only minimize the adverse effect of the bad facts, but you also make yourself appear more credible in the process.”).

⁹⁴ See Wendy Wood & Alice H. Eagly, *Stages in the Analysis of Persuasive Messages: The Role of Causal Attributions and Message Comprehension*, 40 J. PERSONALITY & SOC. PSYCHOL. 246, 257 (1981) (focusing on the expectancy of communication recipients, this study revealed that people tend to find those who disconfirmed their expectancies more credible). The preemptive disclosure of negative information is generally not expected by jury members, and by disconfirming their expectancies, the witness, and even defendants, gain credibility thereby increasing their odds of a favorable jury verdict. As Gerry Spence has recognized:

I always concede at the outset whatever is true even if it is detrimental to my argument. Be up-front with the facts that confront you. A concession coming from your mouth is not nearly as hurtful as an exposure coming from your opponent.

We can be forgiven for a wrongdoing we have committed. We cannot be forgiven for a wrongdoing we have committed and tried to cover up.

SPENCE, *supra* note 14, at 131; *see id.* at 48 (“To win, we must be believed. To be believed, we must be believable. To be believable, we must tell the truth, the truth about ourselves—the whole truth.”). Spence quotes Winston Churchill as saying, “What the people really want to hear is the truth—it is the exciting thing—to speak the truth.” *Id.*; *see, e.g.*, HILL, *supra* note 40, at 314 (describing Abraham Lincoln’s approach to case weaknesses: “If he discovered a weak point in his cause, he frankly admitted it, and thereby prepared the mind to accept . . . more readily his mode of avoiding it”); *see also* NIETZEL & DILLEHAY, *supra* note 15, at 142 (“One who is perceived as arguing against one’s own vested interests is more persuasive than one who is perceived to have vested interests consistent with the conclusions.”).

favorable to her client.⁹⁵ While the boil is still a boil, its harmfulness to the client is mitigated by confrontation.⁹⁶

Without question, enhancing counsel's credibility before the jury is the most significant benefit of pricking a boil.⁹⁷ A lawyer who is willing to admit a fact that hurts her case will be viewed in a favorable light. Conversely, a lawyer who fails to raise the boil will suffer a loss of credibility when the hurtful information is inevitably revealed. There is *nothing* more devastating at a trial than a lawyer the jurors cannot trust.⁹⁸

Boil pricking by defense counsel in criminal cases presents a particularly difficult challenge. For instance, in a defendant's burglary trial, the court has ruled that the defendant's five-year-old assault with a deadly weapon conviction is admissible. Defense counsel addressing the panel may prick the boil as follows:

DEFENSE COUNSEL: Ken Strong is a husband and father. His wife and two sons are here today to support him as he goes through this trial. He is a roofer who works long days to provide for his family. He is going to take the witness stand, not because he has to but because he wants to tell you the truth, the whole truth—not just about where he

⁹⁵ See MCELHANEY, *supra* note 39, at 350, 353 (referring to the tactic as stealing the opponent's thunder and noting that the event heard first is the event more likely to be accepted by the jury as true); Lara Dolnik et al., *Stealing Thunder as a Courtroom Tactic Revisited: Processes and Boundaries*, 27 L. & HUM. BEHAV. 267, 268 (2003); Mark V.A. Howard et al., *How Processing Resources Shape the Influence of Stealing Thunder on Mock-Juror Verdicts*, 13 PSYCHIATRY, PSYCHOL. & L. 60, 60–61 (2006); Kipling Williams et al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 L. & HUM. BEHAV. 597 (1993).

⁹⁶ See Don Rodney Vaughan, *Inoculation Theory*, in 1 ENCYCLOPEDIA COMMUNICATION THEORY 516, 516–17 (Stephen W. Littlejohn & Karen A. Foss eds., 2009); Harry Mitchell Caldwell & Deanne S. Elliot, *Hit the Ground Running: The Complete Opening Statement Supported by Empirical Research and Illustrations*, 24 J. TRIAL & APP. ADVOC. 171, 195 (2019) (“By raising the negative information first, the advocate is actually inoculating the jury to much of the negative fact's destructive force.”); Ayn E. Crowley & Wayne D. Hoyer, *An Integrative Framework for Understanding Two-Sided Persuasion*, 20 J. CONSUMER RES. 561, 562–74 (1994); William J. McGuire, *The Effectiveness of Supportive and Refutational Defenses in Immunizing and Restoring Beliefs Against Persuasion*, 24 SOCIOLOGY 184, 193–94 (1961).

⁹⁷ See Wendy Wood & Alice H. Eagly, *Stages in the Analysis of Persuasive Messages: The Role of Causal Attributions and Message Comprehension*, 40 J. PERSONALITY & SOC. PSYCHOL. 246, 257 (1981) (explaining how disclosure of self-damaging information is akin to disconfirming jury member expectancy, thus such disconfirmed expectancies give the witness greater credibility).

⁹⁸ See STERN, *supra* note 16, at 28 (“[T]he personal rectitude of the attorney in the courtroom, as perceived by the jurors, is the most important weapon of a trial lawyer. It is bigger than the facts and bigger than the law . . . the jurors will usually vote for the case of the lawyer they believe in.”).

was when some others broke into the warehouse but also about his past. You see, five years ago, he and a friend were drinking and got into an argument that led to a fight. Ken hit his friend with a bottle, which required medical attention. He was charged with assault with a deadly weapon, pled guilty, and paid the price. He and his friend made up, and they are still friends today. Now, some might view his conviction as evidence of bad character and hold that against him in this trial. So I have to ask you folks whether Ken Strong's past will cause you to prejudge him as a criminal or whether you will be able to put that incident aside and decide this case only on the facts of this case.

DEFENSE COUNSEL: How about you, Mrs. Lonergan? Will you be able to base your verdict only on the facts of this case?

JUROR LONERGAN: I think so. I'm not sure how the earlier problem matters here.

DEFENSE COUNSEL: So you don't feel you would be biased against Mr. Strong because of his earlier problem?

JUROR LONERGAN: That's right. I would base my decision on the facts of this case.

DEFENSE COUNSEL: Thank you, Mrs. Lonergan. How about you, Mr. Williams? Do you agree with Mrs. Lonergan? Would you decide this case only on the facts of this case?

Ascertaining whether the jurors will or will not consider a past incident is not the primary reason for raising the issue. The more significant benefits are elevating the credibility of both the client and his advocate by raising the issue seemingly on their own initiative, thereby mitigating the impact of the prior conviction by offering some explanation.

J. Commandment Ten: End with a Catchall Question

As advocates are concluding their voir dire, they should ask a global catchall question to allow the prospective jurors a final opportunity to offer any additional observations they might deem important. After sitting through voir dire, a juror may realize he or she failed to disclose some information that the inquiry called for. That omission could have occurred because the juror initially misunderstood a question and later, by listening to the voir dire of the other jurors, better understood the information being sought. That question should proceed as follows:

THE ADVOCATE: [*To the prospective jurors as a group.*] As I am wrapping up my questioning, I want to ask an additional question to each of you. Based on the questions you've already been asked, you can appreciate why this process is so important in achieving the fairest group of people to decide this case. Now I would ask each of

you to sit back and reflect on your responses and let me know if there is anything you need to add that would help us achieve the fairest jury possible.

This catchall question serves two goals. First, it may help to elicit any additional information relevant to the selection process. And second, it emphasizes the goal of achieving a fair jury. The jurors are therefore left with the impression that the advocate is rising above partisan concerns for the greater good of a fair and impartial jury.

CONCLUSION

Upon reading these ten commandments, some advocates will view them as idealistic but not particularly realistic. One concededly legitimate concern is that court-imposed time limitations or a trial judge's restrictive approach to voir dire might prevent advocates from accomplishing everything proposed in this Article. Yet, whatever limitations advocates must labor under, they should recognize that these commandments are as much about what not to do as they are about what to do. The Hippocratic Oath—*do no harm*⁹⁹—could well apply here. In the event that counsel cannot effectuate all the suggestions enumerated in this Article, counsel should at least not damage her client's case.¹⁰⁰ She should not alienate any of the jurors, distance herself behind barriers, limit jurors' responses, nor exclude or embarrass the jurors. Given sufficient leeway, advocates should strive to integrate the foregoing commandments into their voir dire to better develop a rapport and gain credibility with jurors and, moreover, to build a solid foundation on which to stand during the battles awaiting at trial.

⁹⁹ Hippocrates, *The Oath*, INTERNET CLASSICS ARCHIVE, <http://classics.mit.edu/Hippocrates/hippooath.html> [<https://perma.cc/T9LF-JVG9>] (last visited Feb. 20, 2020).

¹⁰⁰ From the Latin "*primum non nocere*," which is translated from Greek. Ironically, the phrase "first do no harm" is not part of the original Hippocratic Oath, but is derived from the ancient Greek physician Hippocrates' work *Of the Epidemics*. Robert H. Shmerling, *First, Do No Harm*, HARV. HEALTH BLOG (Oct. 13, 2015, 8:31 AM), <https://www.health.harvard.edu/blog/first-do-no-harm-201510138421> [<https://perma.cc/GVY3-FFQT>]. Despite the absence of this phrase from the Oath, however, medical students pledge to avoid harming their patients. Some debate exists over the necessity or reality of the phrase. "The idea that doctors should, as a starting point, not harm their patients is an appealing one. But doesn't that set the bar rather low? *Of course* no physician should set out to do something that will only be accompanied by predictable and preventable harm." *Id.*; see also JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 9:6 (3d ed. 2017) (noting that attorneys should "do no harm to the[ir] client's cause").

