

I.

Statutes regarding Jury Selection.

The applicable statutes are attached to these materials. While you should be familiar with these, they are not normally a vital part of jury selection.

II.

Court Rules

There are no Nebraska District Court Rules that deal directly with conducting voir dire. In the past, several districts had court rules which may still be used by individual judges. Those rules were:

a. Questions are to be asked collectively of the entire panel whenever possible.

1. Number of boilerplate questions that should be asked collectively:

Know: Parties - Case

Lawyers

Witnesses

Party to a lawsuit or claim for injury-

on a jury before
injured

b. The case may not be argued in any way while questioning the jurors.

1. You can if you do it right, i.e. if treatment not sought right away, ask:

Anyone here hurt themselves bad enough that you needed treatment?

Did you go right away? If not, why not?

c. Counsel may not engage in efforts to indoctrinate, visit with or establish “rapport” with jurors.

1. Your entire voir dire should be an attempt to establish rapport in the form of trust. More detail later but:

Tell them the bad stuff about your case

Under-promise, don't over-promise

Act like a person, not a lawyer

d. Jurors may not be questioned concerning anticipated instructions or theories of law.

Again, you can if you do it right

e. Jurors may not be asked questions for promises as to what kind of verdict they would return under any given circumstances.

In Federal Court, the court will determine whether the judge, the attorneys or both will conduct voir dire. Commonly, the judge will conduct part of the voir dire and allow each attorney 15 minutes for voir dire.

If your case has any unusual features, you can ask for longer

III.

Preparing for jury selection

1. The Nebraska Supreme Court has adopted a required Juror Qualification Form to be used by both County and District Courts (Rule 6-1002). The completed forms are available prior to the start of the jury term. You should obtain and review the information contained in the form. You can often obtain additional information about potential jurors by using Google, Justice, Facebook or other sources online.

2. Rule 6-1004 states:

Nothing in this rule shall prohibit the use of case-specific supplemental juror questionnaires to the extent that the supplemental questions do not duplicate any information requested in the Nebraska Juror Qualification Form.

Likewise, in Federal Court, Rule 47.1(b) states:

The trial judge may determine sua sponte or upon motion that a particular case's circumstances justify submitting additional questions to prospective jury pool members.

If your case is complicated, or has sensitive issues, prepare and submit supplemental questionnaires to the trial judge.

I haven't done this, but I don't think a judge would refuse if the questions are not improper. Usually the judge will do anything that will save time at trial.

3. If you are going to a small town or county to try a case, be aware that local counsel will likely know everything important about the potential jurors. Contact a local attorney or person who deals with the public there to get information about them.

4. Focus Groups or mock juries can prepare you for problem areas or significant issues. You can do them yourself or hire consultants. They will help identify attitudes and attributes that are specifically important to your case.

These may not be as expensive as you fear.

Caution - only useful if the facts are evenly presented.

Can have different attorneys present each side or do it carefully

yourself.

Test - Does group know who you represent after you are done?

Present outline of case - ask "What else do you want to know" or "What is significant to you?"

Have them talk and then individually complete a mock verdict form

a. Good way to explore possible cultural or ethnic differences.

Also good if you have one specific issue that may control the outcome - i.e. alcohol use by plaintiff

b. May demonstrate that what lawyers think is important is not necessarily what jurors think is important.

May also demonstrate that they consider and believe things that are not presented and may be inaccurate.

c. Will help you gauge the weight jurors may place on various facts in your case and alert you to potential problems with your case.

d. May give some help in anticipating range of verdict. - Use caution

5. Can use a jury consultant to help with voir dire - useful for followup questions.

IV.

Voir Dire - My thoughts

There are many books on the subject of juries and many different theories. I recommend David Ball on Damages, (2nd ed.). Much of the following is based upon his work, plus what I have read, heard and seen.

Goals

There are normally three goals of voir dire.

1. Most important, learn about beliefs and bias that influence how they decide your case;
2. Educate; and
3. Build trust and rapport.

Sometimes you are doing several of these at the same time. To be successful, it is important that jurors trust you. Jurors anticipate that you are there to try to “sell” them something. The more you talk during voir dire, the more it confirms their suspicions. The more you can get jurors to talk, the more you will learn about them and the less you will seem to be selling.

Rules

1. Cannot judge jurors based upon age, gender, status, religion, ethnicity or politics. Attitudes change within these categories.

2. Must ask directly what you want to know and use open ended questions. As part of this you must listen. You must say “Tell me more about that”. You must not judge. You want jurors to talk.

3. Must make all members participate;

4. Talk about “preponderance of the evidence” as a standard, not only for liability, but for damages. Many times with soft tissue injuries, damages will be more important than liability. Visual aids can be useful. See attached examples.

“You will be instructed on the burden of proof - which is the greater weight of the evidence

That means are we more likely right than wrong. (Hands) We expect to do much more than that (hands) But all we have to do is tip the scales just a little. Is it more likely than not that the

defendant is negligent. Is it more likely than not that the right verdict amount is the amount that we are asking for.

That is all we have to do. Some people think that is not enough because it makes it too hard for the defense. Maybe even a little unfair. Other folks think that more likely than not is okay.

Are you comfortable arriving at a verdict when you are 90% sure?

75% sure?

51% sure?

Tell me about that?"

5. Don't worry that one of them will "taint" the others, attitudes aren't that easy to change. You don't want something damaging to surface for the first time in deliberations. Sometimes jurors will make your points for you if you let them talk. For example, ask "Is there anyone here who is in pain as they sit here?" If someone raises their hand, you can ask other jurors if they could tell that person was in pain, showing that pain is not always apparent. Another question might be "Can you think of anything you know exists, but you can't see?" This gives jurors an opportunity to speak of their own experiences with pain that doesn't show up on x-rays, etc.

What about the "McDonald's" case? There are several ways

to respond:

- a. Educate, i.e., damages were reduced, etc., probably not very effective;
- b. Acknowledge there are frivolous lawsuits and it is a problem. It is a problem for your client because it delays his case and negatively affects jurors for legitimate cases;
- c. Ask why we hear about this case but not about people whose spouses, children or parents are killed by negligence and who lose or get small awards.

6 Sometimes jurors don't believe that testimony alone "proves" facts sufficiently, because of the so-called "CSI" effect. This may be worth covering in voir dire.

7. If you want a panelist dismissed for cause, make sure the judge can't rehabilitate them. People have a hard time telling a judge they won't follow his/her instructions. Ask enough questions to establish that they will be impaired even if the judge tells them to follow the law.

8. Voir dire is easier if you have someone to take notes so you can just interact with the jury.

9. If you don't like a panelist, he/she probably doesn't like you and will not be a good juror for you.

10. Be wary of "super-jurors", experts, attorneys, CEOs, etc. I have served upon two juries and was accorded a great deal of deference. Unless you are very confident that this person will be favorable, think about whether you want one person to have that much influence.

11. You should introduce the "warts" of your case to the jury in voir dire, don't give your opponent the opportunity to do it.

12. Ask whether serving on a jury will be a hardship on anyone and if so, why.

13. At the end of your voir dire, ask general "mop-up" questions, such as:

a. Is there anything about you that might help you, even a little, in being a juror in this kind of case?

b. Is there anything about you that you think would make it even just a little bit harder to be a juror in this case?

c. Is there anything else that you would want to know about you if you were standing up here trying to decide who

should be on the jury?

Because of my moral, philosophical or religious beliefs, I would not bring a lawsuit, even if I believed I had a valid claim.

1. Strongly Agree
2. Agree
3. Uncertain
4. Disagree
5. Strongly Disagree

The law states that if the Plaintiff shows that her case is more likely true than not, then you must return a verdict for the Plaintiff. How do you feel about this law?

1. Strongly Agree
2. Agree
3. Uncertain
4. Disagree
5. Strongly Disagree

Because money will not take away the pain, I would not include money for pain and suffering as a part of my verdict.

1. Strongly Agree
2. Agree
3. Uncertain
4. Disagree
5. Strongly Disagree

Because of my moral, philosophical or religious beliefs, I would not award money for the wrongful death of a person.

1. Strongly Agree
2. Agree
3. Uncertain
4. Disagree
5. Strongly Disagree