

ALI-CLE
EMINENT DOMAIN AND LAND VALUE LITIGATION
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VOIR DIRE: HUNTING FOR BIASES
THE CONDEMNOR AND THE CONDEMNEE PERSPECTIVES

Janet Bush Handy
Assistant Attorney General
Deputy Counsel,
Maryland State Highway Administration
707 N. Calvert Street
Baltimore, MD 21202
410-545-0060
jhandy@sha.state.md.us

Christian F. Torgrimson
Managing Partner
Pursley Friese Torgrimson, LLP
1230 Peachtree Street, NE, Suite 1200
Atlanta, Georgia 30309
404-876-4880
ctorgrimson@pftlegal.com

The trial of a condemnation case can start and finish with jury selection. Even the most seasoned litigator can watch helpless as the best case with all the right facts, evidence and witnesses goes down in flames in the hands of a biased jury or even a single juror. It truly is the one element of the trial over which no party and no attorney has full control or full preparation. To quote Forest Gump, the jury pool is "like a box of chocolates, you never know what you are going to get." Strategic voir dire is the key to discovering bias in a juror that can make or break your case.

The specific procedures and format for jury selection vary from state to state and even from courtroom to courtroom. It may be difficult to know a particular judge's preference for even the order in which the individual pool members will sit in the rows until you are in her courtroom for the first time. Once the jury pool is settled, however, there are three general parts to jury selection that assist in whittling the number down to twelve: (1) general and specific questions; (2) challenges; and (3) striking or selecting the jurors. The questions asked by the attorneys during voir dire are the only way to draw out any opinions, feelings or biases that may hurt or help your case. These opinions, feelings or biases may form the basis for a challenge for cause in which a juror holds specific knowledge or has a connection to the case, the parties or the issues that may warrant a challenge for cause.

It is important to start with the understanding that selecting the final lineup of twelve people is not the sole or final objective to questioning a pool. This process also gives a litigator the opportunity to build rapport with the jurors and grab their attention early, and educate the jurors about the issues in the case and set the story to be played

out over the course of the trial. On one hand, voir dire can be uncomfortable because it requires individuals to reveal what they think, feel or believe on certain topics. On the other hand, voir dire in a condemnation case is safer and less intrusive than a criminal or negligence case.

In preparing for voir dire, keep these simple rules in mind:

- (1) Write a general list of questions, but be ready to ditch it, depending on what the judge and opposing counsel ask the pool and how individual jurors respond;
- (2) Try to not to repeat questions already fully covered;
- (3) Admit to being human – if you miss an answer or an important detail, apologize and ask the question in a different format;
- (4) Be friendly, courteous and personable, and always, always, always treat each juror as an individual deserving of your respect;
- (5) Don't act or speak like a lawyer in a moot court competition; save the legalese for court briefs or oral argument;
- (6) Listen, listen, listen - let the jurors speak freely, don't interrupt if at all possible; the more detail about a specific question or issue the better;
- (7) Bring a colleague to observe the jurors and write down details during the Q&A – some jurors speak slowly, others quickly and even more quietly; it helps to have a second pair of eyes and ears;
- (8) Don't ignore nonverbal cues, i.e. rolling eyes, shaking heads, sleepy eyes or bored faces;

- (9) Be direct with questions about hot button or difficult issues, i.e. the bottom falling out of the real estate market;

Legal Standards Impacting Voir Dire

Eminent domain cases throughout the country share the basic need to fulfill the constitutional requirement that private property not be taken for public use without payment of just compensation to property owners. U.S.C.A. Const.Amend. 5. To achieve that goal each state and territory has established its own set of rules in statutes and case law. The procedures ruling voir dire will vary by state and even by jurisdictions within the state. The first question to be answered when beginning to prepare proposed voir dire is to identify both those procedures and the fundamental purpose of voir dire in the specific jurisdiction.

Maryland has one of the most limited approaches to voir dire, "In Maryland, of course, voir dire is directed solely to discovering a basis for challenging jurors for cause and not to assist counsel in the exercise of peremptory challenges." *Williams v. Mayor and City Council of Baltimore*, 632 A.2d 505, 98 Md.App. 209, 216 (1993). Even an amicus brief filed by the Maryland Trial Lawyers Association was not sufficient to convince the Court of Appeals to join the majority of states with a broader view of voir dire. The Court of Appeals restated the rule to be that "*voir dire* questions, however, should be framed so as to identify potential jurors with biases which are cause for disqualification, rather than merely identifying potential jurors with attitudes or associations which might facilitate the exercise of peremptory challenges." *Landon v. Zorn*, 389 Md. 206, 224 (2005).

A Texas court's description of voir dire reflects the more common approach "Thus, the primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath. In addition, this Court recognizes that trial courts should allow "broad latitude" to counsel to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised. A peremptory challenge, commonly referred to as a 'strike,' is defined by rule 232 as one 'made to a juror without assigning any reason therefor. Peremptory challenges allow parties to reject jurors they perceive to be unsympathetic to their position." *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749-750 (2006). (citations omitted) This position is in line with the American Bar Association, *Principles for Juries and Jury Trials*, American Jury Project, 2005, which states "3.Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges." (A portion of this report follows.)

Regardless of the specific legal constraints for voir dire, a diligent advocate will attempt to convince the judge to allow an inquiry which will reveal the biases that may negatively impact the case. An examination of the case law reveals that few civil cases are overturned on appeal because of the failure of a judge to allow a specific inquiry in voir dire or because the judge permitted an inquiry to be made to the venire. The attorney should be prepared to convince the trial court of the reasons that a particular inquiry is necessary.

Trial Consultants and Voir Dire

For cases in which the magnitude of the outcome justifies the expense, a litigator should consider whether the assistance of a trial consultant is warranted. A good consultant would be valuable both to identify the particular inquiry which will expose potential juror bias, but will also assist with the articulation of the reasons that identifying that bias should be important to a court attempting to seat a fair and impartial jury. The American Society of Trial Consultants is a resource to identify potential consultants. If the case does not justify the expense, the organization also publishes "The Jury Expert, The Art and Science of Litigation Advocacy" online at <http://www.thejuryexpert.com>. This publication includes articles which will focus the litigator's attention on ever changing influences on jurors' potential bias.

Example Condemnee Questions:

- Name and age.
- City of residence.
- Marital status.
- Number and age of any children.
- Extent of formal education.
- Any legal training or experience.
- Any real estate appraisal training or experience.
- Any business valuation training or experience.
- Any real estate brokerage/sale training or experience
- Any mortgage or financial training or experience.
- Any accounting training or experience.
- Any engineering training or experience.
- Any experience in real estate development.
- Employment: (1) Present occupation; (2) previous employment
 - including name of employer(s), nature of work and title of position(s), and length of time with each employer.
- Present occupation and previous employment of spouse.
- Any experience or employment with a local, county, state or federal government agency
 - As volunteer or intern
 - Paid position
- Major outside interests and hobbies.
- Military service.
- Prior jury service.
 - Service as foreperson.

- Prior involvement as a party in any civil lawsuit.
- Prior involvement of relatives or close friends in any civil lawsuits.
- Prior experience as a witness (in court or deposition).
- Experience with property being acquired by eminent domain/condemnation (personal, work, relatives or close friends).
- Experience with real property tax appeals.
- Experience with zoning or permitting real property.
- Opinions about eminent domain/condemnation.
- Relationship or experience with the parties in this case (personal, spouse, relatives or close friends).
- Relationship or experience with the witnesses in this case (personal, spouse, relatives or close friends).
- Relationship or experience with the lawyers and/or their firms (personal, spouse, relatives or close friends).
- Relationship or experience with the parties (by name) or any spouse, relatives, or close friends of individual parties.
- Knowledge of subject property.
- Customer or other relationship with subject property (i.e. c-store/gas station, shopping center, etc).
- Prior or current ownership of property (personal or spouse).
- Prior or current ownership of a business (personal, spouse, relatives or close friends).
- Prior or current ownership of a c-store/gas station (personal, spouse, relatives or close friends).
- Prior or current employment with c-store/gas station (personal, spouse, relatives or close friends).
- Opinions about property related industry (i.e. c-store/gas station).

- Prior or current employment/ownership/relationship with property related industry (personal, spouse, relatives or close friends).
- Opinions about property related industry.
- Opinions about the current economy.

Example CONDEMNOR-Case Specific Questions

In Maryland, the attorneys are provided with a list that includes each juror's name, address, limited to city or town and zip code, age, sex, education, occupation and spouse's occupation. In addition to these case specific questions, the list should be examined for any unusual responses that warrant further discussion. Written questions are then presented to the judge who has discretion as to the specific questions.

Voir dire is then presented as yes or no question asked in front of the entire jury pool. If the answer is yes, the judge will ask the juror to explain the answer, (usually out of the hearing of the jury pool). The attorneys are also allowed to request additional follow up questions. Finally the judge will ask whether the juror will be able to render a fair and impartial verdict in light of the answers to these questions. It is a very rare potential juror who will admit that their bias will make it impossible to be fair. The attorney will need to articulate why that bias should be considered grounds for a challenge for cause.

1. To the best of your knowledge, do you know or are you related in any way to any of the witnesses who may testify in this case for the Plaintiff, ***, the Agency.

2. To the best of your knowledge, are you associated or related in any way with or do you know the following employees/consultants listed as possible witnesses on behalf of the Defendant, *** Property Owner.

- If the Property Owner is a corporation or LLC, list the representatives who are expected to testify

- If the Property Owner is a business entity with customers, ask – have you ever been a customer of the Property Owner

3. To the best of your knowledge, do you know or are you related in any way to the attorneys for the or to the attorneys for the Property Owner?

4. Have you ever worked or taught in the following fields:

- real estate sales or brokerage,
- real estate appraising,
- real estate development,
- mortgage origination or servicing
- land planning,
- engineering,
- accounting,
- finance
 - Has any member of your immediate family ...

5. Have you ever had land taken for public purposes by the exercise of the power of eminent domain or as a consequence of the threat of use of the power of eminent domain?

- Has any member of your immediate family...
- Have your close friends...

6. Have you obtained an appraisal of real property within the last five years?

7. Have you owned real property which has fluctuated in value?

8. Have you owned any real property in which the value has decreased so that the amount of the mortgage is greater than the value of the property?

9. Have you had any direct business with the Agency?

- Has any member of your immediate family...

- Have your close friends...
10. Have you been a party or a witness in any litigation against the Agency?
- Has any member of your immediate family...
 - Have your close friends...
11. Have you formed an opinion as to the manner in which the Agency deals with members of the public?
12. This case will involve the jury's determination of the just compensation for the land to be acquired by the Agency for the purpose of the Project (define). Do you have any opinions concerning the power of the government to take private property for public purposes through the exercise of eminent domain?
13. Have you formed an opinion on the need for, design of or location of the Project?
14. Is there any reason why you could not serve on this jury if the trial were to last 4 days?
15. Do you have any concerns about your ability to serve on this jury and to render a verdict that will be fair to both the Agency and the Property Owner?

**AMERICAN BAR ASSOCIATION Principles for Juries and Jury Trials,
American Jury Project 2005**
<http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf>

**PRINCIPLE 11 – COURTS SHOULD ENSURE THAT THE PROCESS USED TO
EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR
AND IMPARTIAL JURY**

A. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.

1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.

3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

B. The voir dire process should be held on the record and appropriate demographic data collected.

1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualification to serve in the case.

2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit each separately represented party to participate meaningfully in

questioning prospective jurors, subject to reasonable time limits and avoidance of repetition.

3. Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.

4. Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.

5. It is the responsibility of the court to prevent abuse of the juror selection examination process.

C. Challenges for cause should be available at the request of a party or at the court's own initiative.

1. Each jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.

2. At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.

3. In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

D. Peremptory challenges should be available to each of the parties.

1. In the courts of each state, the number of and procedure for exercising peremptory challenges should be uniform.

2. The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable

assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.

3. The court should have the authority to allow additional peremptory challenges when justified.

4. Following completion of the examination of jurors, the parties should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.

E. Fair procedures should be utilized in the exercise of challenges.

1. All challenges, whether for cause or peremptory, should be exercised so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge.

2. After completion of the examination of jurors and the hearing and determination of all challenges for cause, the parties should be permitted to exercise their peremptory challenges as set forth in D. 4. above. A party should be permitted to exercise a peremptory challenge against a member of the panel who has been passed for cause.

3. The court should not require a party to exercise any challenges until the attorney for that party has had sufficient time to consult with the client, and in cases with multiple parties on a side, with co-parties, regarding the exercise of challenges.

4. No juror should be sworn to try the case until all challenges have been exercised or waived, at which point all jurors should be sworn as a group.

F. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.

1. It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.

2. A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally

cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that the party challenged the juror because of the juror's membership in that group.

3. When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.

4. The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.

5. When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above.

G. The court may empanel a sufficient number of jurors to allow for one or more alternates whenever, in the court's discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

1. Alternate jurors shall be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as regular jurors.

2. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation.

3. In civil cases where there are 12 or fewer jurors, all jurors, including alternates, should deliberate and vote, but in no case should more than 12 jurors deliberate and vote.