

# THE DAILY RECORD

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## 'Voir Dire' Opening Statements Presented To Potential Jurors

BY JUDGE CHERYL E. CHAMBERS

As a Kings County Supreme Court judge assigned to the Criminal Term, I preside over complex criminal trials, including many drug and gang-related homicides. These cases frequently present difficult issues that prosecutors and defense attorneys wish to explore with prospective jurors during *voir dire* so they can intelligently exercise their right to challenge prospective jurors.

Such issues can include, for example, accomplices who testify in return for plea bargains, witnesses who are gang members with criminal records and DNA evidence. Jurors' experiences with and views about such issues, and many others, can effect their ability to listen to the evidence with an open mind and apply the law as instructed. It is essential that the parties uncover jurors' beliefs concerning critical issues in order to determine whether jurors have misconceptions or are biased.

*Voir dire* openings offer a direct approach to raising these issues with potential jurors effectively and expeditiously, and without prejudice to either side.

As a member of the Jury Trial Project Committee on *Voir Dire*, I permitted attorneys to make *voir dire* openings in several cases and plan to continue to do so. With counsel's consent and, after giving appropriate instructions, each lawyer gives a brief opening statement, approximately three to five minutes in duration, to the entire panel at the beginning of *voir dire*. Each side presents facts, and important issues, from their own perspective. My experience with this jury innovation has been entirely positive.

### Benefits Of 'Voir Dire' Openings

Most prospective jurors take their roles very seriously. The *voir dire* openings appear to encourage prospective jurors to participate in *voir dire* with more interest and focus. The attorneys are relieved of the need to use their questions to present controversial case issues. Thus they are able to ask questions that are more direct and probing.

Having heard the *voir dire* openings, the prospective jurors better understand the lawyers' questions and why certain issues are being discussed. This leads to more candid answers. Thus, the *voir dire* openings make the *voir dire* process itself more efficient while at the same time making it easier to elicit from prospective jurors any bias or concerns they may have.

Traditionally, judges have allowed litigants to raise these matters during *voir dire* by asking the prospective jurors hypothetical questions that incorporate pertinent facts or statements of law. Without context, however, jurors often have difficulty responding meaningfully to the lawyers' questions.

Finally, *voir dire* openings conserve the time of the jurors, the court and the parties. The *voir dire* process becomes more efficient at winnowing the fair and impartial from those who have some bias or prejudice.

Moreover, despite concerns that attorneys might take unfair advantage of the opportunity to make *voir dire* opening statements, I and my colleagues who used the procedure found that attorneys



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were focused, reasonable and brief in their statements.

The Jury Trial Project collected data from 22 trials in which *voir dire* openings were used. The findings were clear. Four out of five attorneys in criminal trials where *voir dire* openings were used, said they improved juror candor, increased jurors' willingness to serve and improved jurors' understanding of why they were being questioned.

Moreover, jurors who heard *voir dire* openings were much more likely than those who heard routine introductions to report that the case description they heard at the outset of the trial was helpful to them in understanding what the trial would be about.

As a result of my experience and the experience of Jury Trial Project colleagues who also used *voir dire* openings with great success, I highly recommend that my colleagues and trial counsel continue to experiment

with *voir dire* openings. I include here the Jury Trial Project recommendations for the procedure to be followed, and a sample judge's instruction.

### Suggested Procedure

1. Each counsel shall be given a brief period of time (about five minutes) to summarize the case from their side's point of view. The time allotted for the *voir dire* openings should be added to the usual time allotted for *voir dire*.
2. Counsel should be given notice as early as possible of the court's intent to use the *voir dire* openings procedure. When counsel is informed of the procedure, reasonable time should be given to allow them to collect their thoughts and prepare.
3. Counsel can be invited to give *voir dire* openings to the entire panel.
4. The procedure should be used only with consent of counsel for both sides and with both sides' participation.

### Special Considerations

#### For Criminal Matters

- 1) *Rosario* material should be provided to the defense before counsel is asked to deliver a *voir dire* opening.
- 2) A defender's decision to make a *voir dire* opening does not preclude exercising the defendant's right not to make an opening statement at the start of the trial.
- 3) The People's *voir dire* opening should be first, and there should be no rebuttal.

### Sample Instruction

Members of the jury, before we begin asking you questions about your qualifications to serve as jurors in this case, each attorney will give a brief statement about the case. What the attorneys say to you by way of their opening remarks is not evidence. These statements are offered to you now as a kind of "preview" of the case.

The purpose in doing so is to make it easier for us to explore with you anything that might impact on your ability to serve fairly and impartially as a juror in this case.

Judge Cheryl E. Chambers is a New York State Supreme Court, Kings County judge and is a member of the Jury Project Committee on *Voir Dire*.