Voir Dire and Openings—Younger Jurors

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Voir Dire and Openings—Younger Jurors

I. Prefatory Comments

The asbestos cases are special and unique cases for multiple reasons that affect the potential understanding of any and all potential jurors. As the years have passed, the politics, technology, and education of all Americans has changed. Consequently, the window through which the cases and actions of pioneers is viewed differently. This paper will try to present aspects of the trial of an asbestos case which are seen through the modern window by jurors who were born in the late 1970's and after 1980 are considered.

Many of the older asbestos attorneys have dealt with asbestos cases for a substantial period of time and have attended multiple seminars. All of us have taken depositions in preparation for trial and in defense of the specific kind of product that our client or clients manufactured. Thus, in theory, all of us know the “low dose defense,” the “chrysotile defense,” the “alternative exposure defense,” “the cigarette defense,” and a myriad of other, mostly static and unchanged, defenses. These are all trial themes and have been the subject to multiple jury selections, openings, and closings. Those topics will not be directly addressed. This paper proposes to discuss, or offer substance, on three things: (a) potential voir dire questions; (b), current juror factors which should influence openings; and (c), factors which address how themes should be prepared and presented.

II. Voir Dire

Every voir dire will be different even though each may contain some common themes. Each lawyer and each trial is governed by the specific state law in each of the 50 states plus the federal system. In addition to the different laws, the reality of our Court system is that no two Judges treat Voir Dire the same, and almost no court within a specific state or the federal system treats voir dire the same. Each Judge has the discretion to administrate the extent of the voir dire, the subject matters of the voir dire, the use of demonstrative PowerPoints and exhibits, and all other voir dire issues. Some courts allow extensive voir dire while others either limit voir dire or ask the questions themselves. Consequently, the first and most important rule in preparing a voir dire is to research the court system and Judge to form an impression of what will be allowed without specific motions.

There are four basic segments of any voir dire: (1) the opportunity to establish rapport and a bond with the prospective jurors; (2) investigating, to the extent possible, pre-determined views and demographic parameters of the prospective jurors; and, (3) a preview of the issues in the case.

A. The Opportunity to Establish Rapport and a Bond with the Prospective Jurors

The Voir dire is the first of three occasions when I get to speak personally with the jurors (in jurisdictions which allow personal voir dire). It is my first opportunity as lead counsel to be personal with the jurors, to be allowed to ask direct questions, and to begin to assert my professional Role with the potential jury. My view, admittedly different from that of most trial lawyers, is that the personal establishment of me in the courtroom is equally as important as determining pre-determined adverse views of the prospective jurors. Yes, I am an attorney, but, in the courtroom, I see myself as the storyteller, the actor, the presenter, and the person they will interact with during the case. I strive to be the person whom they will want to believe in the end. I want to use the voir dire to develop as much of a personal relation with each juror as possible. This is the first moment. The prospective jurors are, for the most part, paying attention (most do not want to be there). This is, in its own way, a first date. I step forward to begin. The jurors are focused on me just as they
were focused on the plaintiff lawyer who preceded me. The jurors want to hear from me. They want to know what I am going to say. They want to know why I am there. They have their own individual personal expectations based on their personal history and what they have seen on television. It is my chance to impress them. It is my chance to convert them. It is my chance to explain my case and show them that I am not a threat to them. It is my chance to be courteous and treat them with respect outside of the facts of the case. It is my chance to introduce issues to them in my way because the only thing they know before I appear is what the Judge and the plaintiff lawyer has said. That philosophy sounds too egotistical for some, but, in my analysis, if the lead lawyer does not achieve a credible relationship with the jurors, the lawyer will not succeed.

B. The Investigation of Pre-Determined Views of the Case That Will Affect the Outcome

All of the voir dire questions in this area should be designed to determine which of the jurors have the most dangerous defense adverse beliefs that will affect the decision regarding your client's actions. We attempt through our questions to identify and then potentially eliminate each prospective juror whom you believe are so against your client's position that they cannot be influenced. We want the questions and responses to determine which prospective jurors have beliefs which cannot be changed or influenced, either by you, or by the collective wisdom of the proposed jurors. We design question to the prospective jurors about backgrounds, general opinions, and related matters in an attempt to determine whether the prospective juror is liberal or conservative. Our question design has always been an attempt, where possible, to get the juror to verbalize as much as possible. I was informed by a jury consultant in a 1985 Robins Dalkon Shield case in Austin, Texas, that if I could get each juror to say over 250 words that consultant could predict the outcome. I was told that the consultant could tell by the words that the juror chose to use which way that juror would lean. I followed that advice and determined that i/we learned a lot more from the juror's expanded answer and word choices than we ever did from a YES or a NO. As a result, we include as many open-ended questions as possible particularly in the spontaneous follow-ups.

Our history of experience shows that the issue of pre-determined opinions is more important in asbestos cases than in many other serious product cases. The 2018 reality of the asbestos litigation world is that many of the potential jurors have already developed opinions about many of the asbestos issues in our cases. Multiple plaintiff firms have spent over 100 million dollars in the last 7 - 10 years on television ads and other media specifically targeting mesothelioma, and, to a lesser degree, lung cancer. The television and other media ads are principally directed toward creating new cases for the Firm or Firms that have sponsored the ads. However a second, and arguably more important and strategic purpose, is to poison the minds of the millions of potential jurors that will see the segments. It is a direct attempt to prejudice the TV ad recipient against asbestos through the extreme content of the ads. The media ads deliver central themes to the viewing public. These media are professionally done by professional actors, and, they are designed in part by psychologists. The repetitive and deadly themes, whether “Asbestos is Bad,” “Asbestos Kills,” or “No Asbestos is Safe,” all have the effect of creating an incredibly negative view of asbestos in the mind of the viewer. Those cumulative and incredibly negative views are carried with them into the courthouse.

Plaintiff law firms understand the psychological principle of “anchoring” and have used it effectively for years in their media coverage. The principle of anchoring is a term used to describe the tendency of individuals to rely too heavily on one piece of information in making decisions. The usual point of the “anchor” is the first time or place a person receives and digests a piece of information. One of the first historical attempts to use this form of persuasion was in the Oxycodeone when millions were spent on advertising in target states about a year before the first suit was filed. Multiple potential jurors had been watching TV articles and press
releases about Oxycodone before the first suit was filed. The result was a series of instances where potential jurors had reached opinions against Oxycodone which forced settlement of multiple millions. The success in Oxycodone litigation spurred the use of “anchoring” in the asbestos litigation. Most prospective jurors, historically, never or rarely heard of asbestos in the normal every-day living of their life. They had no pre-determined opinions. The original advertising firms, using paper advertising and the internet, researched their results and saw the acceptance of their ideas. They rapidly expanded to television. The response to the advent of televised asbestos advertising on mesothelioma and lung cancer, and the incredible amount of money spent, has had the effect of not only being the first piece of asbestos information most prospective jurors receive but since it is (a) repetitive and (b) on television, the impact as an anchor is greater. For that, and other reasons, many, if not most, prospective jurors who walk into court have definite opinions about asbestos. The asbestos lawyer is never going to change the opinions of such a juror, so they have to be actively explored.

In addition to seeking information about asbestos, the research for the voir dire has to consider demographic information. Determine whether there are specific and unusual aspects of the demographics of the jurisdiction that are unfamiliar to you. Demographic information is not the “be all” but it is helpful. As an example, I had a Miami case in the late 80’s for which I significantly studied the Cuban culture only to find in my case that there were no prospective jurors of Cuban descent. There will be a wide diversity of potential jurors in every jurisdiction, and significant diversity in some jurisdictions like Oakland and Manhattan. There will be exceptions but most jurors do not want to serve, are intimidated by the process, and, if chosen, will begin the trial in an uncomfortable position. There will be jurisdictions exceptions, like Seattle, but most jurors who are selected will be marginally educated. Thus, the aim of the Voir dire is not to select jurors but to eliminate, if possible under Court rules, those least likely to support the defense position. Consequently, determining who opinions are damaging and how those opinions will relate to or contrast with the other members of the panel who are chosen is very important. Investigate and know the demographics of the jurisdiction where the case will be tried.

I value and use jury consultants. I believe in them. They have been very helpful in multiple aspects of my work. One reason I use jury consultants is so that I can consciously watch and listen to my prospective jurors as they answer my questions. I do not have to write much of anything as I stroll around the courtroom. Writing notes during voir dire requires you to take your eyes off the jurors. It requires you to be in one place. By leaving all of the note taking to my jury consultant and/or assistants, I am free to totally watch jurors as they respond. While my jury consultants smilingly chide me on my passion for watching prospective jurors for unsolicited movements, nods, voice tone, and body language, I am of the opinion that I can sometimes learn critical information by juror body movements. I move away from the podium. Why? I realize that people have short attention spans. I find that when I move, most of the juror’s eyes follow me. I have their attention.

C. Previewing the Issues in the Case

Voir dire presents the specific opportunity to investigate specific important issues in the case as a part of obtaining as much information as possible from each prospective juror. It is the opportunity to introduce the theories and/or facts of your case which will initiate or inculcate jurors to believe your points in the case. The response of the jurors to your questions also enables you to understand how you can better present your theories and/or how to alter your personal appearance and presentation to confront the particular potential jurors on your selection panel. Voir dire is your chance to vet the significant and important defense issues where you totally control the questions. There are multiple areas of interest regarding asbestos, warnings, fiber toxicity, etc. Those are normal and usual and on the radar for virtually every defense attorney. I think that it is particularly important to focus on (a) younger jurors, (b) older jurors, and (c) people with a corporate back-
I focus on these three because I see Voir Dire as a possible way, through the jurors themselves, to get important information before the jury. The voir dire, unless the lawyer has been able to handle some of the questions “in camera,” is open. Every word spoken by a prospective is heard and potentially evaluated by every other juror. Thus, to the extent that I can obtain favorable responses of specific issues from prospective jurors, the rest of the jurors hear and can evaluate what they hear almost as if that person was a witness at the trial.

I cannot emphasize the importance of preparation for the voir dire and the ability to be spontaneous with a purpose. Any attorney can ask any prospective juror any question. No attorney can control the response that the prospective juror may make to the question. Whether or not the response is favorable or unfavorable, the attorney must be prepared on the spot to follow up and seize the moment or dispel the intrusion. The attorney can write out as many questions as he/she wants but there is no way to write all of the follow-up questions that will be needed to take advantage of an opportunity. The lawyer must anticipate the positive as well as the potential negative responses and be instantly prepared to respond. I personally call this series of questions the “speaking” voir dire just like a “speaking objection.” I use this approach on (a) younger jurors, (b) Corporate people, and (c) older jurors for State of the Art. As an example relating to older jurors, I will intentionally select one of the older prospective jurors whom I believe will give me favorable answers to my questions. I try to go over with them the fact that they did not have cell telephones, the internet, televisions, and Google when they grew up. Depending on how the answers present, I follow up with further questions in sync with the previous responses. These are obviously spontaneous. In the Corporate context, I try to pick a corporate employee or insurance carrier employee who will respond that they have never as a corporate representative ever been asked to hurt someone, never been asked to cut corners, never been asked to cover up, and never been asked to put money ahead of safety. I have never had an answer I could not use. I approach younger potential jurors on the difference between 2018 and 1970, the progress of technology, and their use of social media and its absence in the 1960's and 1970's. All of these proposed answers dovetail with testimony a defense witness will later speak from the stand.

The prospective juror in this scenario is verbally responding to my questions and talking with all of the remaining potential jurors at the same time. The result is that the prospective juror is, in effect, testifying or voicing my themes repeatedly. I try, on the state of the art issue, to pick an older juror. That is easy because I am older. I get them to respond to questions by saying that certain phones, televisions, internet, and other things did not exist when he/she was young.

Your Judge is important. Learn as much about the Judge and that Judge’s procedures as you can. Determine whether there are specific and unusual aspects of the demographics of the jurisdiction that you are unfamiliar with. Has your Judge published or made speeches and talks which you can research? Have any of your partners or friends tried cases before the Judge. The Brooklyn Navy Yard cases were tried in the late 80’s and early 90’s before the Honorable Jack Weinstein who had written considerably on Evidence. Prior to the opening, I spend days researching Judge Weinstein’s writings. I constructed my entire opening around principal points in his writing. When plaintiff objected to various portions of my opening, I was able to demonstrate to Judge Weinstein line and verse in his writings which supported my statements. Every objection was overruled. My client was dismissed with prejudice at the conclusion of the opening.

Voir dire is also used to introduce the facts and theories of the case. This introduction, however, should not be a separate demonstrable segment. The themes and important facts and issues should be carefully, and psychologically, distributed throughout the voir dire so that it is a seamless presentation. There is clearly a point where you need to tell the potential jurors your issues and demonstrate why your client is not liable. The easiest way to do that is to construct your closing argument and create the final things you are going to use to persuade the jury. Then, take those significant portions and include them, professionally, in
your voir dire and your opening. Together, the three opportunities you have to address the jury will be consistent, repetitive, and, in and of themselves, an anchor.

The preparation for the voir dire is important and should be exhaustive. You must understand facts and theories of your case. You must research and understand your adversary. The jury trial is a play or a football game. The lawyers are actors and players as is the Judge and the court staff. The jury is the audience. They see the client through you and against the backdrop of your adversary and the surroundings. Their chairs do not recline but this is CineBistro (CineBistro is a luxury dinner-and-a-movie theatre with reserved seating, chef prepared cuisine, fine wines, cocktails and full in-theatre service). Every defensive college or pro football coach studies the opposing team and determines a method, based on the traits of the adversary, to win the game. The trial is no different. You have to research and defend against your other adversary, that other actor the audience sees. Consult fellow trial lawyers who have seen your adversary in court.

III. Voir Dire Questions

There are obviously multiple types and fact scenarios to every asbestos case. Every mesothelioma and every lung cancer case has different facts and every trial lawyer has a different way of presenting the case for the client. It is, therefore, impossible to list all of the questions or subject matter areas which could or should be used as a basis for questions to prospective jurors. I have researched a number of cases in which prospective jurors have been asked questions. I have included in the portion that follows many of the questions and subject matter areas that have been asked in asbestos cases. I am not suggesting that any or all of the following questions be asked in your case or any case. However, I include them as potential food for thought when any of you are considering voir dire in an asbestos case.

1. WARNINGS
   a. Do any of you have any opinions about when a product should have a warning, what the size of the warning should be, or what the warning should say?
   b. Do any of you remember a time in our history when products did not carry warning labels?
   c. Can any of you remember a time when cigarettes did not carry a warning label, when products that used saccharin did not have warning labels?
   d. Do any of you have a belief about what level of knowledge about a danger that a company might have before you believe that the company should place a warning on its products?

2. OSHA
   a. Do all of you know what OSHA (The occupational safety and health agency) is?
   b. Do any of you work for, or have you ever worked for, federal OSHA or the state counterpart of OSHA?
   c. Have any of you ever worked for the EPA (Environmental Protection Agency) or the state equivalent of the EPA?
   d. Have any of you ever been at a job or held a job where it was one of your responsibilities to either work with OSHA or the EPA or apply the rules and regulations of OSHA or EPA in the workplace.
   e. There will be evidence that Mrs. Smith worked for ____________ between 1971 and 1976 and that OSHA rules applied to ____________. Can you listen to the evidence and determine whether ____________ followed the OSHA rules during Mrs. Smith's employment?
f. Do you read all of the labels on all of the products that you buy?
g. Do you read the instruction manuals for all of the appliances and utility materials that you purchase?

3. BIAS AND PREJUDICE (ALL OF THESE QUESTIONS ARE DESIGNED TO DETERMINE WHETHER ANY JUROR HAS SOME PRECONCEIVED IDEAS OR KNOWLEDGE THAT WOULD INTERFERE WITH A JUROR'S ABILITY TO DISCHARGE HIS/HER OATH AS A JUROR?):
   a. Is there any one of you who does not agree that it is only you that can look inside the depths of your heart and soul to determine whether you have a prejudice?
   b. Can we agree that if you, a relative, or a friend was on trial, you would not want a juror who had some hidden prejudice or belief that might affect the outcome of the case?
   c. Are there any of you who disagree with the statement that bias and prejudice covers subjects beyond race, religion, nationality, and ethnicity?
   d. Let me give you an example as a dog lover. If I was on a jury and somehow learned that one of the parties mis-treated their dog or any dog, I would have a negative attitude toward that person. If you understand that example, please raise your hand.
   e. Will each of you make an attempt to listen to my questions and determine whether you might have some inner feelings similar to the situation I just expressed?
   f. Before I even start, do any of you believe that you have some inner feeling about my client, XYZ Company, that would cause me to have a hurdle to overcome?

4. THIS CASE:
   a. Mrs. Jones has lung cancer and the evidence will show that she smoked cigarettes. Is there any one of you who has the belief that lung cancer is never caused by cigarette smoking?
   b. Are any of you former smokers? (Determine a way with the consent of the Judge for you to explore how long the person smoked, when they quit, and such other questions).
   c. Did any of you former smokers quit because you were concerned that you might develop cancer or some other disease?
   d. Did any of you cease because of the language of warning that was contained on every pack of cigarettes after 1964?
   e. Is there any one of you is not aware that there has been a warning label on every pack of cigarettes since 1964?
   f. Is there any one of you who does not believe that you that ever person has a personal option to cease smoking?
   g. Are any of you current smokers? (Determine a way with the consent of the Judge for you to explore how long the person has smoked and such other questions).

5. DEFENDANT XYZ CORP. BASIC CONTENTIONS:
   a. It is XYZ's contention that Mrs. Jones's lung cancer was not caused by any use of its product;
   b. It is XYZ's contention that any exposure or dose that Mrs. Jones had to its product was insufficient to produce asbestosis or lung cancer;
c. It is XYZ's contention that Mrs. Jones's lung cancer was caused by her 40 pack year history of smoking Camel cigarettes;

d. It is XYZ' contention that the development of scientific and technical abilities existing when Mrs. Jones was exposures to XYZ product between 1965 and 1972 was insufficient to show any causative relationship between asbestos and lung cancer.

6. XYZ CORP:

a. Have you ever heard of the XYZ corp.?
b. XYZ made brake linings between 1940 and 1976;
c. Have you ever used a product of the XYZ corp.?
d. Do you have any existing opinion about the safety of the products made by the XYZ Corp.?

7. PEOPLE’S MEMORY:

a. The witnesses, including Mrs. Smith, will be testifying in 2017 and 2018 about things that happened between 45 and 50 years ago. Are you willing to listen to the evidence today and make a judgment regarding the precision of memory from 45 - 50 years ago;
b. Have any of you had the experience of disagreeing with someone's memory of an event but not doubting that they believed they were telling the truth?
c. Is there anyone here who thinks that memory is like a videotape where everything from the past is preserved intact?
d. Is there anyone on this panel who studied psychology in college or was a psychology major?

8. THE DATES OF THIS EVENT - STATE OF THE ART:

a. The questions I just asked you have been answered today, November 6, 2018. The events in this case began to take place in the late 1960's and through the middle 1970's. Will you attempt to look at the evidence which is presented through the eyes of someone in the 1960's and 1970's as opposed to through the eyes of today?
b. Do you believe that you can make a conscious effort to think of the events and information which was available in the 1960's and 1970's as opposed to viewing it, and judging it, by what we know in 2018?
c. Is there anyone on the jury who does not acknowledge that we know a great deal more about science and technology in 2018 than was known in the 1960's and 1970's?
d. Is there anyone on the jury who does not acknowledge that in 2018 we have technology and technology equipment that did not exist when they were born much less in the 1960's and 1970's?
e. Is there anyone on the jury who does not acknowledge that in 2018 we have knowledge more quickly than when they were born much less in the 1960's and 1970's?
f. Do you believe that you can try to look at the knowledge of medical information about asbestos as it existed in the 1960's and 1970's to determine not only whether asbestos might be a health hazard, but whether a specific use of asbestos might not have been considered a health hazard?
g. How many of you believe the dangers of exposure to asbestos have been known for decades?
9. ASBESTOS:

a. I assume that everyone in the room has heard something about asbestos, is that correct?

b. Is there anyone in the room who has not seen one of those mesothelioma advertisements on television?

c. I talked briefly about the dog situation. Have any of you, deep down, formed any opinion about asbestos, however slight, about whether asbestos is always associated with the production of illness or disease in humans.

d. Have any of you formed any opinions about asbestos and disease?

e. What are those opinions?

f. Do you have any opinions, thoughts, or ideas about the companies that sold products that contained asbestos?

g. Is there anyone in the room who has worked with or handled asbestos or who has had a friend or a relative who has worked with or handled asbestos?

h. Has anyone in the room, a relative, or a friend ever filed an asbestos lawsuit?

i. Is there anyone in the room who has read any newspaper articles, medical science articles, or other science articles about asbestos?

j. Is there anyone on the panel who has a fear or concern that they might develop any condition which they think might be related to asbestos exposure?

k. Have you, any close friend, or a relative ever been through an asbestos x-ray screening?

l. Do any of you feel so strongly about asbestos that you feel for any reason that you would not want to serve on this case?

m. Would you be able to set aside whatever knowledge you have about asbestos gained outside this courtroom and only judge the case by the evidence which will be presented in this case?

n. This case is a complicated matter involving mathematics and science. Can you put aside any previously held opinions that you have about asbestos and health and try to not only hear but listen to the evidence in the case and try to understand the reasons why we think that XYZ Corp. has no liability in this case?

o. Is there any one on this panel who believes that all products that contain asbestos, no matter how asbestos is included in the product, are dangerous?

10. DOSE:

a. One of the issues in this case will be about dose or amount. My question first is whether any of you have NOT HAD the experience of applying a DOSE of medication to a child, family member, or loved one?

b. Is there anyone who has taken medication and NOT read the required dose?

c. Is there anyone on the jury who has not cautioned a child or a loved one about the length of time they spend in the sun because of dose or the amount that they are drinking?

d. Is there anyone in the room who does not know what a dose is like a dose of sunlight, or alcohol, or aspirin?

e. Does anyone have a current opinion about much asbestos exposure or dose may be associated with disease?
f. Have any one of you formed any opinion about asbestos that would prevent you from listening fairly to the evidence about asbestos in this case?

11. SOCIAL MEDIA:
   a. Do any of you use social media including Google, Facebook, Twitter, Instagram, and related social apps?
   b. Is there anyone, seriously, who can't stay off social media, will not go to Wikipedia, will not look up asbestos or peritoneal mesothelioma?

12. WITNESSES:
   a. There will be many witnesses in this case. Some will be what we call lay witnesses and others will be scientific experts. Do you believe that you can listen to them, judge them, and make decisions about which testimony you think is the most truthful and reasonable?
   b. Every witness will be presented by a lawyer who would not be putting up the witness unless that lawyer thought that the witness was going to say something favorable to that lawyer's position. Can you listen to all of the witnesses and make a judgment about bias or one-sidedness.

13. MONEY:
   a. One of the things that you will learn right away is that there have been asbestos related lawsuits tried in the United States since 1975 and that several experts who will appear before you have made a substantial number of appearances and charged over a million dollars. Will that fact alone cause you to feel one way or another about their testimony?
   b. You will find that several expert witnesses in the case charge a significant amount of money per hour for their testimony. Will the amount that they charge affect your opinion about their testimony?

14. HYPOTHETICAL QUESTIONS:
   a. The court will tell you what a hypothetical question is but have any of you ever heard of that phrase?
   b. Experts who take the stand were not around when some of these events took place and have to be asked special questions which ask them to rely on certain facts they could not know themselves.
   c. When they are asked these special questions, will you listen to the facts in the question to see if they are the ones that you heard or know about from the evidence in the case?
   d. The other side also gets to ask these special questions so will you make an attempt to listen to all the facts and the different ways the lawyers ask the questions?

15. A CORPORATION VERSUS AN INDIVIDUAL:
   a. The law of __________ is that a corporation like XYZ Corp. is entitled to the same treatment in a courtroom as an individual or the family of Mrs. Smith. Is there any one of you who has a feeling against corporations or prejudice against corporations or just bad feelings against corporations that would make it more difficult for you to give the XYZ Corp. a fair trial?
   b. Have any of you ever filed a suit against any kind of corporation?
   c. Has a corporation ever filed suit against you or any member of your family?
d. Have any of you ever been an employee of a corporation?

e. Has any corporation asked you, as an employee, to do anything which you thought would cause harm to an individual?

f. Have any corporation ever asked you to destroy a document or a piece of paper that might hurt them?

g. Have any one of you been asked to lie for a corporation?

h. Is there any one of you who has had any kind of unfavorable experience with a corporation which would affect or influence your judgment in this case in any way?

i. Do any of you believe that a corporation in your community has done something to adversely affect your life which would influence your decision in a case with XYZ Corp.?

j. Do any of you have a belief that corporations regularly cover things up for their benefit or destroy records for their benefit?

k. Have any of you ever worked for a corporation that had a records retention policy?

l. Is there anyone on the panel who has changed positions or left a job as a result of being treated unfairly?

m. Is there anyone on the panel who believes big companies are concerned more with profits than consumer safety?

n. Is there anyone on the panel who believes that recent litigation regarding tobacco companies and defective tires proves that most companies conspire to withhold safety information?

o. Is there anyone for whatever reason (personal or otherwise) finds that they will lean in favor of Mrs. Smith in this case? (e.g., “favor the ‘little guy’”)?

p. Is there anyone, for whatever reason, (personal experience or otherwise) would have a tendency to be predisposed against a company?

16. CORPORATION FROM ANOTHER STATE VERSUS THE PLAINTIFFS WHO LIVE IN

a. The plaintiffs are residents of the state of _______ and the XYZ Corp. is from is a resident of another state. is there any one of you who would show favoritism or lean toward the plaintiff simply because XYZ is not from ________________?

b. Do each of you believe that you could treat XYZ with the same kind of evenness that you would treat a corporation who resided in the state of _______ and employed people in the state of _______?

17. CANCER:

a. Mrs. Smith has cancer. Have you or any one of your close friends and family members suffered or are currently suffering from cancer?

b. Have you lost any close friends and/or family members from cancer?

c. Have any of you ever cared for or been the primary care person for someone who had cancer?

d. If not cancer, any other serious or life threatening disease?

e. There will be testimony in the case about Mrs. Smith’s pain, treatments, and medications. Have any of you ever had any kind of cancer or treatment which you suspect might be similar to the kinds of treatment that has been given to Mrs. Smith?
18. SYMPATHY:
   a. My client is a corporation and the plaintiff is an individual. Mrs. Smith has lung cancer. There will be testimony about her illness and treatment. It will be very sad and sympathetic. My question is: Do you believe you can put this aside and treat both sides fairly?
   b. Do you believe that you can remain objective about the case facts when you hear this testimony?
   c. Mrs. Smith has brought this lawsuit and is asking for a substantial sum of money. Will you be able to return a verdict that would deny her any monetary recovery if that is what the evidence and law dictate?
   d. Everyone faces illness, and cancer, and may be even death in their family in their lifetime. It is a sad and difficult time. Have any of you already been through this or are any of you going to feel like this is hitting too close to home to be able to keep an open mind?
   e. It is sensitive and understanding to feel compassion for the plaintiffs? I know that I and my client do, but, do any of you suspect that you are going to be so emotionally moved by the testimony that it is going to interfere with your ability to make a decision in the case?

19. INDUSTRIAL HYGIENE:
   a. Have any of you ever studied industrial hygiene or worked in the field of industrial hygiene?
   b. What was your background in industrial hygiene?
   c. What was the nature of your job in industrial hygiene?
   d. Where did you work when you worked in industrial hygiene?

20. GATEKEEPER:
   a. In trial you hear all the evidence and all of the law and you make the decisions. You are the gatekeeper of justice. Can you fulfill that function?
   b. You, as a juror, guard the future of both Mrs. Smith and the XYZ Corp. Can you fulfill that function?
   c. Since you are the guardian of the system for everyone, is there anyone who feels that he or she cannot or should not have to perform that function?

21. OCCUPATIONS:
   a. Have you or any one of your immediate family ever been a nurse or worked in association with the nursing profession?
   b. Have you or any of your immediate family ever worked in a lawyer's office or with a lawyer?
   c. Have you or any of your immediate family ever worked in a court house or in connection with jury trials?
   d. Have you or any of you ever worked for a lawyer or taken classes in law school?

22. DAMAGES:
   a. Is there anyone who believes that sometimes companies should pay money in lawsuits if it helps injured people even if it is not proven they did something wrong?
   b. Is there anyone who feels they might struggle with rendering zero dollars to Mrs. Smith if the plaintiff cannot show that XYZ Corp. caused Mr. Smith's lung cancer?
23. UNITED STATES ARMED FORCES:
   a. Have any of you served United States Armed Forces?
   b. Are any of you current or former members of the reserves?
   c. I believe that the evidence is clearly going to show that Mr. Jones was exposed to substantial asbestos while he was in the navy. Is there any one of you who feels it would be unpatriotic to conclude that the service in the United States Armed Forces caused his disease?
   d. Are there any of you who feel you would not want to serve on this jury or be conflicted since you have the knowledge that one of our contentions is that the United States Armed Forces caused his disease?
   e. Is there any one of you who could not, if the evidence was that the service in the United States Navy was the sole cause of his disease, exonerate my client, XYZ Corp.?

24. MEMBERSHIP IN A UNION:
   a. Are you currently a member or have you ever held a membership in a labor union?
   b. Which union are or were you a member in?
   c. Did you attend local meetings? If so, what frequency?
   d. Did you ever hold office in the union?
   e. Did you receive information mailed to you from the union?
   f. Several of the witnesses in this case are or were members of a labor union. Do you believe that you would tend to believe them more or give them more credit simply because they belong to a union?

25. CHEMISTRY:
   a. Have any of you taken Chemistry in high school or college?
   b. Did any of you ever study asbestos?

IV. Opening Statement Thoughts

This is your first personal appearance before those who have been selected as a group to decide your case and it is the second time they have seen you one on one. They have just heard the best the best that your adversary can offer. Some, maybe all, are leaning toward your adversary and all feel sorry for the defendant and dislike your horrible product and your uncaring company. They are waiting for you to respond. Yes, they want to hear about your case, but, unless you thoroughly had them at voir dire, they are now waiting for conviction from you. They have heard how very bad you are, and now, the spotlight is on YOU. The client is not standing there; the insurance company is not standing there. You are the actor; you have the lead role. The spotlight is clearly on you and they are waiting. You have your own style, but that style needs to be sincere, confident, likeable, and persuasive. In essence, you have to \textit{HOOK} the jury with your opening statement.

A. The Story

Stop for a moment and think about the last time that you went to a movie, concert, lecture, or even read a book. You are aware that the movie, concert, lecture, or book could be main stream and boring, but that is not why you came or what you hope to experience. You want the beginning to grip you, engage you, and captivate your interest. This what jurors are hoping, if not looking, for. They view you as the story teller, and, prior to starting your case and practice you should have spent some of your time studying the practice of
story-telling and listening to some incredible story-tellers like Garrison Keillor, Garner Ted Armstrong (evangelist) or Paul Harvey. Yes, you want to get your story and themes across but you also want to be interesting, even humorous. You want to engage your jurors and arouse interest. Clearly, part of that is accomplished by creating a unique and captivating sequence of information in your presentation. But, there are equal parts to the fact that a persuasive speaker builds the voice tone and maintains constant eye contact to build rapport. This jury panel is unique. They are your people. Adapt your tone and the way you tell your story to the audience based in part on their collective educations, gender, race, and age.

B. Start at the End: Open with Your Closing

The opening is the lens through which your jury panel sees the case. Time is of the essence. Jurors get bored like you do. They want to know why you are there; tell them in the first 120 seconds. If possible, use a creative visual to catch your most important theory. Do not forget that not everyone on the jury is listening or committed to you at the same time. Jurors that are a part of a 6 and/or 12 panel drift off on their own schedule. Thus, in whatever you do, you must remember redundancy. Norman Vincent Peale, a gifted American minister, author, and speaker said:

Repetition of the same thought
Or physical action develops
Into a habit which repeated
Frequently enough becomes
An automatic reflex.

As you open, focus factually on the themes of your case. You should Begin and Conclude the Opening with your central theme or themes. You want to provide these expectant jurors with a road-map to your theory of the case considering, among other road-maps, a linear or chronological approach.

As you consider building your themes and your visual method of demonstrating these themes to the jury, it is essential that you consider the demographics of the panel and how you believe this selected group will gather together to make the decision. Who is likely to be selected as the foreperson? Your decision, or that of our jury consultant, or both, will depend on the analysis of the panel based on the nature and demographic of the group. It would be wise to try and pinpoint a limited number of people whom you believe stand a chance to become the foreperson. Following that analysis, you can slant your presentation theories toward the social-political structure of that person (or persons). All groups are different, but it is wise, at least, to consider that many jury consultants have reported that in mock trial demonstrations millennials are selected as the foreperson almost 40% of the time. We do not have records of actual recent trials.

C. The Essential Content

The manner in which any trial lawyer constructs the opening is a matter of individual preference. There are, however, certain essentials which have to be placed in the opening. You have to introduce the important people, places, and subjects and subjects. As you develop your story, you must emphasize the dispute and your method of solving the factual and psychological issues. You strongly explain and illustrate your strength and, in some way, approach and explain any weakness. Your conclusion, simply stated, is that your client is not liable.

D. Millennial (and Other) Jurors

Who are the millennials, and why do they make a difference? Millennials are, depending slightly on the author, people born between 1980 and 1988. They are between 30 and 38 years old. I would caution, how-
ever, that in some jurisdictions, jurors can be as young as 18 so it is possible to have a potential juror or sitting juror who is 18 (born in 2000) instead of 30 - 38. Therefore, the approach to a jury that contains some number of people between the ages of 18 and 36 dictates the lawyer reality that the legal approach has to be partially sculptured to access their attention.

Millennials make a difference because they grew up in a different era than the time-frame of our cases, and they think differently than people did between 1965 and 1976. Studies have repeatedly shown that people between the ages of 18 - 36 (Millenials and the some) are, on balance, vastly different than their older counterparts. There are social and political differences within their age-range just as there is between any selected age range. However, there are some things, again on balance, that seem universally true. Here are some of the traits which research predicts apply to a majority of the people within the age group of 18 - 36:

1. Millennials are basically better educated and better read than their older counter-parts;
2. Millennials are extremely mobile (75% of internet use is via cell telephone);
3. 35% of millennials grab their cell phone first when they awake;
4. 85% of millennials keep up with the news and know what is happening;
5. Millennials are a connected generation; technology connects them to everything and everybody. They access the world instantaneously, and, literally, Google EVERYTHING they want to know.
6. Millennials are a socially conscious generation with a strong desire to make a difference in the world.
7. Millennials have a broader vision and want socially responsible companies and not planet polluters.
8. Millennials honor diversity;
9. Millennials outwardly voice their concern about their communities, and they are more willing to volunteer to help the less fortunate or help the homeless;

When we begin to plan our opening story and begin our story-telling role in the voir dire and opening, we are giving jurors information to process. It does not matter the age group; what we are conveying is the same. The question is the manner in which we convey the information? When we talk about millennials, we are leaning how the millennial group is living their lives, but the next issue is how do they, in their chosen lives, process information. What does the research show us about the cross-section of millennials that might guide or influence us in how we plan and/or adjust our case or opening to be better received by this age-group? Research shows us the following:

1. Millennials are visual: Don't hesitate to use creative visuals such as infographics, videos, and photos to grab the attention of Millennials. It's proven that 40% of people respond better to visuals than plain text alone.
2. Millennials like real and personal; Be authentic;
3. Millennials crave structure and guidance;
4. Millennials crave feedback;
5. Millennials like to “figure it out.” Give them guidelines to your goal;

E. A Millennial Approach

There is no ONE millennial approach because we would never know which of the millennials we have on our jury just like we do not know everything about any other potential age group that might be on a jury.
We can sense certain things about this age group that does give us some preparation guidance about how we prepare. We know that younger jurors of all age groups are fastened tightly to social media. Social media has a language and presentation bias all its own. One thing that all of us can do is listen to social media ourselves and learn to speak their language. We can follow them on social media and become familiar with their patterns. We know that they like personal and authentic presentation so we can make our story clear and maintain eye contact and visual feedback. We know that they are into games, stories, and apps (like dating apps), so we need to meet them where we are and do more to adopt our presentations to these methods of communication. We know that they are socially conscious so we really, really need to find a way to present the actions of our client in the most socially responsible way. Your client desire the correct result and not just to save money.

F. PowerPoints and Courtroom Visuals

We know that the Millennials are highly visual. Think for a moment about the quality of the films that you watch today. Think about the films that your children see with all of the science and cinematic movement. This is what the millennial sees every day and this is the quality they expect in the courtroom or they will be bored. As a result, and among other things, the following are just a few pointers to consider when you are designing your case:

1. PowerPoints must be of good design.
2. The PowerPoint slide must actually convey the specific idea at issue;
3. There must be good contrast between the background color and text color;
4. They must be easy to read; keep fonts simple and never less than 30 Points;
5. Use simple graphics, and, in some slides, a limited text;
6. Try to keep a pointer handy;
7. Be prepared with backup;
8. Always store data on additional laptops and external data.

G. State of the Art for Millennials

1. Anyone born after 1970 expects a warning on everything;
2. Anyone born after 1980 believes you should have just “Googled” it;
3. Make every attempt to show the contrast in available knowledge between 2018 and 1976;
4. Find a way to reference 2018 like “you mentioned ______, was that available in 1976.”

H. Greet and Observe the Jurors

1. Look at your jurors; don’t stare, but watch them;
2. Observe Juror body language throughout voir dire and trial to assist you;
3. Research shows that our non-verbal behavior affects jurors;
4. Research shows that our dress, our actions, and the way the Judge and staff address you as opposed to opposing counsel, can all be of influence to jurors.

I. A Defense Verdict for Your Client Is the Right Social and Moral Decision

1. The millennial believes that It is not about money; it is about doing right;
2. Show that your client is a good company, and that it believes in the future and improves upon the past.

3. Create the impression, through you, that a younger juror would want to work for you and your client.