# Jury *Voir Dire* in Criminal Cases

**By Phylis Skloot Bamberger**

*Voir dire* questioning is a process for eliciting, within legally mandated boundaries, information relevant to prospective jurors' qualifications for service. New York law allows lawyers to question each prospective juror about his or her qualifications for service on a particular trial. It is, after all, the well-prepared lawyer who best knows the issues in a case and who is able to fashion an inquiry that is most likely to reveal a potential juror's bias or inability to meet the obligations of judging the evidence and applying the law.

The importance of the *voir dire* in criminal trials has turned it into a virtual battleground between judge and lawyer. If counsel asks questions that are repetitive, improper in form, or that encourage the prospective juror to form an opinion in the case, counsel will provoke adverse rulings from the judge. A tug of war develops, which breeds distrust, so that the judge may preclude even proper questions. The trial is likely, but unnecessarily, off on the wrong foot. This unfortunate state of affairs can be resolved, however, by re-examining the purpose of *voir dire*.

## The Purpose of *Voir Dire*

The New York State Court of Appeals and the United States Supreme Court both have made clear that the *voir dire* is essential to the selection of a fair and impartial jury. The *voir dire* discloses prospective jurors who are unable to fulfill the obligations of a juror or who are not capable of undertaking an impartial evaluation of the evidence and application of the relevant legal rules. Such disclosure leads to excusal of jurors for cause. It also enables counsel to exercise peremptory challenges appropriately.

> *Voir dire* provides a means of discovering actual or implied bias and a firmer basis [than stereotyping] upon which the parties may exercise their peremptory challenges intelligently.[1]

Thus, the *voir dire* is the mechanism for carrying out the due process mandate that the fact-finder be fair.[2]

## The Respective Roles of Judge and Lawyer

Criminal Procedure Law § 270.15(1)(c) (CPL) and the case law prescribe the roles of the lawyers and the judge in the conduct of the *voir dire*. The lawyers are given "a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications." The role of the court is to prevent "questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law," and "if necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter."

Thus, counsel's opportunity to examine a prospective juror extends to questions that are relevant to the case and not repetitious of inquiries already made.[3] The *voir dire* is to be used to learn about a prospective juror's qualifications; it is not to be used as a mini-trial, an opportunity to persuade jurors to a litigant's point of view, or as a dress rehearsal of the trial.[4]

The judge's traditional role in the *voir dire* is to set out the relevant legal principles. Further, to prevent irrelevant and repetitious questioning by attorneys, the judge has the discretion to preclude, or limit the scope of, counsel's questioning,[5] and the authority to conduct the

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questioning of the prospective jurors. Indeed, the court may ask each prospective juror to complete a questionnaire covering any "fact relevant to his or her service on the jury."

After identifying the attorneys and the parties, and outlining the nature of the case, the court is required to "put to the members of the panel . . . questions affecting their qualifications to serve as jurors in the action." These questions are asked of the prospective jurors as a group or individually. The court may have the jurors answer by raising their hands or speaking individually. The court may interrupt during attorneys' examination to prevent repetitious and irrelevant questions. When the lawyers have completed their questioning, the court may ask such further questions as it deems proper regarding prospective jurors' qualifications.

The trial judge sets the boundaries of the inquiry. Noting that this is "an area of the law which does not lend itself to the formulation of precise standards," the Court of Appeals has said that the trial judge "has broad discretion to control and restrict the scope of the *voir dire* examination."[6]

## Areas for Examination

Both the nature of the case and the characteristics of the jurors determine what information is relevant to selection of a jury and therefore what questions are permissible. In all cases, each prospective juror must be qualified to serve and legally suitable for service. Each juror must be fair and unbiased, able to render an impartial verdict in accord with the evidence and applicable law, and capable of performing the functions required of a juror.[7] Here are some areas for inquiry aimed at establishing jurors' qualifications to serve in criminal trials.

**1. *Statutory requirements for jury service.*** Judiciary Law § 510 lists the qualifications for service. Jurors must be American citizens and residents of the county to which they have been summoned. They must not be convicted of a felony. They must be at least 18 years old and able to understand and communicate in English.[8]

**2. *Statutory requirements to sit on a particular case.*** CPL § 270.20(1)(c) lists the social or familial relationships between the prospective juror and trial participants which require that a prospective juror be excused.

**3. *Ability to fulfill the duties of a juror.*** The duties of a juror include: attending court at the prescribed hours, listening to the evidence, evaluating evidence fairly in accordance with the instructions, deliberating, and making efforts to arrive at a decision. Knowing whether these obligations can be fulfilled requires information about: a prospective juror's physical or mental circumstances and how those circumstances might be accommodated; family or employment obligations that cannot be avoided; economic hardship due to jury service; ability to deliberate with other jurors and to judge the credibility of witnesses;[9] and assurance that the juror's ability to make a decision is not prevented by religious belief or some other tenet.

**4. *Personal information about the juror.*** CPL § 270.20(1)(a) requires examination of the prospective juror's state of mind to determine if the juror can render an impartial verdict. Among the relevant subjects are marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests. Other areas might be relevant depending on the circumstances and issues in a particular case.

A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.

**5. *Views about issues related to the case and witnesses who may be called to testify.*** Here, too, state of mind is important. For example, views concerning police witnesses, child witnesses, witnesses with prior convictions, accomplice witnesses, child abuse issues, scientific evidence (or the absence thereof), eye-witness identification, or evidence of confessions may be relevant to a juror's qualifications. The circumstances of the case may determine other areas of questioning.

**6. *Professional expertise.*** If a prospective juror has professional expertise about a material issue in a case, the judge must ask if the prospective juror can deliberate without using personal professional knowledge to assess the evidence and without communicating his or her knowledge as if it were evidence to other members of the jury.

A prospective juror who cannot follow the rule not to disclose expert information to other jurors should be excused.[10] The judge must also question a prospective juror who has professional information about whether that juror can decide the case based on the evidence and disregard any opinion held as a result of personal professional information. A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.[11]

**7. *Race and ethnic issues.*** Questioning prospective jurors about racial or ethnic bias is constitutionally required if counsel so requests and "special circumstances" making the issue part of the case are present. For example, where the defendant was a civil rights worker, examination about racial bias was required.[12] In other cases, a sensitive probe of racial or ethnic issues should be granted if counsel requests it.[13]

**8. *Juror's ability to follow applicable legal principles.*** Lawyers cannot ask the prospective jurors about their knowledge of principles of law. This has been the rule in New York for over a century.[14] *People v. Boulware* included prospective jurors' attitudes toward the law among areas that could not be the subject of counsel's inquiries:

> Although counsel has a right to inquire as to the qualifications of the veniremen and their prejudices so as to provide a foundation for a challenge for cause or a peremptory challenge, it is well settled that it is simply not the province of counsel to question prospective jurors as to their attitudes or knowledge of matters of law. Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad.[15]

The Court added a wrinkle, however, when it said that it was permissible to ask if a prospective juror would have "any difficulty following the instructions of the court" and whether the juror would obey the court's instructions. Inevitably, questions exploring a juror's ability, or lack thereof, to follow instructions, explore the juror's attitude toward the law. Attitudes that may prevent the prospective juror from following the judge's instructions are relevant to the ability to be fair and unbiased. For example, some prospective jurors in narcotics cases have objected to classification of certain narcotics activities as crimes and the practice of using undercover officers or informers. Or, sometimes a prospective juror objects to the defendant's exercising his right not to testify, believing that an accused should offer an explanation.

Notwithstanding authority disallowing questions about attitude toward the law,[16] some questioning about legal principles is permitted. For example, the Fourth Department has held that it was error to deny the defense attorney the opportunity to question jurors on their ability to follow the *Molineaux* rule;[17] that it is permissible to ask jurors about the legal issue of eyewitness identification;[18] that questions about the burden of proof are proper (by implication);[19] and that it is proper to ask prospective jurors whether their associations with police officers would affect their ability to be fair.[20] The First Department has approved giving the defense the opportunity to ask if the jury could follow the instruction not to draw an adverse inference if the defendant did not testify[21] and has also allowed counsel to inquire about prospective jurors' views of the defendant's absence from the trial.[22] Both the First and Fourth Departments have allowed inquiries as to whether the juror could fairly evaluate the testimony of witnesses who have prior convictions.[23]

Even where questions about a prospective juror's attitude toward the law are not permitted, the trial judge, at the request of counsel, can give instructions on relevant legal principles before or during the *voir dire*.[24] The attorney can then properly ask if the panel members can follow the rule.[25] Such follow-up inquiries may disclose jurors' attitudes toward the law. Recent cases requiring unequivocal statements of impartiality, which include the ability to follow the law, make such a procedure not only proper but advisable.[26]

## Questioning That Is Improper

### Immaterial Questions

Whether a particular question in a specific case is material or immaterial is determined by the nature of the case and the prospective jurors. What is material in one case might not be so in another case. The First Department has held that open-ended questions about prospective jurors' familiarity with drug trafficking and law enforcement are not permitted, even in drug cases.[27] Nor are open-ended invitations to relate anecdotes and factual information permitted[28] or questions seeking commitments based on hypotheticals.[29] Where an issue was removed from a case or a legal ruling prevented the jury from learning certain information, so that the jurors were not aware of the issue or information, made *voir dire* on those points unnecessary.[30]

### Repetitive Questions

The judge determines whether counsel's questions are repetitive based on the questions that have already been asked and the information already elicited.[31]

The judge may interview a prospective juror at any time during the *voir dire* and can use a written questionnaire to gather information. All information disclosed by the judge's questioning is available to counsel. Counsel must take that information into consideration to avoid repetitious questioning. The judge's questions or instructions may be sufficient to justify limiting or precluding questions by counsel.[32] Follow-up questions designed to explore a prospective juror's responses or views will be more successful – both in passing muster with the judge and in supplying information – than questions that elicit answers already given to earlier questions.

Judicial efforts to curb counsel's repetitious questioning have resulted in the imposition of time limits on counsel's *voir dire*. Fifteen minutes for each lawyer has been held appropriate, although the judge may extend the time.[33]

## Conclusion

The judge and the lawyers have the same interests in the *voir dire* questioning: to disclose a prospective juror's

bias and partiality, his or her inability to serve because of reasons personal to the juror, or the presence of statutory exclusions. The Court of Appeals has made clear that a prospective juror who cannot unequivocally declare lack of bias must be excused. Trial judges do not want problems based on a juror's hidden bias or inability to fulfill the obligations of a juror, which might result in long interruptions in the trial, substitutions of jurors, and possibly a mistrial. They do not want post-conviction and post-judgment motions or reversals on appeal based on conduct of jurors who should have been excused.

To accomplish the goals of *voir dire* and to persuade the court that a longer than usual time should be allotted for attorney *voir dire*, lawyers can do two things. First, they must be fully prepared with thorough knowledge of the case before jury selection begins. Second, they must frame questions likely to obtain information relevant to the case and to the goals of *voir dire*. Questions designed to obtain new and relevant information are likely to be allowed by the judge. The procedure for eliciting information from prospective jurors can and should be a joint venture between counsel and the judge.

> A prospective juror who cannot unequivocally declare lack of bias must be excused.

Judges are well-advised to hold a pre-*voir dire* conference, where well-prepared lawyers can suggest questions to include in the judge's oral or written questions and can argue why their requested questions should be included. At this point there is no limitation based on repetitious questioning or time constraints – relevance is the sole test.

An objection by an adversary to a question's inclusion can be countered with a request for additional discovery in order to strengthen the argument in favor of asking the question. Alternatively, the pre-*voir dire* conference can lead to an agreement between the parties that a particular subject will not be raised at trial. When the judge includes counsel's requested comments or questions in the charge or questions, some of counsel's allotted time can be saved for use in follow-up questioning.

Counsel can also seek the judge's aid in questioning about principles of law. Counsel is prohibited from stating the legal principles in questions or asking jurors about their knowledge of the law. It may not be permissible to ask if a juror agrees with a rule. Counsel can, however, ask the judge to state the relevant legal principle for the jury panel and can then inquire if panel members can follow the law. In response to such questions jurors frequently disclose that they cannot follow the law because they do not agree with the law or cannot understand it.

The importance of the *voir dire* necessarily brings about disputes about how it should be conducted. For example, the time allotted to counsel is often a subject of contention. The use of hypotheticals and references to specific anticipated evidence is subject to adverse judicial rulings. Examination about relevant legal principles is often foreclosed.

Revising the approach to the questioning will enable counsel to ask the questions relevant to uncovering bias or inability to fulfill the function of a juror. Careful preparation is of course the essence of representation, and it is crucial for asking the right questions about the prospective juror's personal lives and beliefs. With careful preparation and well-thought-out questions, the judge and the lawyer can cooperate in exploring bias and each prospective juror's ability to fulfill the role of a sworn juror. ■

1. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143–44 (1994).

2. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986); *People v. Johnson*, 94 N.Y.2d 600, 610–11, 709 N.Y.S.2d 134 (2000); *People v. Blyden*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982); *People v. Branch*, 46 N.Y.2d 645, 652, 415 N.Y.S.2d 985 (1979); *People v. Boulware*, 29 N.Y.2d 135, 139–40, 324 N.Y.S.2d 30 (1971), *cert. denied*, 405 U.S. 995 (1972).

3. *Boulware*, 29 N.Y.2d at 139–40; *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001); *People v. Porter*, 226 A.D.2d 275, 641 N.Y.S.2d 283 (1st Dep't 1996); *People v. Rampersant*, 182 A.D.2d 373, 581 N.Y.S.2d 784 (1st Dep't 1992).

4. *People v. Corbett*, 68 A.D.2d 772, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980).

5. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118 (4th Dep't), *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 10 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003) (reasonable limits imposed on questions concerning eye-witness identification); *People v. Diaz*, 258 A.D.2d 356, 685 N.Y.S.2d 667 (1st Dep't), *leave denied*, 93 N.Y.2d 969, 695 N.Y.S.2d 55 (1999) (precluded questions about evidence that the prosecutor had not yet decided to use); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998) (curtailed questions about the defendant's right not to testify); *People v. Rodriguez*, 240 A.D.2d 683, 659 N.Y.S.2d 495 (2d Dep't), *leave denied*, 90 N.Y.2d 909, 663 N.Y.S.2d 521 (1997) (precluded questions about self defense).

6. *Boulware*, 29 N.Y.2d at 139–40; *see Carter*, 285 A.D.2d 384; *Byrd*, 284 A.D.2d 201.

7. CPL §§ 270.15(1), 270.20(1)(b).

8. Persons who have received a certificate of Good Conduct or a Certificate of Relief from Civil Disabilities that includes jury service are qualified to serve.

9. *People v. Mendoza*, 191 A.D.2d 648, 595 N.Y.S.2d 113 (2d Dep't), *leave denied*, 81 N.Y.2d 1017, 600 N.Y.S.2d 205 (1993).

10. *People v. Maragh*, 94 N.Y.2d 569, 708 N.Y.S.2d 44 (2000).

11. *People v. Arnold*, 96 N.Y.2d 358, 365–66, 729 N.Y.S.2d 51 (2001).

12. *Ham v. S.C.*, 409 U.S. 524 (1973).

13. *People v. Rubicco*, 34 N.Y.2d 841, 359 N.Y.S.2d 62 (1974) (denial of a request by an Italian defendant to question about ethnic prejudice was an error in the exercise of discretion); *People v. Blyden*, 79 A.D.2d 192, 436 N.Y.S.2d 492 (4th Dep't 1981), *rev'd*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982) (where defendant, victim and witnesses were all African American, it was error not to excuse a prospective juror who did not state he would be fair despite his adverse view of minorities).

14. *People v. Conklin*, 175 N.Y. 333, 341, 67 N.E. 624 (1903).

15. *Boulware*, 29 N.Y.2d at 141 (internal marks and citations omitted).

16. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118, *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 9 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003); *People v. Coleman*, 262 A.D.2d 219, 692 N.Y.S.2d 352 (1st Dep't), *leave denied*, 94 N.Y.2d 798, 700 N.Y.S.2d 431 (1999); *People v. Swift*, 260 A.D.2d 157, 687 N.Y.S.2d 363 (1st Dep't), *leave denied*, 93 N.Y.2d 930, 693 N.Y.S.2d 513 (1999). *See also People v. Glover*, 206 A.D.2d 826, 616 N.Y.S.2d 128 (4th Dep't), *leave denied*, 84 N.Y.2d 935, 621 N.Y.S.2d 532 (table), (1994) (counsel cannot ask about the juror's understanding of the presumption of innocence); *People v. Corbett*, 68 A.D.2d 772, 778–79, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980). In 1985, when the Legislature amended CPL § 270.15 to add subsection (1)(c), the Assembly memorandum stated that the amendment was intended to save time and authorized "the Court *not* [to] permit . . . questions relating to a juror's knowledge of or attitude regarding rules of law such as the presumption of innocence, burden of proof, reasonable doubt, etc" (emphasis added). The Practice Commentary to CPL § 270.15 states that the statute was intended to codify the case law. Preiser, Practice Commentary, McKinney's Cons. Laws of NY Book 11A, Criminal Procedure Law § 270.15 at 275–76 (2002).

17. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (4th Dep't 2005).

18. *Martinez*, 298 A.D.2d 897.

19. *People v. Horning*, 284 A.D.2d 916, 728 N.Y.S.2d 319 (4th Dep't 2001), *leave denied*, 97 N.Y.2d 705, 739 N.Y.S.2d 106 (2002).

20. *People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855, 661 N.Y.S.2d 181 (1997).

21. *People v. Maldonado*, 271 A.D.2d 328, 706 N.Y.S.2d 876 (1st Dep't), *leave denied*, 95 N.Y.2d 867, 715 N.Y.S.2d 222 (2000); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1996).

22. *People v. Castro*, 295 A.D.2d 219, 743 N.Y.S.2d 714 (1st Dep't), *leave denied*, 98 N.Y.2d 729, 749 N.Y.S.2d 479 (2002).

23. *People v. Evans*, 242 A.D.2d 948, 662 N.Y.S.2d 651 (4th Dep't), *leave denied*, 91 N.Y.2d 834, 667 N.Y.S.2d 687 (1997); *Porter*, 226 A.D.2d 276.

24. The idea of charging on the elements of the crime during the *voir dire* is coming into its own. *See People v. Andrews*, 2006 WL 1544053 (2d Dep't 2006) (pre-*voir dire* instruction on elements of the crime is not error); *People v. Miller*, 30 A.D.3d 444, 815 N.Y.S.2d 827 (2d Dep't 2006) (instruction during *voir dire* about acting in concert is proper. The defense, having consented to the giving of the charge, made no objection to its contents).

25. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (2005).

26. *See People v. Chambers*, 97 N.Y.2d 417, 740 N.Y.S.2d 291 (2002); *People v. Bludson*, 97 N.Y.2d 644, 736 N.Y.S.2d 289 (2001).

27. *People v. Green*, 3 A.D.3d 428, 770 N.Y.S.2d 621 (1st Dep't), *leave denied*, 2 N.Y.3d 800 781 N.Y.S.2d 299 (2004); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001).

28. *Byrd*, 284 A.D.2d 201; *see People v. Salley*, 25 A.D.3d 473, 808 N.Y.S.2d 664 (1st Dep't 2006).

29. *Salley*, 25 A.D.3d 473; *People v. Jackson*, 306 A.D.2d 910, 762 N.Y.S.2d 462 (4th Dep't), *leave denied*, 100 N.Y.2d 595, 766 N.Y.S.2d 170 (2003); *People v. Woolridge*, 272 A.D.2d 242, 707 N.Y.S.2d 634 (1st Dep't 2000); *People v. Davis*, 248 A.D.2d 281, 670 N.Y.S.2d 76 (1st Dep't), *leave denied*, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998).

30. *People v. Stanard*, 42 N.Y.2d 74, 396 N.Y.S.2d 825, *cert. denied*, 434 U.S. 986 (1977).

31. *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001).

32. *People v. Dinkins*, 278 A.D.2d 43, 717 N.Y.S.2d 167 (1st Dep't 2000), *leave denied*, 96 N.Y.2d 828, 729 N.Y.S.2d 448 (2001); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998); *People v. Garrow*, 151 A.D.2d 877, 542 N.Y.S.2d 849 (3d Dep't), *leave denied*, 74 N.Y.2d 948, 550 N.Y.S.2d 282 (1989); *see People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855 (1997), *cert. denied sub nom. Bennett v. N.Y.*, 524 U.S. 918 (1998); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1st Dep't 1996).

33. *People v. Jean*, 75 N.Y.2d 744, 551 N.Y.S.2d 889 (1989).