



# Chapter 4

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## Jury Selection and Voir Dire

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## INTRODUCTION

Many attorneys feel that no stage of an obscenity trial is more important than *voir dire* and jury selection. A case can be won or lost at this stage because of strong feelings held by jurors, because of numerous misconceptions about pornography generally, and because of the intricacies of obscenity law itself.

You must be aware that defense strategies begin during *voir dire*. Defense attorneys will begin to communicate one or more of the following messages during *voir dire*: (1) sexually explicit materials are widely available in the community and the community “tolerates” or “accepts” them, (2) the First Amendment protects the material at issue, (3) the case is a total waste of time and should not have been brought, (4) the material on trial is harmless to individuals and society, (5) consenting adults have or should have a right to decide what they will view or read, (6) the law is difficult to enforce and its terms are vague, (7) the material is not arousing or stimulating to an average person, *or* an average person does not have a “prurient interest.” (This argument will be discussed in further detail in Chapter 6, dealing with proof of obscenity). The defense attorney may also attempt the “gross out technique” to cause a jury walkout, discussed *infra*. These themes will permeate defense strategy throughout the trial.

It is the purpose of this chapter to assist you in selecting a fair and impartial jury, which will reflect an accurate cross-section of the community. It will also be the purpose of this chapter to acquaint you with defense strategies and techniques, demonstrate how these strategies can result in acquittals or mistrials, and to assist you in limiting the success of such tactics.

## CHARACTERISTICS OF A FAVORABLE GOVERNMENT JUROR

Anyone who has tried an obscenity case has his or her own ideas about the characteristics of a favorable government juror. There should be little disagreement, however, that a juror with the following characteristics would be ideal: (1) a native of the community, or in the alternative, originally from a smaller town or community; (2) married people with families, especially those with daughters, granddaughters, and/or small children or grandchildren; (3) active church members; (4) at least 40 years of age; (5) active in community clubs and activities; (6) presently living in a small community; (7) little or no exposure to pornography; (8) politically conservative; (9) agreement

with the state's right to enact obscenity and child pornography laws; (10) people who own their homes rather than rent.

Generally, you are looking for jurors who have strong roots and commitments in the community. You are looking for people with relatively stable lifestyles, as opposed to transient people or those with little or no responsibility. You should obviously avoid individuals who are themselves consumers of pornography, and those who strongly oppose obscenity legislation. (See Appendix C for a list of suggested *voir dire* questions and transcript of an actual *voir dire* examination.)

## DEFENSE TACTICS

As discussed earlier, defense strategies begin during *voir dire*. Rather than asking questions which directly relate to prospective jurors' qualifications, defense counsel will usually make an attempt to indoctrinate the jury with misconceptions about the obscenity problem and the law itself. Many of these questions will be objectionable for a variety of reasons.

Defense counsel will often attempt to frighten prospective jurors by giving detailed and graphic descriptions of what the evidence *might* show. These graphic statements are often inaccurate and argumentative, and will usually involve asking the jurors whether they will be too offended by the films or magazines to serve and be fair. Note that this obviously plants a contradiction in the law and in the jurors' minds, since the "patent offensiveness" of the material is a fact issue and relates directly to its obscenity.

Beware of "repetitious" questions to jurors concerning the bias that they might have against pornographic materials and those who traffic in such materials. *One* question might be proper, but you will commonly find that defense counsel will repeatedly pound on jurors to convince them that they will be biased and must excuse themselves to be fair. Remember, jurors seldom approve of other crimes such as rape, arson, or murder, but yet can be fair jurors. Beware of improper technical legal questions about obscenity law. Defense counsel will often ask prospective jurors what "community standards" are, whether *they* have a "prurient interest," whether they know what a prurient interest is, and whether they have a shameful or morbid interest in sex. Such questions are objectionable on the grounds that they are technical legal questions. These terms have legal meanings which will be given by the judge during his instructions, and to invite

debate during *voir dire* will only create confusion in the minds of the jurors.

Beware of improper questions calling for a prejudgment of the evidence and questions asking for a determination of "community standards" based on hypothetical questions and evidence. Also be aware that defense counsel would like nothing better than to begin a debate among the jury panel in open court as to the necessity or propriety of the law.

It is important to object to improper questions or statements by defense counsel; you must let the jury know you don't agree with his theory or twisting of the law. If permitted, "speak" your objections: "That's not the legal test."; "It's irrelevant whether the juror thinks she has a prurient interest, the law requires prurient appeal to be judged by community standards not personal standards."; "Whether or not a particular juror approves of particular sex acts such as sodomy is not a proper question."; "Shameful and morbid are only some of the types of prurient interest."; "The juror's knowledge of community standards is an improper inquiry under *Smith v. U.S.*"; "The jury must apply the law, not make it or repeal it."; "Counsel is trying to embarrass (or confuse) the juror." The jury looks to the prosecutor for guidance and motivation. You must take charge, be fair and polite but firm and sincere. Your objections may be overruled, but at least you tell the jurors there is something wrong and you don't agree with the defense. Make them aware of these conflicts and points of controversy so they question them rather than accept them during the course of the trial. Hopefully, the instructions will prove you are correct, but even if the judge sides with the defense you need to keep the jury aware of the conflict until your closing arguments. This frame of mind starts at *voir dire* and you must begin then to stake your position and object to defense attempts to qualify or distort the two legal tests.

Finally, you should be familiar with one very popular defense tactic during *voir dire*. As will be discussed in Chapter 6 on "Proof of Obscenity," defense counsel have been successful in twisting the meaning of the term "prurient" and in gaining acquittals through such a strategy. Defense attorneys have been asking prospective jurors during *voir dire* whether *they* are average people, and whether or not *they* have a prurient interest, which the defense argues means only a "shameful or morbid interest in sex." Obviously, such questions are intended to embarrass jurors *and* to set the stage for closing argument. During closing argument, defense counsel will remind the jurors that during *voir dire*, they said they were average persons and that *they* did not have a prurient (shameful or morbid) interest and, therefore, if the material does not appeal to or arouse them, then it cannot be obscene.

Such *voir dire* questioning is totally improper since it asks a juror to substitute his own feelings or standards for those of the "community" in complete contradiction to the law. (See Chapter 6 for a discussion of the purpose of "community standards" as a measure of obscenity.)

## **SPECIAL NOTE — PREVENTING A JURY WALK-OUT**

If defense strategies are successful, a "jury walk-out" can result. This is a situation where jurors are made to feel uncomfortable about the possible contents of the trial, and where they request that they not be required to serve. Judges tend to grant such requests for dismissal in this type of case. Some people think that they are doing the right thing by making such a statement and walking out of the courtroom, and do not realize that they are leaving you with jurors who either do not care about this problem or who like pornography.

There are several things that you can do to prevent such a jury walk-out. If you are in a jurisdiction that permits you to make arguments to the judge in the presence of the jurors, you might consider making a statement to the judge that will show the jurors that they are not doing the right thing by walking out. No one "enjoys" sitting through a rape, murder, assault, or other serious trial, but jurors sit through these trials because it is their duty, and because they realize that they must be able to put aside their own beliefs and apply the law as the court instructs. You might have an opportunity to express these thoughts to the jury panel as a whole. You may also be able to prevent such a walk-out through your own *voir dire* questions by calling jurors' attention to the fact that they will be required to look at things which are very explicit or might disgust or sicken them, but it is a part of their duty as a juror, it is an important duty, and the only necessary element of their service is that they base their decision on the evidence and the law as the court instructs. You might also consider the individual *voir dire* of prospective jurors if such a procedure is allowed in your jurisdiction.

Remember that you are asking them as responsible adults to serve the criminal justice system by rendering a cold and impartial verdict. You are not asking them to like or dislike hard-core pornography or the people who make, sell, or use it. You are asking them to determine whether this defendant violated a specific state statute by knowingly distributing a specific obscene item on this specified occasion.

The final thing that you can do to prevent a jury walk-out is to be

as aware as possible of the cases in your jurisdiction dealing with challenges “for cause.” Certain general principles govern *voir dire* and challenges for cause, the first being that the judge has wide discretion in controlling *voir dire*. Case law is not specific on what a judge can and cannot do unless there is an obvious abuse of discretion by the court. Courts generally hold that the decision to excuse a juror for cause is within the sound discretion of the court. It has been held that a law enforcement officer can serve as a juror where he has stated that he could remain impartial. *United States v. McCord*, 695 F.2d 823, 828 (5th Cir. 1983), *cert. denied*, 460 U.S. 1073 (1983). Even though prospective jurors have prior knowledge of the case, they can survive challenges for cause if they state that their prior knowledge would in no way affect their ability to render a fair and impartial verdict. *United States v. Johnson*, 584 F.2d 148, 155 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1978). “If a juror can lay aside any preconceptions about the case and try it solely on the evidence presented in court, it is not error to fail to dismiss such a juror for cause.” *United States v. Gay*, 522 F.2d 429, 432 (6th Cir. 1975). See: *United States v. Salamone*, 800 F.2d 1216, 1225 (3rd Cir. 1986).

It will often be argued in obscenity cases that jurors should be excused for cause because they have a prejudice against the “type” of case. This is not an uncommon thing in any kind of criminal trial. In an Arizona rape trial, a prospective juror admitted that he might be prejudiced because of the type of case, but he was not disqualified for cause where he stated that he would “be guided by the evidence submitted.” *State v. Brady*, 189 P.2d 198, 200 (Ariz. 1948). Defense counsel may ask that a juror be stricken for cause because the individual is biased against the “party” being engaged in a pornography business. “The question of competency in such cases depends on whether the general prejudice against the business is of such a character as to influence the juror’s decision of the particular case; so if he has no prejudice against defendant personally and can, notwithstanding his prejudice against the business, give him a fair trial and render an impartial verdict according to the evidence, he is competent;...” 50 C.J.S. Juries § 226(c).

As a prosecuting attorney, you might have the opportunity to have prospective jurors stricken for cause if they have strong objections *against* obscenity law, and if you feel that they will have a difficult time being fair and impartial in regard to the prosecution’s case. A juror may be disqualified for cause if he has prejudice against the particular class of action which might affect his verdict, or because of his bias, would require stronger proof than if it was an action of another kind. 50 C.J.S. Juries § 226(e).

Other types of questions often asked by defense counsel in obscenity trials have been held improper. Questions calling for prejudgment of the evidence, hypothetical questions to jurors asking them to decide what their ruling would be in advance under a certain set of circumstances, questions relating to impact of evidence on individual jurors, technical questions relating to the burden of proof, etc. If you wish to study this subject in more detail, additional sources are given in this text which will provide a starting place and will prepare you for objections in court. It is further suggested that you study the cases in your own jurisdiction dealing with improper *voir dire* questioning and with the legal basis for "challenges for cause." See: *Smith v. United States*, 431 U.S. 291, 308 (1977) (disapproved the asking of technical legal questions about the law or community standards and specified the questions which were improper); *Hamling v. United States*, 418 U.S. 87, 138-40 (1974); *United States v. Thornus*, 613 F.2d 787 (10th Cir. 1980); *Tidmore v. City of Birmingham*, 356 So.2d 231 (Ala. Crim. App. 1977); *Starley v. City of Birmingham*, 377 So.2d 1131 (Ala. Crim. App. 1979); *Piepenburg v. Cutler*, 649 F.2d 783 (10th Cir. 1981); *Boyd v. State*, 643 S.W.2d 700 (Tex. Crim. App. 1983); *Evert v. State*, 561 S.W.2d 489 (Tex. Crim. App. 1978); *Harris Enterprises v. State*, 408 A.2d 284 (Del. 1979); 50 C.J.S. Juries; 30 Am. Jur. Trials p. 561 ("Jury Selection and Voir Dire in Criminal Cases"); and 47 Am. Jur.2d §§ 195-212 (Voir Dire Examination), and §§ 213-23 (Challenges for Cause).

## CONCLUSION

The purpose of *voir dire* is to determine the qualifications of prospective jurors to serve. Ideally, the jury should represent a cross-section of the community, especially in an obscenity case where it must judge the material at issue by state or local community standards. A fair and impartial jury will not result in your case if conservative or religious or sensitive panel members are permitted to excuse themselves merely because they would "rather not serve." In an obscenity case, you must encourage the judge to strictly apply legal juror qualifications, and you must require defense counsel, if at all possible, to use his peremptory challenges to challenge jurors that he does not want. To repeat, the trial judge has wide discretion on *voir dire* and the case law offers only general principles rather than hard rules to assist you. Familiarize yourself with the holdings in your jurisdiction, be aware of defense tactics, and do not allow jurors to be painted into a corner from the outset by misinterpretations of the law and by unfair and repetitious questions relating to juror qualifications.