

## **View from the Bench**

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## **Voir Dire**

### **Preface**

*This is the first of what is anticipated to be a series of articles derived from interviews of judges throughout the State of Illinois on various aspects of civil trial practice. For this inaugural article, the topic of voir dire was chosen. Four IDC Board members conducted the interviews. Paul Lynch interviewed the Honorable Patrick J. Hitpas from the 4<sup>th</sup> Circuit. William McVisk interviewed the Honorable Barbara A. McDonald from Cook County. Al Pranaitis interviewed the Honorable Barbara L. Crowder from the 3<sup>rd</sup> Circuit. John Robertson interviewed the Honorable James B. Stewart from the 9<sup>th</sup> Circuit. A script of questions was prepared in advance and was generally followed for each interview. The questions and a representative sampling of the judges' answers appear below, after selected vitae of the respective judges.*

### **Vitae**

#### **Barbara L. Crowder, Circuit Judge**

Judge Crowder's practice prior to her becoming a judge included work as an assistant state's attorney and special public defender and as a general practitioner with a concentration in family law. She has been a judge, sitting in Madison County, for 11 years and has conducted *voir dire* in approximately 40 civil trials.

#### **Patrick J. Hitpas, Circuit Judge**

For 20 years before becoming a judge, Judge Hitpas had what he describes as a "general practice, small town practice in Carlyle, Illinois." He handled matters in the areas of real estate, estate planning, probate and civil practice. His civil practice was "about 50% plaintiff, 50% defendant." Judge Hitpas has been a judge for 17 years and has presided over jury selection in approximately 150 civil trials and 230 criminal trials in nine different counties.

### **Barbara A. McDonald, Circuit Judge**

Judge McDonald's initial private practice primarily involved defense of insurance agents and brokers in professional malpractice claims. She then moved to the Office of the Corporation Counsel of the City of Chicago, where she defended a wide variety of tort claims, including medical malpractice cases. Judge McDonald has been a judge for 13 ½ years in Cook County, first in the Municipal Department, then as a jury trial judge in the Law Division where currently she is in the Commercial Calendar Section. Judge McDonald has conducted *voir dire* in over 300 cases.

### **James B. Stewart, Circuit Judge**

Judge Stewart also had a broad general practice prior to becoming a judge. He handled real estate matters, civil litigation and criminal cases. He has presided over jury selection in 50 to 75 trials, both civil and criminal, primarily in Knox County, but also in each of the other five counties in the 9<sup>th</sup> Circuit.

## **Use of Supplemental Juror Questionnaires**

**Q.** Do you allow use of written supplemental juror questionnaires? If so, what criteria do you use for determining whether to allow them and how do you handle their use?

**Judge Stewart:** It depends upon the complexity and seriousness of the case. The more complex the issues and the more serious the case, it tends to justify a supplemental jury questionnaire. I think it saves time but in less serious and less complex cases I think it wastes time. We have a capital litigation case coming up in the next year or two and I fully expect to utilize a supplemental jury questionnaire in that instance.

**Judge Hitpas:** If there is a sensitive matter that a juror really doesn't want to discuss in front of an entire court room of people, I think a supplemental written questionnaire to the jury would work well. It avoids the juror having to disclose things in front of 50 or 60 other people that they would rather not talk about. For example, if they are the victim of some type of crime that perhaps they don't want to discuss in front of everyone, I think it is certainly appropriate in those cases.

**Judge McDonald:** They would be most appropriate in cases involving sensitive areas of jury questioning or where the attorneys needed to have more information than usual to ascertain juror bias. I would not allow the questions to be argumentative or to unduly comment on the evidence.

## **Method of Examination of Prospective Jurors**

**Q.** What is your method of examining the prospective jurors—all at once, or a certain number at a time, or some other way? Why do you prefer examining in that way?

**Judge Crowder:** I do everybody at once. Because when I did jury trials as a practicing attorney, we did four at a time and the problem was you never really got to know so much who you might get to. The reasons that I like questioning the whole bunch at a time is I think it's faster, because the jurors hear the questions the other jurors are asked and they're kind of ready with their answers, and I think it's fairer to the parties. The whole point of the selection process is to get a jury that each party is comfortable with. To see who is ahead gives them a chance to think through how they might want to use their challenges.

**Judge Hitpas:** The courtrooms I work in traditionally are not large enough that you can question a lot of jurors because the acoustics aren't picking up and that sort of thing. It just becomes unworkable. What I generally do is I seat sixteen in the jury box and place some chairs next to the jury box. I question the entire panel of sixteen. I then turn it over to the plaintiff's lawyer, then the defendant's lawyer to question the same jurors.

After the sixteen are questioned, we usually sit and do another sixteen identically the same way. After thirty-two are questioned, we do all the challenges back in chambers and outside the presence of the jurors, doing, obviously first, cause challenges, then going into peremptory challenges. Then at that point in time we do it in panels of four, which I think the rule requires. When we do the panels of four, I have always allowed back striking within the panel of four. I know there are judges that don't, but I do. I allow back striking within the panels until both sides are locked in four.

### **Restraints on Lawyer Questioning**

**Q.** What restraints, if any, do you place on lawyer questioning during *voir dire*, e.g. time limits, method of questioning, etc.? Why?

**Judge Hitpas:** I have never given a lawyer a time limit, and it has never been abused. Not unduly. I think some of them got a little long. But, I don't usually give a time limit. I emphasize that I do not want the lawyers to be repetitive of what I have already covered. If they are a little repetitive or want to clarify something, not a problem. The lawyers I know, I don't even have to say this, but the lawyers I don't know, if I'm concerned, I usually tell them you are operating at your own risk anyway. If you get too repetitive, you're going to hurt yourself. So, use your own judgment. I usually never have to stop anyone or do much by way of reining anyone in.

**Judge Stewart:** I do not really place many restraints on the attorneys other than telling them in advance that I do not want questions to be repetitive, if at all possible. We do not want jury indoctrination as to the facts of the case or the law. Those are fairly common in most instances but as a general rule, especially in civil cases, I believe this is the lawyer's case and they have a stake in a fair trial and they are the ones that will have to make determinations with regard to peremptory challenges or whether to argue a challenge for cause against an individual person so I give quite a bit of latitude.

### **General Advice about Lawyer Questioning**

**Q.** What general advice about conducting *voir dire* in a civil case would you give to attorneys?

**Judge Crowder:** It's the time to explore for feelings and attitudes that you worry will override the presentation of what the law is and that's really the whole thing that people are searching for. Everybody comes to court with preconceived ideas. I know we tell them you can't have them, but what we really mean is that you won't unfairly apply those ideas here. Everybody comes in with an outlook, so I think it's fair to make sure that you have explored their attitudes and you try to ask questions from different perspectives to do that. That and my other advice, would be to be personable and try to really get a feel for the jurors and let them get a feel for you because partly you are looking for somebody that you think will mesh with your presentation style.

**Judge Stewart:** I would say be prepared. The lawyers that are prepared and have a good idea what kind of juror they are looking for and what kinds of things can cause problems are the ones that can ask the questions most expeditiously and without repeating themselves. Being prepared and being able to conduct *voir dire* in an expeditious way, I believe a jury appreciates it. Jury service is not the first thing a juror volunteers to do if there are other possibilities out there. They are willing to do their duty for the most part but I have found that they don't want to have their time wasted and if attorneys are prepared with regard to their case and the kind of questions they want to ask the juries appreciate that.

**Judge Hitpas:** From a plaintiff's perspective, I would explore with the jurors whether they have a problem with the plaintiff even bringing a lawsuit. There are jurors who just don't like anyone who brings a lawsuit,

especially if they have never had to do it in their family. If I were a plaintiff's lawyer looking for any kind of substantial verdict, I would definitely explore that area. That's a tough area to cover, but I think that they really need to cover it. I think we need to get –we are obviously not allowed to get jurors to so-called “commit” to a verdict – but to get something in the form of a commitment from the juror that if the plaintiff proves everything that's required of the plaintiff, that, yes, they can return a verdict for money damages. There has been a lot of media attention in recent years about lawsuits and I think the plaintiff in a civil case that doesn't at least address that is making a mistake.

If you're a defense lawyer, again, I think I would want to get something close. You can't get an actual commitment, but if you can get something close to a commitment that regardless of how difficult it may be and how sympathetic they may be to a plaintiff, especially in a serious injury case, that if the plaintiff fails to prove the case, they could return a verdict to the defendant, and get something close to a commitment. In general, for both plaintiffs and defendants, I think the most important thing that I have seen over the years is to tailor the jury selection to the case on trial. I think some lawyers try to use the same questions in every case and yes, you can do that, but if the case involves drinking alcohol, I think both the plaintiff and defendant have got to hit that issue on jury selection. If it involves a product, I think they have got to do some discussion of the product, without getting into all the facts of the case. If it involves a chain saw, then I think they probably better inquire about jurors' knowledge of chain saws. I think tailoring it to the particular facts of the case is important for plaintiffs and defendants. I see all the time that it isn't done.

## Effective Lawyers

**Q.** Are there any things that stand out in separating lawyers who are excellent at conducting *voir dire* from those who are not?

**Judge Hitpas:** The best I have seen are people who have a quality that you probably can't teach. They just have a quality that they are good with people. They can relate to people. They know how to ask a question and it's not offensive to a juror. The good ones just have a knack to be pleasant, likeable, and they never ask a question that embarrasses a juror. [On the other hand,] I think they also have got to use language that the jurors can understand. You know lawyers use one word I hear all the time. Lawyers use the word “subsequent” all the time, and jurors and witnesses don't pick up on what that means.

**Judge Crowder:** The lawyers that I believe have done a better job are the ones that listen very carefully to what the jurors are saying and sometimes have a follow-up question that is pertinent to the answer. You can tell when a lawyer is really not listening closely because they go on to another question without follow up. Not only can I tell that, but also I believe the jurors can tell that. And if you are asking them a question, presumably it's because you want to know their answer. One way that people know you are listening to them is to look at them when they talk to you.

## Injecting Humor

**Q.** What do you think about attorneys injecting humor into *voir dire*?

**Judge Hitpas:** I think it is good, if it fits. If it is forced, it just doesn't work. It's got to fit and it can only happen when it does happen.

**Judge McDonald:** I see no reason not to inject humor into *voir dire* as long as it is done in a manner which does not suggest the attorney does not take the case seriously. It is best if the humor appears, and is, spontaneous. Often it helps if the humor is self deprecating, as it helps the jury connect with the attorney as a person.

## Things that Get Lawyers in Trouble

**Q.** What types of things get a lawyer “in trouble” with the judge when conducting *voir dire*?

**Judge McDonald:** Besides violating an in limine order, rudeness is the thing most likely to get a lawyer in trouble.

**Judge Hitpas:** Embarrassing a juror is probably the most obvious thing. Trying to get into too-detailed of a discussion of the law is going to generally get a lawyer into some trouble.

**Judge Stewart:** Any time a lawyer crosses the line with the goal of indoctrinating the jury. If they waste time and are repetitive in terms of the questions they are asking, that causes me a problem.

**Judge Crowder:** Well, if you get into an area that I’ve already ruled off limits, or get too close to that area, I’m not going to be very happy about that. Or if you criticize the court system. It’s fair to ask people how they feel about lawsuits being brought and all of that, but to start out with prefacing that by criticisms of the court system and that people shouldn’t get to bring lawsuits in some areas? We are the court system. So I’m not going to be very happy about that either.

## Questioning on Sensitive Subjects

**Q.** Sometimes civil suits involve sensitive subjects, i.e. subjects that are important to selecting jurors, but are very difficult to question jurors about. Do you have any suggestions as to how a defense lawyer can best handle questioning in such situations?

**Judge Hitpas:** This is a perfect example for a written questionnaire that might only be three or four questions. [Otherwise,] routine questions would be done in open court like we always have, but one or two questions perhaps are so sensitive we would just take every juror back and ask them privately.

## When Not to Question

**Q.** Are there any circumstances under which a defense lawyer should not ask any questions of a particular prospective juror? If so, what are the circumstances?

**Judge Hitpas:** I would probably engage every juror a little bit as we talked about before. It could be minimal. I think it would be a rare case where I would not talk with them.

**Judge Stewart:** In those instances where the Court has inquired of the pool, opposing counsel has inquired of the pool and apparently a good enough job was done in soliciting responses that it simply was not necessary. Young attorneys, especially, all think they have to say something but the experienced trial counsel know that they do not have to and in fact, brevity, is often far better in getting to the point.

**Judge Crowder:** If what has been elicited so far from that juror would give a rational person a belief that the juror is going to be excused for cause and you’re pretty comfortable that juror is going to be excused for cause, and if you don’t want to gamble [that the juror might say something that poisons the entire panel], you can bring the other attorney up and talk to me in a sidebar. Another thing is if somebody is in a lawsuit currently. He is not going to be on that panel. When the attorneys start asking him questions I tell them to stop. It is wasting time.

## Opposing Counsel Going Beyond the Bounds

**Q.** Is there a particularly effective way for a lawyer to handle a situation where opposing counsel is continually going “over the line” in questioning prospective jurors?

**Judge Stewart:** The way I handle it is if an objection is made, counsel can either make a formal objection and then approach for a sidebar conference with me, possibly out of the presence of the individuals being questioned or at least off to the side where we can make a record of what is happening, where the lawyer may have crossed the line and deal with it.

**Judge McDonald:** In situations where the other attorney is continuously going over the line, by improperly commenting on evidence or other improper questioning, opposing counsel should object the first time it occurs and if it occurs again ask for a sidebar.

## Internet Searches

**Q.** Has the availability of the internet affected jury trials? If so, during *voir dire*, how can attorneys most effectively deal with the possible effects of the internet on the trial?

**Judge Crowder:** Well, of course, the part of the new I.P.I. 1.01 that you read to the jury at the beginning tells them they can't go on the internet, they can't research, they can't use computers to . . . they can't do any of those things. We make sure we tell them they cannot use the computer system that is available to the public downstairs in this court. We had that happen here.

## Mistrials during *Voir Dire*

**Q.** What types of things are likely to lead to mistrials during *voir dire* and how can lawyers avoid them?

**Judge Crowder:** Violating an order in limine and continuing to question a prospective juror on a subject where it's pretty clear they have strong feelings about one of the parties. Let's not go too far with that if it looks like cause has already been met.

**Judge Hitpas:** Strong opinions. If one juror blurts out some very strong opinions, it certainly can lead to a mistrial. Some things are just beyond our control. We do our best to prevent them, but they happen. I will give you an example. I was trying a criminal trial a number of years ago. We had a motion in limine prior to trial that the defendant's prior conviction for manslaughter would be kept out of the trial. The motion was granted. About the third question to the jurors was, “Do any of you know the defendant, Mr. So and So?” A guy raises his hand, and I said, “How is it that you know Mr. So and So?” And he said, “He killed my uncle.” Well, that took care of that panel. So some things can't be avoided.

## Weeding out Problem Jurors

**Q.** Do you have any suggestions about how a lawyer can identify the prospective jurors who pose the biggest problems for the positions the lawyer will be advocating during the trial?

**Judge Hitpas:** I would look to be getting eye contact from the lawyers. I watch jurors all the time, and if they are looking the other direction, and won't look the lawyer in the eye, I would be cautious about that juror.

**Judge Crowder:** Don't we all wish we could, because that's really why the lawyers question. Short of watching their body language and listening to them, I don't know. I mean some of them are making it pretty

clear that they're not overjoyed with one perspective or the other—not to the point that they could not be fair, but sometimes there is body language that I'm not sure people pick up on, such as, the juror looks happier talking to one side or the other.

### **Rehabilitating Prospective Jurors**

**Q.** Do you have any suggestions for what lawyers should or should not do in attempting to “rehabilitate” a prospective juror whose prior answers might lead to the juror being excused for cause?

**Judge Crowder:** If you've asked them something and you're worried that the answer they gave or the way they phrased it might have them excused, but you really think that perhaps they weren't listening carefully or they didn't say it the best way, I'd follow up with that.

**Judge Hitpas:** I rarely think it works. I think you can try, but I think it rarely works. If it is a cause challenge, and a pretty obvious one, I probably wouldn't explore it too much.

### **Mistakes in Making Challenges for Cause**

**Q.** What mistakes do lawyers make in asking for a juror to be excused for cause?

**Judge Hitpas:** Well, if it is done in the fashion that I select the jury, I don't think you can really make a mistake. If you are back in chambers, and the jurors don't know who is being asked for cause, I think you can make as many [as you feel appropriate.] I mean, you can certainly ask for too many. I think a lawyer would lose his or her credibility if they wanted to challenge too many for cause.

**Judge Crowder:** I don't know that I'd say there's any mistake at all if you think the facts are there. We do it outside the jury's presence. I remember days when you picked a jury and you were just pretty much telling the judge in front of them that the person should be excused. That's horrible. We don't do that now. I don't think anybody does it that way. Maybe, but I know I don't. It's all outside the presence of the jury. So if you think there is a basis for cause, a mistake would be made not to ask.

### **Mistakes in Using Peremptory Challenges**

**Q.** What mistakes do lawyers make in exercising peremptory challenges?

**Judge Crowder:** I would hate to say that I know better than anybody that is handling their own case. I mean if it's a really big deal and you have challenges left, go for it. But those are individual calls. You know what you're looking for in jurors. Some people hire consultants for goodness sake. I presume the people that are jury consultants must add something to the mix. But since I never had the experience of using one myself, I couldn't tell you whether I think they're better than the gut level feeling of a lawyer looking a juror in the eye and what they think.

**Judge Hitpas:** I don't know if there is a mistake to be made necessarily. I think it sometimes is just a feeling you have about a juror or their reaction to questioning. I would look for leaders, whichever side you are dealing with. If someone strikes me as a leader for the plaintiff, and I am the defendant, I am going to use a challenge on that person, and vice versa. So I would look for somebody who would be a leader, whether it be at a school, or a bank, or wherever they work. If they are in a leadership position, they are likely to be a leader on the jury. Those are the ones I would be very cautious of.

## Final Thoughts

**Q.** Is there anything else that I haven't thought to ask you that would be advice you think lawyers ought to hear in terms of picking juries?

**Judge McDonald:** I disagree with most attorneys about the significance of *voir dire* and do not believe that an attorney can perform a psychological assessment of the prospective jurors to determine which ones are likely to be favorable to the attorney's side. Realistically, the most that can be accomplished is to determine obvious biases, to determine which jurors are likely to identify with the opponent, and to begin developing rapport with the jury. Questions designed to determine bias and to determine which jurors had experiences similar to those of the other side are most appropriate. Also, it is important for an attorney to have a relaxed and friendly demeanor and to stand up while questioning the panel rather than sitting at counsel table.

**Judge Crowder:** I think it's always helpful if the lawyers looks like they're happy to be there and that this is important to them and that they're not distracted. I know things are going on and there's other stuff and there's this and that but the jury is watching everybody from the moment they walk into the room, every second they're in there. There may be 40 of them, but they're all watching the lawyers at both tables and the clients that are there. I am sometimes surprised to see what I think might not be sending the right message, but it happens. I would just remind everybody that they are "on" every minute.

## About the Authors

**Paul R. Lynch** is a partner in the firm of *Craig & Craig*, where he has been employed since 1977, first at Mattoon and, since 1986, in Mt. Vernon. He is engaged in a general practice of civil litigation on the defense side, including medical and legal malpractice, products liability, employment termination, nursing home and dram shop claims. He has had many jury trials in state court and in the U.S. District Court for the Southern District of Illinois. In addition to his membership in the IDC, Mr. Lynch is a member of the Seventh Circuit, Illinois State, and Jefferson County Bar Associations. Mr. Lynch obtained his B.A. from Loyola University Chicago in 1974, and graduated from the University of Illinois College of Law in 1977.

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## About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at [www.iadtc.org](http://www.iadtc.org).

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