

Framing Our Future

The KBA CONVENTION *Re-Imagined!* for 2008
LEXINGTON CONVENTION CENTER, JUNE 18-20

YOUNG LAWYERS CONFERENCE: THE ART OF EFFECTIVE VOIR DIRE AND JURY INSTRUCTION

Convention Coordinator: Jennifer L. Howard
Program Chair: Rebekkah C. Bravo
CLE Credit: 1.0
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Lexington Convention Center
Lexington, Kentucky

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Kentucky Bar Association

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THE PRESENTERS



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THE ART OF EFFECTIVE VOIR DIRE AND JURY SELECTION
Randall Scott May

I. JURY SELECTION PROCEDURE

A. Federal Court Voir Dire

1. FRCP 47(a).

a. The court may permit the parties or their attorneys to conduct examination or may itself conduct the examination.

- 1994 Judicial Center study: 41 percent – court; 33 percent limited exam by attorneys; 18 percent allowed fairly extended exam by attorneys; and 9 percent entire exam by attorneys;

b. Peremptory challenges – 28 USC §1870 – civil – three each party. Several defendants or several plaintiffs may be considered as a single party or court may allow additional challenges and permit them to be exercised separately or jointly.

2. FRCP 48.

a. Not fewer than six or no more than twelve.

b. Unanimous verdict.

B. Kentucky (State Court)

1. Exclusively by counsel and at length at discretion of court.

2. Legal sources:

a. Tax rolls; or

b. Last voter's registration list;

c. Names drawn from drum. KRS 29.280(1).

3. Cause.

Only if cannot conform views to requirements of law; bias; disqualified by law; determined unfit to serve.

4. Peremptory challenges.

a. Civil – three but co-parties with antagonistic interests shall have three each. CR 47.03.

b. Criminal – Felony eight; misdemeanor three. RCr. 9.40.

c. Alternates – increase by one.

C. Objections – Caution, but may have to if:

1. Seeking commitments.

a. How to vote;

b. How they will view evidence.

2. Asking how voted in another case if on prior jury.

3. Arguing case.

4. Discussing what has been declared inadmissible evidence.

5. Violation of rulings on motion *in limine*.

6. Misstating the law.

II. VOIR DIRE (FR. "TO SPEAK THE TRUTH")

A. Pre-Trial Preparation

1. Local contacts/knowledge/jury verdicts.

2. Jury "de-selection," not "selection."

B. Introduction (establishing rapport and credibility) ("like you")

1. Representation/relationship/parties/witness.

2. Purpose – not to pry but to obtain fair and impartial jury.

3. No notes, just eye contact.
4. Memorize – people like to hear their names (if permitted).
5. Only time we get to talk.
6. Individual questions (juror qualification forms).
 - a. Occupations.
 - b. Education.
 - c. Family and their jobs.
 - d. Spare time.
 - e. Legal experience (prior suits, juror before, foreperson – responsible for 25 percent of participation).

C. Relevant Issues

1. Aware anyone can file lawsuit...think therefore automatically entitled.
2. "We are contending..." (establish your theme of case).
 - If proven, return verdict for...(wrongly accused analogy).
3. Meet any sympathy factor head-on.
4. Open-ended questions.
 1. Ex: Strong feelings about companies or corporations?
 - a. Made up of people just like you.
 - b. Proud and privileged to represent.
 - c. Employs a lot of people.
 2. Plaintiff v. defendant, company/corporation – level playing field.

4. Wait until hear all the evidence.
5. Separate liability from damages.

D. Exit Questions

1. Individual verdict/decision.
2. "We try to think of everything we can ask..." "Any reason whatsoever..."
3. Bond.

**INSTRUCTING THE JURY:
POINTERS AND PITFALLS**

Glenn D. Denton and Rebekkah C. Bravo

I. PRIOR TO TRIAL

- A. Draft your complaint with the elements of the jury instructions in mind, and how they will be presented at trial. Whether plaintiff or defendant, you always want to tailor your evidence, testimony and arguments to the elements that will be presented in the jury instructions.
- B. Draft your jury instructions using plain language. This is good advice, though it is hard to follow because you are busy preparing for trial.
- C. Make a decision whether standard or complex instructions are necessary:
 - 1. Standard instructions: Use standard instructions for simple, straightforward cases, such as automobile accidents involving simple negligence.
 - 2. Complex instructions

II. DRAFTING THE INSTRUCTIONS

- A. When drafting instructions, do not try to reinvent the wheel. Follow the model instructions when possible:
 - 1. Kentucky Criminal cases: Cooper & Cetrulo, Instructions to Juries, Criminal Section.
 - 2. Kentucky Civil Cases: Palmore & Cetrulo, Instructions to Juries, Civil Section.
 - 3. Federal Cases: Federal Jury Practice and Instructions (West Group).
- B. There are circumstances when the pattern jury instructions will not suffice, most likely in complex cases involving multiple theories of liability, apportionment, etc. The trial court retains broad discretion in Kentucky to modify or supplement pattern instructions. The primary responsibility is to ensure that the jury instructions permit

the jury to fulfill its duty, which can only be accomplished with clear and concise instructions.

C. Resources:

1. Pattern Jury Instructions: This resource is published by the Sixth Circuit and includes model instructions for federal criminal offenses. The current edition was most recently revised in April, 2008. The entire edition is available at http://www.ca6.uscourts.gov/internet/crim_jury_insts.htm. The table of contents is provided in the appendix for your reference.
2. www.JuryInstruction.com: This website tracks the developments in criminal jury instructions. It contains numerous pertinent articles pertaining to jury instructions and related issues, as well as sample instructions. It is a particularly beneficial resource when practicing out of state. A subscription is required for full access, though guest access to the website provides much information and resources.
3. Previous instructions: When possible, refer to previous instructions used by this judge in other similar cases. This is the best indication of that judge's "philosophy" regarding jury instructions, and what he or she is willing to deliver to the jury.
4. www.abanet.org

D. Additional Resources:

1. Joseph Kimble, "How to Mangle Court Rules and Jury Instructions", 8 Scribes J. Legal Writing 39 (2001-2002).
2. Dorothy Easley, "Plain English in Jury Instructions: Why They are Still Needed and What the Appellate Community Can Do To Help", 78 Fla. B.J. 68 (Oct. 2004).

III. THE INSTRUCTION CONFERENCE AND OBJECTIONS TO THE INSTRUCTIONS

- A. Have your draft prepared before the initial conference regarding jury instructions. Do not expect the presiding judge to have form jury instructions.

- B. You must submit proposed instructions to preserve your objections. See RCr 9.54; CR 51; Commonwealth v. Duke, 750 S.W.2d 432 (Ky. 1988).
- C. A common pitfall: Going into the instructions conference and ‘hammering out’ the instructions. Perhaps you have voiced your objections and issues. However, your objections are not preserved unless you do this on the record. Reiterate any objections voiced during the conference on the record.
- D. When the trial court rejects your proposed instruction, you still have some strategies to rely upon:
 - 1. Always ask the trial court if there is a modification to the proposed instruction that could make them acceptable.
 - 2. Argue your point to the jury nonetheless during closing arguments.
 - 3. Impress upon the trial court that average jurors may not understand the terms used in the instruction. See Free v. Peters, 12 F.3d 700 (7th Cir. 1993) (where instructions were found to be overly confusing based, in part, on argument relying on results of empirical study of average juror comprehension of written instructions).

IV. PRESENTING THE INSTRUCTIONS TO THE JURY

The trial judge will read the instructions to the jury. RCr 9.54. During this time, read along with your own copy. Make sure the judge is accurately presenting the instructions to the jury – mistakes are often made. See, e.g., Gibbs v. Commonwealth, 208 S.W.3d 848 (Ky. 2006).

V. JURY QUESTIONS

- A. The jury's questions should not be answered, particularly when they involve issues central to the case. A reviewing court may find such an error to be harmless, however, if no prejudice resulted.
- B. RCr 9.74 requires that the information requested by the jury be given in open court in the presence of the parties.

- C. See Welch v. Commonwealth, 235 S.W.3d 555 (Ky. 2007) (finding reversible error where trial court answered substantive question presented by the jury, despite the fact that answer was supported by the record).
- D. See 33 ALR5th 205 "Prejudicial Effect, in Civil Cases, of Communications Between Judges and Jurors."

VI. RETURN OF THE VERDICT AND POLLING THE JURY

- A. Follow the jury's verdict with your own copy of the instructions, and take notes as to the jury's answers.
- B. Double check the percentages in cases where a unanimous verdict is not required.
- C. Always poll the jury where there is a split vote. There is no reason to overlook this opportunity to "double check" the jury's verdict.

VII. BEFORE YOU LEAVE THE COURTROOM

Get a copy of the jury instructions as presented to the trial court. You may need this on appeal.

**SIXTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS
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