NACDL's 2026 NATIONAL VOIR DIRE COLLEGE

JUNE 4-6, 2026

The Legal Aid Training and Advocacy Center
55 Water Street, 36th Floor
New York, NY 10041

NACDL CLE INSTITUTE

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Session 1: Theory of the Case and Introduction to Deselection

This lecture will outline the three most common approaches to jury selection (education, demographic, and deselection) and explain why deselection maximizes the collection of relevant information (to exercise strikes for cause and peremptory strikes) while minimizing the risk of revealing pro-defense jurors. We will also explore how to frame deselection questions based on your theory of the case, the evidence in the case, juror prejudice, and juror bias including implicit bias and bias regarding the criminal legal system. Finally, it will describe the practices which maximize juror honesty and openness in the courtroom.

Core Argument

The entire premise of voir dire is misunderstood by most attorneys. Since lawyers can only remove jurors (via cause challenges or peremptory strikes), the goal should never be to educate, persuade, or bond with good jurors. Instead, the sole objective is to identify and eliminate biased ones — the "haters." The focus of deselection is to identify potential “targets” to develop cause challenges and exercise peremptory strikes.

The Four-Step Framework:

1. **Identify the biases** — figure out what values or attitudes would prevent a juror from fairly evaluating your theory of the case;
2. Frame questions designed to identify candidates with those values or attitudes;
3. **Create a non-judgmental environment** — ask open-ended "red meat" questions that biased jurors actually want to answer, without making them feel judged;
4. **Use that information** — to exercise cause challenges (for biases that violate constitutional rights) or peremptory strikes (for other biases).

Key Practical Tips:

- Don't engage heavily with favorable jurors — you'll just put a target on their backs for the prosecutor
- You can't change anyone's values in voir dire, so don't try
- Listen more than you talk; never interrupt; maintain eye contact
- Use simple, visual, concrete questions ("skewed survey" or "spectrum" frames)
- To strike for cause, use conversational language and the juror's own words — never put words in their mouth

Bonus Advice:

- Include case details likely to trigger bias in your opening statement of the case
- Use juror questionnaires to get more candid answers on sensitive topics
- Have a protocol to rehabilitate favorable jurors who may have expressed minor concerns

The overarching philosophy is that **respect and non-judgment** — not persuasion — is what gets biased jurors to reveal themselves.

Session 2: How Juries Think & the Value of Deselection

Participants will learn how modern jury trials are shaped by a deeply polarized social and informational landscape, teaching that jurors do not arrive as blank slates but as products of fragmented media ecosystems, declining institutional trust, and sharply divided political attitudes. You will learn how these forces influence perceptions of crime, authority, and fairness, and how structural issues—like flawed jury pool sourcing, economic barriers to service, and underrepresentation—skew who actually serves. Practical strategies for navigating this reality will be discussed: leveraging juror questionnaires and social media ethically to uncover bias, identifying influence dynamics within the jury, and embracing rather than suppressing polarization when it can be strategically advantageous. An emphasis on a disciplined voir dire approach focused on eliciting honest negative bias, not superficial claims of fairness, while also addressing the risks posed by jurors' access to online information will be highlighted. Finally, we will address the importance of fostering diverse juries and using legal tools to protect that diversity, framing effective trial advocacy today as an exercise in understanding human behavior under conditions of division, information overload, and evolving social norms.

Session 3: Challenges for Cause

This lecture will explain how to shift from open-ended questions designed to identify potential strikes to "soft cross" closed-ended questions designed to lay the foundation for a cause challenge *using the exact words and body language of the candidate*. The lecture will also identify questions specifically designed to elicit cause challenges. Finally, the lecture will explain how to "lock in" cause challenges to avoid "rehabilitation" by the prosecutor or by the court.

The "reasonable ground" standard becomes more reachable. Under *US* v *Sturgeon*, you only need reasonable ground to believe a juror can't be fair — not certainty. A well-executed deselection voir dire, where a juror has openly stated a problematic belief (e.g., "if someone is charged, there's usually a reason"), hands you that reasonable ground far more reliably than a passive voir dire would.

Session 4: Voir Dire on Difficult Topics in "Bad Evidence" Cases

The core premise is that when what could be characterized as "bad or damaging" evidence exists, the defense lawyer's primary goal in jury selection shifts to **identifying and removing jurors who are unlikely to hold the government to its burden of proof**. The lecture covers "bad" evidence into six categories and then explains what to look for in jurors.

The overall teaching point is that confronting bad evidence during voir dire — rather than avoiding it — is essential to finding jurors who can genuinely apply reasonable doubt standards even in the face of strong-seeming prosecution evidence.

> **Physical/Forensic** — DNA, fingerprints, gunshot residue, cell phone location data, surveillance footage, and incriminating digital search history.
>
> **Statements and Admissions** — Confessions (even allegedly coerced ones), inconsistent police statements, incriminating texts/emails, jail calls, social media posts, and informant statements.
>
> **Witness Testimony** — Eyewitness IDs, accomplice testimony from plea deals, expert witnesses, sympathetic accusers, and multiple corroborating witnesses.
>
> **Prior Bad Acts and History** — Prior convictions, Rule 404(b) evidence (e.g., prior domestic violence), restraining orders, gang affiliation, and documented prior threats.

Motive Evidence — Life insurance policies, financial benefit, evidence of affairs, documented conflict, and threatening text messages.

Circumstantial but Powerful — Flight, lying to investigators, disposing of evidence, unusual post-crime behavior, and being the last known person to see the accuser alive.

Session 5: Importance of Jury Questionnaires

In criminal practice, not all juror questionnaires serve the same function. The conventional understanding — that a questionnaire is a tool for identifying and seating favorable jurors — describes only one model. A deselection-based questionnaire operates from a fundamentally different strategic premise: rather than asking who should be chosen, it asks who must be removed. That distinction in purpose shapes everything about how the questionnaire is designed, what it asks, and how its responses are used.

The deselection questionnaire operates defensively — it's a precision instrument engineered to expose which specific jurors are too dangerous to allow on the panel, and to build a record sufficient to remove them for cause. It sacrifices breadth for depth on the topics that matter most to that particular case.

This lecture will include a side-by-side comparison table across seven factors — primary goal, strategic logic, question focus, use of challenges, design approach, length, and tone — and closes with a practical note on why the for-cause challenge, supported by a deselection questionnaire, has become increasingly critical as peremptory strikes face growing legal scrutiny.

Session 6: AI and Jury Selection

This session examines whether professional jury consultants can accurately predict juror verdict tendencies and compares their performance to supervised machine-learning models using the same pretrial questionnaire data. Using a controlled mock-trial experiment with 410 jurors, researchers found that while consultants perform better than chance, machine-learning models—specifically Random Forest and k-Nearest Neighbors—significantly outperform them in predicting juror leanings, achieving higher accuracy and more consistent error patterns. The results show that juror attitudes (e.g., beliefs about fairness and responsibility) are far more predictive than demographic characteristics, and that models can capture complex patterns that human judgment often misses. These tools should serve as decision-support rather than replacements for human judgment, given important legal and ethical concerns, including potential bias and constitutional limits on juror evaluation.

Overall, the session will challenge the empirical foundations of “scientific jury selection” and argue for greater transparency, validation, and cautious integration of data-driven methods in legal practice.

2026 National Voir Dire College

June 4-6, 2026 | The Legal Aid Training and Advocacy Center | New York, NY

Faculty Biographies

Amelia Blyth (Colorado Springs, CO)
Amelia Blyth is a supervising attorney working in the Pueblo regional office of the Colorado Public Defender. She started her career in Colorado Springs office where she tried over one hundred cases in her tenure. She is faculty of the National Criminal Defense College, finalist for Public Justice's Trial Lawyer of the Year, recipient of the Colorado Springs Public Defender Attorney of the Year Award, the El Paso County Criminal Defense Bar Attorney of the Year Award, recipient of the 2023 Olom Award (the highest honor bestowed upon a defense attorney by the Colorado Criminal Defense Bar), and was the Colorado Public Defender Attorney of the year for 2025. Amelia specializes in complex litigation and training.

Michael L. Bloch (New York, NY) | NACDL MEMBER
Michael Bloch is an accomplished trial attorney with an unparalleled record of courtroom success. Most recently, he was the lead trial counsel in *Jawaun Fraser v. City of New York, Undercover Officer 84, Detective Matthew Regina, and Detective Jason Deltoro*, a federal civil rights wrongful conviction action brought against three NYPD detectives and the City of New York for constitutional violations. After trial, the jury found all defendants liable on all claims, and awarded Michael's client nearly $2 million in compensatory and punitive damages. Prior to his most recent victory, Michael was one of the lead attorneys in *Sines v. Kessler*, the historic federal civil rights lawsuit brought against the neo-Nazis and white supremacists who conspired to commit racially-motivated violence in Charlottesville, Virginia in August 2017. The four-week jury trial resulted in a $26 million judgment for Michael's clients. Coverage of the trial can be found here, here, and here. Michael's work in the case was featured in the Emmy-nominated HBO documentary, "No Accident." Prior to launching Bloch & White LLP, Michael practiced at Kaplan Hecker & Fink LLP, where he represented individuals investigated by various state and federal regulatory agencies, in addition to leading other plaintiff-side matters, including the Charlottesville litigation. Before Kaplan Hecker, Michael spent over seven years as a public defender at the Bronx Defenders and three years at Williams & Connolly LLP. At Bronx Defenders, Michael represented hundreds of clients charged with criminal matters at all stages of litigation. He tried more than a dozen felony and misdemeanor cases to verdict and earned an acquittal or dismissal of all criminal charges in all but one case. In his last four years as a public defender, he tried seven cases to jury verdict – as lead counsel on five of them – and earned a full acquittal on all of them. In addition to working as a staff attorney, Michael was a supervisor in the Criminal Defense Practice, counseling a team of five to eight felony-certified attorneys on criminal matters from arrest through trial. Michael was also a member of the Homicide Practice Group, and previously served as a supervisor of the Investigations Practice, training and overseeing the team of Bronx Defenders investigators. At Williams & Connolly LLP in Washington, D.C., Michael worked primarily in the areas of commercial litigation and legal malpractice defense. Michael has been a member of the faculty of the leading trial advocacy schools in the country, including Harvard Law School's Trial Advocacy Workshop, National Criminal Defense College, the New York State Bar Association's Trial Academy and The Defenders' Academy. He has been a guest lecturer on civil procedure at Columbia Law School, the University of Virginia School of Law, and Georgetown University Law Center, among others. Michael has conducted numerous trainings on trial advocacy and criminal defense investigations. Michael graduated cum laude from Harvard Law School, where he represented clients charged with crimes in Roxbury District Court as part of the Criminal Justice Institute, and he worked with the NAACP representing a client in post-conviction proceedings as part of the Death Penalty Clinic. He was also a member of the winning team in the Ames Moot Court competition. After law school, Michael served as a law clerk to the Honorable Chief Judge Helen Ginger Berrigan on the U.S. District Court for the Eastern District of Louisiana and subsequently to the Honorable Diane P. Wood on the U.S. Court of Appeals for the Seventh Circuit. Michael graduated cum laude from Wesleyan University with a B.A. in Government. Before law school, he worked as a criminal defense investigator with the Public Defender Service in Washington, D.C. Michael is currently a member of the Criminal Justice Act Panel and has been a member of the New York City Bar Association's Criminal Justice Operations Committee and Mass Incarceration Task Force. He is proud to serve as a member of the board of the Bronx Defenders. His writings have appeared in the *New York Times*, *USA Today*, *New York Daily News, Bloomberg Law, National Law Journal, The Champion* and *The Forward*.

Eric Davis (Houston, TX) | NACDL MEMBER
Davis has been a practicing attorney since 1994 and accepted employment at the Harris County Public Defender's Office in September of 2011. There Mr. Davis serves as an Assistant Public Defender. He is the Chief of the Felony Trial Division. As Chief, Mr. Davis supervises over 40 lawyers, eight investigators and several other administrative employees. He oversees training in the Felony Trial Division. And he still regularly defends and tries criminal cases, sitting first chair in multiple jury trials each year. Immediately prior to joining the Public Defender's Office, Mr. Davis was the senior member of Davis & Associates, PLLC, a law firm based in Houston, Texas. Mr. Davis graduated from Howard University with honors in 1991 and from Tulane University Law School with honors in 1994. He is also a graduate of the Trial Lawyer's College where he honed his trial skills by learning from some of the best trial lawyers in the country. Following graduation, Mr. Davis was asked to join the staff of the college. He currently serves on the board of directors of the organization and helps train lawyers from across the country.

In 2020, he received the Mentor of the Year Award from the Harris County Criminal Lawyers Association for his efforts mentoring and training lawyers. He received that same award from the Harris County Criminal Lawyers Association in 2016 as well. Mr. Davis regularly presents at Continuing Legal Education courses (CLE) and is routinely a top rated speaker at those CLEs. In 2019, Mr. Davis was recognized as one of the "Best of the Best" by the National Association of Criminal Defense Lawyers for a CLE presentation he gave that year on "Arguing and Defining Reasonable Doubt for Juries."

David Beller (Denver, CO)
David Beller specializes in criminal defense, attorney and judicial discipline, and internal investigations. He represents individuals and organizations involved as targets, subjects, or witnesses in state and federal criminal investigations and related grand jury and pretrial proceedings, including antitrust actions. David brings a depth of experience in managing crisis level regulatory and criminal matters, as well as in advising clients on how to structure compliance programs so as to help avoid such problems. He has defended actions throughout Colorado and worked opposite both municipal and state prosecutors, Colorado Attorney General, Colorado Department of Regulatory Agencies, Department of Human & Health Services (TRAILS), Office of Attorney Regulation Counsel, Judicial Discipline Commission, university disciplinary boards, SEC, Department of Justice, and United States Attorney's Offices for the Districts of Colorado and the Eastern District of California. His litigation skills have also been called on to assist in the representation and support of firm clients in complex civil and regulatory actions. Prior to joining Recht Kornfeld, P.C., David was a Colorado State Public Defender. He is a Colorado native and attended school in Fort Collins, earning a Bachelor of Science in Public Health/Biomedical Science in 1999, and his Juris Doctor in Ohio in 2004. In 2007 David joined Recht Kornfeld, PC and was made a Partner in 2011. David served as President of the Colorado Criminal Defense Bar, proudly serving 1000 criminal defense lawyers, paralegals and investigators. He is a frequent guest lecturer at the University of Denver College of Law and at Metropolitan State University. He is a faculty member of Colorado Alternate Defense Counsel and National Criminal Defense College, teaching trial skills to Colorado criminal defense lawyers. He serves by appointment of the Denver Presiding Judge as a Commissioner of the Office of Municipal Public Defender, and by the Colorado Supreme Court to serve on the Committee for Character and Fitness and on the Colorado Supreme Court Advisory Committee. Since starting his legal career, David has consistently been recognized as one of Denver's premier attorneys. In 2007, he was named by Law Week Magazine as one of Denver's Top 20 Up and Coming Lawyers. He has been recognized as one of Denver's best criminal defense lawyers in Super Lawyers Magazine every year since 2009 and has been named a Denver Top Lawyer by 5280 Magazine annually since 2017. In March 2015, the Denver Business Journal named David amongst Denver's Top 40 business leaders under the age of 40. David has been named in The Best Lawyers in America since 2017 and by Law Dragon Leading Litigators in America 2026. Law Dragon named David in 500 Leading Litigators in America; White Collar Criminal Defense in 2022 and 2025.

Fernando Freyre (Denver, CO)
Fernando Freyre was born in Havana, Cuba in 1955, raised in Louisiana and Wyoming. He graduated from Louisiana State University-Geaux Tigers- and later from the University of Denver College of Law in 1982. He started as a trial lawyer in the Denver trial office of the Colorado State Public Defender's office in 1983 and spent a total of 25 years with them. He is now in private practice and teaches trial tactics around the US, Mexico, Chile, Peru and Argentina. At last count, he had tried over 130 jury trials and more than 25 homicide trials. He is on the faculty of the National Criminal Defense College, Colorado Office of Alternate Defense Counsel, INECIP, ALECIP, ADePRA. He has taught for the Federal Public Defender's, Public Defender's Office in Wisconsin and University of Denver and University of Colorado Law schools. and is a fellow of the American College of trial lawyers, a member of The National Association of Criminal Defense Lawyers, the Colorado Criminal Defense Bar and from 2000 to 2009 was on the Colorado Ethics Committee of the ABA.

Linda Moreno (New York, NY) | NACDL MEMBER
Linda Moreno is a Jury Consultant and Strategy Advisor at DRC. With a career and reputation built on some of the most complex and controversial cases in modern legal history, Linda uses her analytical and intuitive insights to provide a comprehensive advantage in court, helping to craft winning trial narratives and guiding strategic decisions from voir dire through closing argument. A nationally prominent criminal defense attorney, Linda has tried over one hundred jury trials across the United States, specializing in complex litigation involving white collar crime, espionage, and national security. She played a key role in guiding jury selection and strategy for the defense in United States v. Sean Diddy Combs, a case in which Combs was acquitted of the most serious charges. She also helped select the jury for Elizabeth Holmes in the Theranos trial, where Ms. Holmes was acquitted on eight charges and convicted on the remaining charges. Her successful defense of Noor Salman—the widow of the Pulse nightclub shooter—resulted in full acquittals, marking the first terrorism-related trial victory of its kind in the U.S. since 9/11. Linda's diverse clientele has included actor Wesley Snipes, Professor Sami al Arian, the chairman of the Holy Land Foundation, and Guantanamo detainee Mohamedou Salahi. She has also been retained by foreign embassies, including those of Pakistan and Egypt, to defend their nationals in American courts, and has held a Security Clearance enabling her to review classified evidence under appropriate protocols. Linda lectures widely on human rights, civil liberties, and anti-Muslim bias in jury trials, and has taught trial advocacy from Los Angeles to London. She was invited by the Nobel Peace Center to speak in Oslo on terrorism prosecutions post-9/11. She is an International Associate Tenant at 5 King's Bench Walk Chambers in London England, a prestigious set leading the field in white collar crime and regulatory work, and home to some of the biggest names and the very best at the Criminal Bar. Her legal insights

have been featured on CNN, BBC, NPR, ABC, NBC, CBS, Al Jazeera, and in publications including The New York Times, The Washington Post, Los Angeles Times, and The National Law Journal. Additionally, she has spoken at the University of Oxford, University of Cambridge, Columbia University, Yale University, Georgetown University, and other prestigious institutions.

Archana Prakash (Brooklyn, NY)
In 2005, Archana started her career as a public defender at The Bronx Defenders. She moved to the Neighborhood Defender Service of Harlem in 2008 where she worked for over a decade. While at NDS, she started as a Staff Attorney became a Supervisor and moved onto the Management Team. She ended her time at NDS as a Senior Staff Attorney, representing clients charged with homicides and other serious felonies. In January 2019, Archana went back to the Bronx to help create the Homicide Unit at the Bronx Defenders. She has tried cases ranging from homicides to violations and represented thousands of clients in New York City. She is on the faculty at the National Criminal Defense College and the NYSDA Basic Trials Skills Program. She teaches at various other public defenders trainings and spent three months in Palestine through the International Legal Foundation, training and mentoring public defenders. Prior to becoming a public defender, she spent two years litigating civil claims related to wrongful convictions. After graduating from law school, she clerked for the Honorable Myron H. Thompson in the Middle District of Alabama. She is a graduate of Columbia Law School and Cornell University.

Emily Prokesch (Atlanta, GA) | NACDL MEMBER
Emily Prokesch is a Founding Partner of Factor Space Forensics, a specialized boutique firm that provides forensic expert consultation and litigation services. Factor Space Forensics brings over two decades of combined experience litigating complex forensic cases nationwide. Emily is also a Lecturer in Law at Columbia Law School, where she teaches Forensic Evidence. Emily currently serves as the Chair of the Legal Task Group to the Organization of Scientific Area Committees under NIST, on the Forensic Science Standards Board Standards Review Panel, and on the pattern matching planning committee for the National Forensic College, where she is faculty. Prior to founding Factor Space Forensics, Emily was the inaugural Team Leader of the New York State Defender Association's Discovery and Forensic Support Unit; a First Chair Trial Attorney at the Office of the Georgia Capital Defender in Atlanta, GA; and the Forensic Practice Director and member of the Homicide Practice Group at The Bronx Defenders, where she represented indigent clients facing criminal charges, supervised the Forensic Practice Group, and oversaw forensic litigation and training.

Martin Sabelli (San Francisco, CA) | NACDL LIFE MEMBER
Martín represents individuals in state and federal courts including federal gang/RICO death penalty cases. He previously served as a federal defender in the Northern District of California and as the Director of Training for the San Francisco Public Defender's Office and practiced as a partner in Winston & Strawn. Martín served as President of the National Association of Criminal Defense Lawyers and received its Champion of Justice Award in 2018. He has taught for the National Criminal Defense College since 2001 (focusing on jury selection and race) and served on its Board of Regents. In 2013, he established the Latin American Criminal Defense College in Buenos Aires and has been deeply involved in establishing a jury trial system for criminal cases in Argentina. He is currently drafting Argentina's first evidence code and teaches law in the University of Buenos Aires and the University of San Andres. He trains thousands of lawyers in Argentina every year and hundreds across Latin America. Martín received his degrees from Harvard College (1985), the London School of Economics and Political Science (1987), and Yale Law School (1990).

Laurie Shanks (Glenmont, NY) | NACDL MEMBER
Laurie Shanks has been a criminal defense attorney for almost 50 years. She is an Emerita Clinical Professor of Law at Albany Law School where she was the Director of the Domestic Violence Clinic and the Field Placement Clinics. She taught Client Counseling, Fact Investigations, Negotiations and Pre-Trial and Trial Practice courses. She served on the New York Task Force on the Future of Indigent Defense and the Task Force on Wrongful Convictions. She has been a faculty member at the National Criminal Defense College since 1988. She is a frequent lecturer at conferences and seminars throughout the country on the topics of cross-examination in cases of child sexual abuse, opening statements and closing arguments, voir dire, client interviewing and counseling, trial preparation and client-centered representation. Laurie has substantial and wide-ranging experience in criminal justice systems in the United States and abroad. She was invited to Tula, Russia to assist judges and attorneys in the implementation of a jury system in criminal trials. She taught a comparative Trial Practice class in Paris, France and was invited to be one of the plenary speakers at the Pacific Judicial Council in Pohnpei, Micronesia. Additionally, she has provided extensive training to the attorneys and investigators at the Guam Public Defenders Office and taught at the University of Chile in Santiago as a Fulbright Specialist in October 2018.

William C. Snowden (New Orleans, LA)
William C. Snowden is the Director of The Juror Project and a professor at Loyola University New Orleans College of Law. His work is grounded in a simple truth: exclusion is not accidental. As a former public defender in New Orleans, he represented people forced to stand trial in courtrooms designed to convict them. He later served as Executive Director of the Vera Institute of Justice in Louisiana, where he advanced efforts to eliminate money bail, reduce jail populations, and shift power toward communities. Through public education, legal scholarship, and grassroots organizing, Will challenges the myths of

fairness that surround the jury system. He exposes how civic participation has been weaponized to protect institutions rather than people. His work does not ask for faith in the system. It calls for clear vision, informed resistance, and collective presence in the places where decisions are made about our lives.

Deja Vishny (Milwaukee, WI) | NACDL MEMBER
Deja Vishny is a criminal defense lawyer who is available as a consultant, trainer, and expert witness. She is a specialist in homicide and false confession cases as well as suppression, trial skills and providing effective assistance in criminal defense cases. Deja is available as a consultant for defending homicide, confession, and other serious felony matters. She is a nationally known trainer and speaker for your criminal defense, public defender, or state bar organization. She testifies as an expert witness in post-conviction hearings regarding ineffective assistance of trial counsel. She has represented the accused in over 125 homicide cases, handles thousands of cases during her career, and is well informed on how to best represent a client in every stage of a criminal proceed. Deja Vishny has lectured for criminal defense associations, public defender offices, state bar associations and NGO's on defending confession cases, suppression and various aspects of trial practice in over 40 states and India. She is on the faculty of the National Criminal Defense College and served on the Boards of the National Association of Criminal Defense Lawyers, National Criminal Defense College, and the Wisconsin State Bar Criminal Law Section. In 2023 NACDL she was the recipient of NACDL's Champion of Justice award. Additionally, the Wisconsin Association of Criminal Defense Lawyers presented her with two lifetime achievement awards for her work as a criminal defense lawyer and another for the defense of the indigent accused. She is a five time recipient of WACDL's award given to those who get acquittals in homicide cases. In 2012 Deja Vishny was honored by the Wisconsin Law Journal with a 'Women in the Law' award. She has been named a "Superlawyer" several consecutive years. Previously she worked for the Wisconsin State Public Defender from 1980 to 2018, where she was the Homicide Practice Coordinator and Deputy Training Director and a well-respected trial lawyer. She served as an adjunct professor at Marquette University Law School, where she taught trial advocacy for 20 years.

Lisa Wayne (Washington, DC) | NACDL LIFE MEMBER
Lisa Monet Wayne was appointed Executive Director of NACDL and the NACDL Foundation for Criminal Justice by the Board of Directors and assumed the role full-time in February of 2022. Prior, Wayne had been an attorney in private practice in both state and federal courts around the country since 1985. She has represented hundreds of individuals and corporations in both the investigation phase and criminally accused capacity. Previously, Wayne was a Colorado State Public Defender for 13 years where she served as office head, training director, and senior trial attorney. She lectures nationally with NACDL, National Criminal Defense College, National Institute of Trial Advocates, American Bar Association, numerous State Bar Associations, Public Defender Organizations, and many other legal organizations. Wayne has served as an adjunct law professor at the University of Colorado where she taught trial advocacy for 22 years, she serves on faculty at the Trial Practice Institute at Harvard Law School, The National Criminal Defense College, and Cardoza Law School. Ms. Wayne has been an advocate in all venues of the media addressing important issues confronting the criminally accused. She has been a legal analyst for numerous media outlets including, ABC, CBS, CNN, Al Jazeera, World Radio and Fox regarding high profile cases around the country. She is frequently quoted in print media such as the Wall Street Journal, New York Times, Washington Post, Detroit Free Press, and the AP wire. Ms. Wayne testified before the United States Sentencing Commission in 2012 against the implementation of the Federal Sentencing Guidelines as mandatory. In 2005, Wayne was honored with the Robert J. Heeney Award, NACDL's most prestigious recognition. Wayne is the Past President of NACDL, Past President of the National Foundation of Criminal Justice, and serves on numerous committees' around criminal justice issues. Wayne is a member of the Colorado Supreme Court Standing Committee on Ethics. She is also a member of The Colorado Sentencing Reform Task Force. Wayne is a law graduate of Pepperdine University Law School, and an undergraduate degree in Psychology from the University of Colorado.

THEORY OF THE CASE AND INTRODUCTION TO DESELECTION

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Saying Bye-Bye to the Haters
Deselection Checklist

The term "jury selection" is cruelly deceptive. You cannot *select* (include) a juror; you can only deselect (strike) potential jurors for the simple reason that you have only two tools in jury selection: cause challenges and peremptory strikes.

Cause challenges and peremptory strikes are not instruments of inclusion; they are tools of elimination which empower you to send a candidate home rather than offering him/her a seat in the box. Once you wrap your head around this fundamental notion, you realize that you are wasting your time and effort during voir dire by seeking to identify candidates sympathetic to your theory of the case or by seeking to educate neutral candidates. ***By focusing on good or neutral candidates, you do not learn information useful for exercising cause challenges or peremptory strikes to shape the most open-minded jury you can.***

In fact, by focusing on good or neutral candidates, you will likely harm your client by alerting the prosecution to their views. The more you engage a good juror, the more a prosecutor is likely to challenge or strike the juror and the more information the prosecutor has to exercise a cause challenge. ***By focusing on good or neutral candidates, you effectively put bullseyes on the backs of your best jurors so that a moderately caffeinated prosecutor will know whom to strike and how to strike them.***

The fundamental insight of deselection is that you should use the time you have *not* to educate or to identify good jurors or change the minds of neutral jurors, but to unmask biased jurors, or more precisely, to induce them to unmask themselves. The purpose of jury selection is not to select jurors who are receptive to your case. The goal is "*deselection*" – identifying those jurors who are closed your case or inclined to be closed to your case. *So how do you do that?*

<u>The Right Mindset: Listen Without Trying to Persuade</u>
Social science and common sense teach us that you cannot even minimally shift the values of a human being during a brief interaction during voir dire. Persuasion takes a great deal of time *and listening* in a comfortable environment and based on a relationship of trust which is emphatically not the case in any jury selection in any courtroom I have ever seen. Consider this: *How often have you changed the mind of someone you just met during a party regarding their values, opinions, or attitudes on matters like crime, race relations, police accountability, or homelessness?* If you can think of an example, are you certain that his or her agreement actually signified a shift in their outlook as opposed to being respectful and agreeable?

This ain't rocket science, but it does require a mindset that is distinctly different than the mindset we need for all the other work we do in the courtroom. Why? Because, unlike trial, you are *not seeking to persuade*; rather, you are seeking only *to understand* the candidates. Thus, it requires letting go of control and adopting a nonjudgmental approach and not an adversarial one. It also requires that attorneys expose the elements of their case most likely to trigger biases within the jury pool and that, of course, contradicts, at first, our instincts.

In this respect, do not be concerned about "contaminating" candidates with the views of other candidates. People come to jury selection as fully formed human beings who are not going to change their views because another juror holds a different view. Juror 18 isn't going to have an epiphany that police are deeply trustworthy because Juror 37 expresses his that police are heroes and have been mistreated in the media; she has thought this issue through already and will not be moved by a stranger's views expressed in a short exchange.

Nor do we, as lawyers, have that kind of Svengali-like power of other people's mindsets; we cannot "educate" people in short exchanges because their views have been established over the span of their lives and are based on personal experiences as well as the culture of their families, friends, etc.[1]

<u>Rapport Flows from Being Respectful and Not from Ingratiating Oneself</u>
People often say that they use voir dire to build rapport with the jury rather than to deselect. Building "rapport" is, of course, helpful but it is not the primary goal of voir dire and it is not at all incompatible with developing the information you need to exercise challenges to remove the worst candidates. In fact, practicing deselection requires that you treat candidates with respect (that you not try to convince them that their views are wrong) and this type of respect tends to generate trust and rapport much more than trying to push them to think differently or trying to ingratiate yourself with jurors. *That is, deselection requires listening respectfully without judgment and this orientation tends to build authentic rapport with all candidates and models what you will ask of the jurors who are sworn.*

Outline

This work comes to down four steps:

1. (before trial) identifying the values that stand in the way of any juror being open to your theory of the case (TOC);

2. (before trial) framing questions that a juror with those values would really *want* to answer ("red meat" questions);

3. (during voir dire) asking those questions in a completely non-judgmental atmosphere which includes (1) speaking in the language of the jurors you want to strike and (2) conveying that you are not judging them; and

[1] Contamination could occur in two limited contexts: (1) media coverage has exposed some candidates to case related information and (2) there is an "expert" among the candidates on an issue that will be engaged at trial. These possibilities should be addressed in a questionnaire or by identifying and segregating these jurors at the outset of voir dire.

4. Listening very closely to the words of, and observing very closely the body language of, potential jurors so that you can use that information to justify challenges for cause and, where these challenges fail, exercise peremptory strikes.

Part One: Gathering Information for Exercising Peremptory and Cause Strikes (Throwing Red Meat)

Step One: Know your Theory of the Case (TOC): A story of not guilt or innocence consistent with the facts beyond change and the law. A TOC is not an opening statement: it is a movie trailer with the ending revealed. It should be consistent with the facts that you cannot change as well as the applicable law and project a narrative (story) that either demonstrates innocence or offers a reality that is both reasonable and different from the reality proposed by the prosecution.

Step Two: Identify the haters by identifying conscious or unconscious biases (attitudes, values, or opinions) that would undermine, stand in the way, or cause a person to resist or be closed to your TOC. People who hold those biases are haters. The more strongly a person has these biases the harder it is to get through to them and the higher s/he belongs on your peremptory strike list or your go-for-cause list if the bias is inconsistent with the law (for example, someone who will hold a client's decision not to testify against that client contrary to the Fifth Amendment).

> These will include biases against your theory (for example, the prosecutor would never call an informant to testify unless s/he was 100% certain that the informant was telling the truth).
>
> These often include biases about your client including implicit racial bias. *We owe to our clients in a system pervaded by systemic racism and implicit bias to take this head on.*
>
> These might include biases about you (for example, views regarding defense attorneys)
>
> These might include biases about your best sources of proof (for example, that your expert will say anything because s/he is being paid).

Step Three: Find a question that the haters really want to answer as opposed to one that might appeal to you or someone who shares your mindset and communication style. Depending on how much time you have, pick either the one question you really want to ask or several categories of questions. *Always have a good backup question for each category in case a question flops.*

> Go for ***visual, easy, and short*** questions. For example, if you have an undocumented client, you might ask "how many of you believe that people who come to this country should cross the border the right way?"
>
> Or, regarding the criminal legal system, ask yourself what Tucker Carlson wants a viewer to ask him…… *"isn't it true that these days crime is out the roof because the police have their hands tied behind their backs?"*

<u>Step Four</u>: Choose the frame for your question. The two most common frames are:

> Skewed survey: "How many of you feel that the system makes it too hard for the police and prosecutors to do their jobs?"
>
> Spectrum: "Some people think that we are lucky to live in a country with constitutional rights. Many others feel that we have gone too far to protect the rights of criminals. How many of you feel the latter – that we have made it too hard for police and prosecutors to do their jobs?

If possible, use the language that your "strikes" would use; speak with the ear of the other. This can be harder to swallow than it sounds but is useful in conveying that you will not judge. For example, *How many of you feel that someone who comes to* ***our country*** *should learn to speak English?* The phrases "our country" and "ought to speak English" might reflect our views, but using these phrases might be helpful in securing a less-biased jury for your LatinX client (to whom our ethical duties flow). These are not our views. These are the views we are identifying in order to deselect.

Be visual and concrete. Frame questions that jurors can see; that contain vignettes. *How many of you feel that someone who comes to our country ought to cross the border in the right way? How many of you feel that while we have some race problems in our country, Colin Kaepernick should not have disrespected the flag by kneeling during the anthem?* Crossing the border or kneeling are visual.

Final Note: Prepare back up questions for each question you want to ask just in case your “great question” flops in the court room.

Part Two: Creating the Environment (Finding Your Inner Oprah or Speaking with the Ear of the Other)

In a nutshell, create the conditions to let the haters feel comfortable expressing hateful attitudes without feeling judged. Let them talk by asking open-ended questions using active listening techniques. *Active listening is the key.*

In other words, convey a non-judgmental curiosity about the candidates. People with strongly held views are not going to share their true feelings with you if you make clear from your attitude or the phrasing of your questions that you disapprove of them. Most people don't like the feeling of being judged, especially in front of a judge and 70 strangers.

Get the jurors talking and do less talking than you think you should. We can simply repeat a few words of their answers to signal we want to hear more (one aspect/technique of active listening) or simply ask a candidate to explain part of her answer.

As is true for questioning during the trial, timing is as critical while questioning jurors. Take your time. **Ask your questions slowly,** thoughtfully, and with a conversational tone. Do not speed up because the juror speeds up.

Pause between questions long enough to:

1. Be positive the juror is quite finished.

2. Think a bit about the answer, what is left unanswered, and what your follow-up will be, if there should be a follow-up.

3. Give the juror a second to relax and catch breath.

<u>**NEVER INTERRUPT – (Unless it is *painfully* clear to everyone in the room that this juror is providing needless details and not answering your question.)**</u>

Practice active listening and maintain eye contact as you ask the question ***and*** as they answer. Give the jurors time to answer and do not interrupt. Be attentive and polite. Remember, you're not talking to the floor or the lectern. There is no better way to shut someone down and close them up than to ask a question, then look immediately away, as if you don't care what the answer is.

Do not take notes while you listen. This act telegraphs judgement. Let someone on your team do this work.

Use your voice and your facial expressions to convey the clear impression that you are very interested in the juror as an individual, and that more than anything in the world, you want to know what they really think and feel about this next question.

Let your voice go up at the end of the sentence to signal interest and to encourage an answer. Your body language should mirror that interest by leaning slightly toward the person, listening actively, and maintaining eye contact politely.

Part Three: Striking for Cause (Pain-free Purging)

Some questions go to attitudes that may undermine our TOC but are not necessarily the basis for a cause challenge. For example, many people feel that lethal violence should be a last resort but could see their way to a Not Guilty based on self-defense.

Other questions go to core constitutional or statutory rights and therefore to cause. For example, a person who needs some reason to overcome the client’s decision not to testify.

While any questions which lead to cause challenges because there are extreme views on any issue, be sure to know which questions are likely to lead to cause challenges.

Striking for cause requires that you first ask open-ended questions to gather the evidence you need (in the form of answers) to show improper bias. Once you have that evidence, you switch to ***very conversational cross*** show the judge that the juror will not be able to hear the evidence or follow the law or both. ***Never put words in the mouth of a juror – I have made that mistake and barely survived.***

The universe of words you use to justify the causse challenge with the judge is the universe of words they used plus their nonverbal communication (e.g., delay in answering, rolling of eyes, hostile body language).

As you interact with a potential juror, *you must be conscious of the effect on other jurors of the length, tone, and nature of your interaction to avoid chilling and deterring other potential jurors from being open and responsive*. Being conscious of this dynamic, ask yourself whether a juror has expressed an attitude, value, or opinion (bias) that conflicts with a constitutional or statutory right including the following with examples in italics:

> The right to equal protection of the law. *A racial bias including statements like "Black people seem to use drugs more for whatever reason" or "Hispanics are really different from the rest of us." "Latinos are taking our/a lot of jobs."*
>
> The right to remain silent now or when questioned by the police. *A view that a person who does not speak to the police or testify has something to hide.*
>
> The right to be presumed innocent. *The view that the defense has to prove something*.
>
> The right not to be convicted until and unless the state proves its case beyond a reasonable doubt regarding every element of the offense. *The view that the defense has to prove something or being closed to a defense TOC (e.g., a religious view that violence is never justified or the view that the state should have the right to entrap*

> *"bad guys."* Some evidence rules might fit here; for example, a juror who will take "other acts" evidence as dispositive thereby eliminating an element of the offense. *If he is guilty of selling drugs, then he must be guilty of having the firearm.*
>
> The right to confront witnesses. *I think you defense attorneys give victims a hard time on cross so I might have a tough time listening. I can't listen to you cross a child witness.*
>
> The right to compulsory process. *You shouldn't called that person to testify – she's a victim and you made it worse.*
>
> Some due process right including the right to have jurors follow the law (not reject a law or rule of evidence based on their own values). *The law might say it's legal to be in the U.S. with asylum, but he's illegal in my book.*
>
> There might be a situation involving a conflict between a juror attitude and the right to be free of unreasonable searches and seizures, but I have not encountered one. This is likely because Fourth Amendment arguments should be litigated before trial. *Perhaps you might want to cross an officer on past bad acts involving illegal searches and that might create a basis to strike.*

Opinions in conflict with these rights are improper biases that, if shown to the judge during voir dire, should result in striking the juror for cause because they conflict with a legal right. *Peremptory challenges should be used for people who have biases that conflict with your TOC but not a legal right.*

TO PIN DOWN FOR CAUSE

Use easy to understand visual metaphors like "steep climb" or head start."

1. I have the sense that you have strong feelings about this ATTITUDE [*for example, being from a police-officer family, client needing to*

testify in his own defense; burden of proof is too high for prosecutors] – is that right?

2. You feel strongly about this, don't you?

3. I feel like I might be facing a bit of an uphill climb here given what you have explained to me, right?

4. Does the prosecutor have a little bit of a head start given your feelings on XXXX?

5. I sense that it might be a little hard to put aside completely your reactions, your experiences, your expertise, etc. – am I close?

6. Please take a moment. Can you promise that, without reservation that, you won’t be affected at all by your view?

7. ***ESSENTIAL IN SOME FORM TO LOCK IN THE CHALLENGE: So even if the judge asked you to set aside that feeling, you might have a hard time doing that? Or even if the judge asked you to set aside that feeling, you cannot promise us for sure that you can do that?***

Useful Phrases for Some Systemic Issues:

Is what you're saying that your feelings might make it hard for you vote not guilty in case like this one despite the law?

That you *might feel* my client might be guilty just because the prosecution has charged s/him [or if she doesn’t take the stand]?

Given what we have talked about, might you *feel* that you *might need* less proof than someone else in a case like this one?

Is what you're saying that my client might have to do something in the trial because you already feel that if s/he was arrested, s/he’s probably guilty?

Sounds like you might need a little less proof than someone else – is that right?

BONUS TIPS

The Statement of the Case (read by the court) Should Include the Issues that Concern You

Jurors do not know if they have might have views about the case if they don't know anything about the case. Therefore, your Statement of the Case (read by the court) should include those aspects of the case that are likely to elicit problematic views or attitudes.

For example, if there are certain drugs (fentanyl, crack, meth) that are at issue in the case, mention those. If there's a neighborhood where the case occurred that people are likely to have opinions about, mention that neighborhood.

The Statement of the Case should not cross a line to suggest that the Court is passing judgment on either the client(s), or the strength of the prosecution case, but the Statement of the Case should include information that concerns you.

Rehabilitate a Favorable Juror

These questions lead the juror acknowledge that they can be fair and impartial.

1. You don't know my client.
2. You don't know anything about this case except what you've heard here.
3. You have an open mind, right?
4. You can listen to judge and the evidence and follow her instructions, right?

For example, *"I understand that you believe that the police planted evidence on your friend, but the question is, will you be able to set aside that experience, and listen to the evidence, and apply the law that the judge will give you to the evidence you hear in court?"*

Questionnaires Help

- Questionnaires can elicit more candid responses on sensitive topics. Some people will reveal more in a private (written) context. That is, questionnaires facilitate some jurors, who might otherwise not speak up in the court room, to share their views.

- Questionnaires allow us to insulate and remove jurors contaminated by exposure to information by the media. That is, they ensure that the venire is not tainted by case-related information [for example, a suppressed confession] by any single potential juror.

- They allow jurors more time to think through questions and give complete answers.

- They expedite voir dire by providing counsel with advance information about each prospective juror—information that could otherwise be obtained only through in-court questioning of each juror.

- Questionnaires are efficient in that they can facilitate stipulated removal of jurors for hardship, or other reasons, thus freeing up time for the in-court process.

- Questionnaires are effective if they are short and if their purpose is communicated clearly by the judge with encouragement by the judge to be open and honest.

- Judges should encourage that answers be legible. This matters.

VOIR DIRE CONVERSATION STEMS: FRAMING THE QUESTION

1. **Deselection - The Equation:**

    a. Create a safe space using language that will make your target audience feel comfortable and willing to talk.
    b. Identify a belief or idea that is incompatible with your theory of non-guilt
    c. Structure a question that will elicit a response from those who possess that belief or idea that is inconsistent with your theory of non-guilt
    d. Focus follow-up questions on those with that identified incompatible viewpoint.

    In deselection, we are intentionally not drawing out those who have a viewpoint or belief that would be helpful in our theory. Ideally, those people will not speak and will not identify themselves to the prosecutor.

2. **Suggested Deselection Question Structures**

- A lot of people believe [insert biased viewpoint]. Raise your hand if you agree that [insert biased viewpoint using the exact same language]. What about those who just don't have an opinion – haven't thought about it, or just don't have a strong feeling one way or the other?
- A lot of people believe [insert biased viewpoint]. Please raise your hand if you strongly agree, agree, or are neutral on the idea that [insert biased viewpoint using the exact same language].
- A lot of people believe [insert biased viewpoint]. Please raise your hand if you strongly agree, agree, or are neutral on the idea that [insert biased viewpoint using the exact same language]. Of those with your hand up, on a scale of 1-5 with 1 being the least, and 5 being the most, how strongly do you feel [insert biased viewpoint with the exact same language]? Note: model both raising hand and using 1-5 fingers as you ask the question so the jury can hear and see what you want them to do.
- Using the room as a scale. There are some things in the world that people have strong opinions about. Some really agree. Some really disagree. Even then, some are still somewhere in the middle. One of those things is: [state biased viewpoint]. Again, some really agree (moving to that side of the room) and some really disagree (moving to the other side of the room). Stand there and say: who would be here – because you believe [insert strong viewpoint]. If nobody raises their hand, then you can start inching towards the middle and say "here?" and "how about here?".
- Some people believe that [biased viewpoint]. Others believe [opposite of that viewpoint]. Who here believes that [repeat biased viewpoint]?
- I think a lot of people have opinions on [state topic]. For example, my grandmother (or other person you love) believes [biased viewpoint]. Others feel the opposite. Who here agrees with my grandma and believes [biased viewpoint]?

- Caution when using: My biggest fear is that people will go back in the jury room on this case and think [insert biased viewpoint]. Is my worry that people believe [insert biased viewpoint] a reasonable fear?

3. Example of The Equation:

a. Create a safe space:

I proudly stand with Mr. Garcia as you decide this very important case involving an accusation of child sex abuse. We need to know your opinions about issues in this case, and the only way we can learn your opinion is to have an open conversation. There are no right or wrong answers. There is also no room for judgment. It is your RIGHT to have your own opinions, your own beliefs. That is exactly what we will do today – share our beliefs.

b. Identify a belief system that is incompatible with your theory.

Undocumented persons in the United States are criminals just for being here and it's more likely they are guilty of another criminal act.

c. Identify those with incompatible belief system:

Please raise your hand if you strongly agree, agree, or are neutral on the idea that people who are in our country illegally should not have the same rights as citizens? (Have your hand up while asking the question to show the jury what you are asking of them and also to show it is okay to raise your hand)

d. Optional follow-up on those individuals:

Of those of you who raised your hand. On a scale of 1-5, with 1 being the lowest and 5 being strongly believe, how strongly do you feel that those illegally in our country should not have the same rights as citizens? (Signal using your hand – modeling 1 to 5 fingers, as you ask the question)

Core Take-Aways for

Theory of the Case

Revised 2024

Theory: Our core story of innocence, reasonable doubt, or lesser culpability consistent with (1) the facts beyond change and (2) the law and (3) supported by evidence – never all he evidence and our most persuasive evidence. The story should generate an emotional response which, ideally, flows from the values of your jurors.

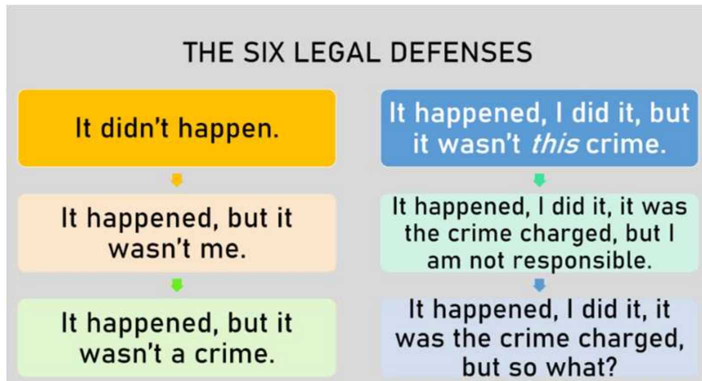
To find the story, consider the tools of storytelling including timelines, character, motivation, key moments.

Fact Beyond Change:
A fact which you cannot change no matter what you do through investigation, expert testimony, or any other means.

Theme: Support your story with a theme or themes – words, phrases, images, or refrains that resonates with and open the minds of the jurors to your story.

Examples:

- **Fractions of a second to decide (self defense)**
- **Blood is thicker than water (family covering up for family member.**
- **The strong prey on the weak ("gang" members lying about a non-member).**



Cultural and Generational Insight
ALWAYS consider how your theories and themes will land on people from different cultures, backgrounds, and generations.

EXAMPLE THEORY:
David should not have been in Big Block turf that night if he valued his life. When two men jumped from an unmarked car dressed just as he was – baggy dark jeans and a hoodie – he had fractions of a second to choose between his life and that of the two men pointing Glocks at him who, he learned later, were police dressed "for the hood."

How Juries Think and the Value of Deselection

NACDL's 2026 National Voir Dire College
June 4-6, 2026 | New York, New York

<u>Trial considerations in polarizing times</u>

<u>Author: Lois Heaney; NJP Litigation Consulting/West</u>

Juries reflect the times we live in, and these are intensely polarizing, head spinning times.

Even before the events of 2026, Reuters Institute reported:

> 39% of respondents avoid the news because it negatively impacts their mood, while 31% **feel worn out by the sheer volume**.

Confidence in mass media is at its lowest point in 50 years. According to Gallup polls trust in mass media has taken a nosedive from a "trusted rating "of 66% in the 1970's to 31% in 2025, with 33% saying they have "no trust in mass media." But "no trust" is not evenly distributed with 59% of Republicans holding the "no trust" point of view and only 6% of Democrats.

While reliance on mass media has dropped, engagement with social media has stepped in. The Pew Research Center's poll "Americans' Social Media Use in 2025" found:

84% say they use You Tube
71% Facebook
50 % Instagram
37% Tik Tok
26% Reddit
21% X/Twitter
4 % Bluesky
3%TruthSocial

For prime-time cable "news" Fox still holds the top spot, as it has for decades, followed by MS Now, and trailed by CNN. News silos are intense whether in social media, cable news, conversations or elsewhere.

Pew found that adults "under 30 are far more likely to use Instagram, Snapchat, TikTok and Reddit" than other social media sources. Instead of mass media people are looking to social media for their "news". Ask people what their primary news sources are on a jury questionnaire and you will learn something about the kind of media they are exposed to, the depth and breadth of their engagement with news and that impressive numbers rely only on You Tube, Facebook and conversations with friends and family.

As a result, public opinion is increasingly polarized about crime, immigration/deportation, the economy, international events, and of course Donald Trump. An August 2025 AP-NORC poll revealed that two-thirds of the public view crime as a major problem nationally, and more than 80% see it as a major problem in cities. The same poll found that Republicans were far more likely than Democrats to view crime as a major problem in large cities. And NPR/lpsos poll of September 2025 found that 93% of Republicans compared to 54% of Democrats feel that crime and violence in American cities is unacceptably high. We don't have to wonder long where that point of view comes from. Those sentiments were a disconnect from the official data released by the FBI which showed a significant drop in violent and property crime in 2024. Approval/disapproval ratings for President Trump are driven by party affiliation with the gap between Democrats and Republicans as large as 70% on overall job performance and immigration.

Juries are drawn from this same universe of public opinion. Juries, small groups of strangers brought together through a maze of criteria that leaves many out due to unrepresentative and outdated source lists, economic hardship, language barriers, priors and more. The greatest barriers, well before the exercise of cause and peremptory challenges are the inadequacy of source lists which may not be updated often enough to take into account the greater mobility of renters, young people, poor people and a system which does not pursue non response/non deliverable jury notices; and MOST IMPORTANTLY the barrier of economic hardship in a system based on grossly inadequate juror pay, and a dearth of employers who pay salaries or wages during extended jury service.

Consider who is not present and what that is doing to skew the attitudinal mix in the pool. As Paula Hannford-Agor formerly of the National Center for State Courts observed:

> *"Our entire jurisprudence concerning the right to trial by jury is premised on the ideal of juries that reflect the broadest possible cross section of their communities. One might reasonably doubt the ability of a jury to be fair and impartial if it was selected from a jury pool consisting only of people with the wherewithal and inclination to serve."*

Most criminal courts run trials from 9am to 4:30 with 90-minute lunch breaks, and 15 minute morning and afternoon breaks. Often things start late for jurors as time is taken up in the morning with objections and other matters, all told reducing actual in court time by a minimum of two hours and often much more, meaning actual trial time is never more than 5.5 hours a day and often much less but takes up a full work day. There has been more innovation on the civil side where many trial courts now run without a lunch break starting the day at 9am and concluding at 1:30 with two 15-minute breaks, providing 4 hours of daily in court time. Motions and matters can be taken up after the jury leaves. This can enhance the composition of the jury pool – allowing people to work part time or pick up their kids after school.

Social Media Juror Background Searches

We know people expose more bias in the privacy of a questionnaire than they will in open court, and still more from their keyboards on social media. Follow the rules and do not overstep. Apps and young folks who are adept of social media searches will find information beyond what is available in court, and you may learn much more about a juror's news sources, interests, affiliations, likes, politics, contributions, activities and life's challenges from their public pages; just don't friend anyone and avoid LinkedIn which leaves a trail. Don't be afraid of information. You may not be able to use what you learn from the search in voir dire but it will aid in your evaluation of the juror.

In jury selection identify the likely leaders and cohorts within the group, evaluate who is likely to have sway with other jurors, the opinion leaders, folks who in effect carry more than one vote. Evaluate whether there really is a "good verdict" for your client and whether disagreement in the jury is more preferable; if the latter look for opposing forces and the polarization that may be to your client's benefit.

This strategy involves risk taking – on the one hand avoid allowing the perfect to be the enemy of the good, and on the other be as sure as you can be that the forces aligned against your client have a critical mass of jurors with substantial enough strength to hold their own. Counting on one juror is much too risky, not only may they not be able to withstand the pressure to return a verdict during protracted deliberations, illness or other circumstances may remove them from the jury before deliberation.

Jurors' Access to the Internet

The availability of information literally at our fingertips also means that potential jurors (and seated jurors) can readily access case information. In the pre-internet days finding old news coverage of a case/crime was a chore. Only very few kept copies of news reports, and those people largely were driven by some personal involvement. Forty years ago (1986) in jury selection in the Stephen Bingham case, a potential juror ended their voir dire fanning the case clippings he carried in his jacket's interior pocket.

Now of course some jurors google cases when they get jury notices, when they appear at the courthouse, during breaks in jury selection and later still. Information is instantly available and no longer has a limited shelf life allowing the curious to surreptitiously find out about priors, other inadmissible evidence, and social media commentary.

Monitoring jurors' social media during jury selection and trials has from time to time resulted in jurors being dismissed due to their public comments about the case and behavior during trial. [We found comments by a prospective juror in a Seattle murder trial discussing her drinking habits during the lunch break and how she managed to get past the security despite her alcohol consumption. Others have written about the case, parties, judge, boredom and so on.]

<u>Working with Polarization</u>

Here at NJP we have long advised lawyers that voir dire is best when it involves less attorney talk and more juror talk – "talk less and listen more" or taking a note from Lin-Manuel Miranda's advice to Alexander Hamilton by Aaron Burr "talk less, smile more, don't let them know what you're against or for." Welcome expression of negative bias, it is what builds a cause challenge, use the simple three words "tell me more". Gear questions that expose the negative, not the positive, in fact welcome the negative and expose it by being open and nonjudgmental, just work on pulling it out so that it stands up to the test of a cause challenge, and cannot vaporize with some simple admonition to follow the law or set aside those views. Once negative bias is exposed gently lead, draw more out and don't rehab, avoid the temptation of asking jurors "if' they can be "fair." Judges are too often satisfied by a juror's statement that they can set aside what they know, think, feel and somehow judge the case fairly.

Develop an introduction and questions that are geared to exposing the negative, don't go hunting for positive jurors, you are just creating a challenge list for the other side, for example:

> Introduction: We all come to court with our own life of experience, the good and bad things that have happened, what we were taught at home or school or in life. That's what forms us, our values and it isn't something we can just drop at the door.
>
> Sample questions: Often people feel when someone charged with a crime does not testify to tell their side, they must be hiding something, what do you think?
>
> "Police officers are trained observers; would you tend to feel an officer's testimony is inherently more reliable than a bystander?"
>
> "No one likes injury or harm to another, but when [a child] is involved, it tips the scale for you, and you'd want to be as sure as possible that the person charged is innocent before you could acquit him?" "And so, we would need to convince you of that?"

Learn something about their tolerance for disagreement, ambiguity and group decision making. Consider including questions on the questionnaire or in oral voir dire such as:

How do you approach decision making with others when there is disagreement?

Some people feel more frustration than others when a group is unable to agree on an important decision, how do you feel?

How difficult is it for you to “agree to disagree” with others even if it means not making a decision or taking action?
☐ Not at all Difficult ☐ Somewhat Difficult ☐ Very Difficult ☐ Extremely Difficult

When working with others is it more important to you to:
☐ Reach a resolution of a complicated issue and move on
☐ Refrain from making a decision if there are deeply held differences of opinion

Take a page from the Colorado method in capital cases and teach respect for differing opinions:

A juror is not required to vote in any specific way, and each juror ultimately makes the decision based on their personal judgement of the facts and the law. If you serve as a juror in this case, will you respect the right of every juror to arrive at an individual decision, even if you disagree?

If you serve as a juror in this case you will need to allow for all jurors to express their own opinions and respect the right of every juror to arrive at their personal, individual decisions. Do you agree with this process?

<u>CCP 231.7 is your friend</u>

It is well documented that racial diversity in a jury improves the quality of group decision making. In jury simulations racially diverse juries exchanged more information, had more detailed discussions, made fewer factual errors, asked a wider range of questions about the evidence, and in general engaged in more thorough and robust deliberations. (see Sommers, S. R. (2006). On racial diversity and group decision-making: Identifying multiple effects of racial composition on jury deliberations. *Journal of Personality and Social Psychology*, *90*, 597-612.)

CCP 231.7 seeks to protect and support diversity in juries and remedy the difficulty of implementing Batson. If possible, have someone with you during jury selection to take complete notes and observe the jurors and the panel. This will allow you to better engage in voir dire and have the material you need for cause and peremptory challenges. Know how to use CCP 231.7 to protect jurors and challenge prosecution peremptory challenges.

Challenge race based [or other improper] peremptories and build a record, it may dissuade the other side from additional race-based challenges or you may succeed in retaining a challenged juror, especially after the object to multiple challenges. Be prepared to justify your challenges, you should be doing than anyway.

RADICAL JURY TOOLS FOR DIFFICULT-CHALLENGING-TROUBLESOME TRIALS[1]

DR. SUNWOLF
Professor, Santa Clara University

As criminal defense attorneys, we have probably spent too many years as advocates in the criminal justice system looking at *the justice our clients are offered* to *notice the justice they ought to be receiving.* No matter how maverick our personal passion for advocacy may be, the courts have been subtly persuading us, every day, to accept as "normal" what is, in fact, unfair.

I've become convinced that anytime a judge says, "This court has no choice but to [fill in blank] . . ." what follows is never true. I believe that if we required the justice system to simply play by *its own rules*, it could not handle those rules. Having left the courtroom after 17 years as a criminal defense lawyer, in order to understand more about how jurors really think and feel, I see myriad ways in which our clients can get a bigger slice of the justice pie. Delighted to share some of them with you. (You'll start seeing more.)

[1] *Some materials are excerpted and adapted with permission from her 2008 book:* PRACTICAL JURY DYNAMICS2: FROM ONE JUROR'S TRIAL PERCEPTIONS TO THE GROUP'S DECISION-MAKING PROCESS [LexisNexis]

WHO GETS INVITED INTO THE JURY BOX?

All clients and all trials benefit from our attention to the neglected processes that affect *who gets invited to the jury party* and who is routinely excluded. Further, our justice system has long neglected paying attention to the myriad ways in which fairness becomes skewed in the courtroom.

State and federal constitutional requirements include the fact that the jury pool must be representative of community within the judicial district. If you have no idea if this is true for your client's trial, you shouldn't be going to trial. Chances are, it is not.

Every state has rules for the assembly of jury pool. Find those rules. Interview the jury commissioner to see how they are assembling their pool. How often is that pool refreshed, as populations turn constantly. How does the jury commissioner handled no shows (a large % of no-shows are marginalized groups that are afraid to miss work to respond to the jury summons). Get the latest census data to find out what the demographics SHOULD look like. File a motion to quash the venire, at which you call the jury commissioner.

These challenges help every broth and sister defending anyone. Hence, a group effort/consult, including appellate lawyers, to make the challenge appellate-friendly makes sense.

EVERY TRIAL SHOULD BE **PRECEDED** BY THE CONSIDERATION BY JUDGES, ADMINISTRATORS, AND ATTORNEYS OF TWO QUESTIONS CONCERNING POTENTIAL JURORS:

- WHAT HAS THE COURT BEEN DOING?
- WHAT WOULD BE A BETTER WAY?

CHRONOLOGICAL JURY MARKERS: *POINTS AT WHICH A JURY EVENT/ISSUE MAY ARISE*[2]		
Event	**Issues**	**Comments**
Venire	*What are the procedures used in the trial courts: Who is in the pool, who is not included?* •Statutes, Rules •Local Court Rules •Previous Challenges to the Venire Process •Demographics of the Judicial District: Whose faces should we see?) •Latest Census Figures •Method of Notifying Juror •Information Feeders: Driver's Licenses, Voting, Other Methods •Age of Information (How often is it refreshed?)	The jurors who actually arrive in our courtrooms are skewed by the selection process. Interviewing the Jury Commissioner is an excellent place to start: What are they doing now? Many jury commissioners have appropriate ideas about what they need to do a better job and what is blocking them from following the rules. Whether the venire you get is legally appropriate will always depend upon your ability to show on the record that the folks who show up do not look like the folks who reside in the judicial district. Hence, the value of the most recent censes. The local Chamber of Commerce also has excellent statistics for businesses on who lives in that community. The poorest people in a community move most often, hence they often no longer live at the last address, or do not show up in a telephone directory, or do not have a driver's license. An advocate has the right to request that more ways of including names be used, in order to fairly represent the face of the community *currently.*

2. These are practical suggestions to get your own thinking started. They are not inclusive.

CHRONOLOGICAL JURY MARKERS:
POINTS AT WHICH A JURY EVENT/ISSUE MAY ARISE[2]

Event	Issues	Comments
Summons	*What procedures does the judicial district use to summons potential jurors for jury duty?* •telephone call-ins •methods used to create sub-pools for specific trials •internet, court web sites •timing of summons relative to the trial •**No-shows**: What happens when a citizen does not respond to a summons and what are the court rules about what should happen? •% that do not show up •demographics of those who do not show up •addresses that commonly do not show up •court procedure to contact people that do not show up •punishment available for willfully failing to show up •re-sending summons •What information is included with the summons? (brochures, pamphlets, suggestions, web sites)	The failure of courts to follow their own rules when it comes to jurors who ignore the summons has long been neglected by trial advocates. 1. First get a copy of the statute and the court rule governing what the procedures and penalties are for failing to show up for jury duty, once summoned. 2. Second, interview the jury commissioner to find out what they are doing now. 3. File a motion challenging the venire, if you discover that appropriate follow up and the resending of unanswered summons does not occur. 4. Have a hearing at which you call the jury commissioner and offer recent community profiles.
Pre-Trial Exposure to Information	*What information on this trial, legal issues, facts have potential jurors been exposed to?* •media, films, television, radio, magazines, newspapers •internet, blogs •person-to-person information •what does the summons itself look like/say/contain? •prior jury service, subsequent interviews	Jurors may have been tainted before they get to the courtroom. Hence, you must gather the taint and request appropriate remedies before the trial starts. The frequency, content, and number of alternate media containing prejudicial information will be needed to support a motion for change of venue, for extensive questionnaire inquiry, or for one-on-one juror voir dire.

CHRONOLOGICAL JURY MARKERS: *POINTS AT WHICH A JURY EVENT/ISSUE MAY ARISE*[2]		
Event	**Issues**	**Comments**
Early Non-judicial Excusals	*Which citizens who were summoned were subsequently excused by someone at the courthouse other than the trial judge?* •Who handles early requests to be excused? •What written information/guidelines does the Chief Judge give to the Jury Commissioner's Office? [expression delegation] •What written information/guidelines does the Jury Commissioner give to staff? •What types of excusals are handled *ex parte* (without the presence of either party)? •What are local court variances from judicial district rules? •What are the statistics on excusals from the original venire for the last 6 months, 12 months, 3 years?	It turns out that jury commissioners and their staff may be routinely excusing the jurors you need for reasons that are not appropriate: age, distance from courthouse, pregnancy, being a student, having a vacation planned, to name a few. You cannot represent a client without knowing how this works—and how it worked on your case. When you look at a jury panel, know that there are many faces missing. You have no record of this unless you file a pre-trial motion asking that every citizen's request for delay or excusal be on the record.
Exposure to Information in the Jury Assembly Room	*What is a potential juror exposed to in the jury assembly room?* •Orientation •Films •Slides •Brochures •Off-hand Comments •Posters •Staff •Outside Persons (who is allowed in?) •Researchers •Magazines •Newspapers •Television	The easiest, yet most neglected, investigation that judges and attorneys should be doing is a visit to the jury assembly room. Many things that jurors are told or read are appropriate for some civil trials, but not others; for civil cases, but not criminal cases. Other things are just plain wrong. Assembly room clutter includes anything a bored juror might read. Visit the jury assembly room and clean it up (cooperatively, by motion, or by request). Jurors may be watching news shows about your trial (or one just like it).

We are all time-starved, yet there exists a vast amount of information about our jury pools (and, consequently, about our potential jurors and how they think—that we can access BEFORE the trial starts. That helps us begin thinking and choosing more wisely about our case themes, language, and potential juror strikes.

Include these valuable web cites in your trial tool box:

• Free Demographics

www.freedomographics.com

This site offers us an opportunity to analyze demographics and values of any place in the country. Further, trial attorneys and consultants can customize their reports and searches for any region or judicial district. An added bonus is being able to access recent United States census data. It is FREE. [The web site, of course, will be advertising to you.]

DELIBERATING UNDER THE INFLUENCE: JUICED JURORS

One pill makes you larger
And one pill makes you small
And the ones that mother gives you
Don't do anything at all.
Go ask Alice,
When she's ten feet tall.

[lyrics, Jefferson Airplane, *White Rabbit*]

A 55-year-old juror was held in contempt of court on August 11, 2006 by a district court judge in New Mexico. As the jurors showed up for a criminal trial in the morning, a sheriff's deputy alerted the trial judge that this juror might be intoxicated. The judge ordered a breath test, which came back at .19 (more than twice the legal driving limit); the juror was immediately placed in jail. A trial court was found to have committed reversible error by failing to grant defendant's timely motion to replace a sleeping juror, where the record clearly reflected that the juror had, in fact, been asleep (SPUNAUGLE V. STATE, 946 P.2d 246 (Okla. 1997)).

Further, it is now estimated by the National Institute on Drug Abuse (www.nida.nih.gov) that the prescription drug usage by people for *non-medical* reasons reaches 20 percent of the population of those over twelve years of age. *Justice may be impaired in our trials more often than any of us have realized.*

Physical and Mental Competency for Every Juror

> One juror may be the difference between liberty and imprisonment. Due process requires that every member of a jury meet minimal requirements of mental competence and impartiality.
>
> MCILWAIN V. UNITED STATES, 464 U.S. 972 (1983)

Justice requires that every juror be not only impartial, but physically and mentally competent, as well. If a juror is unable to listen, attend to, retain, recall, or remember the trial testimony due to the fact that this juror is impaired, the integrity of the verdict will be, correspondingly, impaired. Federal and state rules of criminal procedure have long anticipated sudden illnesses incapacitating a juror during trial (allowing for the substitution of alternate jurors to replace a juror who, prior to deliberations, becomes unable or disqualified to perform the duty of a juror; or, alternatively, agreement by the parties to stipulate to fewer jurors). What has been lacking, however, is acknowledgement by the judicial system that:

1. Many of the citizens called for jury duty might be unable to perform that duty at the outset of a trial,
2. People called for jury duty may be unaware of their own physical/mental impairments, or that
3. Impaneled/sworn jurors might be confused about whether/how to report their own unexpected impairments during the trial itself.

The community's trust in a system that relies on the decisions of *lay people* requires that the attorneys and trial judges involved in every trial give real attention to the issue of juror competency: (1) at the outset of any trial (when tools are available to reasonably discover potential impairments within the venire assembled) and, further, (2) as a matter of administrative course (when consistent administrative policies can be enacted for every trial). Significantly, issues involving juror competence can be raised either by trial judges or by the attorney-advocates. One trial court, for example, *sua sponte* removed a juror who the judge had seen sleeping (replaced with an alternate), where neither the prosecution nor the defense requested that substitution (in fact, trial counsel objected, STATE V. BURNS, 800 So.2d 106 (LaApp.2 Cir. 2001)).

What if a substantial number of our trial jurors are, in fact, *not* competent to do the trial task required? Beyond statutory qualifiers and disqualifiers, what if a juror is **impaired** (either at the outset of the trial or later, at some point during the trial task)? The challenge is an urgent one, which begins by recognizing: (a) what every juror's *trial task* actually is, and (b) what circumstances might impair a juror's ability to perform that task.

What is a Juror's Mental Competency?

The issue of **juror competency** is usefully assembled, piece-by-piece, by examining the manner in which the law has handled *witness* competency. Qualifications for jurors in federal courts, for example, in both civil and criminal cases, fall under 28 U.S.C. § 1865 (a citizen is qualified to serve unless not at least 18 years old, cannot read, write, understand, or speak English; has not lived in the judicial district for at least one year; has a charge pending for a crime or was convicted of a crime with a punishment of more than one year imprisonment; or has a mental or physical incapacity). In this discussion, however, we focus on casting light on **mental capacity or competency**:

> THE DEGREE TO WHICH STRESS, PAIN, SLEEP DEPRIVATION, MEDICATIONS, DRUGS, ALCOHOL, OR DIVIDED ATTENTION MAY INTERFERE WITH THE CAPACITY OF A JUROR TO DO THE JOB *AT ANY POINT IN THE TRIAL*.

Any jury pool is likely to contain jurors with mental disorders, specifically. An estimated 26.2 percent of Americans over 18 (1 in 4 adults) suffer from a diagnosable mental disorder in any given year, with Generalized Anxiety Disorders affecting 6.8 million adults, Obsessive-Compulsive Disorders 2.2 million, Panic Disorders 6 million, Post-Traumatic Stress Disorders 7.7 million, Social Phobias/Social Anxiety Disorders a startling 15 million, Bipolar/Manic-Depressive, 5.7 million, Depression 6 million men (possibly twice as many women), and more with eating disorders (www.nimh.nih.gov). These statistics alone suggest that a substantial number of citizens reporting for jury duty may be medicated (successfully or unsuccessfully) for significant mental disorders.

Competent to Do What, Exactly?

> **com•pe•ten•ce**, n., **1**. The quality of being adequate for the task. **2**. Having suitable or sufficient skill, knowledge, or ability for some purpose. **3**. Legal capacity or qualifications; fitness, as in, the competency of a witness or of a piece of evidence.
>
> Every criminal defendant has a constitutional right to be tried by competent jurors.
>
> TANNER V. UNITED STATES, 483 U.S. 107 (1987)

What degree of mental competence is required of a juror? Each juror must be an active witness to the evidence (testimony, documents, demonstrations) at trial, such that each juror can remember and discuss these evidentiary events during deliberations. The legal mental competency of a *witness* concerns that witness's ability to observe, recall, relate the events to which they may testify.

Medicated Jurors—The Ignored Impairment in Every Jury Venire

> Close to retirement at the time, Merck's aggressive chief executive Henry Gadsden told *Fortune* magazine of his distress that the company's potential markets had been limited to sick people. Suggesting he'd rather Merck be more like chewing gum maker Wrigley's, Gadsen said it had long been his dream to make drugs for healthy people. Because then, Merck would be able to "sell to everyone."
>
> Prologue, *Selling Sickness*

Marketing strategies of the world's biggest drug companies now aggressively aim at the *healthy* among us—with double-page ads spilling from every magazine and Hollywood-style mini-stories as televised advertisements. The United States is now at the epicenter of a $500 billion pharmaceutical industry. In a single day, we are the targets of messages that transform the ups and downs of our daily lives into frightening conditions (for which there are pharmaceutical remedies): "*Ask your doctor if Widget is right for you*!" Awareness campaigns are turning the worried well into the worried sick. Medical reformists Ray Moynihan and Alan Cassels, in their 2005 book, SELLING SICKNESS: HOW THE WORLD'S BIGGEST PHARMACEUTICAL COMPANIES ARE TURNING US ALL INTO PATIENTS, offered a shout-out to all of us that people (include yourself) are being seduced into over-medication.

As a result, more people than ever before are medicated. More people than ever before are, in fact, multi-medicated. These people are showing up for jury duty. In 1987 the United States Supreme Court took the opportunity to examine a trial in which the post-verdict evidence from jurors themselves showed that:

- seven of the jurors drank alcohol during the lunch hour
- four jurors consumed one to three pitchers of beer during court recesses
- two jurors had mixed drinks during the lunch hour
- the foreperson had a liter of wine three separate times
- one juror ingested cocaine five times
- another juror ingested cocaine 2-3 times
- one juror sold a quarter pound of marijuana to another juror during the trial
- one juror took drug paraphernalia into the courthouse
- many of the jurors fell asleep during the trial
- one juror remarked to others that he was "flying"

By anyone's standard, that jury was juiced! The Supreme Court held that this post-verdict juror testimony was barred by Rule 606(b), prohibiting the impeachment of a verdict with a juror's testimony as to the effect of anything upon a juror's mind or emotions (TANNER V. UNITED STATES, 483 U.S. 107, 1987). There was good news, though: the court specifically pointed out that **voir dire is the proper forum** to examine juror competency of this sort:

> The suitability of an individual for the responsibility of jury service, of course, is examined during voir dire. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel.

Extending the TANNER trial's lesson by borrowing from the current controversies running rampant in the sports world about juiced athletes—what about jurors who are simply medicating (prescription)? They may be just as juiced, but **we don't ask and they don't tell**. *That is a policy that allows impaired jurors into our clients' trials.*

Rule 606(b) is always going to thwart an attempt to dig this up after the trial is over.

Practical Solution: Ask, at the first opportunity. Remember, most people have something better to do than serve on this particular trial. Hence, potential jurors may tell, *under the right conditions*; the "right conditions" includes actually asking them!

Practical Questionnaire Tools

Our first trial task is to harvest the information about medications a potential juror might be taking. This is questionnaire material (that would subject the juror to embarrassment or a violation of privacy in open court). Health concerns should always be private, in-chambers material.

Option A

Questionnaire item:

Please tell us all **medications** (include prescriptions as well as over-the-counter drugs, vitamins, or herbal remedies) that you are currently taking, or have taken with the last month:

Option B

Recognizing that people (like each of us) have difficulty accurately retrieving all the medications we may be taking when we did not know we were going to be asked, you can create a checklist.

Questionnaire item:

Please tell us all **medications** you are currently taking (or have taken with the last month) by checking the ones that apply:

❒ Aricept
❒ Bextra
❒ Detrol
❒ Humira
❒ Lipitor

What can a medication tell us about whether a person is competent to serve? [This answer to this question will also be important in creating cogent argument to trial judges about *why* they should allow the item on the questionnaire.] We know several things:

- Some medical conditions are disqualifiers. [Knowing the medication reveals the condition.]
- Some medical conditions reveal a vulnerability to the trial task or the stress to which we should not subject the juror's health.
- Some medical conditions reveal chronic pain, which divides attention.
- Some medical conditions require specific accommodations.
- Some medications impair memory.
- Some medications reveal sleep debt.
- Some medications impair attention.
- Some medications flatten normal emotions (or affect).

Here are some examples [my books lists pages of these medications, so you don't have to look them up to argue to a judge the horrific medical effects common medications have]:

Medical Condition	Medication	Impairment
Adult ADD	[various]	Ability to Pay Attention
Alzheimer's Disease	Aricept	Memory Deterioration
Bladder Control	Detrol	Frequent Urination [need accommodation]
Bi-polar Disorder	[various]	Fluctuating emotions triggered by stress May be Incompetent
Cancer	Humira	Person is battling a life-threatening disease which is damaged by more stress
Sleep Deprivation	Ambien	Person is sleep-impaired, subject to drowsiness and lack of attention the next day.
Heart Attack Heart Failure	Coreg	Side effects of drug (dizziness, fainting) as well as fear of another attack.

Fluctuating Competency

> A thousand people show up downstairs at 8 a.m. We don't participate in orientation, and they are not a visible component in our lives. The judicial system is not responsive to jurors.
>
> Judge's observation, THROUGH THE EYES OF A JUROR

Any juror's competency may fail at any time during the trial, whether it is from abusing drugs, self-medicating, developing stressful life distractions, coping with pain relationship issues, or becoming ill, to name but a few. As a result, "fluctuating competency" should be brought to a potential juror's attention, so they can report it. Judges should be requested to instruct sworn jurors that should things change in their family or work lives or health, in ways that are now painful or distracting, they must let the judge know. *Under no circumstances are they to sit through a trial to which they cannot pay attention.*

On this point, the National Center for State Courts published an eye-opening piece, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS in 1998. Jurors confront sources of stress at every stage of jury duty, even in routine trials. Their daily routine is disrupted and this may present additional stress for their families and co-workers, which causes them guilt. They are in unpleasant surroundings (at best), and experience scrutiny of lawyers and the judge during voir dire, tension from sifting through conflicting versions of facts and unfamiliar legal concepts, conflict during deliberation with other jurors, and the anticipation of criticism following the verdict (someone's going to be unhappy).

The task of deliberating on certain trials, due to publicity, complexity, or emotional components of the evidence will be stressful for jurors. When a juror has a pre-existing medical condition that is triggered by stress, it can be anticipated that we are asking such a juror to risk painful medical symptoms that can feel crippling. Recent studies on job strain in general, and multi-tasking in particular, offer strong support for a more compassionate view of the physical damage to their health that we are asking some jurors to risk.

The influence of stress, anxiety, cognitive overload, and sleep debt have been neglected as powerful factors that block a potential juror's ability to do the job. This is an attempt to trigger new thinking about why some jurors *must* be excused from serving on our trials or, alternatively, why some medicated jurors may need reasonable accommodations that we have not been offering them (bladder control, arthritis pain, diabetic sugar control, hearing impairments, opportunities to take medications on schedule, to name but a few).

Juror Listening and Attention Errors

Cognitive Busyness

When a juror is faced with thinking about many tasks
Cognitive busyness described errors that occur due to the fact that attention is divided.

At a single point in time during trial, a juror may be attempting to manage impressions, anticipate relevancy, organize new testimony, read a chart, remember errands that must happen after court, and decide how to handle a frustrated family member.

A **nonbusy** juror perceiving the trial is one who is devoting full attention to the testimony or argument at hand.

The more cognitively busy a juror is *at any point* in the trial, **the less competent** the juror will be at complex thinking tasks.

Cognitive busyness is not a stable trait within any juror, but, rather, a description of **changing mental activities** and levels of attention. Jurors who were *nonbusy* on Day 1 of the trial may be close to tears with *cognitive busyness* on Day 2, for a variety of unexpected situational factors (some related to the trial, others related to a juror's on-going life outside the courtroom).

Practice Point

1. Cognitive busyness directly impacts a juror's trial task (hence, a juror's competency), it is relevant for voir dire. Both judges and attorneys should be concerned with situations that necessitate multiple attention elsewhere for a juror, no matter how willing that juror is to serve. Many things going on in a juror's life may be **emotionally manageable**, yet **cognitively impairing**. Each party has a right to jurors who are completely competent.
2. *Voir Dire*: Studies show that when people have lots of different things to think about, they have less attention to give something new. What experiences have you had with that? Has it been true for you? Can you share an example? Have you seen it be true for someone else, perhaps when you were trying to get their attention but felt it wasn't really there?
3. *Voir Dire #2*: Combine #2 above, with the challenge for cause inquiry: Would you help us in our decision, now, by honestly letting us know how many important things in your life need your thoughts and attention, in addition to this trial? And what else? How important are those to you? How many times has your mind already drifted to them, in concern? Fair to say you can't turn those distracting thoughts off, because those situations (family/work/health/finances) are real for you?

Juror Listening Errors

Jurors promise to listen. Judges assure jurors that it is important that they listen. Attorneys remind jurors to listen carefully and regularly thank them for listening.

WHAT WE DO *NOT* DO IS REACH A MUTUAL UNDERSTANDING ABOUT WHAT SORT OF LISTENING IS BEING REQUESTED.

Types of ineffective listening that directly impact a juror's task include:

• **Pseudo-listening**, which is an imitation of the real thing, giving the outward appearance of being attentive.

• **Selective Listening**, when a listener attends only to the parts of your message that interest them, rejecting everything else.

• **Insulated Listening**, when a listener chooses to avoid the message, failing to acknowledge it at all.

• **Listening-by-Ambush**, such that the listener is only collecting enough of what you say to attack you with inconsistencies. (Might also be thought of as Listening-to-cross-examine.)

• **Insensitive Listening**, in which a listener receives only the superficial content of the message, missing the emotional information that was expressed indirectly.

Why?

• Message Overload: Too much, too fast, from too many directions.

• Preoccupation: Personal concerns are distracting us.

• Rapid Thought: Listeners think faster than speakers speak.

• Lack of Effort: Listening is hard work.

• External Noise: Many sounds in the background are distracting.

• Faulty Assumptions: Listener thinks they know what the speaker is going to say because it seems familiar so they stop listening.

• Lack of Apparent Reason:

• Lack of Training

• Hearing Problems

• Media Influences

The physical changes in a person listening demonstrate how hard the task actually is.

During careful listening, the heart rate quickens, respiration increases, and body temperature rises. These are the typical signs of physical effort; excellent listening is like a physical workout (which offers an excellent anchor point for jurors in determining whether they are accomplishing it). The most relevant time in a juror's life when they may have done deep effortful listening may have been when they've returned from a friend's house, or a hospital bed, or time with a relative, after a full evening of listening intently because that person was in need. Then they will be able to describe how draining the process can be.

Jurors in listening occupations can help describe the differences as well (psychotherapy, health care, negotiators, to name a few).

With these signs, symptoms, and characteristics of effortful listening on the table, how many jurors are *competent* to sustain that level of listening in a particular trial?

Divided Attention

Paying attention is the most important task a juror has in the courtroom. Whereas **hearing** is a physiological process (a juror may have, for example, physical hearing impairments), **attending** is a psychological one.

The Self-Reference Effect

According to the **self-reference effect**, if we relate new information to ourselves we can recall it more frequently.

> *Practice Point*. Provide opportunities, through dialogue or rhetorical references, for a juror to link new information in the trial to their own life.
> • Do you know someone like that?
> • Has that ever happened to you?
> • Have you ever met someone who was always right?
> • Think about the time you were most afraid.
> • What would you say to a juror who won't listen to someone else?
> • Did a doctor ever say that to you?
> • Remember the last time you walked down a dark alley, alone.
> • When someone yells at you, do you think more clearly, or less?

Deliberating Under the Influence of Stress

A 54-year old woman was serving as an alternate juror in a murder trial when she left a phone message one morning with court officials, saying she was too stressed to continue. The judge ordered her arrested by deputies and brought to the courthouse. The juror wept that the crime scene and autopsy photos were too upsetting, that she had an extreme asthma attack the night before, and that she was terribly worried about her mother in a nursing home. Strangely, the trial judge showed no compassion for the juror's verifiable facts and ordered *the other jurors* to "sentence" the stressed juror:

> The judge then told the jury to pick S.'s fate: one day in fail, a return trip to the jury pool next week or a sentence of sitting somewhere in the courthouse for the rest of the trial. Jurors decided against jail, but chose the other two penalties. Late Thursday, the juror sat in the jury pool room alone, saying she was afraid to go home without permission. "I just felt like I couldn't deal with it today," she said, "I don't think this is fair."

There is growing evidence in the United States that the stress of jury service makes some jurors sick.
Further, stress impairs jury decision-making.

A **stressor** is anything that throws your body out of balance, but, in addition, a stressor can also be the *anticipation* of that happening.
A juror's world may be awash with stressors.

> One of the hallmarks of the stress-response is the rapid mobilization in the body of stored energy, together with the inhibition of further energy storage. Glucose and simple forms of proteins and fats pour out of your fat cells, liver, muscles, all to stroke whichever muscles are struggling to save your neck. Heart rate, blood pressure, breathing rate all increase, functionally, in order to transport nutrients and oxygen at faster rates. At the same time, it makes sense that your body halts other on-going construction projects until the disaster has passed: digestion all but stops, reproduction is curtailed, perception of pain is blunted, shifts occur in cognitive and sensory skills, growth is inhibited (especially in children), and immune systems are suppressed. Grim news, if you are unable to stave off the saber-toothed tiger and resolve the stress quickly.

> Stress makes you sick, damaging almost every part of your body, from your brain to your bones.

Performing important tasks that affect other people, *while we are impaired*, is frequently considered *illegal* (as well as dangerous), under many circumstances! Consider, then, these simple, but jarring, truths:

Chronic stress for jurors includes

> unemployment (particularly with no sign of ending),
> physical disability,
> the need to care for a parent with dementia,
> a contested divorce with child custody issues,
> failure of a business,
> grieving over the death of a dear friend or relative, or
> repeated financial hits of many kinds.

The Effect of Stress on Citizens Selected for Jury Duty

Once chosen, many jurors find themselves buried beneath a dynamic **avalanche of stressful issues.**

> How will finances be managed, jobs secured, the multiple needs of family members be organized, health issues handled under new circumstances, transportation arranged, vacations rearranged, evidence understood, publicity ignored, sitting endured, the presence of strangers tolerated, unpleasant argument with others managed, legal instructions interpreted, behaviors watched, motivations discerned, deceptions detected, persuasive efforts of lawyers suffered, and sleep secured?

These issues, and more, are **cyclical,** such that they may be resolved, yet unexpectedly **reappear** during the trial.

Chronic stress occurs when the body's stress mechanisms are triggered too often and for too long. (The system was designed with "escape the saber-toothed tiger" in mind.)

> Jurors may have on-going conflicts with family members or co-workers. Jurors who have private or career lives that have already placed them into chronic stress environments daily will be *damaged* jurors. Some jurors may make a virtue of stress, claiming it makes them more capable; science shows this is a lie. *Alert: there is no such thing as someone who "thrives" on stress.* (You are included in this particular alert.) When stress happens regularly, the damaging effects destructively cascade.

Practice Point, from Physiology: **GOT STRESS?**

> Jurors are validly **challengeable as incompetent** when, at a particular time in their private lives, the anticipation of jury service triggers stress. It doesn't matter whether it *should* trigger stress, or whether it would trigger stress for the judge, it simply matters that this individual juror reports painful stress. (As an a practical aside, I know of no juror who would admit that they are experiencing stress, yet would be unwilling to add that the stress is painful. If so, the juror is in denial. Stress *is* painful to the body. That's how stress gets our attention.)
> • Make the first point in talking with the juror ("You are stressed.").
> • Following that, make the second point ("That stress, naturally, is painful.").
> • You are now entitled to the third, necessarily included, point ("The pain of your stress is distracting and makes it harder for you to pay attention.").
> You will either be able to proceed to establish a legal challenge for cause (appeal), a challenge to the juror that the judge and prosecutor are unwilling to oppose (granted now), or you will have gained one juror who appreciates your direct compassion.

This is important to share with jurors (so they can better self-assess their own willingness to serve) and judges (so they can more compassionately assess a juror's stressed life separately from a generic duty to serve).

> Weak arguments that challenge jurors simply repeat the words "stress" and "bad time to serve."

Reversible-error-on-appeal arguments and more-likely-to-be-granted-by-a-trial-court arguments have hard science, supported by concrete facts from a particular juror's life.

Practice Point from Health Science*:* ***STRESS DISTRACTS****. Develop the argument, during jury selection, one point per question, with a particular juror, rather than the whole panel.*

Attorney: You've shared some issues in your life right now that sound stressful.

Juror: Yes.
Attorney: There are many stresses, right now, in your life.
Juror: Yes, there are.
Attorney: When you think about these stresses, it's a little painful.
Juror: Unfortunately, yes.
Attorney: Even now, you are feeling some of that painful stress, even though you are trying not to let it distract you.
Juror: Yes.
Attorney: It's important for you to handle those stresses, but you can't while you're in court.
Juror: Yes.
Attorney: If you aren't handling them, you fear they will get worse.
Juror: Yes, I do.
Attorney: Those stressful issues distract you, so you can't pay your normal 100% attention when you think about them.
Juror: True.
Attorney: For some of us, we feel the stress as headaches, for others of us, it's in our stomachs or breathing. How do you experience serious stress?
Juror: [Symptoms.]
Attorney: What else do you feel. Sometimes, under stress?
Juror: [More symptoms.]
Attorney: Science now shows that unresolved stress damages our bodies. How long have you felt some stress over these issues?
Juror: [Time given.]
Attorney: Science now shows that repeated stress hurt our blood pressure, our heart, and makes us more vulnerable to disease. Have you read any articles, perhaps the *Newsweek* issue, that discuss such effects?
Juror: [If "no," explain more. If "yes," have the juror explain what they've read.]
Attorney: Have you already noticed that the stress, while you were sitting in court, was distracting you?
Juror: A little.
Attorney: If you have to serve on this trial for many weeks, from 9 a.m. to 5 p.m., will your stress naturally be more painful and a little more distracting?
Juror: Could be.
Attorney: No matter how much you might try, is the honest truth that you know you won't be able to listen or remember testimony well enough?
Juror: [If "that's true," ready for challenge for cause. If "not sure" then develop further.]

The Effect of Sleep Debt on Juror Competency

Millions of Americans are plagued by a huge sleep debt (you may be one of them). Startling, however, is the news that new brain science has discovered that sleep debt affects a person's performance **as much as alcohol.**

Most adults might consider seven hours of sleep a night a success, but if jurors (and you) are *only* getting seven hours, they (and you) are about 90 minutes into sleep debt (considerably less sleep than most people accomplished a century ago). That debt is cumulative and dangerous.

Jurors are particularly vulnerable to sleep debt, however. Notwithstanding that trial judges prod jurors to promise to "set aside" concerns about family and work if asked to serve, jurors consistently report that they continued to go to work during jury service, stressed. However, that they were jeopardizing their projects, their income, or their job security.

> **The sleep debt, for these jurors, was cumulative; the juror listening at the end of the trial was *not* the same competent juror listening at the outset.**

Further dangerous to the *competency* of a juror-serving-on-sleep-debt is irregular work hours. Some jurors have been working night shifts or evening shifts, and studies show that they are much more likely to have sleep problems (our biorhythms make it difficult to force sleep during daylight, however dark the room; your body has just returned home during daylight—it *knows* it's not nighttime).

Lawyers have yet to challenge the competency of jurors based upon predictable and claimed sleep debt of potential jurors.

Clients deserve competent jurors; it seems clear, now, that at least some jurors on most trials, based on sleep debt alone, are not competent to serve.

> *Practice Point, from Neuroscience:* **GOT SLEEP?**
> Jurors are validly challengeable for cause during jury selection, if two realities are established during voir dire. First, a juror is currently in sleep debt, getting less than seven hours a night. Second, if chosen as a juror in this case, the juror admits that family and job obligations will continue both before and after court hours, further eating into sleep deprivation.

Practice Point, from Neuroscience: **CHANGE THE CONDITIONS.** Attorneys can request that court conditions be established that do not threaten sleep debt to the jurors during trial.
• Shorter court hours: shorten the total day, shorten the in court time between breaks, lengthen the breaks.
• Make standing, stretching breaks for jurors a regular, court-directed occurrence. Base the request on the science of sleep, listening, and attention, not on a judge's "gut feeling" about when a break is needed.
• Have not only water, but sugar-infused drinks (orange juice) available in the jury box. Hard candy, fruit. Your job is to ask; the court's job is to explain, if denied, "why not."
• Enter into evidence for the judge articles on sleep debt. It makes a record and usefully educates a judge (if not this trial, it may provoke changes in the next; people need time to adjust to new ways of thinking and judges genuinely want better conditions for jurors).

Practice Point, from Neuroscience: **CHALLENGE COMPETENCY.** The competency of any (or all) jurors to serve may be challenged at any time during trial.
• A request may be made to inquire about sleep debt of jurors (in chambers) of particular jurors during trial, based on answers they gave during jury selection that seemed to predict sleep debt.
• A record can be made concerning the trial behaviors of individual jurors that are indicative of sleep debt. Juror watchers (staff, colleagues, or volunteers for an attorney are particularly adept at noticing these; friends and relatives of the client are particularly inappropriate choices; more than one source, for the record, is best). If you volunteer, for half a day, to do "watch" for a colleague on an important trial, you will learn how easy these behaviors are to spot and be able to better manage the issue on your own trials.

PERFECTING THE CHALLENGE FOR CAUSE[3]

The Law on Challenges for Cause: 5 Legal Bases for Excusal

1. A juror's assurances that the jurors will render a verdict based solely on the evidence are never dispositive.

2. A juror may be unconsciously influenced by preconceptions.

3. A juror may be ambivalent about an ability to render a fair verdict based solely on the evidence.

4. A juror who has a serious doubt in their own mind abut their ability to be fair should be excused.

5. Even though any one factor in support of a challenge for cause may not be sufficient, a combination of factions may require a judge to dismiss the juror for cause.

A 10-Step Guide for the Journey to Cause

Step 1: Bring up the issue at the earliest possible opportunity.

Step 2: Reward the potential juror immediately.

Step 3: Give the potential juror a fair opportunity to explain. [open-ended question]

Note: If the explanation offered now takes the potential juror OUT of a valid challenge for cause, stop.

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[3] Summary of the more extension discussion with specific examples and case citations in Dr. SunWolf's book, *Practical Jury Dynamics2*, Chapter 23.

Step 4: Decide what answer you want, now make that answer attractive to the potential juror and offer it as a statement. [close-ended question]

Step 5: Switch to leading question format in your mind. *This step is only a mental decision.*

Step 6: Using a leading question format, use the legal magic words *[So, you're telling us . . .]*.

Step 7: Anticipate rehabilitation attempts from the judge or prosecution and prepare the potential juror to give an appropriate saving-the-challenge answer in advance *[So, if someone were to say … your answer would be …].*

Step 8: Stop questioning this potential juror.

Step 9: Smile reassuringly at the citizen, who has just played a fair game.

Step 10: Make the challenge now, in open court. Do not wait.

Dr. SunWolf was a trial and appellate attorney, later Training Director for Colorado's Public Defenders, when she left to get her M.A. and Ph.D. at the University of California, studying juries. Now a social science professor at Santa Clara University, she has spoken at CLE programs in more than thirty states, is on the faculty of the National Criminal Defense College, and is an award-winning researcher. Translating social science studies into strategies for trial lawyers, her award-winning book, *Practical Jury Dynamics2: From One Juror's Trial Perceptions to the Group's Decision-Making Processes*, examines a juror's mental tools, juror stress, juror misconduct, and the dark side of deliberations. Her book *God-Thinking: Every Juror's Moral Brain, Religious Beliefs, and the Effects of a Trial Verdict* (LexisNexis) offers a glimpse into the neuroscience of everyone's religious thinking and then gives tools for investigation, questionnaires, motions, and voir dire. She is the originator of Decisional Regret Theory, which explains how jurors cope with the anxiety of anticipated verdict-regret by telling one another counterfactual stories about the case. She has been given her university's *Achievement in Scholarship* award for scholarly work that represents a major contribution to a field of knowledge. As a social scientist, she teaches courses in persuasion, friendships and romances, group dynamics, multicultural storytelling, and the science of happiness. Her twitter identity @TheSocialBrain is followed by psychologists, neuroscientists, professors, lawyers, and real people interested in human behavior from countries all over the world. **SunWolf has successfully survived angry judges, misguided prosecutors, strange juries, and the most creative of clients.**

Simplicity is Key: Cognitive Load on Jury Decision-Making

Bigger is not always better, especially when it comes to information presented at trial. With a limited cognitive capacity, jurors can only process a finite amount of material at a time. Jurors typically remember the "gist" of trials without analyzing each distinct detail presented in a courtroom.[1] Not only are minutiae difficult to remember, but extraneous details may even hinder jurors' abilities to comprehend relevant trial information.[2]

As jurors devote their limited cognitive resources toward making sense of unnecessary details, they might overlook key points. This underscores the *coherence principle,* which states that the inclusion of unnecessary information can interfere with learning and memory.[3] The coherence principle is based on cognitive load theory, which details how people have limited working memory capacity to process information at any given time before getting overwhelmed.[4]

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[1] "*Give the Jury What It Wants: Decision-Making in Trial Practice*," Litigation, Patton, C. & Adams, J., (2021), https://www.lynnllp.com/uploads/lawyers/pdfs/Give-The-Jury-What-It-Wants-Decision-Making-in-Trial-Practice-Litigation-Journal-Winter-2021.pdf

[2] "*What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*," Scholarly Works, Gordon, S., (2014), https://scholars.law.unlv.edu/facpub/829

[3] "*Principles for Reducing Extraneous Processing in Multimedia Learning: Coherence, Signaling, Redundancy, Spatial Contiguity, and Temporal Contiguity Principles*," The Cambridge Handbook of Multimedia Learning, Mayer, R.E., & Fiorella, L., (2014), https://www.cambridge.org/core/books/abs/cambridge-handbook-of-multimedia-learning/principles-for-reducing-extraneous-processing-in-multimedia-learning-coherence-signaling-redundancy-spatial-contiguity-and-temporal-contiguity-principles/CD5B7AE1279A9AB81F8EEBB53DBEC86E

[4] "*Intrinsic and Extraneous Cognitive Load*," Cognitive Load Theory. Explorations in the Learning Sciences, Instructional Systems and Performance Technologies, Sweller, J., Ayres, P., Kalyuga, S., (2011), https://doi.org/10.1007/978-1-4419-8126-4_5

Cognitive load, or the amount of information a person can process at a time, is determined by both fixed and malleable factors.[5] Intrinsic cognitive load is dictated by the innate complexity of material, and it is thus predetermined. Extraneous cognitive load, by contrast, is informed by the presentation and organization of information; it can be controlled.[6] When information is complex, the intrinsic cognitive load is high. Therefore, to prevent cognitive overload, extraneous load should be reduced through simple, straightforward presentation of the material.

Legal information often imposes a high intrinsic cognitive load on jurors. Jurors typically struggle to comprehend complex legalistic terms and details, as has been well documented in relation to judicial instructions.[7] Paralyzed by an influx of information, jurors may struggle to absorb and process any new material,[8] hampering their abilities to actively listen, remember, and reflect. Making subsequent decisions requires too much mental exertion. Overburdened by complexity and embarrassed by their confusion, jurors might withdraw from deliberations,[9] becoming passive decision-makers. They may defer to the opinions of others—a

[5] "*Managing Cognitive Load in Multimedia Presentations: Reducing Extraneous Processing*," Radiographics, Ayoob A., Owen J.W., & Lee J.T., (2020), https://pubs.rsna.org/doi/pdf/10.1148/rg.2020190130

[6] "*Intrinsic and Extraneous Cognitive Load*," Cognitive Load Theory. Explorations in the Learning Sciences, Instructional Systems and Performance Technologies, Sweller, J., Ayres, P., & Kalyuga, S., (2011), https://doi.org/10.1007/978-1-4419-8126-4_5

[7] "*What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*," Scholarly Works, Gordon, S., (2014), https://scholars.law.unlv.edu/facpub/829

[8] "*Cognitive overload: When processing information becomes a problem*," Mayo Clinic Health System, Schimming, C., (Mar. 2022), https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/cognitive-overload

[9] "*Jurors and Social Loafing: Factors That Reduce Participation During Jury Deliberations*," Psychology Faculty Scholarship, Najdowski, C.J., (2010), https://scholarsarchive.library.albany.edu/psychology_fac_scholar/18

psychological phenomenon called social loafing.[10] In social loafing situations, deliberations tend to be less productive as the opinions of assertive jurors dominate discussions.[11]

Jurors may be even more likely to engage in social loafing while fatigued.[12] Overly detailed information might lead to high rates of juror fatigue as jurors get overwhelmed by an abundance of material. As stated by the American College of Trial Lawyers, "A tired mind will take the path of least resistance."[13] Instead of exerting effort to make sense of the content, jurors may opt to loaf. This may, in turn, lead to less fruitful deliberations.

When jurors are cognitively overloaded, their stress levels can also surge as they struggle to keep up with new information. Increased stress tends to diminish learning, memory, and decision-making abilities in jurors.[14] This can be explained by the Yerkes-Dodson Law, which describes the relationship between performance and stress. Performance tends to increase alongside stress levels up to a certain point, then diminishes as stress becomes overbearing.[15] In

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[10] "*Jurors and Social Loafing: Factors That Reduce Participation During Jury Deliberations*," Psychology Faculty Scholarship, Najdowski, C.J., (2010), https://scholarsarchive.library.albany.edu/psychology_fac_scholar/18

[11] "*Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science*," American College of Trial Lawyers, (2019), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/improving-jury-deliberations-final.pdf

[12] "*Social loafing under fatigue,*" Journal of personality and social psychology, Orden, C., Gaillard, A., & Buunk, B., (1998), https://www.researchgate.net/publication/13422292_Social_loafing_under_fatigue

[13] "*Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science*," American College of Trial Lawyers, (2019), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/improving-jury-deliberations-final.pdf

[14] "*The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors*," William & Mary Bill of Rights Journal, Morgan, K. & Zydney Mannheimer, M.J., (2009), https://scholarship.law.wm.edu/wmborj/vol17/iss4/4

[15] "*The relation of strength of stimulus to rapidity of habit-formation*," Journal of Comparative Neurology and Psychology, Yerkes, R. M., & Dodson, J. D., (1908),18(5), 459–482.

other words, people need to be alert enough that they pay attention to the task at hand, but not so stressed that they lose the ability to function at optimal levels.

Several studies have examined the negative effects of cognitive overload on jury decision-making. High information load has been found to hinder jurors' abilities to assess liability, with complex language, specifically, impeding jurors' abilities to properly award compensatory damages.[16] Studies have also shown that when jurors experience high cognitive load, they tend to rely more on stereotypes and biases, which could have severe consequences on verdicts.[17]

Thus, instead of overloading jurors with information, researchers recommend presenting information through a palatable story that aligns with jurors' understandings of the world.[18] While making sense of new information, jurors rely on their schemas, or cognitive frameworks formed from prior knowledge and experiences.[19] Narratives serve as digestible structures through which jurors can activate relevant schemas and weave distinct pieces of evidence together.[20] Therefore, while it may be wise to draft a coherent narrative for jurors to latch onto,

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[16] "*Effects of trial complexity on decision making*," Journal of Applied Psychology, Horowitz, I. A., ForsterLee, L., & Brolly, I., (1996), https://doi.org/10.1037/0021-9010.81.6.757

[17] "*Working memory and cognitive load in the legal system: Influences on police shooting decisions, interrogation and jury decisions*," Journal of Applied Research in Memory and Cognition, Kleider-Offutt, H. M., Clevinger, A. M., & Bond, A. D., (2016), https://doi.org/10.1016/j.jarmac.2016.04.008

[18] "*How Jurors Learn: Applying Learning Design to Trial Practice*," Wolf Technical Services, Inc., Maher, T., (2015), https://www.wolftechnical.com/wp-content/uploads/2017/02/How-Jurors-Learn.pdf

[19] "*Through the Eyes of Jurors: The Use of Schemas in the Application of 'Plain Language' Jury Instructions*," Hastings Law Journal, Gordon, S., (2013), https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1726&context=fac_pubs

[20] "*A Cognitive Theory of Jury Decision-Making: The Story Model*," Cardozo Law Review, Pennington, N., & Hastie, R., (1991), https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1633&context=clr

be wary about crafting such a long saga that jurors forget where their journey began. Remember to keep cognitive overload at bay; for the sake of the jury, less is usually more.

The Neglected Factor: How Anxiety Affects Juror Decision-Making

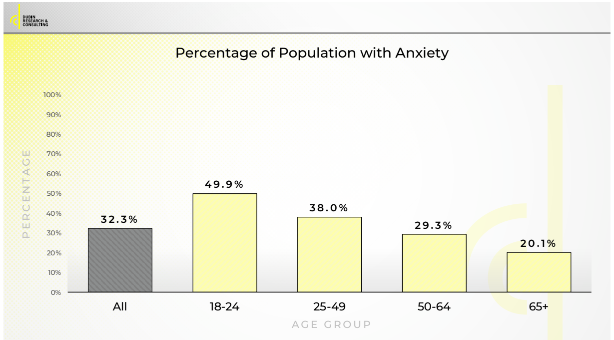
By Dubin Research and Consulting

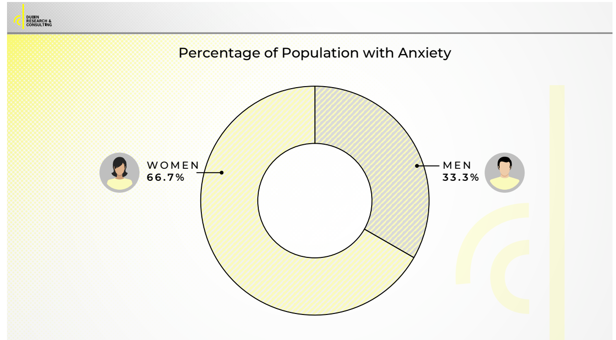
Lawyers are experts at managing the stresses associated with trial—their own stress and their clients' stress. But in their zest to win, lawyers often forget about the stress under which the *jury* operates. In one study, 96% of jurors reported that they experienced stress due to long trials, with 27% of jurors reporting that even the shortest trials (those lasting one to three days) caused anxiety.[1] In the same study, respondents reported serious symptoms from jury duty, including "disturbing memories," "feelings of detachment," and "nightmares."[2] While many jurors don't let this stress show in the courtroom, it has a real impact—both personally and on deliberations. As such, lawyers should be just as concerned with jurors' anxiety as the jurors themselves.

This report is intended to help attorneys understand how anxiety might alter jurors' deliberation patterns. We proceed as follows: *First*, we examine the causes of juror anxiety. *Second*, we examine how anxiety can compromise jurors' normal cognitive behavior, with reference to key legal and psychological studies. *Third*, we provide recommendations for neutralizing the effect of juror anxiety, when beneficial for a particular case.

I. The Causes of Juror Anxiety

Anxiety disorders are the most common mental illness in the United States. According to the U.S. Census Bureau's *Household Pulse Survey*, about a third of adults overall (32.3%) reported anxiety and depression symptoms in 2023.[3] As depicted in the left chart below, nearly half of these adults (49.9%) were between the ages of 18 and 24; 38% were between the ages of 25 and 49; 29.3% were between 50 and 64; and 20.1% were 65+. Moreover, as shown in the right-hand chart, anxiety disorders occur more frequently in females than in males, with an approximate 2:1 ratio.[4]





More specifically, current estimates suggest that Generalized Anxiety Disorder—which causes people to feel unrealistic worry about everyday life events—affects 6.8 million adults (or 3.1% of the U.S. population). Likewise, Social Anxiety Disorder—which causes people to have persistent fear of social situations—affects 15 million adults (or 7.1% of the U.S. population).[5]

This is the backdrop against which jurors enter trial proceedings. Unsurprisingly, jury service serves to instigate these existing anxieties or cause new ones already. A study conducted by the National Center for State Courts described the causes of juror stress as follows:

> Jurors confront numerous sources of stress at every stage of jury duty, even in routine trials. Beginning with the summons to jury service, they experience disruption of their daily routines, lengthy waits with little information and often in unpleasant surroundings, anxiety from the scrutiny of lawyers and the judge during voir dire, tension from sifting through conflicting versions of facts and unfamiliar legal concepts, conflicts during deliberations, and isolation following the verdict and their release from jury service.[6]

While there are a seemingly unlimited number of ways that jurors experience anxiety, three drivers stand out in the relevant literature:

1. A Tennessee Journal of Law and Policy journal article concluded that the decision-making process itself—*i.e.*, the stress of deliberations—was the greatest inducer of stress.[7]

2. The *voir dire* process also induces anxiety, with one study reporting that 77% of jurors experienced stress during jury selection.[8] This makes sense since *voir dire* is often characterized by intrusion, with attorneys asking personal questions about jurors' lives and private affairs.[9]

3. Another study indicated that jurors are particularly likely to experience anxiety in trials that

depict violent crimes.[10] These trials are characterized by visually graphic and horrific evidence that is often accompanied by a recording of the crime scene.[11]

It should be noted, however, that the cause of anxiety for jurors is not limited to these specific examples: jurors will experience some degree of anxiety at every level of jury service. In other words, stress accumulates over the course of jury duty.[12]

II. How Juror Anxiety Impacts Deliberation Patterns

But how does this stress affect the jurors' decision-making? There is little research specifically addressing how jurors make decisions in the face of anxiety. To answer this question, we draw upon the psychology of anxiety generally, as well as research performed in other disciplines (*e.g.*, how anxiety impacts doctors and business managers). This research has identified four important changes in juror behavior:

First, anxiety may reduce jurors' ability to focus and cause them to ***forget key information***, particularly information that is sequenced directly after a triggering event. This is a type of perceptual bias that impacts memory space, such that high levels of anxiety prevent an individual from focusing on a given task (particularly when interpreting graphic evidence). Numerous studies indicate that high levels of anxiety prevent an individual from returning to their task because they are so consumed with anxiety. One such study found that anxiety impairs two types of attentional control driven by the working memory system: (1) negative attention control (the ability to factor out task-irrelevant stimuli); and (2) positive attentional control (the ability to switch attention between tasks to maximize performance).[13]

The extent of attentional impairment may be proportional to the amount of information already held in memory. Naxanin Derakshan, a Professor of Experimental Psychopathology at the Department of Psychological Sciences at Birkbeck University of London, found that, when "the amount of information held in memory is low to medium, anxiety impairs memory capacity significantly because the cognitive processes that are not required for carrying out the task are available for processing these threat distractors. However, when the load is high, anxiety impairs the capacity of working memory much less since all of the resources are consumed by processing the high load of information, and little to no working memory is available to attend distracting threats."[14] As a result, the effect of anxiety on memory retention may be greatest earlier in a trial, when jurors have not yet been asked to retain a great deal of information. Conversely, the effects of anxiety may be lesser later in trial, after a large amount of testimony and evidence has been presented, *i.e.*, when the "information load" is high.

Second, separate from any memory/perceptual bias, ***anxiety also injects an "emotional bias"*** into decision-making. Jurors suffering from stress are more likely to be driven by an emotional response to the evidence, limiting their ability to engage in logical thinking. American legal scholar Cass Sunstein noted this tendency in his book, *Hazardous Heuristics*; he concluded: "When people are anxious and fearful, they are less likely to engage in systematic processing, and (such correction) is especially unreliable."[15] Psychologist Robert Zajonc proposed specific reasons this reduction in cognitive reasoning; he found that emotional processing dominated because: (i) emotions benefit from a cultural universality; (ii) there are limited number of distinct emotions, as compared to an infinite number of distinct cognitions; (iii) emotional reactions have a physiological primacy; and (iv) emotions can exist without a direct referent (*e.g.,* "free-floating anxiety"), whereas cognitions must have an anchor (*i.e.*, they are always "about something").[16] According to Zajonc, these differences drive people to rely upon emotion when faced with anxiety. Thus, regardless of the level of anxiety a juror faces, their normal thought-processes will be disrupted due to the separation of thoughts and emotions.

Third, studies show that individuals under stress adopt a simpler mode of information processing—one which makes jurors more ***comfortable with incomplete information***. For instance, a study conducted by the National Institute for Occupational Safety and Health noted that "[d]ecisions can only be made based on the information available, and studies have shown that, on many occasions, decisions are made with incomplete information."[17] James Driskell and Eduardo Salas agreed in their 1996 book *Stress and Human Performance*; they found that "[t]he changes induced by stressors appear fairly adaptive – to trade off accuracy for speed, as when faced with a threat, and to narrow the focus of attention when faced with capacity limitations and attentional disruptions."[18]

Fourth, stress may ***change the risk profile*** of jurors. For instance, where anxiety manifests as frustration or anger, jurors could be more likely to ascribe severe appropriations of blame to a defendant. That is because "angry jurors generally perceive events to be under human control and are more likely to disregard or minimize situational factors which would mitigate culpability."[19] For instance, Georges et al. (2013) found that angry jurors are more likely than emotionally-neutral jurors to rely on intuitive judgments to make capital sentencing decisions in death penalty cases.[20]

III. <u>Strategic Recommendations</u>

If you're a judge, your approach is simple: juror anxiety is detrimental and should be mitigated. But for trial lawyers, the task is more complex. Attorneys should not assume that juror stress is *per se* bad for their case. As suggested above, many cases will benefit from the perceived negative consequences of stress, such as jurors' tendency to hyperfocus on critical evidence and overlook incomplete information. But if you decide that stress is harmful—as criminal defendants often will—attorneys have multiple options. We provide a few recommendations below:

- Attorneys can take steps to make *voir dire* less threatening. One technique is to utilize a juror questionnaire. In California, there now is a court-approved questionnaire of 33 general questions that can then be supplemented with questions specific to the case. The questionnaire method allows the attorney to determine whether the juror has anxieties about the issues in a case without the adversarial implications of live questioning.

- Jurors experiencing stress may attempt to expedite their decision-making process, potentially resulting in an overly narrow focus. Attorneys can mitigate this effect by supplying jurors with structured tools (e.g., charts outlining the elements of the case or summary slides that consolidate key evidence into a single location). As an analog, researchers in cognitive psychology recommend that emergency responders be provided with a "decision support system," which serves as a roadmap during high-stress situations. Attorneys could furnish jurors with an analogous failsafe.

- Have a clear sense of where you'll draw the line in terms of graphical evidence. Not every awful picture may need to be shown, and not every awful scene may need to be described.

- When a jury is feeling stressed, the leadership dynamics can shift, causing members to rely more heavily on the leader's guidance.[21] If you know who the leaders are, focus on what might appeal to them, keeping in mind their individual attitudes and life experiences. Witnesses can also adjust their approach by targeting their testimony and eye contact towards these leaders, as they tend to have more influence on an anxious jury.

Despite these findings and recommendations, there is still plenty of room for research on the effects of emotional stress in the courtroom. Further research would be extremely beneficial to understanding the psychology of jurors. The legal community must remain cognizant that jurors may be experiencing extreme levels of stress before, during, and after the trial.

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[1] *See* National Center for State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998) (characterizing long trial as ones lasting longer than 21 days); *see also* A. Reed, *Juror Stress: The Hidden Influence of the Jury Experience*, American. Society of Trial Consultants, Jury Expert (May 2009).

[2] *See id*.

[3] *See* Kaiser Family Foundation*, Latest Federal Data Shows That Young People Are More Likely Than Older Adults to be Experiencing Symptoms of Anxiety* (May 20, 2023) (citing statistics for February 2023).

[4] Office on Women's Health, *Anxiety Disorders*, https://www.womenshealth.gov/mental-health/mental-health-conditions/anxiety-disorders.

[5] Anxiety & Depression Association of America, *Anxiety Disorders – Facts & Statistics*, https://adaa.org/understanding-anxiety/facts-statistics.

[6] *See* National Center for State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998).

[7] Clark, J.W., *Is It Possible to Predict Juror Behavior?*, Tennessee Journal of Law and Policy Tennessee Journal of Law and Policy, 5(2) (Apr. 2014), at 16-17.

[8] *See* National Center for State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998).

[9] B.H. Bornstein et al., *Juror reactions to jury duty: perceptions of the system and potential stressors*, Behav Sci Law. 23(3):321-46 (2005) at 17.

[10] Hafemeter, T. & Ventis, W.L., *Juror Stress: Sources and Implications,*30 TRIAL 68 (1994).

[11] *Id*.

[12] *See* Hannaford-Agar, P., *A New Option for Addressing Juror Stress*, The Court Manager 26:2 (2012), *available at* https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0025/7891/a-new-option-for-addressing-juror-stress.pdf.

[13] Derakshan, N., & Eysenck, M. W., *Anxiety, processing efficiency, and cognitive performance: New developments from attentional control theory*, European Psychologist, 14(2) (2009) at 168–176.

[14] Rapgay, L., *How Anxiety Impacts the Way We Perceive and Think*, Psychology Today (Feb. 6, 2019) (citing Derakshan (2009)).

[15] Sunstein, C.,m *Hazardous Heuristics*, University of Chicago Public Law & Legal Theory, Working Paper. No. 33 (2002).

[16] Zajonc, R., *Emotions* in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 591, 597 (Daniel T. Gilbert et al. eds., 1998).

[17] Kowalski-Trakofler, K. & Vaught, C., *Judgment and decision making under stress: an overview for emergency managers*, National Institute for Occupational Safety and Health 2003, https://www.cdc.gov/niosh/mining/userfiles/works/pdfs/jadmu.pdf.

[18] Driskell, J. E., & Salas, E. (Eds.). *Stress and human performance.* Lawrence Erlbaum Associates, Inc. (1996); *see also see also* A. Reed, *Juror Stress: The Hidden Influence of the Jury Experience*, American. Society of Trial Consultants, Jury Expert (May 2009).

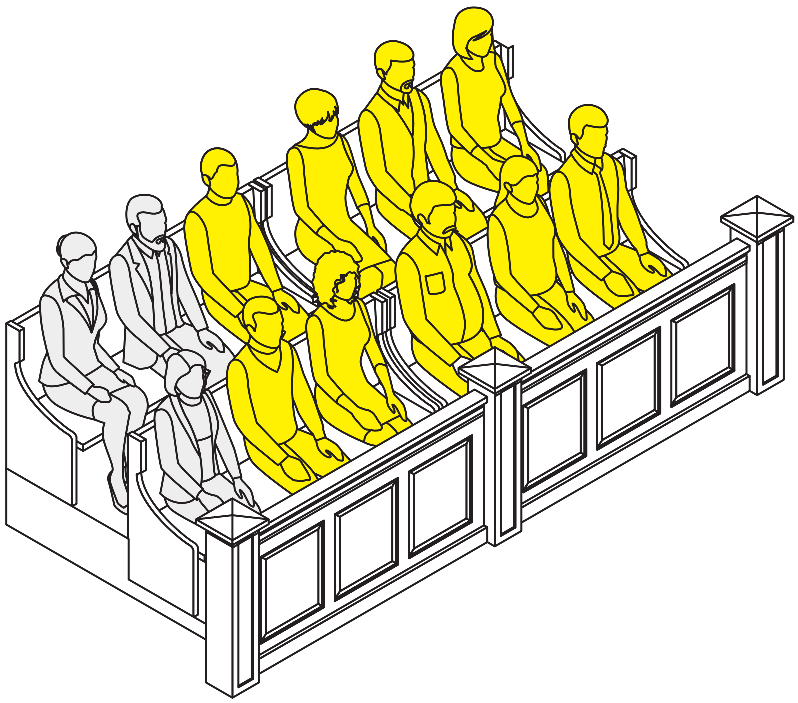
[19] Holloway, C. & Wiener, R., *The Role of Emotion and Motivation in Jury Decision-Making* (Sept. 2018).

[20] Georges, L. C., Wiener, R. L., & Keller, S. R., *The angry juror: Sentencing decisions in first-degree murder.* Applied Cognitive Psychology, 27, 156–166 (2013).

[21] *See* Harms, P.D., *et al.*, *Leadership and stress: A meta-analytic review*, The Leadership Quarterly, Volume 28, Issue 1, 2017, Pages 178-194.

DRC SURVEY

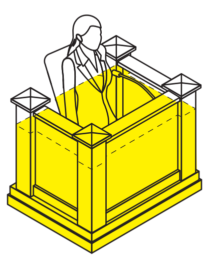
ASSUMPTION OF GUILT IN NEW YORK



77%

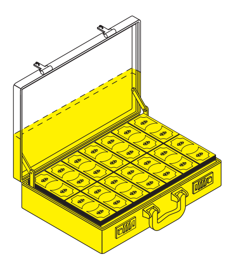
BELIEVE **INDICTED DEFENDANTS** MOST LIKELY **COMMITTED THE CRIME**

56%



FEEL THAT CRIMINAL DEFENDANTS WHO **DON'T TESTIFY** ARE **HIDING SOMETHING**

78%



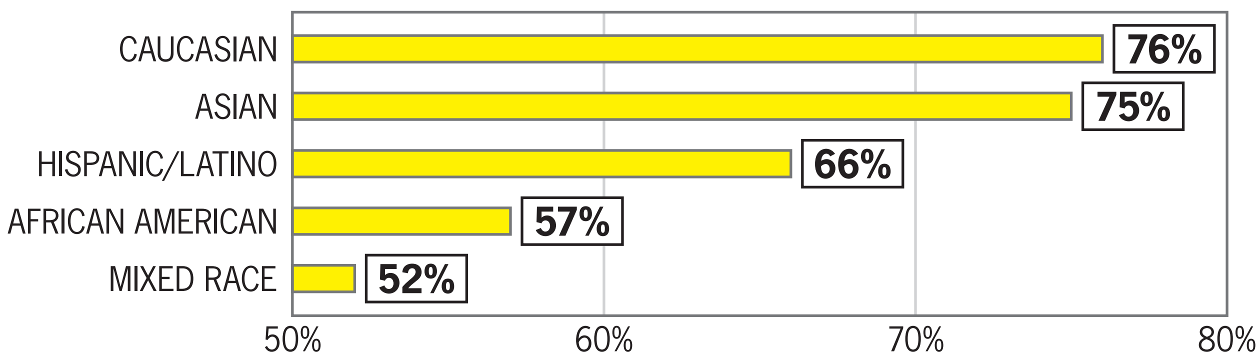
ASSUME THAT **FINANCIAL PROFESSIONALS** CHARGED WITH WHITE-COLLAR CRIMES **MOST LIKELY COMMITTED** THE CRIME

DRC SURVEY

ASSUMPTION OF GUILT IN NEW YORK

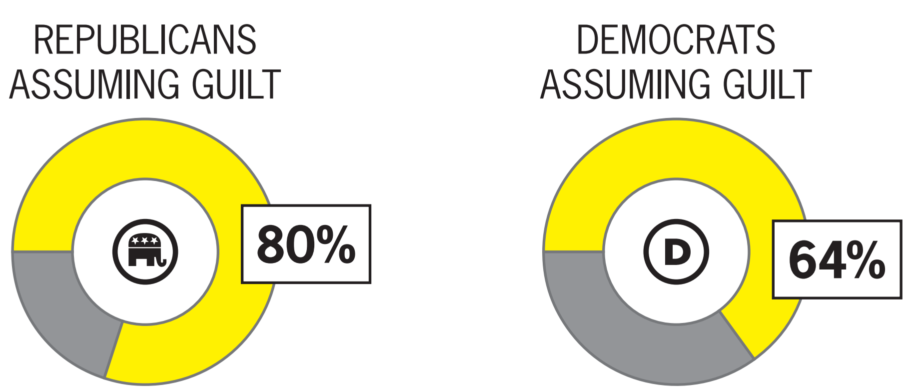
ROLE OF RACE

Caucasians and Asians were more likely to assume guilt than those of other races. Over 75% of Caucasians and Asians polled believe that a person charged with a crime most likely committed the crime.



POLITICAL AFFILIATION

Republicans were more likely to assume guilt than Democrats – 80% of Republicans agreed that a suspect most likely committed the crime for which he/she is accused.

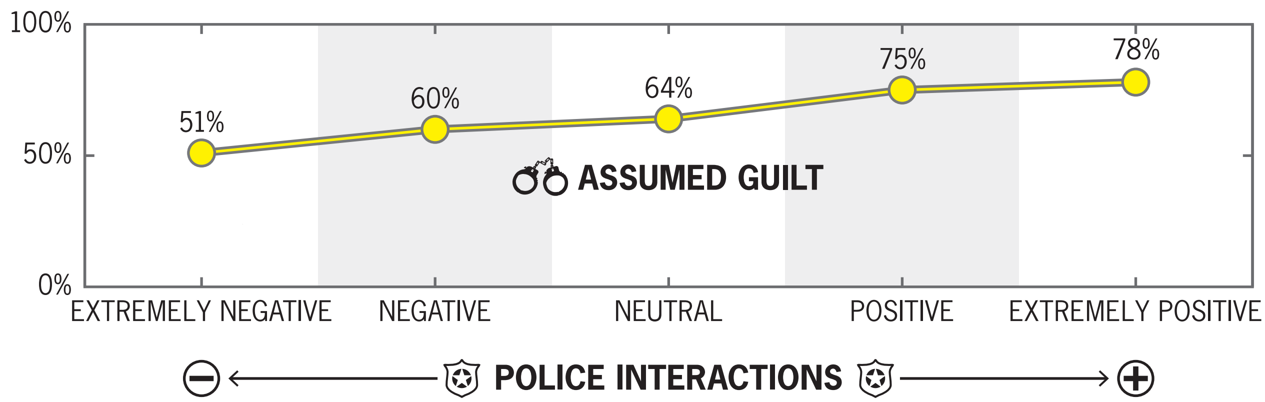


DRC SURVEY

ASSUMPTION OF GUILT IN NEW YORK

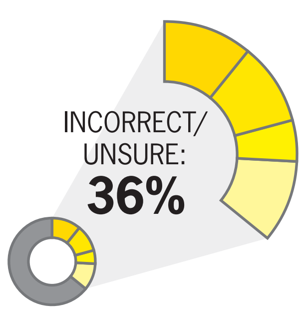
ROLE OF POLICE INTERACTIONS

Respondents who report favorable interactions with police were more likely to assume guilt than those who have had negative or neutral interactions.



UNDERSTANDING THE BURDEN OF PROOF

When asked about their understanding of the burden of proof in criminal cases, 26% of respondents were incorrect in their response and 10% were unsure of the correct standard.



PREPONDERANCE OF EVIDENCE	**11%**
CLEAR AND CONVINCING EVIDENCE	**10%**
BEYOND ANY DOUBT	**5%**
UNSURE OF CORRECT STANDARD	**10%**
CORRECT (BEYOND REASONABLE DOUBT)	**64%**

The presumption of innocence is on life support. To believe otherwise would be to ignore the empirical data. The accused are convicted at an alarmingly high rate in both Federal and State courts. Regrettably, New York sets the standard in this regard –with a conviction rate approaching 99% in the Southern and Eastern District according to the latest available data. It does not get much better in Manhattan State Supreme Court, where the conviction rate is north of 80%. These percentages are not a reflection of some stark reality where the vast majority of the accused are in fact guilty. In fact, a close examination of how these figures are compiled does not offer any comfort. For instance, in the Southern and Eastern District, approximately 95% of convictions can be attributed to guilty pleas. And we now can be certain that the accused plead guilty for a number of reasons – lack of education or resources to mount a defense, or, ironically, because of the elevated conviction rates.[1] In the cost versus benefit analysis, many criminal defendants fear that because there is such a high likelihood they will be convicted, they would rather accept a guilty plea (and the attendant more lenient punishment) than roll the dice with a jury and risk a lengthy prison sentence.

Once guilty pleas are siphoned off, we are still left with an extraordinarily high number of guilty verdicts. Judges, prosecutors, and many in law enforcement resort to the simple reasoning on this – people are found guilty because they are in fact guilty. But that conclusion ignores several important realities. First, while it is difficult to quantify how often it occurs,

[1] *See,* Judge Jed S. Rakoff. "Why Innocent People Plead Guilty." *New York Review of Books,* November 2014, http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; Judge John L., Kane. "Plea Bargaining and the Innocent." The Marshall Project, December 2014, https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent

prosecutors and members of law enforcement sometimes just get it wrong. Whether it is tunnel vision, failure to follow proper identification procedures, *Brady* violations, or due to the actions of rogue cops or prosecutors, the innocent are sometimes accused of crimes that they simply did not commit.

Next, there are instances of mistaken eyewitness identifications, fabrications of jail-house snitches, and other scenarios in which witnesses blame the wrong person. So isn't this where the presumption of innocence comes in to act as the ultimate safety net for the accused? If so, it is riddled with gaping tears. To put it simply, people are more apt to take the word of prosecutors and members of law enforcement than someone who says "I didn't do it." Jurors are by-products of a culture that *assumes guilt*, rather than presumes innocence. This is not hyperbole; rather, it is scientific fact.

DRC conducted a study to gauge the extent to which the *assumption of guilt* exists in the counties that comprise the Southern and Eastern Districts of New York. Here are the findings:

- ***STUDY DESIGN***

  DRC conducted an anonymous survey of 1,261 jury-eligible citizens in the following counties: Bronx, Dutchess, Kings, New York, Orange, Putnam, Queens, Richmond, Rockland, Sullivan, Westchester, Suffolk, and Nassau. The sample matched the collective demographic characteristics of jury-eligible citizens of the combined counties.

- ***SEVENTY-SEVEN PERCENT (77%) OF RESPONDENTS BELIEVE THAT A PERSON WHO IS INDICTED MOST LIKELY COMMITTED THE CRIME***

  Without being provided with any specific evidence or details related to a case, respondents were asked: *"Do you believe that if there was enough evidence to indict (*i.e.*, formally accuse or charge with a serious crime) a suspect most likely committed the crime?" Seventy-seven percent* answered affirmatively.

- ***SEVENTY-EIGHT PERCENT (78%) BELIEVE THAT WHITE-COLLAR DEFENDANTS ARE MOST LIKELY GUILTY***

  Respondents were asked*: "Do you believe that in most cases when a banker, trader, or another financial professional is charged with a white-collar crime (*i.e.*, fraud* *embezzlement, laundering, etc.) he / she most likely committed this crime?" Seventy-eight percent* of respondents answered "Yes."

- ***<u>29% BELIEVE THAT AN INNOCENT PERSON IS RARELY ACCUSED OF A CRIME</u>***

  Respondents were asked: *"How often (i.e., never, rarely, sometimes, often, or unsure) do you believe that an innocent person is accused of a crime?"* Nearly one-third of respondents reported that innocent people are rarely accused of crimes. This assumption was correlated with respondents' likelihood to presume guilt. Specifically, of the 367 respondents who believe that innocent people are rarely accused of crimes, 309 (84%) also believed that in most cases, a person who is charged with a crime has most likely committed the crime.

The foregoing should be frightening to anyone that cares about our system of justice. Unfortunately, it confirms what many criminal defense lawyers have long suspected: while the presumption of innocence is touted as a fundamental Constitutional right that distinguishes this Country and our criminal justice system from the rest of the world, it is, in truth, a mere romantic apparition. These findings should be particularly alarming to those who practice in Federal Courts – where attorney-conducted *voir dire* is essentially extinct and you are lucky to get a judge to ask any meaningful questions about prospective jurors' biases related to important legal concepts, let alone issues involved in the case. So, lest we be judged by history as the generation of lawyers that allowed this to occur without a fight, it is time we tried to resuscitate the critically important ideal of the presumption of innocence by doing the following:

- ***<u>PROPOSE VOIR DIRE QUESTIONS REGARDING THE PRESUMPTION OF INNOCENCE</u>***

  Despite the tendency of most Federal judges to reject *voir dire* questions proposed by counsel, you must make a strong case for the court to ask the following:

  - *How many of you believe that in most cases, a person who is charged with a crime or has been indicted has most likely committed the crime?*

  - *Do you believe that innocent people are rarely accused of crimes they did not commit?*

- *Under the law, a defendant need not testify in his / her own defense. If a defendant does not testify, the jury is not supposed to consider that fact in any way in reaching a decision as to whether the defendant is guilty. Despite this, how many of you have the expectation that a criminal defendant should testify? Why or why not?*

- *How many of you believe that if a defendant decides to invoke his / her Fifth Amendment right and does not testify, he / she is most likely hiding something?*

- ***MAKE A RECORD!***

  When a Federal judge does not ask proposed *voir dire* questions, *make a record!* The objection should be that failure to ask fundamental questions that explore jurors' beliefs regarding the presumption of innocence violate the client's Sixth Amendment right to a fair and impartial jury.[2] Cite DRC's study as a basis to ask the questions listed above. Make the argument that defense counsel cannot make meaningful cause challenges if they are deprived of the right to ask questions designed to expose bias.

- ***MAKE IT AGAIN***

  After *voir dire*, but prior to the jury being sworn, renew the objection. The basis should be that the cumulative effect of the court's jury selection process (deprivation of the ability to meaningfully participate in jury selection by asking questions, limiting the amount of questions, etc.) has deprived the client of his or her Sixth Amendment right to a fair and impartial jury.[3]

The great educator and former President of Yale University, Kingman Brewster, Jr., once said, *"[t]he presumption of innocence is not just a legal concept. In commonplace terms, it rests on that generosity of spirit which assumes the best, not the worst, of the stranger.*" The ideals and fundamental legal concepts that define a free society are nothing, just words that disappear into the ether after they are uttered, if we do not breathe life into them. So cite this study, push back, make a record. This is a cause worth getting behind. Just ask all of the men and women who have been wrongfully convicted and spent time in prisons for crimes they did not commit.

[2] *See United States v. Allen*, 788 F.3d 61, 73-74 (2d Cir. 2015)
[3] *See Fietzer v. Ford Motor Co.*, 622 F.2d 281, 284-85 (7th Cir. 1980)

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DRC LITIGATION STRATEGIES

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FOCUS GROUP METHODOLOGY

- Identify problem areas and strengths
- Isolate values, beliefs, and life experiences indicative of decision-making and verdict outcome
- Determine the most advantageous order of proof
- Develop concepts for demonstrative aids / graphics
- Develop a plan for jury de-selection, including effective *voir dire*, questionnaires, and development of "cause"
- Consider how to leverage weaknesses in your opponent's case

FOCUS GROUP DELIBERATIONS CAN SHOW:

- Words or phrases that are pro conviction, like: "*A fraud is a fraud,*" "*he's shady,*" "*when you smell a rat, there's always a rat.*"
- Words or phrases that are pro acquittal, like: "*He wasn't a thief, he just wanted to sell the American Dream,*" "*he didn't singlehandedly control the situation,*" "*lots of reasonable doubt,*" "*mistakes were made.*"
- What are the hardest parts to understand? *Is it terminology, financial concepts?*
- What lingering questions remain? *Credibility?*
- What education needs to take place in the courtroom? *Who is the defendant? Is he an ordinary man with an extraordinary problem or an extraordinary man with an ordinary problem? If he got bad advice, does it mean he is a criminal?*
- What are the Government's strongest and weakest arguments?
- What are the Defense's strongest and weakest arguments?
- What other specific information should be provided?

Challenges for Cause

NACDL's 2026 National Voir Dire College
June 4-6, 2026 | New York, New York

Challenges for Cause

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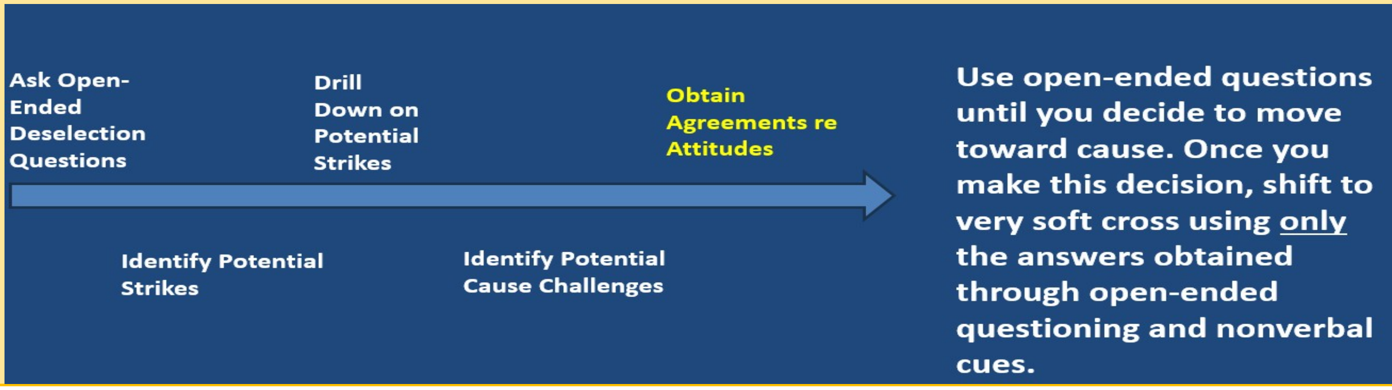
Core Take-Aways for

Cause Challenges:
Obtaining Agreements for Bias



Step One: Obtain Sufficient Information: Before Attempting a Cause Challenge, Drill Down Through Open-Ended Questions to:

1. Understand *Fully* the Precise Nature of the Value that this Juror Holds.

2. Identify the Source of the Value for this Juror (e.g., family, experiences, religion, etc).

3. Determine the Intensity of the Value for this Juror.

Step Two: Mirror the Information to Lock In The Juror

Confirming *step by step* the words and nonverbal cues used by the juror that support the argument that the value may affect the juror's evaluation of the facts or law.

Example: "If I hear you right, you feel that …."

Step Three: Closing Off the Challenge

After mirroring, close off the challenges by obtaining an agreement and closing off rehabilitation by the judge. For example::

"you cannot promise us at this point that your experiences will not affect you later in the case even if you try?"

"you might have difficulty in putting aside your feelings about people who don't choose to tell their side of the story?"

"prosecutor might have a head start if my client doesn't testify even if you try to talk yourself out of it?"

Then follow up on each option with "even if the judge asks/instructs you to……"

Jury Deselection: Mastering Challenges for Cause in Criminal Cases

A Practical Guide for Criminal Defense Practitioners

NACDL CLE Presentation

1

The Mindset Shift: Selection vs. Deselection

- Forget “jury selection” — you don't pick your jury, you inherit a pool
- The goal isn't finding the perfect juror — it's removing the dangerous ones
- This shift changes everything: the questions you ask, the record you build, and how you deploy your challenges
    - Think of voir dire as a search-and-remove mission, not a recruiting exercise

2

Why the Stakes Demand Precision

- In civil cases: a bad juror costs your client money
- In criminal cases: a bad juror costs your client their freedom — or their life
- One biased juror can nullify everything you do at trial
- A juror who walks in having already decided the case is not a juror — they're a verdict waiting to be announced
- The Sixth Amendment guarantee of an impartial jury isn't self-executing — you have to enforce it
  - Challenges for cause are your primary enforcement mechanism

3

What Is a Challenge for Cause?

- A request to the court to remove a juror based on a specific, articulable reason demonstrating inability to be fair
- Common grounds:
  - Prior knowledge of the case or parties
  - Relationship with a witness, attorney, or defendant
  - Prior victimization by a similar crime
  - Stated inability to apply the law — burden of proof, presumption of innocence, sentencing
  - Implicit or explicit bias that cannot be set aside
- Critical distinction: unlike peremptory challenges, challenges for cause are UNLIMITED

4

Building the Record: Where Most Lawyers Fall Short

- A judge will not grant your challenge based on instinct — you need a record
- Get the juror — in their own words — to demonstrate disqualifying bias
- Ask open-ended questions first — let jurors talk; people reveal more than they intend to
- Don't accept “I'll try to be fair” — that's not the standard; keep digging
- Commit them to the law — walk through presumption of innocence and burden of proof, then ask if they can apply it
- Know when to re-examine after prosecution rehabilitation attempts
- Document everything — not just what was said, but hesitation, body language, missed follow-ups

5

Hypothetical Voir Dire Exchanges

6

Exchange 1: The Burden of Proof

Move for Cause

Defense:
You mentioned 15 years as a police officer. When someone was arrested and charged, what did that usually mean to you?

Juror:
Usually meant they did something. We didn't just arrest people for no reason.

Defense:
Right now — before you've heard a single piece of evidence — do you believe my client is innocent?

Juror:
I think I'd need to hear the evidence.

Defense:
Does any part of your background make it hard to start from the presumption of innocence?

Juror:
Honestly? A little, yes. I just — fifteen years, you develop instincts.

7

Exchange 2: Prior Victimization

Stop. Move for Cause.

Defense:
When you heard this case involves an assault, what was your first reaction?

Juror:
I thought about my own experience. I won't lie.

Defense:
Could you still hold the government to its burden and require proof beyond a reasonable doubt?

Juror:
I would try. But I think it would be hard not to relate to the victim.

Defense:
Can you promise that your experience wouldn't affect how you weigh the testimony?

Juror:
I honestly don't know. I'd want to be fair. But I can't promise that my experience wouldn't affect me.

8

Exchange 3: Pretrial Publicity

Inverted Burden → Cause

Defense:
On a scale of 1–10, where 1 is certain innocence and 10 is certain guilt, where are you right now?

Juror:
Probably a six or seven. But I can move off that.

Defense:
What would it take to move you to a one?

Juror:
I guess... pretty strong evidence the other way.

Defense:
So you'd need my client to prove something to you?

Juror:
When you put it that way... I guess so. Yeah.

9

Exchange 4: Defeating the Rehabilitation Attempt

Renew the Motion

Prosecutor:
Even with your prior views, you said you could follow the judge's instructions and be fair, right?

Juror:
Yes, I think so.

Defense:
You told me earlier you'd still be looking for something from the defense. The judge will instruct that my client doesn't have to present any evidence. Does knowing that change your answer?

Juror:
I mean... I understand that intellectually. But I think I'd still be looking for something from the defense.

Defense:
Even knowing the law says you can't require that?

Juror:
I think so. Yes.

10

Exchange 5: Breaking Through "I Can Be Fair"

Lock It In. Move.

Defense:
Your brother is a police officer — have you talked with him about cases where he believed someone was guilty but charges didn't stick?

Juror:
Yeah, that used to really frustrate him.

Defense:
Not whether you want to be fair — but would this relationship make it harder to weigh police testimony and defense testimony equally?

Juror:
I'd like to think I could be fair.

Defense:
(Re-ask directly) Would the relationship make it harder to weigh testimony equally?

Juror:
Probably harder, yes.

11

The Golden Rule of Voir Dire

"Probably harder, yes."
"I can't promise."
"I think so. Yes."

Those are your cause challenges.

Get the bias on the record — in the juror's own words. Everything else follows.

12

Challenges for Cause vs. Peremptory Challenges

	Challenge for Cause	Peremptory Challenge	Strategic Value
Basis Required	Yes — articulable bias	No	Cause = precision tool
Number Allowed	Unlimited	Limited by statute	Preserve peremptories
Decided By	Judge	Lawyer	Cause = judicial check
Best Used For	Provable, on-record bias	Gut-level concern	Use both strategically

13

Strategic Interplay: Preserving Your Peremptories

- Every juror you remove for cause is a peremptory challenge you didn't spend
- Use cause challenges to remove jurors you can prove are biased
- Reserve peremptories for jurors you feel are wrong but can't prove on the record
- The lawyer who burns peremptories on removable-for-cause jurors runs out of options when it counts
  - Discipline in cause challenges = flexibility when you need it most

14

High-Profile Cases: When Cause Becomes Critical

- Jurors who consumed media coverage may sincerely believe they can be fair — while harboring conclusions they cannot set aside
- The standard: not whether a juror thinks they can be impartial — whether they can be
- Push past self-assessment — ask about specific coverage, conclusions drawn, conversations had
- A juror who says “I saw the news but I can be fair” is not automatically rehabilitated
- Build the record around what they actually know — and what that knowledge has already done to their presumption of innocence
  - Pretrial publicity cases demand the most rigorous cause challenge practice

15

Preserving the Issue for Appeal

- A denied challenge for cause isn't just a setback — it's a potential appellate issue
- State your grounds clearly and specifically on the record
- Renew your objection if the challenged juror is seated
- Note if you were forced to use a peremptory to remove a juror who should have been excused for cause
- Record that you subsequently exhausted your peremptories
- Argue the denial forced you to accept an objectionable juror
  - Denial of a meritorious cause challenge resulting in a biased juror = reversible error

16

The Constitutional Foundation

The Sixth Amendment right to an impartial jury is the threshold guarantee that everything else at trial depends on.

Mastering challenges for cause isn't just good trial strategy. It's what the Constitution demands of us.

17

Key Takeaways

1. You are deselecting, not selecting
2. Challenges for cause are unlimited — use them aggressively
3. The record is everything — get bias on record in the juror's own words
4. Preserve peremptories by exhausting cause challenges first
5. Denied challenges for cause are appellate issues — preserve them
6. In high-profile cases, push past self-reported impartiality
7. Don't accept “I can be fair” — dig until you get the truth
8. Rehabilitation attempts can be defeated — always re-examine
9. The Sixth Amendment is your client's right — you are its enforcer

18

Questions & Discussion

Thank you for your commitment to the Constitution — and to your clients.

19

<u>Preserving Strikes for Cause</u>

This represents the current state of preserving juror strikes for cause. Without it, the issue is waived.

"[T]o preserve the error that a trial court failed to strike a juror for cause a litigant must:

(1) move to strike the juror for cause and be denied;

(2) exercise a peremptory strike on said juror, and show the use of that peremptory strike on the strike sheet, and exhaust all other peremptory strikes;

(3) clearly indicate by writing on her strike sheet the juror she would have used a peremptory strike on, had she not been forced to use a peremptory on the juror complained of for cause;

(4) designate the same number of would-be peremptory strikes as the number of jurors complained of for cause;

(5) the would-be peremptory strikes must be made known to the court prior to the jury being empaneled; and

(6) the juror identified on the litigant's strike sheet must ultimately sit on the jury."

Floyd v. Neal, 590 S.W.3d 245, 252 (Ky. 2019).

“Challenges for Cause: Effective Ways to Eliminate Bad Jurors and Prevent the Judge from Rehabilitating”

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INTRODUCTION:

In many jurisdictions, judges try to limit the time for jury selection-it is not unusual for judges to limit each side- even in very serious cases to 30 minutes or less. Judges are reluctant to strike any juror for cause and they will go out of their way to rehabilitate jurors. Once during jury selection in a sexual assault case, where the defendant was charged with raping his nine-year-old daughter during a weekend visitation, a prospective juror, a Catholic nun in full habit, asked to speak to the parties privately at sidebar. She tearfully said to the judge, “Your Honor, I have never shared this with anyone, but when I was 7 years old my grandfather molested me. Just hearing the accusation and listening to the questions has reminded me of my experience. I don’t think I can be a juror on this case. I am very sorry.” The judge pulled out her juror questionnaire and said, “Sister Agnes, I am looking at your juror questionnaire and if my math is correct, you are 57 years old?” “Yes,” answered Sister Agnes. “So, this molestation happened 50 years ago?” asked the Judge with some incredulity. “Yes.” “And you say it was your *grandfather* that abused you?” “Yes” replied Sister Agnes tearfully. “Well, the allegation in this case is a *father* charged with molesting his 9-year-old *daughter*- this has nothing to do with a *grandfather-granddaughter* relationship. I am sure as a nun you follow orders? You are very disciplined? Sister Agnes, I am sure you understand how important jury service is in this country and the need for our citizens to fulfill their civic duties. If I instruct you that you must follow the law and follow my instructions, I am sure you will put your feelings aside and follow the law and the instructions. Isn’t that correct?” “Well…yes your Honor. When you put it like that, I will listen to you and your instructions.” With that the judge said, “Thank you. You may return to the jury box. I find that Sister Agnes can be a fair and impartial juror.”

I am sure everyone has had a similar experience of having a biased juror be rehabilitated by the judge. Thus, we must talk to the jurors, get their true, unbiased opinions, and close all rehabilitative gates BEFORE the judge has the opportunity to rehabilitate. Just remember- as talented and articulate and charming and persuasive of a defense lawyer you may be, you will never have enough time or skill to change the minds of jurors who have opinions that are bad for your case. Our primary goal is to discover the true thoughts, feelings and opinions of the jurors.

PREPARE FOR VOIR DIRE

Effective voir dire cannot exist without a well-developed theory of the case. Thus, you must identify all major issues in your case; identify all the “bad” facts of your case, and be prepared to address them head on in voir dire. Prepare fact-based questions that are critical to your theory of the case and will expose and eliminate “bad” jurors.

DESELECTION:

We have learned that getting jurors to like us, force feeding our case to jurors to make them like us and our client, trying to convince jurors that not all people charged with crimes are not bad, not guilty, and they must uphold the presumption of innocence...has not always worked out well for many of us. Jurors may smile at us, nod their head…. but will be the first to state “GUILTY”! In recent years, many criminal defense lawyers have realized that the primary purpose of voir dire is to eliminate/deselect prospective jurors who pose the greatest threat to the theory of our case and to our theory of innocence.

Deselection demands a completely different mind-set for the defense lawyer. You must:

- Narrow the focus of the questions to issues that are related to your theory and theme of you case.
- Identify the issues that you are most afraid of in your case.
- Think about those issues and recognize your fear of the issues;
- Invite jurors to speak freely about that issue- Who thinks children do not lie about being sexually assaulted- especially a 7-year-old?
- Accept and honor the jurors’ feelings about the issue with you- openly and honestly. Do not cut them off. Do not cross examine. Do not seek to rehabilitate.
- When a juror gives a “bad” answer- thank them. This is a gift!
- Continue to elicit the juror’s feelings even though you may not like the answers- it is better to have the bad answers come out in jury selection rather than the juror keeping their opinions to themselves and sharing them for the first time in the jury deliberation room.
- Don’t explain things to jurors- let them explain them to you.
- If an extremely negative opinion is expressed “just looking at your client makes me think CHILD MOLESTER!” Don’t argue with the jury- simply say- tell me more. Ask if other jurors share that opinion or have a different view. Create an environment where the jurors feel free to express their true opinions.
- Do not show by tone, body language or expression that you think that the opinion expressed by the juror is horrible, vile, or disgusting. Thank the juror for having the courage to share their opinion and indicate that other people may share that same exact opinion. Inquire to the other jurors “who else shares Mr. Jones opinion?”

- Trust that in this honest, open, unguarded and non-judged opinion, you will gain the knowledge that you will need to intelligently exercise your preemptory challenges or prepare for challenges for cause.

Thus, the purpose of your questions is to get the jurors to reveal all the bad stuff about your case, about your client, and about why they will vote guilty, if they get a chance to. Deselection is counter intuitive to how we have been trained in the past and how we practiced in the past. In essence bad stuff is good for us, because if we don't know their honest and true feelings, perceptions, behavior, prejudices and biases and how strong they hold these core values, we will not be able to determine who they are and who are the worst of the worst. And when we start to receive all the negative information that tells you that a potential juror is bad for your case, it is necessary to encourage the other jurors to join in the disclosures of whatever bad stuff they are holding back and have not revealed.

CHALLENGES FOR CAUSE

By allowing the jurors to feel free to express their opinions openly and honestly you will often encourage opinions that are directly contrary to your case and they are opinions that will preclude them from being fair jurors on YOUR case. An effective challenge for cause requires the use of plain dialogue to establish a mandatory reason for excusing the juror. For cause challenges may be caused by:

1) A connection to the case of the parties: a social, legal or other relationship between the juror and one of the parties; i.e. the juror suffered a similar injury-previous domestic violence or sex assault complainant; victim of robbery, burglary, assault. A juror may also be disqualified if they have a close friend or family member who is a member of law enforcement or prosecutors' office and that relationship would make it impossible for them to be unbiased.
2) Disability: Jurors who have disqualifications prescribed by law, as well as mental or physical infirmities which would render them incapable of performing the duties of the jury: language; physical disability; hearing or sight impaired that cannot be corrected.
3) Attitudinal Biases: Racism or bias against the parties based on national origin, religion, sexual preference or other status; fixed positions with respect to important issues raised by the case at bar, like conscientious object to the death penalty or to the insanity defense or anti-drug or bias's garnered because of pretrial publicity concerning the case i.e., exposure to inadmissible priors, pretrial publicity, defendant's confession to crime…
4) Bias Regarding Critical Facts: Those with substantial potential for disqualifying bias. Matters about which the local community or population at large in commonly known to harbor strong feelings that may stop short of a presumptive bias in law yet significantly skew deliberations in fact. *United States v. Jones*, 722 F. 2d 528, 529 (9 Cir. 1983).

In many jurisdictions- such as Colorado, the legal authority for a challenge for cause exists through CO Crim P 24 (b) which provides in relevant part:

(1) The court shall sustain a challenge for cause on one or more of the following grounds:
    The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution, or the acknowledgement of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court.

When the juror expresses an opinion that is directly contrary to your theory, begin to carefully set up the stage for a challenge for cause and consider the following:

- TAKE YOUR TIME! Allow the juror to express his/her opinion.
- LEARN ABOUT THE JUROR! Learn as much as you can about the juror before you solidify the challenge for case;
- CREATE AN ENVIRONMENT THAT ENCOURAGES HONESTY. In a case where you represent a client who is charged with trafficking in drugs and the juror, Ms. Johnson says: "My daughter was a meth addict. She stole from us. She over dosed and had to be resuscitated and yet she went back to using. She ran away, and I don't even know where she is today. Meth destroyed my family. I hate anyone that is even remotely involved in drugs." Immediately thank the juror for telling this very personal story- acknowledge how hard that must be for the her as well as her family. Follow up with open ended questions: Tell me more…. How old was your daughter when she got involved in drugs? How did she get involved in drugs? You said that she stole from you- please tell me more. How long ago did she run away? When is the last time you had contact with her? How has your family been impacted by your daughter's addiction?
  By continuing your probing in an open-ended way and finding the rationale why the juror feels this way, the juror feels heard in their story; the juror has not only convinced herself but has expressed to all present that the juror is genuine in her position, feels strongly about her position and will not change her position. Similarly, other jurors who may share that opinion will feel free to open up and share their positions.
- ACKNOWLEDGE THE JUROR'S EXPERIENCE. Acknowledge the validity of the juror's position and ask if others share her position. "Thank you, Ms. Johnson for sharing this very personal and tragic experience with your daughter. I am sorry for the pain this has caused you and your family, and it is understandable that you feel this way.
- POLL OTHERS ON THE JURY THAT MAY SHARE THAT OPINION. You have all heard Ms. Johnson's tragic story about her daughter is there anyone else who feels the same way or has had a similar experience?

CEMENT THE JUROR'S COMMITMENT TO HIS/HER OPINION FOR A CHALLENGE FOR CAUSE AND USE LEADING QUESTIONS TO LOCK IN THE CHALLENGE FOR CAUSE: Only after you have satisfactorily gathered all the information about the juror's position, can the defense attorney be able to nail down the challenge for cause using close ended/leading questions that use all the information you have gathered from this juror.

- This allows the defense lawyer to confirm, reinforce and insulate the juror's position and closes all "rehabilitative gates" for the judge. For example:
- Ms. Johnson, it is clear from your answers that your daughter's addiction has had a profound impact on your life.
- Ms. Johnson your position about people who use or sell drugs is a position that you have held for a very long time.
- You feel very strongly about this issue.
- During this very long time, you have thought about this over and over- in fact you said that "you have lost countless nights of sleep thinking about this issue and you have prayed over this issue." (Use the juror's exact words).
- You appear to be a very strong woman. A very thoughtful person. You do not make statements like this lightly.
- Like all matters that are important in your life you consider this very seriously. This has been one of the most serious issues in your life. And you stated on more than one occasion that you "absolutely despise drug dealers."
- Having thought about this issue seriously, there is no one that can change your mind on this issue,
- I cannot change your mind.
- The District Attorney Mr. Davidson cannot change your mind.
- Not even Judge Russell can change your mind on this issue.

If the juror answers yes to these close ended questions- at that point you can state to the Judge, Your Honor at this point the defense is challenging Ms. Johnson for Cause.

CUT OFF THE JUDGE'S ATTEMPTS TO REHABILITATE AND MAKE A RECORD

There is some great case law that governs the Court's attempt to rehabilitate jurors. However, similar caselaw may not exist in your jurisdiction. Even if there is not great law in your jurisdiction- alert the court to these cases and always remember: precedent must start somewhere. Object. Make a great record!

OBJECT TO THE COURT'S ATTEMPT TP REHABILITATE:

A great example of a case being reversed in part due to the Court's failure to grant challenges for cause is *Montgomery v. Commonwealth*, 819 S.W. 2d 713, 718 (Ky. 1991).

> The concept of "rehabilitation" is a misnomer in the context of choosing qualified jurors and trial judge must "remove it from their thinking and strike it from their lexicon." *Montgomery v. Commonwealth*, 819 S.W. 2d 713, 718 (Ky. 1991). In this highly publicized case dealing with escapees from a local jail, all potential jurors in the venire had indicated that they had heard about the case, and answered questions acknowledging not only familiarity with the pretrial publicity surrounding the case, but also that they had formed opinions as to the appellants' guilt. In each instance they asserted they believed they could put aside their preconceived opinions and be impartial, but, perhaps individually, and certainly collectively, these answers fail to meet the standard for a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and the Kentucky Constitution. Mere agreement to a leading question asking whether the jurors will be able to disregard what they have previously read or heard is not enough to discharge the court's obligation to provide a neutral jury:
>
> "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. . .." *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S. Ct. 1639, 1645, 6 L. Ed. 2d 751, 759 (1961). ". . . the test is `whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact. . ..'" *Id.,* at 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756.
>
> One of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions. This has come to be referred to in the vernacular as the "magic question." But, as Chief Justice Hughes observed in *United States v. Wood*, 299 U.S. 123, 146, 57 S. Ct. 177, 185, 81 L. Ed. 78 (1936), "[i]mpartiality is not a technical conception. It is a state of mind.

> " A trial court's decision whether a juror possessed "this mental attitude of appropriate indifference" must be reviewed in the totality of circumstances. It is not limited to the juror's response to a "magic question." In this case the record is replete with circumstances establishing an inference of bias or prejudice on the part of jurors so pervasive that the jurors were beyond being rehabilitated as appropriate jurors by affirmative answer to such a question, however well intentioned. *Id* at 718.

Thus, mere agreement to a leading question by the judge asking whether the jurors will be able to disregard what they have previously read or heard is not enough to discharge the court's obligation to provide a neutral jury.

OBJECT WHEN THE JUDGE INTERUPTS A JUROR TO REHABILITATE AND ALWAYS MAKE A RECORD

It is error to "cut off inquiry and rely on an affirmative answer to a rehabilitative question from the bench as a talisman to show that the juror has magically, suddenly become unbiased and impartial." *Remillard v. Long Street Clinic*, 599 S.E.2d 198, 200 (Ga. App. 2004).

> …Jurors, however, must be free from bias and prejudice regarding the trial's outcome. And as recently established by our Supreme Court, a trial court cannot "rehabilitate" a biased juror simply by asking a "talismanic question," such as whether the juror can set aside his personal feelings and decide the case based solely on the evidence and the law. In other words, a court may not "cut off inquiry and rely on an affirmative answer to a rehabilitative question from the bench as a talisman to show that the juror has magically, suddenly become unbiased and impartial. "Nor may counsel or the trial court "browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions." The court instead must conduct an inquiry, either through its own questioning or allowance of questions by counsel, sufficient to evaluate the potential juror's fairness and impartiality. A trial court has broad discretion in making this evaluation, and we will not reverse its ruling absent a manifest abuse of discretion.

THE STRIKE FOR CAUSE METHOD OF JURY SELECTION

MAXIMIZING STRIKES FOR CAUSE IN CRIMINAL CASES

ROBERT R. SWAFFORD

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I. INTRODUCTION

This paper will show how lawyers can maximize their Strikes for Cause in criminal cases.

Historically, lawyers used Voir Dire as an opportunity to try to sell their case. With the advent of jury consultants trained in psychology, methods arose which emphasized using Voir Dire as an opportunity to obtain information that would be useful in exercising preemptory strikes. While both of these approaches have laudable goals, they are limited in their effectiveness.

The Strike For Cause method of jury selection aims squarely at maximizing strikes for cause. By careful drafting and utilization of questions and appropriate follow-up, a lawyer can significantly and consistently increase the number of strikes for cause he can obtain. The steps required to achieve this result are the following: accurately analyzing the hot-button issues in a case; drafting appropriate questions; effectively asking the questions; and, finally, nailing down the strike for cause. Attorneys who successfully execute these steps will be able to eliminate the worst jurors and leave only panelists who are neutral or favorable, greatly increasing their chance of winning the case.

This method is effective in any type of case. However, it is especially important for a lawyer who is trying criminal cases. There are few types of cases that arouse such strong emotional reactions as criminal cases. Both because of intense media coverage and because of many individuals' intense personal experiences, the criminal justice area is one in which is it especially important to control the jury selection process.

Before explaining the "Strike for Cause" method of jury selection, it is important to address the reasons why this approach is superior to previous strategies. The traditional approach to jury selection was primarily concerned with two things: first, getting a head start in placing a litigant's theory of the case before the jury, and second, not poisoning the jury pool with attitudes that are contrary to one's position. This concern with persuading the jury pool during Voir Dire was fueled in part by a misreading of a study which indicated that jurors had made up their minds as to who should win a trial by the end of Voir Dire. Many people took this to mean that the lawyer must persuade the jury in Voir Dire, or they have lost the case. A more accurate reading of that study would indicate that the venire persons had made up their mind about the issues of the case before they had walked into the courtroom. It is absurd to think that what a lawyer says in a brief address to a jury pool can come close to being as important as the life experiences and attitudes that the potential jurors brought with them to the courthouse. To give an example that would resonate with a trial lawyer, ask yourself if you would rather have a jury made up of members of the ACLU, or instead be given an opportunity to present a one and a half hour speech. Any criminal defense lawyer would choose to have a jury that is prejudiced in his favor than to have yet another speech. The same is true for prosecutors. There is an inherent conflict, however, between the desire to maximize strikes for cause and the desire to persuade a jury panel. It is essential in order to obtain strikes for cause to get jurors saying bad things about your side of the case. This is the only way to expose prejudice and, ultimately, to have them struck for cause. Not only do you have to risk poisoning the jury pool by venire persons making statements antithetical to your theory of the case, you must also restrain yourself in selling your case. Individuals are much less likely to express their strongly held opinions if they believe they are going to get into an argument with a lawyer in public. These dangers inherent in the "Strike for Cause" method are more than made up for by the advantage of having ten, fifteen, and, in some cases, as many as twenty strikes for cause, while your opposing counsel is limited to one or two. Through the process of elimination, you can guarantee the best jury possible from a given panel.

II. IDENTIFYING HOT-BUTTON ISSUES

The first step in any case is to identify the emotional issues on which jurors will be deciding your case. If one has tens of thousands of dollars to spend on a case, this information can be obtained through the use of focus groups, mock trials and polling. It is dangerous, however, to rely too heavily on the information gleaned from these methods. There is a temptation to believe that if an individual in your focus group holds a certain opinion, then someone on a jury panel with similar demographics will hold the same opinion. There are no focus groups that have a large enough sample size to be predictive of what individuals on a jury panel are likely to believe. The only purpose of a focus group is to discern what issues may be of importance to a jury that would not be important to an attorney.

If a case does not justify the expense of a focus group, there are other alternatives that are at least as effective. One option is to develop a brief summary of the case, and then ask friends and family members what they think about the case without revealing your role in the case. Try to be as neutral as possible and include facts that you don't think are relevant, but might be important to a non-lawyer. Have staff members do the same thing. If you are a criminal defense lawyer, call your one Republican friend, and ask his opinion. If you are a prosecutor, call your one Democrat or Green Party friend and ask her opinion. Be careful not to argue with the individual who is helping you. Encourage them to express their opinions fully with follow-up questions. Listen more than you talk.

Another very effective technique is to interview former jurors who have heard and decided cases similar to yours. For example, send out a query on a listserv asking if anyone has had a case go to trial with facts similar to yours. Obtain the list of jurors, then phone them and interview them about their service. This is superior to any mock trial or focus group because you are interviewing actual jurors and finding out the basis of their decisions.

In making your notes, be sure to rely on what the non-lawyers say, rather than the lawyers, as to what issues are the most important. If non-lawyers seem to think that the fact that the Defendant liked to dance is important, then you need to focus on dancing, regardless of its relevance as to any issue in the case.

Once you've identified the hot-button issues, you are ready to start drafting questions.

III. DRAFTING QUESTIONS

Historically, lawyers would ask jurors "selling questions" such as, "Does everyone here agree that they will follow the law and make the prosecution prove their case by beyond a reasonable doubt? I take it by your silence that everyone agrees that they will require the prosecution to prove their case beyond a reasonable doubt."

This approach was replaced by the open-ended questions such as, "How do you feel about the burden of proof being beyond a reasonable doubt?" Open-ended questions were introduced to try to find out jurors' attitudes so that the lawyers could intelligently exercise their preemptory strikes.

The approach advocated in this paper relies upon loaded questions. These are questions that make it easy for a juror to express opinions which result in them being struck for cause. For example, "People have strong feelings about the burden of proof in criminal cases. Some people, if they were on the jury, would require the state to prove their case beyond a reasonable doubt. There are other people, if they were on a jury, feel that, in cases like child sexual assault, is too high a burden. They would only require the state to prove their case by clear and convincing evidence. Which of those best describe you?"

This question works on many levels. First, by suggesting that there is a group of people that has one set of opinions and another group of people who have a different set of opinions, a juror feels comfortable in expressing his opinion because it will be consistent with one group or the other. He is not out there alone in opposition to the law. The second level on which the question works is that the language makes saying "yes" to the second half of the question seem more reasonable by using the words "clear" and "convincing."

The question on its face looks neutral, but to someone with a strong law enforcement bias, the question is heavily loaded toward lowering the standard of proof in a criminal case.

This is not to say that loaded questions are the only questions to be asked during Voir Dire. They are simply the most important weapon in your arsenal. Certainly, open-ended questions such as, "How do you feel about sexual assault cases?" are useful in gaining information and in opening up discussions about critical issues.

The first step is to list all the hot-button issues you have distinguished from your formal or informal focus groups. You then begin to write out word-for-word the questions which reveal the attitudes of the venire persons with regard to each hot-button issue. Some lawyers resist the idea of scripting out the language of the questions. This resistance is accompanied by the justification that scripting would somehow impede the natural delivery of the Voir Dire. A lawyer might say, for example, "I have to put it in my words; otherwise, it won't work." I would suggest that almost everything a lawyer says in a Voir Dire is unconsciously scripted. Lawyers repeat what they have heard other lawyers say, or what they have said in the past. The only reason that it seems natural is because they've repeated it so many times. A new, carefully crafted question will feel natural if you say it enough. I therefore recommend that on key questions that you memorize them and practice saying them until they are as natural as anything else you say over and over again.

As I have pointed out before, there are several forms in which questions can be drafted. One is an either-or form. Ex: "Some people believe x, other people believe y. Which best describes you?" Another form is the open-ended question. Ex: "How do you feel about y?" "What have you heard about x?"

Once you have written questions covering all of the hot-button issues in your case, then examine the court's charge and the applicable law in the case to see if there are opportunities for strikes for cause. In general, there are two types of opportunities for strikes for cause. One is through the personal experiences of individual panel members. The second is through abstractions and beliefs such as "police officers would never lie under oath."

An example of a series of questions for a defense lawyer would be as follows:

People have strong feelings about police officers. There are some people who so admire and respect police officers, they simply wouldn't believe that a police officer would lie under oath. There are other people who believe that a police officer is just as likely as anyone else to lie under oath. Which of those best describe you? Mr. Smith, tell me more about that.

Now I want to be clear that I am not talking about believing a police officer of his superior education, training, or experience. I am simply asking: do you believe that police officer is more likely to tell the truth?

Is it fair to say that regardless of the law, the facts, or the judge's instructions, you would give more credibility to the testimony of a police officer?

This question will result in many state's-oriented jurors being struck for cause. This example also demonstrates the next step in obtaining a strike for cause, which is drafting effective follow-up questions. By asking Ms. Smith to tell you more about that, she will provide personal experiences and statements that will be useful in seeking a strike for cause. The question that begins, "Is it fair to say . . ." makes it easy for Ms. Smith to agree that she cannot follow the law. Adding the phrase, "Is it fair to say . . ." softens the question and is less confrontational than if you had worded the question, "Isn't it true that you can't follow the judge's instructions?" By telling Ms. Smith that she could follow all the other judge's instructions but simply couldn't follow this one, it makes it appear as if she's getting a B+ or an A- rather than failing as a juror because she could not follow one of the judge's instructions.

The important point is to draft follow-up questions which give the potential juror permission to express prejudices. Another way to make it easy for a venire person to slide off of the panel is to say, "Is it fair to say I'm starting out behind with you with regard to x?"

IV. SELECTING THE JURY

Once you have drafted the questions and practiced saying them, you are ready for the day of trial. If your jurisdiction allows you to request a larger panel, by all means do so. Judges are more likely to grant your legitimate strikes for cause if they are not afraid that you're going to burn the panel.

In most jurisdictions, you will have some period of time in which to review the juror cards before the beginning of trial. Quickly assign each juror a rating of "Leader" or

"Follower," and an additional category of "For Me" or "Against Me." Obviously, you will have to rely on stereotypes for this initial categorization. An obvious example would be the President of the local MADD Chapter, who would be categorized as a "Leader" and "Against" the Defendant's side. There may be a student or file clerk that turns out to be a leader on a jury, but for the purposes of your initial evaluation, use your stereotype, and place them in the "Follower" category. Do a quick count, and if there are more "Leaders" who are against you in the first half of the jury pool than there are "Leaders" who are for you, and there are more "Leaders" who are for you than there are "Leaders" who are against you in the second half of the jury pool, request a shuffle.

Do your best to rank the jurors using the criterion of "Leaders" who are against you first, "Leaders" who are you don't know whether they are for you or against you second, and then "Followers" who are against you third. Begin the questioning with the "Leaders" who are against you and work down the list. This is also the order in which to use your preemptory strikes. Even if someone is against your case, if they were a follower, they're not nearly as dangerous as someone who is a leader that turns out to be against you in a jury room.

I like to begin Voir Dires by providing a context to the panel, which encourages full participation. The following is a good introduction:

I am going to start out by asking if there is anyone here who's ever watched one of those daytime talk programs, like Oprah Winfrey, Jerry Springer . . . go ahead and get your hands up. Do people in the audience on those shows have any difficulty expressing their opinions?

Juror: *No, people will speak right out.*

Well, that's exactly how people should express themselves during voir dire. When either I or the lawyer for the defense asks a question, everyone needs to feel free to tell us exactly what you think.

Always have someone taking notes for you. It is difficult, if not impossible, to listen to jurors and take notes. Have the person who is taking notes put a big "C," or a star, or an "X" to remind you who has made a statement that would support a strike for cause. Encourage the jurors to express their prejudices against your case. When a juror makes a statement that evidences bias or prejudice, ask the panel, "Who else agrees with this statement?" You want to create a feeding frenzy that results in ten or fifteen strikes for cause for your side.

Depending on the judge, you will either have to make your strikes for cause known as they occur in the panel, or at the completion of the Voir Dire. If the judge gives you an option, make your strikes for cause at the end of the Voir Dire. If the judge requires additional questioning at the bench of anyone who you are seeking to strike for cause, begin by reading the jurors' words back to them from the notes. Then, follow-up with, "Are my notes accurate?" Nail the strike down by saying, "Is it fair to say that we are starting out behind with you with regard to issue x?"

After obtaining many strikes for cause, the choices you must make with your preemptory strikes should not be as difficult as in the past. As mentioned earlier, "Leaders" who are against you are struck first, "Leaders" we have questions about are struck second, and then "Followers" who are against you are struck third. In order to efficiently use the time allotted for exercising your preemptory strikes, run the discussion like a meeting. Ask all of the decision makers to list which six venire persons they would strike. Go around the table, one by one, and write down the six juror numbers for each decision maker. Do not allow discussion at this point. You only want each person to give the numbers of the six people they would strike if jury selection was entirely up to them. If some venire person's number shows up on everyone's list, use a preemptory strike for that person without discussion. You then will have plenty of time to discuss the remaining venire persons upon whom there was not initial agreement. This system saves time and provides more clarity.

Hopefully, at the end of the process, you will look and see twelve people in a jury box with whom, if you do not have a head start, you at least are not behind the eight ball.

V. ADDITIONAL EXAMPLES

The following are a few additional examples of Strike For Cause questions.

1. People have strong feelings about the Fifth Amendment. There are some people who believe that if an individual doesn't testify in a case, it doesn't mean anything with regard to whether or not he is guilty. There are other people who believe that if someone were innocent, they would get on the stand and testify. Who here fits in the second category, that is, you would just have to consider a defendant's failure to testify as evidence that they were guilty?
   - Tell me about that.
   - Is it fair to say that even if a judge instructed you that you are not to hold it against my client if he decides not to testify that you would still have to consider a decision not to testify as evidence of guilt? Is that fair to say?

2. There are some people who have no problem at all presuming that someone who is accused of a crime is innocent. There are other people who, even though they know they should presume someone innocent, believe that they wouldn't be sitting here facing charges if they hadn't done something wrong. Who here fits in the second category?
   - Is it fair to say that although you would do your best to presume my client is innocent, I am starting out behind with you from the start? That does not mean that you wouldn't listen to the evidence. I am just saying that, as we sit here, I am starting out behind with you. Isn't that fair to say?
   - For example, has anyone ever seen the Boston marathon? There are some runners that begin the race at the very front of the pack, while other runners start out further behind. In all honesty, where am I starting out with you?

3. People have strong feelings about the testimony of children in sexual assault cases. There are some people who might believe that an older child such as a teenager might lie about sexual assault, but they simply could not believe that a very young child would lie under oath. Who here fits into that category, you simply could not believe that a very young child would lie about something as serious as sexual assault?
   - So, is it fair to say that regardless of the law, the facts, or the judge's instructions, you simply could not believe that a very young child would lie about sexual assault? Is that fair to say?

4. People have strong feelings about the burden of proof in criminal cases. There are some people who, if they were on a jury, would have no problem requiring the prosecution to prove their case beyond a reasonable doubt. There are other people who, if they believed that the prosecution had proved that someone was guilty by clear and convincing evidence, they would have to find someone guilty, even if a reasonable doubt remained. Who here would just have to find them guilty if the state had proven their case by clear and convincing evidence, even if a reasonable doubt remained?
    - Tell me about that.
    - I want to give you a couple of definitions. The first one is the definition of preponderance of the evidence. The definition of preponderance of the evidence is the greater weight and degree of credible evidence admitted in the case. Another way to talk about it, is that if you have the scales of justice, and the evidence for the defense is stacked on one side and the evidence for the prosecution is stacked on the other, and it tips ever so slightly in the favor of the prosecution, then the prosecution would prevail. Clear and convincing evidence is a higher standard, and it means that measure or degree of proof that will produce in the mind of the tier of fact a firm belief or conviction as to the truth of the allegations sought to be established. For example: in a case in which the state wants to take away someone's child, the state must prove its case by clear and convincing evidence. The standard of proof in this case is beyond a reasonable doubt.
    - Is it fair to say that even if the judge instructed you, that the standard of proof in this case is beyond a reasonable doubt, but that you would hold the prosecution to a lower standard such as clear and convincing evidence or preponderance of the evidence? Is that fair to say?
    - Who here agrees with these jurors?

5. There are some people who have no problem presuming that someone who is accused of a crime is innocent, no matter the severity of the crime they are accused of. There are other people who, while they may be able to presume innocence in a case about traffic violations or theft, simply would not be able to presume innocence in something

as severe as a murder case. Who here fits in the second category?

- Tell me about that.
- How would that affect you if you were to be a juror?

6. Is there anyone here who has formed an opinion as to my client's guilt or innocence based on what they've heard from the prosecution in their voir dire? Now, I'm not asking whether or not you can listen to the evidence and later on find my client not guilty. I'm simply asking, as we stand here right now, are we starting out behind with you?
    - Tell me about that.
    - How would that affect you if you were to be a juror?

7. There are some people who could never consider self-defense, if the person who claimed self-defense was engaged in an illegal activity. There are other people who could consider self-defense, even if it was in the context of an illegal activity. Who here fits in the first category, that is, you could never consider self-defense if the person claiming self-defense was engaged in an illegal activity?
    - Tell me about that.
    - How would that affect you if you were to be a juror?

8. Who here could never consider probation in a criminal case in which someone had lost their life, regardless of the circumstances?
    - Tell me about that.
    - How would that affect you if you were to be a juror?

9. People have strong feelings about using marijuana. There are some people who feel that if someone is using marijuana, it says something about their character, and you would tend to give less credibility to their testimony. There are other people for whom that would make no difference. Who here would tend to give less credibility to someone who is a marijuana user?
    - Tell me about that.
    - How would that affect you if you were to be a juror on a case in which there were allegations of marijuana use?

10. People have strong feelings about the use of interpreters. There are some people who would have no problem giving the same credibility to testimony that came through an interpreter as testimony that was given in English. There are other people who would just have to give less credibility to testimony that had been translated. Who here fits in the second category, that you would

just tend to give less credibility to testimony that came through a translator?

- Tell me about that.
- Is it fair to say that regardless of the law, the facts, or the judge's instructions, you would just have to give less credibility to testimony that came through a translator?

IV. EFFECTIVE TECHNIQUES AND "BITS"

In addition to questions, it is important to have in your back pocket what I refer to as "bits." These are things that are not necessarily questions, but are useful in creating context, inoculation, preventing rehabilitation, or nailing down strikes for cause. Bits are like a tiny speech—something you say to set the context or make a point, not to get information. Generally speaking, your time is better spent asking questions than doing bits, but they are still important to know how to use.

1. <u>Oprah Winfrey</u>
   May it please the court, opposing counsel, Ladies and Gentlemen of the jury. My name is ________. It is my honor to represent the plaintiff before you today. As the judge explained to you, this part of a trial is called Voir Dire, or jury selection. This will be my only opportunity to get to know you in order for us to select the best jury possible for this trial. I have a very brief time in which to get to know each and every one of you. It is therefore necessary for you to talk more than me, and I know that it is tough to talk more than a lawyer. But if I'm doing my job that is exactly what should happen. Now I've spent considerable time preparing these particular questions for today in order to make sure they are proper under the law.

   I am going to start out by asking if there is anyone here who's ever watched one of those daytime talk programs, like Oprah Winfrey, go ahead and get your hands up. Do people in the audience on those shows have any difficulty expressing their opinions?

   Juror: No, people will speak right out.

   Attorney: Well that's exactly how people should express themselves during Voir Dire. When either I, or the lawyers for the defense asks a question, everyone needs to feel free to tell us exactly what you think.

2. Boston Marathon/Starting Out Behind

Has anybody ever seen the start of one of those big races like the Boston marathon? Do you notice that at the beginning of the race there are some people whose toe is touching the start line, and there are other people who are way in the back of the pack at the beginning of a race? Would you agree with me that where you start out in the race can affect where you end up at the end? That although it is possible to catch up and pass the people at the front it makes it harder? The reason I ask this, is that I need to know, are there any jurors who have me at the back of the back, that I am starting out behind? Would you please raise your cards.

3. Those Who Talk, Walk

Despite the name, jury selection is not a process in which we select people, but rather a process by which we eliminate people. We go from the front of the room to the back, and the first 12 people who aren't eliminated will end up serving on this jury. The reason why there are so many people here, when we only need 12 jurors and alternates, is that not everyone is appropriate for every jury. One thing I want to let you know about this process is that people who talk the most tend to be the ones who are eliminated. There's a saying that goes, "Those who talk, walk, those who don't say, stay." So if you think you're going to be able to hide out and not talk and get sent home, that's not really how this works.

4. Teacher

Has anyone here ever had a really great teacher? When you were in that teacher's class, did she mostly lecture, or was there a lot of class participation and discussion? Before I went to law school, I was a high school teacher, and my best days were when I had a class discussion, and everyone participated. That's really what we need today.

5. Pie Contest

When I was a kid, my grandma made the best pies. She could make lemon meringue pies, apple pies, coconut cream pies…just about any pie she made was great. One of her best pies was pecan pie. I remember one evening at about six or seven, grandma made her pecan pie and I kept going back for helping after helping. I ate so much pie that it made me sick. I couldn't stop throwing up for hours.

For years and years after that, I just couldn't touch pecan pie—not even a bite. I couldn't swallow it without feeling sick. So if I were asked to be the judge of a pie baking contest, and some of the pies were pecan pies, I just wouldn't be a fair judge, because of my personal experience with pecan pie.

As we go through voir dire, some issues may come up that for many of you, are like my history with pecan pie. You may be a perfect juror on some other case, but because of your personal experience with a specific issue, you just can't be fair on this case. I want you to let me know when an issue comes up that is like pecan pie for you. Can everyone agree to do that?

6. Red-Faced Monkey
   When I was a child, my father would joke with me, and he would say, "Son, go stand in the corner and don't think about a red-faced monkey." So, what do you think I did? That's right – I thought about a red-faced monkey. The reason I tell this story is, for some of you, some of the judge's instructions may be red-faced monkeys. You would do your best to try and follow the judge's instructions, but when it comes right down to it, you would have to consider_______________ in your deliberations. So, is this a red-faced monkey for you? By that I mean that although you would try and follow the judge's instructions, you simply couldn't follow the instruction to ________________.

7. Duty to Serve/Duty Not to Serve
   From the time we have our first civics class we hear about a juror's duty to serve. Very rarely do we hear about the corresponding duty and that is the duty not to serve. There are all kinds of cases that get tried in this courthouse. For example, there are contract cases, personal injury cases, real estate cases, for which you may be the perfect juror. But given what you have told us today is it fair to say that in this case it may be your duty not to serve? Is that fair to say?

Brush 'Em Off: The Legal Authority To Let You Ask Questions In Voir Dire To Select A Fair Jury

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Research assistance from Tyler Bliss, Colorado State Public Defender 2008 Summer Intern, is gratefully acknowledged.

I. Introduction[1]

The purposes of voir dire are to exercise peremptory challenges intelligently and to identify prospective jurors whose actual or implied bias should disqualify them for cause. Crim.P. 24; C.R.S. Section 16-10-103. Counsel must therefore be able to ask questions to determine which prospective jurors have "beliefs that would cause them to be biased in such a manner as to prevent the defendant from obtaining a fair and impartial trial." *People v. Martinez,* 24 P.3d 629, 632 (Colo. App. 2000); *see also People v. Robinson,* 187 P.3d 1166, 1176 (Colo. App. 2008).

Of course, a prospective juror's beliefs may only make him or her biased in a specific set of circumstances. For example, a juror who does not believe that people should be allowed to use physical force to defend themselves would, without more, be able to be a fair and impartial juror in a theft case. A juror whose life experiences have led him to conclude that children never fabricate accusations of sexual assault would, without more, be able to be a fair and impartial juror in the trial of a bank robbery. Without being able to talk about the

[1] *Because the author practices in Colorado, the citations to Rules of Criminal Procedure and to statutes in this outline are, respectively, to the Colorado Rules of Criminal Procedure and the Colorado Revised*

allegations and the evidence and testimony the lawyer believes will be offered at trial, counsel cannot conduct voir dire that accomplishes the two proper and legal purposes of voir dire. Limits on the scope of questions that thwart the proper and legal purposes of voir dire violate the accused's fundamental constitutional rights to due process, to a fair trial, to an impartial jury and to the effective assistance of counsel. Colo. Const. art, II, sections 16, 24; U.S. Const. amends. VI; XIV.

This outline examines the popular (and mistaken) belief that voir dire questions that are "too close to the facts of the case," as the objection is often stated, are categorically impermissible. Through an analysis of both state and federal case law and rules, this outline demonstrates that it is not only permissible, but a requirement of due process to ask prospective jurors fact-based questions in voir dire. The outline then examines various types of fact-based voir dire questions. Finally, the outline examines impermissible stakeout questions, to help practitioners avoid them.

Statutes. Colorado's rules of criminal procedure are modeled after the federal rules, with some modifications.

II. "Too close to the facts of the case."

Cases from around the country demonstrate the widely varied approaches to those voir questions that are objected to because they are "too close to the facts of the case." Of course, questions that blatantly call for prospective jurors to commit to a verdict in advance are quite properly disallowed. "[D]isallowing voir dire questions that approached actually trying the case during jury questioning was not an abuse of discretion." *State v. Nevils,* 2003 WL 1787294, 6 (Tenn. Crim.App. 2003). "[T]he most effective question would be 'under the evidence that will be introduced in the case, would you convict the defendant?' Obviously, neither the State nor the defendant should be able to ask such a question." *Watson v. State,* 176 S.W.3d. 413, 416 (Tex. App. 2004). "Voir dire questions that ask jurors to comment on how they will evaluate the evidence in the case are improper." *Id.*

However, the analysis becomes more nuanced when a court must decide if a proposed voir question simply discloses facts sufficient to assure the accused of an impartial jury or if it constitutes a prejudicial presentation of the evidence during jury selection. *See State v. Oates,* 12 S.W.3d 307, 310 (Mo. 2000).

A trial court may only impose reasonable limitations on voir dire. Crim.P. 24. Thus, a reviewing court will reverse if counsel is deprived of the opportunity to identify unqualified, biased jurors. For example, in a murder case involving a three-year-old decedent, it was an undue restriction and thus an abuse of discretion to forbid defense counsel from asking prospective jurors about whether the age of the victim would affect their ability to afford the accused a fair and constitutional trial. *State v. Clark,* 981 S.W.2d 143, 146 (Mo. 1998).

In *Clark,* the Missouri Supreme Court expressly noted that voir dire requires "the revelation of some portion of the facts of the case." *Id.* at 146-147. Specifically, *Clark* recognized that some inquiry of the critical facts of a case is essential to the accused's right to discover bias and prejudice among potential jurors. *Id.* at 147. Critical facts are those "with substantial potential for disqualifying bias." *Id.* Because the age of the victim was a "critical fact," it was reversible error to prohibit any questions about it during jury selection.

In *State v. Finch,* 746 S.W.2d 607 (Mo. App. W.D. 1988), defense counsel wanted to ask prospective jurors in a case involving an accusation of attempted sexual assault whether any of them would believe the testimony of a complaining witness in a sexual assault trial merely because she said someone had tried to rape her. In reversing, the court "noted that where a prospective juror enters the trial of a case with the formed disposition to give preferential belief to a generic class, the bias of credibility contrary to the interest of a litigant will disqualify the person to serve as a juror." *Id.* at 613. As a result, the defense must have the opportunity to discover whether any potential jurors are generally predisposed to believe the testimony of an alleged rape victim and, by extension, other generic classes of witnesses, depending on the facts of the case. For example, questions about juror predispositions on the credibility of children, police officers and drug addicts would all be permissible if a member of one of these generic classes of witnesses is expected to testify at trial. *Id.*

In contrast, another division of the Missouri appellate court held that asking jurors whether testimony from a single eyewitness would be enough to convince them of defendant's guilt was an impermissible attempt to obtain a commitment from the prospective jurors. *State v. Delancy,* ___ S.W. 3d ____, 2008 WL 2796576, 3 (Mo. App. E.D. 2008). The court noted that forbidding this inquiry did not prejudice the defendant because defense counsel was allowed to ask the prospective jurors if they would consider all of the evidence in the case. *Id.; see also State v. Twitty,* 793 S.W.2d 561, 565 (Mo. App. E.D. 1990).

In a California capital case where the asserted defense was intoxication, the prosecution was allowed to ask jurors about "their experiences relating to alcohol consumption, specifically with regard to its effect on their capacity to make decisions." *People v. Salcido,* 44 Cal.4th 93, 186 P.3d 437, 483 (Cal. 2008). "This questioning did not improperly attempt to educate potential jurors concerning the facts of the case or to secure their votes, and thus was proper." *Id.*

Colorado also recognizes that some inquiry about the critical facts of the case is necessary to protect the defendant's rights to due process and a fair trial. In *People v. LeFebre,* 5 P.3d 295 (Colo. 2000), the court recognized that a challenge for cause must be granted "if a prospective juror is unable to unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict **based on the evidence admitted at trial** and the court's instructions." *Id.* at 299 (emphasis added); *see also* 16-10-103(1)(j); Crim.P. 24(b)(X).

A juror must be excused for cause if the trial court finds "[t]he existence of a state of mind in a juror manifesting a bias" against either the accused or the state, "or the acknowledgement of a previously formed or expressed opinion" as to guilt or innocence. Crim.P. 24(b)(X). Fact-based questioning is the only reliable way to identify jurors who may suffer from one or both of these disqualifying incapacities. This is so because a prospective juror will generally only form an opinion about a particular defendant's guilt or innocence based on that juror's knowledge of the specific facts of the case.

The language of Crim.P. 24(a)(1)(iv) provides additional support for the right to ask prospective jurors fact-based questions. That subsection of the rule states that, prior to beginning of voir dire, the trial court has the mandatory obligation to inform the jurors of the following:

> The nature of the case using applicable instructions if available or, alternatively a joint *statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them*. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements[.]

Crim.P. 24(a)(1)(iv) (emphasis added).

It is important to remember that the right to ask fact-based questions is not only a function of case law and procedural rule in Colorado and several other states. In many states, parties or their counsel have the right to question prospective jurors and the court has no authority to deprive them of this right. *See* Crim.P. 24(3) ("The parties or their counsel shall be permitted to ask the jurors additional questions."). The basis for this rule, of course, is the constitutional guarantee of a fair trial by an impartial jury and to due process of law. Therefore, any argument in support of one's right to ask fact-based questions of prospective jurors should be premised not only on applicable rule and statute, but also on the client's fundamental constitutional rights to the effective assistance of counsel, to a fair and impartial jury and to due process of law under the state and federal constitutions. Including the state and federal constitutional justifications for the proposed questions both strengthens the persuasive nature of the argument in the trial court and also facilitates subsequent appellate success, if required.

Especially in light of the explicit language of Crim.P. 24(a)(1)(iv), *supra*, fact-based questions are not only permitted, but preferred in Colorado and those states with similar rules. Citizen jurors act as a protective barrier between the individual accused and the overwhelmingly powerful state. In the context of permitting impaneled jurors to question witnesses, our Supreme Court observed that:

> The jury's presence thus provides a formidable restraint on government power in our criminal courts. Therefore, it is only logical that jurors who are the arbiters of truth and hedge against government power also have the tools available to think critically and to seek clarification of the issues presented to them.

Medina v. People, 114 P.3d 845, 851 (Colo. 2005).

Fact-based questioning during voir dire furthers this fundamental policy by producing juries whose members have sufficient information to evaluate honestly their ability to be fair in a particular case. Without fact-based questioning, a prospective juror's self-assessment of his or her fairness is meaningless. One's ability to be fair—that is, to reach a conclusion unclouded by the pernicious influence of one's own deeply rooted and often unrecognized bias—is wholly dependent on the facts one is asked to evaluate. Jurors are asked to interpret the facts presented to them in the framework of the court's legal instructions; inevitably, this interpretation relies on the filter of their own life experiences. Therefore, a juror's ability to interpret facts and apply the law to those interpreted facts is shaped by his or her past experiences. These past experiences can lead to bias that, in some cases, may rise to the level of a challenge for cause. Without fact-based questioning, it is impossible to ensure that those jurors selected to serve are able to discharge their duty in a constitutional manner. Because of this, it is the better policy to allow some fact-based questions during jury selection, in order to further the goal of providing criminal defendants a fair and constitutional trial.

At least one court has found that fact-based questions are necessary to a fair trial when the case involves:

> Matters concerning which the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.

United States v. Jones, 722 F.2d 528, 529 (9th Cir. 1983), citing *United States v. Robinson,* 475 F.2d 376, 381-382 (D.C.Cir. 1973). In those topic areas involving less patent bias, the burden is on the questioner to show that each proposed question "is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp." *Jones, supra,* 722 F.2d at 530. Other cases have approved fact-based questions in cases involving a variety of subjects about which people typically harbor strong feelings. *See, e.g., Lurding v. United States,* 179 F.2d 419 (6th Cir. 1950) (wagering); *State v. Miller,* 88 P.2d 526 (1939) (intoxicants); *United States v. Daily*, 139 F.2d 7 (7th Cir. 1943) (religious minority member); *Webb v. Commonwealth,* 314 S.W.2d 543, 544 (Ky. 1958).

One court explained the relationship between fact-based voir dire and a constitutional trial this way:

> Since the crux of the defense was that while the defendant had lied concerning the purposes of his investigation he had not presented himself as "an employee of the Veterans Administration," he had the right to have prospective jurors questions as to whether they had such a moral or ethical repugnance toward liars and lying that the could not evaluate his testimony "objectively and fairly."

United States v. Napoleone, 349 F.2d 350 (3rd Cir. 1965).

The analytic tension, then, is between fact-based questions that seek to uncover bias in the context of the evidence that will be developed at trial and questions that impermissibly attempt to commit a juror to a certain conclusion before any evidence is presented. This latter type of question, known as a stakeout question, is impermissible. Determining which side of the line a particular question falls on is not always an obvious call.

III. <u>Fact-based Questions</u>

United States v. Johnson, 366 F.Supp.2d 822 (N.D. Iowa 2005) addressed the propriety of and limits on fact-based questions in voir dire.

Johnson was a capital case and resolved the issue of fact-based questioning in that context. *Id.* at 824. However, its basic premise is the right of all criminal defendants to a fair trial by an impartial jury ("voir dire of prospective jurors serves a critical purpose in affording a criminal defendant a fair trial."). *Id.* at 826. *Johnson* began its analysis by reviewing the Court's holding in *Morgan v. Illinois,* 504 U.S. 719 (1992). Of particular interest in non-capital cases is *Morgan*'s observation that "general fairness" and "follow the law" questions were insufficient to identify and exclude jurors who would automatically impose the death penalty if a defendant were convicted of a capital crime (in other words, jurors who were unable to follow the law and should have been removed for cause). *Morgan, supra* at 734. This language in *Morgan* is a useful starting point for the argument in favor of fact-based voir dire: the United States Supreme Court has found that generalized, vague inquiries about fairness are inadequate to ferret out bias.

In determining the permissible scope of fact-based questions in voir dire, *Johnson* identified five sub-classes of fact-based questions:

- Abstract questions;
- Defendant's status questions;
- Case-categorization questions;
- Case-specific questions;
- Stake-out questions.

In *Johnson,* the court concluded that only stakeout questions were impermissible. It is useful to define the other four permissible permutations of fact-based questions in order to better understand how to avoid asking an impermissible stakeout question.

- ***Abstract Questions***

Abstract questions probe a juror's basic beliefs without reference to the facts and circumstances of the case at issue. So, for example, asking a prospective juror in a sexual assault on a child case if he or she would always convict someone accused of this crime is an abstract question. Case law from various jurisdictions indicates that "'abstract' questions appear to be generally permitted and viewed to be sufficient to satisfy a defendant's constitutional right to a fair and impartial jury." *Johnson,* 366 F.Supp.3d at 835.

- ***Defendant's status questions***

These are "questions that do not raise facts about the alleged crime, but about the defendant's status separate and independent of the alleged crime." *Id.* at 836. However, there is disagreement about which aspects of a defendant's status are fair game for defendant's status voir dire question.

It seems that only those specifics of defendant's status that are: (a) self-evident, that is, not requiring proof at trial; and (b) constitutionally protected, are generally permissible areas of inquiry during jury selection. *Johnson,* at 837. In practical terms, questions about defendant's race are always safe "defendant's status" questions. When possible racial bias from jurors is an issue, mere general rhetorical questions about whether prospective jurors could be fair to a defendant of a different race are not sufficient to satisfy due process. *See United States v. Bear Runner,* 502 F.2d 908 (8th Cir. 1974). In *Bear Runner,* the trial court asked a single question about possible bias toward the accused, who was a Native American. The reviewing court held:

> In the instant case, the court's single question concerning racial bias was not only general in scope but was made to the prospective veniremen [sic] as a group. The effect was more like a monologue by the court than a probing examination of the jurors. Although the use of general questions has been approved by this court, *see United States v. Thompson,* 490 F.2d 1218 (8th Cir. 1974), and *United States v. Powers,* 482 F.2d 941 (8th Cir. 1973) . . . the better practice in a sensitive case is to direct probing questions touching areas of possible prejudice to each individual juror, with the questions to be asked by the trial judge or counsel. Individual questioning is particularly necessary when the

> overall circumstances and surroundings suggest the possibility of racial bias.

Id. at 912.

Be aware that some aspects of a defendant's status—for example, his prior convictions that will come in at trial—are sometimes prohibited because they involve issues that must be proved or stipulated to at trial before they may be found as fact by the jury. *Id.*

- ***Case-categorization questions***

These types of questions seek to identify jurors who will automatically convict or acquit based upon the type of charge. At first blush, this type of question seems to be the same as an abstract question that asks jurors if they would always convict someone accused of sexual assault on a child. However, a case-categorization question in that context would go further and focus on the specific subclass of sexual assault on a child involved. For example, a case-categorization question might ask, "If you were a juror in a case where the defendant was accused of penetrating the vagina of a three-year-old with his penis, would you always convict, based on the type of charge involved?"

"Some courts consider such questions to be permissible, while others do not." *Johnson,* 366 F.Supp.3d at 838. Decisions approving case-categorization questions include *Green v. Johnson,* 160 F.3d 1029, 1036 (5th Cir. 1998) (prosecutor allowed to ask jurors if they could impose death penalty in felony murder case if predicate felony was unsuccessful or if defendant was an aider and abettor rather than the gunman); and *United States v. Flores,* 63 F.3d 1342, 1356 (5th Cir. 1996) (prosecutor allowed to ask juror if he would never impose the death penalty if the victim were shown to have been dealing drugs). The court in *Johnson* gleaned the following from *Flores:*

> Thus, the court found it appropriate to probe a juror's attitude toward imposition of the death penalty In a case in a certain category, a case in which both the defendant and the victim were "in drugs," not just in the "abstract"; indeed, the court seemed to suggest that merely "abstract" or "irrelevant hypothetical" questions were not as instructive about a juror's true attitude as the juror's response to the category of case actually at issue.

Johnson, 366 F.Supp.3d at 839. *But see Oken v. Corcoran,* 220 F.3d 259 (4th Cir. 2000) (case-categorization question improper). "Thus, there is a split in authority on the propriety, or at least the necessity, of such 'case-categorization' questions to determine whether jurors can be fair and impartial." *Johnson, supra* at 840.

➢ ***Case-specific questions***

Case-specific questions are those fact-based questions that are most often prohibited by trial courts. Case-specific questions that in essence ask a juror how she or he would vote are improper. However, case-specific questions that are "designed to measure a prospective juror's ability to follow the law" are proper within the context of voir dire. *Johnson, supra* at 843, citing *North Carolina v. Henderson,* 574 S.E.2d 700, 706 (N.C. App. 2003) (internal quotations omitted). In *Henderson,* for example, which involved an allegation of sexual assault on a child, it was proper to ask prospective jurors if they would need to hear a finding by a physician in order to be convinced beyond a reasonable doubt that the child had, in fact, been sexually assaulted. This question was simply an "attempt[] to secure an impartial jury rather than commit the jurors to a future course of action." *Henderson, supra* at 704. The *Henderson* court contrasted the question actually asked with the following, impermissible form of the same question: "if there is medical evidence stating that some incident has occurred, will you find defendant guilty beyond a reasonable doubt?" The court explained that such a question would have been impermissible as a stakeout question "regardless of the fact that the law does not require medical evidence." *Id.* at 705.

Comparing the two questions—the one the court found permissible and the court's hypothetical impermissible question—demonstrates the often contorted logic involved in determining which case-specific questions are permissible under *Morgan* and which questions are impermissible stakeout questions.

IV. <u>Stakeout Questions</u>

The prohibition against stakeout questions was stated as follows by the Tenth Circuit in the infamous Oklahoma City bombing case against Timothy McVeigh: "When a defendant seeks to ask a juror to speculate or precommit on how that juror might vote based on any particular facts, the question strays beyond the purpose and protection of *Morgan*." *United States v. McVeigh*, 153 F.3d 1166, 1207 (10^{th} Cir. 1998). The *McVeigh* court determined that the following question constituted an impermissible stakeout question: "If the allegations did—if you served on the jury and heard all the evidence in the guilt/innocence part of the trial and the jury vote that Mr. McVeigh was guilty, would you feel in that instance that the death penalty automatically should apply?" *Id.* at 1206.

It is instructive to compare the question condemned by the Tenth Circuit in *McVeigh* with the permissible question in *Morgan*: "If you found [the defendant] guilty, would you automatically vote for the death penalty no matter what the facts are?" *Morgan,* 504 U.S. at 723. One possible distinction may be that the latter question made the facts irrelevant, whereas the former required the juror to assume that a certain version of facts would be presented at trial and precommit to her reaction to these facts.

This seems, though, to be a distinction without a difference. The court in *Johnson* recognized that the analytical flaw with using *Morgan* as the yardstick by which voir dire questions addressing the facts at issue rise or fall is the false premise that the *Morgan* Court was scrutinizing the case-specific content of the voir dire questions. "Instead of focusing on the 'case-specific' content of questions to prospective jurors, the Court in *Morgan* focused on what was necessary to empanel a fair and impartial jury." *Johnson, supra* at 844, citing *Morgan,* 504 U.S. at 729.

While the court in *McVeigh* held that "all fact-based questions are improper because they exceed the scope of what *Morgan* requires," the *Johnson* court rejected such a categorical imperative. *Johnson,* 366 F.Supp.2d at 834, 845.

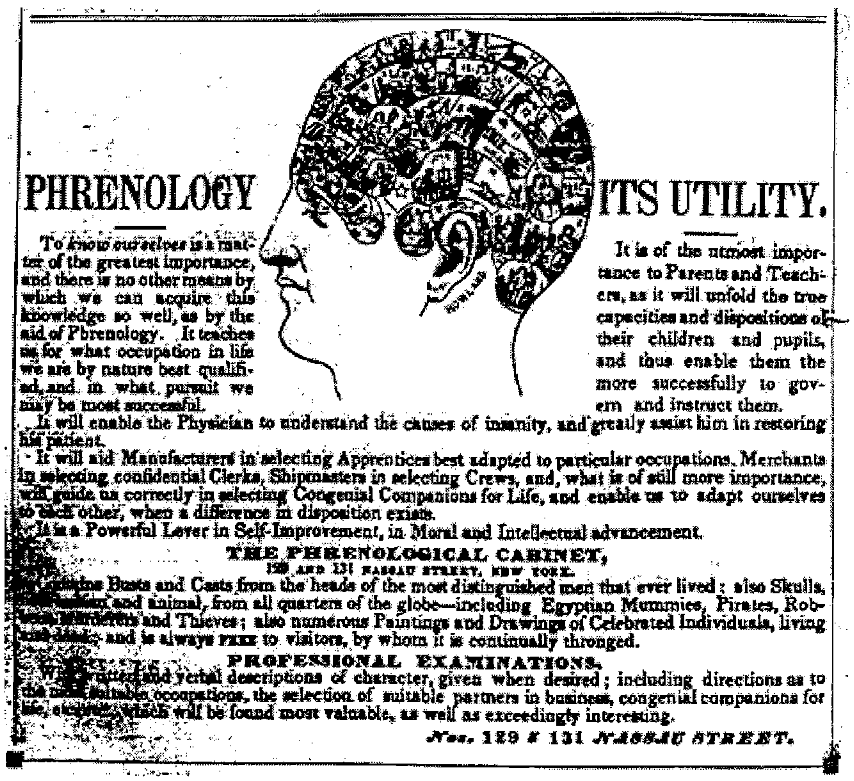
Instead, the *Johnson* court proposed a tripartite test for determining which fact-based questions are impermissible stakeout questions. The three factors guiding this determination are:

> - Does the question ask a juror to speculate or precommit to how that juror might vote base on any particular facts?
> - Does it seek to discover in advance what a prospective juror's decision will be under a certain state of the evidence?
> - Does it seek to cause prospective jurors to pledge themselves to a future course of action and indoctrinate them regarding potential issues before the evidence has been presented and they have been instructed on the law?

Johnson, supra at 845 (all internal quotations and citations omitted).

IV. Conclusion

Being able to articulate to the court why a proposed question does not violate any of the three foregoing characteristics of a stakeout question is a critical part of winning the right to ask fact-based questions in jury selection. As the *Johnson* court correctly recognized, stakeout questions are simply another category of fact-based questions. Therefore, the question's linguistic precision often makes the difference between a prohibited and acceptable inquiry. For that reason, conducting fact-based voir dire requires significant advance preparation, with all questions written out fully so that there is an opportunity to make any of the small but important editing decisions prior to beginning voir dire.



JURY THINKING:
NEW TOOLS, STRATEGIES, MOTIONS[1]

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§ 5-2. Jury Reform
§ 5-2(a). ABA 2005 Principles for Juries and Jury Trial

In the spring of 2005, the House of Delegates and the Board of Governors of the American Bar Association approved the "Principles for Juries and Jury Trials" proposed in a cooperative national project by the American Jury Project. *[The full text of these principles are appear in the appendix.]* The preamble to the Principles makes it clear that jury thinking and innovative reforms that emerge from thinking about jurors are encouraged:

[1] Excerpted with permission from Dr. Sunwolf's books: **Practical Jury Dynamics: From One Juror's Trial Perceptions to the Group's Decision-Making Processes** © 2004 LexisNexis www.practicaljurydynamics.com and **Jury Thinking** © 2005 LexisNexis www.jurythinking.com or LexisNexis 800-446-3410

> The American jury is *a living institution* that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's *ongoing need to refine and improve jury practice* so that the right to jury trial is preserved and *juror participation enhanced.* What follows is a set of 19 principles that define our fundamental aspirations for the management of the jury system. Each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated that over the course of the next decade jury practice will improve so that the *principles set forth will have to be updated* in a manner that will draw them ever closer to the principles to which we aspire. [Emphasis added.]

The ABA's **preamble** provides several excellent supporting principles for an attorney's request for special jury conditions, and these should be included in any motions (oral or written). Many of the various ABA standards have been cited by the United States Supreme Court as appropriate authorities.

While it is beyond the scope of this year's update to analyze each of the new Principles, a number of them fit into the reformist thinking and problematizing already introduced in both JURY THINKING and in PRACTICAL JURY DYNAMICS. These are summarized below. *The alerts offered to Principles should be read with the realization that the saliency of these issues will differ across cases; however, since some attorneys are representing people facing the death penalty and others are speaking for clients whose entire livelihood, health, or future is impacted by the verdict, it is important to acknowledge what a complete fair trial might look like, in light of these new principles.*

ABA Jury Principle	Jury Thinking
Principle 2(E): Courts should provide an adequate and suitable environment for jurors.	*Motions* that request specific jurors' health needs are met, in terms of breaks, chairs, opportunities to eat frequently, standing-stretching, access to medicines or medical devices, hearing or visual enhancement, length of breaks/lunch hours, total hours in court day, opportunities to communicate with dependent family members, and transportation needs, to name a few. *Questionnaires* that ask jurors what conditions they have that will make jury service burdensome in any way, then requesting a description of accommodations they need in all of these areas to make their jury service less burdensome. *Court instructions at the outset* informing the jurors that their lives may change and when they need new accommodations, schedules, or opportunities, they should immediately inform the court.
Principle 3(A): Juries in civil cases should be constituted if 12 members wherever possible and under no circumstances fewer than six members.	*Motions* detailing how it would be possible to have 12 members appears particularly advantageous to the party who does not have the burden of proof, since a jury of 12 may not agree as readily as a jury of 6 that a burden has been met. If the motion is denied, it is critical for future cases and appeal that the trial judge set forth on the record *all* the reasons Principle 3(A) was not possible for this trial.
Principle 3(B)(1): Juries in criminal cases should consist of twelve persons if a penalty of confinement for more than six months may be imposed upon conviction.	*Motions* in advance of trial for 12-person juries can be made in states that previous had fewer in criminal cases (for example 6 jurors in Florida or 8 in Arizona). *Motions* for 12-person juries can be made for juvenile cases, especially where the charge would be a crime if committed by an adult and "confinement" is the likely outcome. All *reasons* for a denial of such a motion must be requested, on the record. Further, ask the judge what additional evidence or law would be considered for a favorable ruling. A blanket denial appears in appropriate in light of Principle 3(B)(1). *Motions* challenging any state court rules or statutes concerning juries that detail fewer than 12 should be challenged as unconstitutional, offering in support the extensive testimony and rationale used by the ABA in endorsing this radical change.

Principle 4(A): In civil cases, ***jury decisions should be unanimous wherever possible***. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors.	The wording of this principle suggests some within-committee controversy and lacks relevant specifics, so the creative burden is now on litigators to ask for what your client and the case needs. • In advance of trial, a request can be made to the trial judge to define guidelines for determining *"a reasonable period of time"* and what authorities or history would be relied upon for that finding. What will be the relevant variables considered? What training has the court had or authorities presented at recent judicial conferences on this point? Who had the burden of persuasion in arguing the matter to the court? • What will the jurors be told and when will they be told it? Jurors informed at the outset that their verdict must be unanimous have *different* deliberations than those who are told that less than unanimity might apply. Deliberations and the persuasion burden during decision-making will be impacted. • How many jurors is 5/6 of 8, for example?
Principle 5(A)(3): Responsibility for administering the jury system should be vested in a single administrator or clerk *acting under the supervision of a presiding judge of the court.*	Many courts have delegated the assembly and excusal of jury venires to jury commissioners (some of whom have, in turn, delegated to clerks). A delegation of responsibility without guidelines, dialogue, and specifics would be improper. Here, authority exists for supervision (presumably a direct form of communication on a regular basis). • Consider a hearing (challenging the venire), at which the jury commissioner is called as a witness to explain what supervision is given, by whom, what written guidelines are offered, and how the office responds to specific citizen requests. Some jury offices routinely excuse people over a certain age, with a certain number of children, or those who have to drive a certain distance, for example, and these are not made on the record. Consider also calling one or more members of the staff, sequestered, to see who they are excusing over the phone and with what guidelines. The Chief Judge of the court is also an appropriate witness on the issue of what was delegated, in what form, and what supervision and regular feedback occurs.
Principle 5(B): Courts should collect and analyze information regarding the performance of the jury	Is this happening? How often, with what data? Has anything changed since the new ABA Principles were adopted?

system on a regular basis in order to endure . . . representativeness, inclusiveness, effectiveness, responsiveness to summonses, efficient use of jurors, and disability accommodations. **Principle 10:** Courts should use open, fair and flexible procedures to select a representative pool of prospective jurors.	Particularly alarming is the way a jury venire can be skewed when there is no regular immediate action for **failure to respond to a jury summons**. While this is tedious for the jury commissioner's office, failure to respond to a summons can be due to moving, renters, nondrivers, multi-person living situations where mail is lost or not delivered, and students (parents do not forward the summons), to name a few. Interview the jury office clerks and collect data. What percentage of citizens did not respond to the summons in the last call? Last 3 months? Last 12 months? Are records kept of who those people are (names, addresses may suggest ethnicity or social economic levels)? Venires can be challenged on the basis that (a) there is no data kept, or (b) there is no effective follow up for failure to respond (allowing citizens to opt out).
Principle 6(A): Courts should provide orientation and preliminary information to persons called for jury service upon initial contact prior to service, upon fist appearance at the courthouse, and upon reporting to a courtroom for juror voir dire.	• Gather the specific information mailed to jurors with the summons, including any web sites they are directed to. • Gather all information distributed by the jury office. • Gather all video, slides, films shown to orient jurors. • Gather all oral remarks and guidelines for those remarks made by anyone. • Some orientation material is appropriate for a civil case but not a criminal case, or the reverse. Read the material with your case in mind. • Some orientation material may improperly suggest how the jurors should deliberate, how they should select a foreperson, or how the deliberations and voting should proceed.
Principle 6(B)(2): Orientation programs should be presented in a uniform and efficient manner using a combination of written, oral, and audiovisual materials.	Consider objecting to oral remarks by anyone. They cannot possibly be presented in a uniform manner. How do they answer oral questions by citizens who show up? Do they record them?

Principle 10(A): Juror source pools should be assembled so as to assure representativeness and inclusiveness. **Principle 10(A)(4):** Should the court dwetermine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.	There has been no clear comparison base developed for determining representativeness. Some courts use census numbers, but these are frequently more than 10 years old. Gather the best comparison data you can, from multiple sources, to challenge the venire based on a failure to represent the population AT THE TIME OF TRIAL. Chambers of Commerce, schools, colleges, assessors, civil organizations, marketing groups all have data. If a mall is built, a restaurant opened, a new WallMart appears, there is fresh data about the demographics of the projected customers. Do not rely upon old census demographics.
Principle 11(A): Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire … **Principle 11(A)(1):** In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire … **Principle 11(A)(3):** All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.	Questionnaires are clearly endorsed, beyond simple demographics. Case specific issues are not only mandated, but adequate time for the parties to read them. However, for some judges this will be new. It benefits attorneys to raise this issue well-ahead of trial (first appearance is not too soon), to ask the court to talk about new thinking in light of the 2005 ABA Principles: *How can we work together to help this happen, judge?*

Principle 11(B)(2): Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. **Principle 11(B)(3):** Voir dire should be sufficient to disclose grounds for challenges for cause *and to facilitate intelligent exercise of peremptory challenges.*	In some jurisdictions, this is a radical departure, but the language is strong, that is, "should." Both the books PRACTICAL JURY DYNAMICS and JURY THINKING set out detailed, issue-specific voir dire questions. File a motion well-before trial if this has not been happening: you need to know what the judge's thinking is and what you can offer to get what your client needs.
Principle 13(A)(1): Jurors should be allowed to take notes during trial ... and should receive appropriate cautionary instructions on note-taking and note use... **Principle 13(A)(2):** Jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations.	Since jurors stop observing the demeanor of witnesses when they take notes, miss portions of testimony when they take notes, and are not certified to take accurate notes, the taking of notes impairs a juror's trial task. All four video-taped jury deliberations reported in PRACTICAL JURY DYNAMICS showed that even though each jury was instructed to only use their notes for their own memory—the rule was not followed. Jurors shared notes, read notes out loud, commented on valuing the notes of one another. *As a result, more instruction is needed.* An attorney or judge may wish to tell jurors to report to the judge if anyone reads their notes out loud or quotes from their notes during deliberations. *Jurors must be reminded of the errors of reporting that may be in anyone's notes.* It takes a lot of training and certification to become a court reporter. *Voir Dire*: If jurors are going to be allowed to take notes, ask them what value they place on note-taking and what dangers it holds. How will a juror feel if they decide not to take notes but others do? How will they feel if someone says "It was in my notes!"? What will they miss when taking notes? Alert them to the issues, before note-taking happens, and see what their juror thinking is on note-taking during testimony. Find out who knows shorthand. The safest practice based upon group dynamics, status, and memory failures reported in PRACTICAL JURY DYNAMICS would be the simple request that notes are kept outside the courtroom. If a juror wishes to view their notes, the only legitimate reason is for personal memory enhancement, and a break can be had to accomplish that.

Principle 13(C): In civil cases, jurors should, ordinarily, be permitted to **submit written questions** for witnesses … in criminal cases the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.	That this is dangerous is obvious and the historical reason for allowing it was not based on hard science: jurors would be more satisfied with their jury service and feel more involved. Clearly, one danger is that we switch from a 3 part system (judge, attorneys, jury) to a system where jurors get to be jury sometimes and advocate others. Why not let them have a go at the bench? When a juror becomes an advocate (wanting something proven or discredited is an advocacy task), one party is faced with impeaching or cross-examining that juror's "new" answers. No one has yet explained how to avoid this. While the rule impinges on clients' rights, this book takes a Juror's Task as the focal point. Here, the problem is that group status can result from having one's question "accepted" and distracting disappointment or embarrassment when one's question was "denied." Who got the most questions asked? What effects flow during deliberations? The true test should be the "open mind" test: no juror should be allowed to ask any question that impeaches any witness or fact, that bolsters any witness or fact, or that fills in a gap that would have benefited one of the parties. A juror can merely indicate a personal confusion, and the parties can decide what, if anything, to do about that.
Principle 13(F): Jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from the trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.	Since studies of juries using this rule found clearly that many juries violated the "reserve" judgment rules, as well as the "talk only when all are present rule" it is surprising this Principle survived. Get a copy of the 2003 study by Diamond and her colleagues, proving the number of violations.[i]

Principle 13(G): Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues … **Principle 15:** Courts and parties have a duty to facilitate effective and impartial deliberations	Authority or all attempts to create more democratic juries previously discussed, including seat arrangements, tables, and juror-centered brakes and trial schedules.
Principle 15(B): Exhibits admitted into evidence should ordinarily be provided to the jury for use during deliberations …	This skews jury deliberations, over-valuing and attending to physical exhibits, to the marginalization of trial testimony (oral) which jurors are expected to remember. Jury thinking encourages attention to the obvious results of this rule: each juror will have a memory burden/deficit for oral testimony and a memory aid for exhibits. The principles of evidence make it clear that no piece of evidence or form of evidence should be valued over another. This rule should be objected to, if suggested. If exhibits are allowed into the jury room, the only remedy for a party whose primary case or impeachment was presented in the form of oral testimony is to request to: (a) have a transcript go into the jury room, (b) have a separate reporter record at the party's expense so quick transcripts can be made each day and go into the jury room, or (c) tape record or video record the testimony, so that can go into the jury room. The most trustworthy format of physical evidence will be given to the jurors, while the most untrustworthy format of oral evidence will be present (juror memory or uncertified juror notes). No justification for this rule, under the rules of evidence, can be made. It appears, however, that it has yet to be taken up on appeal. If this is a significant issue, check with an appellate attorney to learn how to make the best possible record on the issue.
	Consider ways to reduce critical oral testimony to charts, tables, blow ups of prior statements, photos, exhibits, physical objects, and video demonstrations, so that it can be admitted to the juryroom. Finally, the rule suggests a new question topic for voir dire, probing each juror's evaluation of their own memory, over days and weeks, and any prior tasks where they have had to do that.

[i] Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis, & Beth Murphy (2003). Juror discussions during civil trials: Studying an Arizona innovation. 45 Ariz.L.Rev. 1. These researchers had deliberation videotapes as well as juror questions.

Earlier studies from Arizona reform on discussions, Paul L. Hannaford et al., Permitting Jury Discussions During Trial: Impact of the Arizona Reform, 24 Law & Hum. Behav. 359 (2000); Paula L. Hannaford-Agor et al., Speaking Rights: Evaluating Juror Discussions During Civil Trials, 85 Judicature 237 (2002).

See also Valerie P. Hans et al., The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges and Jurors, 32 U. Mich. J.L. Reform 349 (1999).

Discussion about the long practice forbidding juror discussion in criminal cases, in *Winebrenner* v. *United States* 147 F.2d 322 (8th Cir. 1945), recognizing the principle that it is improper for jurors to discuss a case prior to its submission to them.

WHO IS THE AUTHOR?

DR. SUNWOLF has been fascinated with jurors and their imperfect worlds since her first trial, in 1975. A veteran of many roles within the American justice system (law school faculty, civil litigation attorney, Training Director for Colorado's Public Defender System, trial consultant)—a moment of epiphany during a death penalty trial (about how to touch a juror's heart as well as mind) pushed her back to graduate school, where she completed both Master's and Doctoral degrees in Interpersonal and Group Communication from the University of California, Santa Barbara in 1998. Dr. Sunwolf is now an Associate Professor of Communication at Santa Clara University, California, where she teaches interpersonal relationships, group dynamics, conflict, persuasion, and oral storytelling. An active trial consultant and media trial-analyst, she serves on trial advocacy faculties nationally and teaches at continuing education programs throughout the country. Professor Sunwolf is also a performing storyteller, with corresponding research investigating the pedagogical and persuasive effects of multicultural tales. An expert on jury deliberations and social persuasion, she is the originator of Decisional Regret Theory, which explains how jurors attempt to reduce the anxiety of "anticipated verdict-regret" by creating counterfactual stories. Believing that early group experiences affect adult jurors, she has published studies about the painful dynamics of social exclusion in adolescent peer groups. She has recently been appointed Visiting Professor at Santa Clara University School of Law, teaching a new course, "Jury Law and Strategies"—which may be the first law school course in the nation, devoted solely to *jury thinking*.

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Closing Arguments

Getting Democracy Back into the Juryroom

BY SUNWOLF, VISITING PROFESSOR, SANTA CLARA UNIVERSITY SCHOOL OF LAW

A juror's trial task has never been easy and courts are responding with innovations. The 2005 ABA jury standards, juror notebooks, juror witness-questioning, and pre-deliberation discussions are being adopted nationally. *The time has never been better for innovative thinking about a juror's deliberative world.*

Democracy within any juryroom is more illusion than reality. A jury's foreperson has been found to seize more turns than other jurors. More alarming, forepersons are not selected for leadership skills.

> **A clutch of strangers yelled, cursed, rolled on the floor, vomited, whispered, embraced, sobbed, and invoked both God and necromancy.**
>
> —Science professor, after jury service

A socially awkward moment, forepersons are selected because they were the first to speak, once served on a jury, or by drawing names. In a 1998 study, when I asked citizens assembled for jury duty how they would select a leader, half suggested a voluntary or random process, ignoring traits or experience.

Not all jury seats are created equal. The foreperson is frequently selected from one of the two persons seated at the table's ends. Further, *table shape* impacts discussion dynamics. Accessibility between seats is contaminated at a rectangular table. Participation is impacted by table shape: fewer contributions emerge from flank and corner positions and jurors tend to (inaccurately) conclude that those more visually accessible to them are like-minded.

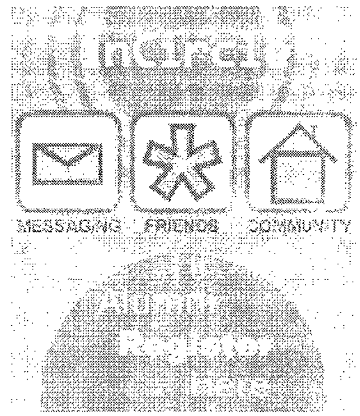
What if the foreperson were eliminated? The Functional Theory of Leadership argues effective leadership happens when any group member performs a communication act that moves the group toward accomplishing its task. From a functional perspective, *any* juror (at any time) can help lead the jury into or out of opinion-jam. Gender, ethnicity, or prior life experiences impact styles of leadership. Many styles may be needed to help all issues get group consideration and all jurors participate.

Historically, jurors had little experience with formal decision-making groups. There is no compelling reason, today, to demand a foreperson—especially where the foreperson is not being selected based on a thoughtful consideration of a jury's needs. Rarely will a jury know what type of leader they will need

> **Tension is high, nerves are frayed, and all minds are not sound.**
>
> —Jury note to judge

Contact Us

Send a question or comment to the editor of *Santa Clara Law*.



until argument emerges.

No study demonstrates that a jury would flounder without a foreperson. No case describes compelling legal reasoning for a foreperson. It's time for shared leadership, which tends to promote shared responsibility. *All jurors can be encouraged to step up to the leadership plate during deliberations:*

You are instructed that no formal leader need be selected. A variety of leadership styles may benefit this jury. All jurors should share their leadership skills throughout deliberations, in order to insure that issues are fairly discussed, evidence and law are fully considered, and all jurors have equal opportunities to speak and are appropriately listened to.

What if the table were eliminated? A rectangular table fosters juror clumping. (While it is tempting to consider King Arthur's round table, it would provoke Goldilocks' Dilemma: too large for some juries, too small for others, only occasionally just right.) Since a table for notetaking *during* deliberations is unnecessary, eliminating tables makes sense—jurors can form a chair circle, creating equal speaking/listening access to one another. (Should a writing surface be deemed essential, classroom chair-with-attached-writing-board would suffice.)

I have spent years studying deliberation tapes from real juries and saw inequality again and again. Deliberative waters get rough, yet structures that facilitate group equality throughout the process are available. *Sua sponte* or by motion, let's put them on the jury reform table. Discussions (and verdicts) will be the richer for it.

Sunwolf tried her first case in 1975 and is now an associate professor of communication at Santa Clara University, teaching group decision-making, conflict, relationships, and persuasion. Her book, *Practical Jury Dynamics*(LexisNexis, 2004), describes juror cliques, invisible jurors, and jury misconduct; her new book, *Jury Thinking* (LexisNexis) describes effects of religious beliefs, cognitive processes of changing minds, juryblink, and metaphoric thinking. She is the originator of Decisional Regret Theory, which explains how jurors cope with the anxiety of anticipated verdict-regret using counterfactual storytelling. This fall, she is teaching Jury Law and Strategies, which may be the first law course in the nation devoted to jurors.

Jury Procedures:
Points at Which a Jury Event/Issue May Arise

1. **Venire**
   a. General Procedures Used in District: *Who's in the Pool/Who's Not?*
      (1) state statutes, rules
      (2) local court rules
      (3) previous challenges, appeals to the district's venire process
      (4) demographics of court's district (Whose faces should we see?)
      (5) method of notification to juror
      (6) information feeders:
         (a) driver's licenses, voting, ?
         (b) age of the information (how often refreshed)
   b. Procedure Used to Summon Potential Jurors for a Trial: *Sub-pools*
      (1) Telephone call-ins
      (2) Methods of assembling sub-pools from the venire
      (3) Internet, court web sites
      (4) When is the summons sent?
      (5) What happens when a citizen doesn't respond to summons?
   c. Failure of Citizens to Respond to Summons: *No Shows*
      (1) percentage that doesn't show up
      (2) procedure to contact people that don't show up
      (3) punishment for willfully failing to show up

2. **Pre-Trial Exposure to Prejudicial Information**
   a. Media
   b. Personal Information
   c. Copy of the Summons
   d. Information Sent By Court with the Summons
   e. Internet cites, formal/informal
   f. Prior Jury Service

3. **Early Nonjudicial Excusals**
   a. Jurors' Requests to be Excused
   b. Ex Parte Excusals
   c. Court rules (district wide)
   d. Judicial (exceptions specifically delegated rule to jury commissioner)
   e. Judgment calls of clerks

4. **Jury Assembly Room Exposure to Information**
   a. Clerks
   b. Videos
   c. Formal oral orientations
   d. Written materials
   e. Other citizens assembled for possible jury duty
   f. Other people in the courthouse

5. Pre-Trial Motions by Parties Relating to Jurors

a. All excusals on the record
b. Motion for Change of Venue
c. Request specific # to be summoned
d. Request specific # for jury
e. Challenge to Venire
f. Challenge to Ex Parte Excusals
g. Request for Alternates (specific numbers, use of peremptories)
h. Request for Individually-Sequestered Voir Dire
i. Request for Alternating Voir Dire
j. Clarification of Scope of Voir Dire
k. Time Limits
l. Multi-party roles in voir dire
m. Issues regarding sequestration of jurors
n. Issues regarding voir dire conditions/limitations
o. Request for additional peremptory challenges
p. Issues regarding co-plaintiffs, co-defendants and jury selection
q. Issues regarding the court's legal instructions
r. Issues regarding reading of charges
s. Length of trial (predictions, requests)
t. Issues regarding press
u. Issues regarding public/family presence during jury selection
v. Who gets to sit at the tables (assistants, consultants, investigators)?
w. Gag orders
x. Requests for early list of jurors
y. Restrictions on pre-investigation of jurors
z. Discussion/Motions regarding court's procedure for exercise of challenges
aa. Issues regarding courtroom security
bb. Issues regarding custodial parties (criminal defendants, witnesses)
cc. Issues regarding press/public trial
dd. Special needs

6. Pre-Trial Discussion of Jury Questionnaire for Specific Case

a. Court's questionnaire
b. Questionnaires proposed by parties
c. Agreement, challenges to final questionnaire
d. Requests for time to review written questionnaires

7. First Appearance of Jurors in Courtroom

a. Jurors' personal requests to be excused

(1) Hardship
(2) Publicity
(3) Bias

b. ADA accommodations

(1) Disability
(2) Hearing
(3) Eyesight
(4) Access/Locomotion
(5) Breaks
(6) Other:

c. **Legal Disqualifications (statutory) read to jurors**
d. **Questionnaires Distributed**
e. **Judge's oral orientation to specific case/trial**
f. **Introduction of parties**
g. **Reading of potential list of witnesses**
h. Badges
i. Time estimations

8. **Legal Instructions Pre-Deliberation: Oral**
   a. Instructions given at the Outset of Trial
   b. Instructions for breaks
   c. Instructions for recess
   d. special issues
   e. publicity, restrictions on mass media, conversations with others

9. **Jury Selection**
   a. **Oral: *Voir Dire***
   b. **Written: *Questionnaires***
   c. **Excusals:**
      (1) Hardship
      (2) Publicity
      (3) Jointly-Agreed
      (4) Statutory Disqualifiers
      (5) Challenge for Cause
      (6) Peremptory Challenge
      (7) Requests for additional challenges
      (8) Misconduct
   d. Running out of Jurors

10. **Swearing in Jurors**
    a. Attachment of Jeopardy
    b. Swearing in of Bailiff
    c. **New Instructions to Jury for Trial**
    ☑ Before searing in, motions = **challenge to the venire.**
    After jury is sworn, motions = **mistrial.**

11. **During Trial: In the Courtroom**
    a. Notetaking by jurors
    b. Question-asking by jurors
    c. Notebooks for jurors
    d. Juror notes to the court during trial
    e. Breaks
    f. Instructions to disregard evidence
    g. Instructions limiting the use of specific evidence
    h. Questioning of jurors (specific issues that arise)
    i. Juror Misconduct
    j. Tardiness
    k. Illness
    l. Sleeping
    m. **Replacing jurors with alternates**

12. During Trial: Out of the Courtroom

a. Sequestration
b. Publicity
c. Juror Investigations
d. Exposure to Inadmissible/Prejudicial Information

13. Reading of Case's Legal Instructions to Jurors

14. Instructions to Alternates During Deliberation

15. Instructions to Bailiff(s)

16. Deliberations

a. Selection of Foreperson
b. Notes from jury/juror
c. Replacing juror with alternate
d. Evidence that goes into deliberations
e. Issues regarding the jury room
f. Communicating with Bailiff
g. Judge's instructions at outset of deliberations, each break, end of day
h. Juror misconduct
i. Extraneous information in jury room
j. Issues regarding length of deliberations, hours, breaks, meals
k. Issues regarding sequestered deliberations

17. Deadlock

a. Mistrial
b. Further Deliberations: Dynamite Charges

18.Verdict

a. Polling of jury
b. Final instructions of court
c. Partial verdicts

19. Discharge of Jurors

20. Courthouse Discussions with Jurors after Discharge

a. Private talks with judge
b. Talks with lawyers in the courthouse
c. Security
d. Psychologists
e. Press

21.ImpeachingVerdicts: Motion for New Trial (New Evidence)

Sunwolf's Sample Issues for Jury Motions
449: Jury Law & Strategies/Dr. Sunwolf

1. Motion for Change of Venue Based on Prejudicial Pre-trial Publicity [Attached Appendix: Newspaper and Internet Publicity Indicating (1) Saturation of Prejudicial Media Publicity, and (2) Exposure of Inadmissible Evidence to Jury Pool]
2. Challenge to the Jury Venire Based Upon Failure of Court to Properly Respond to Undeliverable Summonses
3. Challenge to Jury Venire Based Upon Non-representative Methods of Assembling the Venire Pursuant to the 2005 American Bar Association Principles for Juries and Jury Trials, Principle 10
4. Request that Court Immediately Re-send all Jury Summonses for the Venire of Plaintiff's Trial that are Returned Undeliverable, Using Additional District Location Information in Order to Obtain a Proper Pool for the Trial that Represents the True Community of Eligible Jurors [Attached Appendix: Latest Census Figures for District]
5. Request to Limit Material Mailed to Potential Jurors with Summons Based on Improper Statements of the Law
6. Challenge to Jury Venire Based Upon Exposure of Potential Jurors to Improper Statements of the Law on the Court's Web Site [Appendix: Printouts of Information on the Court's Web Site as of October 13, 2005]
7. Request of Defendant that all Potential Juror Requests for Extensions, Excusals, or Continuances in the Venire for Defendant's Trial be Referred to the Trial Judge, Together with Notice to both Parties, and an Opportunity to Object or Offer Proper Solutions
8. Request of Plaintiff to Have All Jurors Requests for Excusals or Continuances be made on the Record with Parties Present
9. Defendant's Motion to Abolish all Early Nonjudicial Out-of-Court Excusals of Potential Jurors
10. Motion to Eliminate any Judicial or Judicially-Delegated Automatic Excusals or Exemptions from Jury Service (see ABA Principles for Juries and Jury Trials, Principle 20C(1))
11. Prosecution's Motion for Gag Order, Limiting Statements to the Media by all Parties, Witnesses, and their Attorneys or Staff of their Attorneys Prior to Jury Selection
12. Plaintiff's Motion for all Jury Orientation Material or Communication to be Previewed by the Court with an Opportunity for the Parties to be Heard and enter Objections, Including Slides, Videos, Written Materials, Booklets, or Oral Orientation by any Member of the Jury Commissioner's Office Pursuant to the 2005 American Bar Association Principles for Juries and Jury Trials, Principle 6
13. Defendant's Motion that all Potential Jurors Wear and be Instructed to Wear Jury Badges From the Moment They Arrive at the Courthouse, Whether or Not They Have been Assigned to Any Court or Trial
14. Motion for Additional 400 Jurors to be Summoned in the Venire for this Trial, Based upon the Anticipated Difficulty of Obtaining a Jury Due to Publicity and Hardship Issues Arising from the Length of the Trial

15. Prosecution's Request for 10 Alternate Jurors in Order to Insure a Sufficient Number to Complete Service through Deliberations, Due to the Length of the Trial and the Anticipation of Illnesses and Personal Tragedies
16. Request for Individually-Sequestered Voir Dire of Potential Jurors (Prior to the Open Voir Dire of the Panel) on the Specific Issues of Hardship, Exposure to Pre-trial Publicity, and Personal Exposure to Sexual Abuse
17. Request for Attorney-Conducted Voir Dire on the Issue of a Potential Juror's Attitude, Religious Beliefs, and Experiences with Homosexuality
18. Request for Court-Conducted Voir Dire on the Issues of a Potential Juror's Experiences with Sexual Abuse and Homosexuality
19. Request for Court-Conducted Voir Dire on Previous Arrests of any Potential Juror
20. Request to Limit Opposing Counsel's Voir Dire, Prohibiting Discussion of All Evidence Counsel Knows or Has Reason to Believe May be Objected to or ruled Inadmissible at Trial
21. Defendant's Motion to Participate in Voir Dire as Co-Counsel
22. Request to Limit Opposing Counsel's Voir Dire, Prohibiting Disclosure of Personal Biographical or Experiential Information
23. Request to Limit Press and Public to Video-View Access to the Courtroom During Voir Dire, Due to the Lack of Space in the Courtroom and the Prejudicial Effect of Jurors Sitting in Close Proximity to Nonjurors Who May Inadvertently Expose them to Prejudicial Verbal or Nonverbal Communication
24. Request for Court Order to Potential Jurors Upon Their Arrival at the Courthouse Prohibiting Them from Watching Television, Listening to the Radio, or Gaining Access to the Media Due to the Extraordinary Attention to Prejudicial Information About this Case from Multiple Media Sources
25. Request for Court-Conducted Voir Dire on all Special Needs any Potential Juror May Have During Jury Selection or Trial, Including Breaks (Length or Frequency), Food, Chairs, Hearing/Vision, Medications, Doctor's Appointments, Daily Trial Schedule, Interpretation, Accessibility, or Needed Compliance with the Americans With Disabilities Act [Appendix: Relevant Sections of the ADA]
26. Request for Change of Venue Due to the Court's Noncompliance with the Americans With Disabilities Act in that the Courthouse and Its Facilities are Not Properly Accessible to All Citizens Eligible as Jurors, Pursuant to the 2005 American Bar Association Principles for Juries and Jury Trials, Principle 9 (Courts Should Conduct Jury Trials in the Venue Required by the Interests of Justice)
27. Request to Make All Challenges for Cause and Peremptory Challenges Outside the Presence of the Potential Jurors
28. Motion for All Court Security Staff, Including Sheriff Deputies, to Wear Plain Clothes During Jury Selection and Trial in Order to Fully Comply with the Constitutional Presumption of Innocence as Embodied in *Estelle* v. *Williams*, 425 U.S. 501 (1976)
29. Request for Security Procedures that Allow to Have Defendant Clothed in Civilian Clothing with No Shackles or Restraints at times that Potential Jurors May Have Visual Access to Defendant, Pursuant to *Estelle* v. *Williams*, 425 U.S. 501 (1976)

30. Request for Early List of Potential Jurors in the Venire One Week Before Trial
31. Request for Specialized Questionnaire Addressing Issues which are Critical to Defendant's Right to a Fair Trial and Due Process of Law, Pursuant to the 2005 American Bar Association Principles for Juries and Jury Trials, Principle 11A [Appendix: ABA Principle 11 and Proposed Additional Written Questions]
32. Request for Additional Time for Counsel to Sufficiently Voir Dire Potential Jurors on the Complex Highly-Charged Issues of this Case, Including Sexual Abuse, Extensive Publicity, Child Abuse, Weapons Experience, Alcohol and Drug Abuse and/or Education, Forensic Training or Beliefs, and Religious Beliefs, Pursuant to the 2005 American Bar Association Principles for Juries and Jury Trials, Principle 11B(2) and (3)
33. Motion for Appointment of Expert to Conduct Public Opinion Survey in Support of Possible Motion to Challenge to Venue and Change of Venue due to Extensive Publicity Surrounding the Trial and Other Prejudicial Community Events Preventing a Fair and Impartial Trial in this Venue, Pursuant to the principles of *United States* v. *Ruben Campa*, et al., decided August 9, 2005, United States Court of Appeals for the Eleventh Circuit, No. 01-17176
34. Defendant's Request to Have the Court Voir Dire Potential Jurors on their Understanding of the Terms "Abiding Conviction" in California's Reasonable Doubt Instruction CALJIC 2.90 and to Supplement CALJIC 2.90 to Correct Citizen Misunderstandings
35. Motion for Jury View of Relevant Locations and Scenes at Issue in this Trial in That No Other Evidence Can Adequately Place into Issue the Contested Geographical/Positioning/Location/Structural Facts Embedded in those Scenes
36. Prosecution's Request for Court Instructions to Jury on duty to deliberate [Attachment: (1) California District Attorneys Association, "Non-Unanimous Jury Verdicts: A Necessary Criminal Justice Reform" (May 1995); (2) National Institute of Justice, Recommendations of The National Center for State Courts, "Are Hung Juries a Problem?" September 30, 2002]

Examples [not complete!] of useful provisions to have the TEXT of, in order to CITE in the body of your motions to establish the grounds for (not the entire legal argument):

Relevant CALJIC Instructions of Law
Federal Rule of Criminal Procedure 18, 21, 33
ABA Standards for Criminal Justice: Fair Trial and Free Press
U.S. Constitution: 5th, 6th, 8th, and 14th Amendments to federal constitution
California Constitutional Fair Trial Protections: Article I, Sections 7,15, 16, 17, 24
California Code of Civil Procedure 190-237, 607-619, 631-636
California Penal Code Section 1122
Rule 4.201 California Rules of Court

Voir Dire on Difficult Topics

NACDL's 2026 National Voir Dire College
June 4-6, 2026 | New York, New York

NACDL Voir Dire College 2026

Voir Dire on Difficult Topics -They have $\boxed{\textbf{WHAT}}$ against your client?

Outline of what the presentation will include

Physical/Forensic Evidence

- DNA matching the accused found or around the crime scene
- Fingerprints on a weapon or at the point of entry
- Gunshot residue on the Accused's hands or clothing
- Cell phone location data placing the Accused at the scene
- Surveillance footage showing the Accused at or near the crime
- Digital footprints — search history showing the Accused researched the crime (e.g., "how to dispose of a body," poison dosages, how to disable security cameras)

Statements and Admissions

- A confession, even one the defense argues was coerced
- Inconsistent statements made to police
- Incriminating text messages or emails
- Social media posts that contradict the defense theory
- Recorded phone calls from jail
- Statements made to informants or cooperating witnesses

Witness Testimony

- Eyewitness identification, even if imperfect
- Accomplice testimony in exchange for a plea deal
- Expert witnesses connecting the Accused to the crime (forensic, medical, digital)
- An accuser who is sympathetic and credible
- Multiple independent witnesses telling a consistent story

Prior Bad Acts and History

- Prior convictions for the same or similar crimes
- Evidence of prior bad acts admitted under Rule 404(b) — prior domestic violence in a murder case, prior drug sales in a trafficking case
- Restraining orders or prior police contacts with the Accuser
- Gang affiliation evidence
- Prior threats made against the accuser documented by witnesses or in writing

Motive Evidence

- Life insurance policy on the accuser recently taken out by the Accused
- Financial records showing the Accused stood to benefit
- Evidence of an affair in a domestic homicide case
- Documented history of conflict between Accused and Accuser
- Text messages showing anger, jealousy, or threats toward the Accuser

Circumstantial but Powerful

- Accused fleeing after the crime — crossing state lines, using aliases, disguise
- Lying to investigators about whereabouts
- Disposing of evidence — phone, clothing, weapon
- Unusual behavior after the crime — no grief, inconsistent emotional response
- Accused was the last known person to see the Accuser alive

Case-Specific Examples for Teaching

These fact patterns are particularly useful in the classroom because they combine multiple types of bad evidence:

- **Domestic homicide** — prior 911 calls, a history of violence, texts threatening the Accuser, Accused's DNA, no alibi, and a life insurance policy
- **Drug trafficking** — controlled buys on video, text messages arranging deals, large amounts of cash, scales and packaging materials, and a prior conviction
- **Child abuse** — medical expert testimony on injuries inconsistent with the Accused's explanation, prior DCF reports, and a child Accuser who gave a consistent forensic interview
- **Financial fraud** — documentary evidence, bank records, emails, and a cooperating co-conspirator

Why These Examples Matter for Jury Deselection

Teaching lawyers to highlight unfavorable evidence during jury deselection helps identify jurors who may not:

- Require the government to meet its burden of proof,
- Differentiate between suspicion and proven guilt beyond a reasonable doubt,
- Question confessions, eyewitnesses, and forensic evidence,
- Separate prior bad acts from current charges,
- Maintain openness to defense explanations.

SPEAKING WITH JURORS ABOUT THE UNSPEAKBLE:

JURY SELECTION IN SEXUAL ASSAULT AND CHILD MOLESTATION CASES

Denise de La Rue

Not only are charges of child molestation or abuse among the most serious charges a citizen accused can face, they are becoming frighteningly common. An accusation of child molestation or abuse is supremely difficult for any and everyone involved: no citizen accused of any other charges ever faces a more extreme stigma; witnesses and the alleged victim are under grueling stress, regardless of the reason the charges were brought; the crime is excruciatingly difficult for even the most seasoned lawyer to defend; rarely are prosecutors under more extreme political pressure to win; and it is difficult to imagine any conflict in a courtroom that is more emotionally charged, yet jurors are asked to make a decision based on reason, fact, and law.

An essential part of any successful defense is the development of a theory which illuminates innocence, and themes that are congruent with that theory, and then selecting a jury who will be receptive to that theory and those themes. In a case involving abuse of a child, it is even more critical if possible, and every nuance in the evidence and your arguments about it are crucial to include and explore with the prospective jurors.

A Theory of the Case

A Simple Story … A compelling, cohesive, congruent theory of the case is nothing more than a simple story that illustrates our vision. It tells the jury, from our perspective, what brings us together in the courtroom. It is a story that jurors must understand, believe and relate to. It connects us, as advocates, to our case (and to our clients.) It invigorates, energizes and inspires us.

A theory of the case:

Allows the jurors to see the case with our vision.

Allows us to touch the hearts and minds of jurors.

Allows jurors to vote with us because it is the right thing to do.

To be clear, a theory of the case is not a defense, a legal claim, or a cause of action. Misidentification is not a theory. Innocence is not a theory. A theory is the simple story that adds meaning, context and texture to the legal claim or defense.

Most often, we develop a winning theory of the case by answering our own questions: Who is this person that I am representing? How did she get in this situation? How do I feel about this witness? Why is he lying? Is she lying or is he mistaken or is she brainwashed? What is it about my client's story that *I* have a difficult time believing? What about the case do *I* relate to?

In developing the theory of the case:

Use your client as a resource.

Allow yourself to be curious.

Indulge yourself in the mystery of the case.

A*Infinite possibilities exist within discipline.*

There are endless mysteries within a set of rules.@

-- I.M. Pei, Architect

A theory of the case, must, of course, encompass all of the facts beyond change. We must weave those facts into a story that allows jurors to see, along with us, how and why things happened the way that they did. We must enable them to see these facts in a new light ... a light that illuminates our perspective of the case.

In most if not all child molestation cases, we are asking the jury to believe a number of things that are not intuitive to them, and may in fact be in complete contradiction with their views of the world. A child is making up terrible things about someone that she dearly loves. A mother is willing to use her daughter and perhaps cause life-long emotional damage to her just to get back at a man she despises because he cheated on her. A young child somehow has sexual knowledge well beyond his years, but he didn't learn it experience. A prosecutor didn't turn over key evidence; she cares more about winning than the truth. In order to enable the jury to see the case from our perspective, our theory cannot only communicate our conclusions about the evidence, it must allow them to see how we got there … to come along with us on the journey that we made … to reach these conclusions consistent with innocence on their own.

From your case theory, themes begin to emerge. Themes are usually expressed in phrases, and sometimes a single word. Themes are like the threads that weave into the fabric of the theory. Many events and relationships in our cases have strong emotional themes running through them. It is up to us to discover, not ignore them, and then to communicate them to the jurors in a very real way.

The themes in your case will be very different if the alleged victim is a teenager lying about your client, saying that she was molested by her stepfather to take attention away from her being caught in a sexual situation with her boyfriend, than if she is emotionally fragile, and has been brainwashed by her mother who is trying to hurt the alleged abuser. They will be very different if the mother who has brainwashed her child, in reality wants custody of her child because she doesn't want her to live with her Dad (the accused) because he has converted to Scientology, than if it is because she is mad that she didn't get the beach house in the divorce.

Jurors know that you know the case better than they do. They know that you have an opinion, thoughts and feelings about it. They know that there are certain witnesses that you like, certain witnesses that you detest, some evidence that you believe has merit, and some testimony that you believe is a downright lie. They are looking for you to guide them, to cue them. They are waiting to make their own judgments on the same witnesses, the same evidence, and to see whether or not they agree with you.

In planning on how you are to communicate your theory and themes to the jury, it is imperative to choose the exact, precise words that communicate your thoughts and feelings about each witness and each piece of evidence. "The alleged victim" does not give the jury much insight into your theory of the case, "a fragile, badgered, hollow young girl" let's the jury in on how you feel about her, and goes a long way toward explaining why we are in the courtroom.

It is critical to determine the language that you are going to use in telling the jury about your case in closing argument, the words that you want them to use in deliberations, so that you can begin using the same language in voir dire.

Selecting a Jury That Can Become Yours

Voir Dire is considered by many to be "the most significant part of any trial."[a] Others declare that "there is no aspect of a trial more important to the ultimate outcome,"[b] than jury selection, and even the United States Supreme Court acknowledges that voir dire "represents the jurors first introduction to the substantive factual and legal issues in a case ... the influence of the voir dire process may persist through the whole course of the trial proceedings."[c]

Do we really win and lose cases in Voir Dire?

Who knows, really? But, we do know this: we know that it is through voir dire that we must select a group of 12 people with whom we **can** win.

We have all heard, no doubt, the undocumented claim that most jurors make up their minds about the case in opening statement. If we truly believe this, then we don't give jurors much credit for taking their duties and oaths seriously.

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[a] Fahringer, Herald Price, Mirror, Mirror On the Wall ... Body Language, Intuition and the Art of Jury Selection, 17 Am. J. Trial Advoc. 197 (1993).

[b] Mogill, Kenneth, A Practical Primer on Jury Selection, 65 Mich. B. J. 52 (1986).

[c] Powers v. Ohio, 111 S. Ct. 1364 (1990)

More recent research perhaps asks a better question than when do most jurors "make up their minds," and that question is "When do jurors first lean toward one side or the other?" Results of the research shows that all phases of the trial are influential, so all phases of the trial are potentially "the most important part of the trial." However, the largest segment of jurors initially lean even before the opening statement, in voir dire.[d]

Three Goals of Voir Dire

In voir dire, we have an opportunity to :

(1) Learn about the jurors, so we know which jurors we must challenge for cause or strike,

(2) Establish credibility and rapport with the jurors,

(3) "Float" the theory and themes of the case.

At first blush, these goals may seem that they are competing, and impossible to achieve all at once. In fact, when voir dire is conducted properly, these goals are

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[d] Island, David, When Do Jurors Make Up Their Minds, Research Notes: Trends in Litigation Research, published by Trial Behavior Consulting, Inc. (Fall, 1989)

complementary, and achieved in concert with each other.

Learning About Jurors

There is only one way for us to learn about jurors, and that is to get them to TALK. We want jurors to talk about themselves, their experiences, their beliefs and in short, their world views. We accomplish this by asking *open-ended questions*.

When asking general questions of the panel, of course, we must ask questions that can be answered in the affirmative. Our goal is to make these questions as broad as possible, so that we will get as many hands raised as possible. If we are fishing for answers, then we must think of ourselves as using a big net with little holes, not a fishing pole. We must also make it as safe and comfortable as possible for jurors to respond. For example:

Don't ask: Who has ever been sexually abused?

Rather, ask: Who has experience with, or knows something about, people who have been affected by sexual abuse. This may mean that you have learned something about the subject from a class or a television show or reading, or

it may mean that you know someone who has

been personally affected by sexual abuse.

We want to talk to AS MANY jurors as possible. And, if a juror follows news and television programs about a topic that is central to your case, you want to know that information about that juror as well.

Use the Words the Jury Will Hear, No Matter How Uncomfortable

It goes without saying in any case involving allegations of sexual abuse there is going to be some anatomically descriptive, and many times graphic language. It is imperative that they attorney defending the case use *this very language* in voir dire, and use it *without flinching, grimacing, laughing, or blushing.* Whatever it takes to be able to say "penis" "vagina" and any street or slang term with the same meaning while looking a juror in the face who looks like your grandmother, you must have prepared yourself to do so before trial.

It is one thing to ask jurors who has undue discomfort or stress listening to evidence that sounds like it comes form a high school heath textbook; its quite another to ask jurors who might feel undue stress while listening to evidence that comes from an XXX rated flick. *If that evidence or those words exist in your case, use them in voir dire.* We have only one chance to see a jurors' reaction and then do something about it .... seeing a juror flinch, turn beat red, or burst into tears in opening statement is too late.

Learn to love the answers you hate

When you are allowed to speak to jurors individually, DON'T CROSS EXAMINE THEM. This is the part of the voir dire where we MUST ask open-ended questions, rather than leading questions that suggest a desired response. Sometimes giving up "control" is not comfortable for attorneys, and perhaps it is not appropriate during any other phase of the trial, but we MUST not try to control the jurors responses in voir dire.

Sometimes we forget that jury selection is really a misnomer. It would more accurately be called jury *de*selection. We are not selecting a jury like we used to choose a kickball team in school. We are not choosing who we want, we are getting rid of the jurors that we cannot live with. So, we must ***learn to love the answers we hate.***

Give jurors permission NOT to share your world view.

Give them permission NOT to be receptive to your theory.

Give jurors permission to have biases and prejudices.

Don't try to change them.

Sometimes these are the most difficult things for trial attorneys to do. We are so accustomed to being able to make witnesses say what we want them to say. Don't do this is jury selection. If jurors oppose your side of the case, and are inherently biased against you, you must honor these jurors and their beliefs. And strike them.

Establishing rapport and credibility

Aristotle taught about three aspects that were central to persuasion in spoken words. They were the ethos, or the character of the speaker; the logos, or the appeal of the argument itself, and the pathos or the emotion that the audience feels when they hear the words spoken. Aristotle judged that the ethos, the credibility or character of the speaker was the most important.[e]

Centuries and centuries later, social scientists have found Aristotle to be correct.

[e] Aristotle, On Rhetoric, translated by George A. Kennedy, Oxford University Press, (1991).

Audiences are more likely to disbelieve a speaker more readily when they know that the speaker has a vested interest in the OUTCOME of the audience's decision. (That's us.) HOWEVER, if they trust and LIKE the speaker, they don't care if he or she has a vested interest in the outcome.[f]

As simplistic as it may be: we only have one chance to make a first impression, and with a jury, voir dire is it.

You can establish your credibility with the jury by:

Showing interest and concern for what they have to say.

Actively listening to them.

Revealing your humanness and not your lawyerness.

Many times, in jury selection, as in other parts of the trial, language gets in our way more than it helps us. GET RID OF LAWYER WORDS. Talk to jurors like you do a neighbor that you see when you are going out to get the mail, or a friend that you are sharing a cup of coffee or a beer with.

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[f] Aronson, Elliot, The Social Animal, W. H. Freeman and Company, (1980).

We like people, and are more readily persuaded by them, when we can relate to them.

"Floating" our theory of the case.

Persuasion may begin in voir dire, but we aren't floating the theory of our case so get a jump start on opening statement. Qute simply, we are putting it out there to learn who shimply will not buy it.. By carefully listening to and observing jurors responses, we then *de*select the jurors who we believe will not be receptive to our theory.

How do we find out if jurors can relate to themes, perspectives, emotions and dynamics in our case? Ask them.

Determine whose experience and belief systems are congruent with your theory and themes

If they are receptive to your themes, then they begin to create the prism through which they will view the rest of the case.

Also, listen, listen, listen, for what you don't hear.

In a case involving allegations of child molestation or abuse, there is are diverse categories of witnesses and evidence a jury will be called up on to receive and evaluate: most always the alleged victim, police officers, perhaps "outcry" witnesses, medical experts, psychological evidence, many times the defendant. If a juror is seated who cannot receive, evaluate, and *believe* any witness crucial to the defense then your case is doomed before it starts. Again, post-verdict interviews is not the time to learn that a juror "has a problem with shrinks." No matter how much time it takes to be thorough, jurors must be asked questions about each critical aspect of the case.

Use of Questionnaires in Child Sexual Abuse Cases

In most every case involving allegations of a topic as serious and sensitive as sexual abuse, a juror questionnaire is of great benefit. Jurors will answer questions more candidly on paper than they will in a crowded courtroom with other prospective jurors who may be their friends or neighbors. Many times the ultimate benefit can be derived from a very brief questionnaire, asking only the most sensitive questions, perhaps ten questions or less. A questionnaire this length is also most likely to be approved by the court.

Often times no follow up to these responses are necessary, and if they are, jurors can be instructed that they will have the opportunity to respond to those questions privately. While it is helpful to question jurors who have had experience with sexual abuse privately, it is also helpful to have general voir dire discussing these topics, and indoctrinating the jury to your theory of the case. A juror questionnaire should never be thought of as a substitute for voir dire, only a tool to enhance it.

Following are examples of a brief juror questionnaire on sensitive issues in a child molestation case, as well as a sample list of general voir dire question.

PLEASE NOTE THAT THIS QUESTIONNAIRE AND THESE QUESTIONS WERE DEVELOPED FOR PARTICULAR CASES, THEY SHOULD NOT BE THOUGHT OF AS SUFFICIENT NOR APPROPRIATE FOR ANY CASE INVOLVING ALLEGEGATIONS

INVOLVING CHILD SEXUAL ABUSE. IT IS CRITICAL TO DEVELOP A VOIR DIRE STARTEGY AND APPROACH BASED ON THE EVIDENCE, ISSUES, THEORY AND THEMES OF EACH INDIVIDUAL CASE

SUPPLEMENTAL JUROR QUESTIONNAIRE

This juror questionnaire has been prepared for your completion, and has been approved by the Court. Please answer each question completely and as accurately as you possibly can. Your complete written answers will save a great deal of time for the judge, the lawyers, and for you. Your answers will have the effect of a statement given to the Court under oath. Your very best, honest effort to answer the questions is needed. There are no right or wrong answers to any of the questions, please answer thoughtfully, thoroughly and candidly.

If there is not sufficient space provided for you to write your full answer, there are blank pages at the end of the questionnaire. When you need to do so, continue your answer on one of those pages.

For some of the questions, limited follow up questions by the Court or the attorneys may be necessary. If there is any question that you would rather not discuss publicly, or would only want to discuss further in private, please place a (*) by that question and/or answer. If it is necessary to discuss that matter further with you, it will not be done in front of other jurors.

Your completed questionnaires care strictly confidential, and will only be provided to me and the lawyers for use during the jury selection process in this case. Do not discuss this questionnaire, or your answers to any of the questions, with anyone, including other prospective jurors, the lawyers, parties, or witnesses.

Thank you very much for your assistance and cooperation.

____

Judge

Name ________________________________ Juror # _____

1. Have you, or has anyone close to you, ever been involved in *or affected by* a situation in which there was child molestation, rape, sexually battery, sexual assault, unwanted or inappropriate sexual contact, or in which there were allegations of this type of behavior? If yes, please briefly describe that situation (it is not necessary to give names).

2. Do you know anyone who is a victim of sexual assault, or who has claimed to be a victim of any type of sexual assault, regardless of whether you know or believe

it to be true? If yes, please briefly describe that situation (it is not necessary to give names).

3. Do you know of any situation in which there were allegations of a child being sexually abused by an adult? If yes, please briefly describe that situation (it is not necessary to give names).

4. Have you ever given a statement to the police or an investigator regarding a sexual assault, or an alleged sexual assault? If yes, please explain.

5. Have you ever, for any reason at all, given a statement to, been questioned by, or made a report to any child protective agency, DFACS, the police, or anyone about an incident involving a child? If yes, please explain

6. Have you had any dealings whatsoever with DFACS (Department of Family and Children=s Services) or any child protective agency in any state? If yes, please explain

7. Have you ever suspected or come to learn that any baby or child that you know was mistreated or abused by an adult? If yes, please explain that situation.

8. Do you know of any situation in which a person was investigated for, accused of, or charged with molestation, abuse or mistreating a child? If yes, please explain.

9. Have you, or has anyone you know, ever been involved in, or participated in any way, in an investigation, legal matter, or criminal proceeding in which there is a suspicion or allegation of child abuse? If yes, please explain.

10. Due to our beliefs or life experiences, we all have certain cases for which we would not be the most appropriate jurors, or that would be unduly difficult for us to serve as jurors on. Is there any reason that you feel you would not be the most appropriate juror, or that it would be unduly difficult for you to serve, on a sexual assault or unwanted sexual contact? If yes, please explain.

11. Is there anything else that you think the Court or the parties should know about you, or you wish to tell them

GENERAL QUESTIONS

1. Who has ever served on a jury, whether criminal or civil?

2. Who has ever been a witness in a court case or legal proceeding, or has ever given a deposition or received a subpoena?

3. Who has ever been in a courtroom for any reason OTHER THAN those asked in the two previous questions ... that is, not because you were on jury duty, or were a witness in a case?

4. Have any of you, for any reason at all, given a statement to, or been questioned by, or made a report to the police, an investigator, lawyer, or a child protective

agency?

5. Do you know anyone who works, in any capacity, for the ( ) County D.A.s office?

6. Have you ever campaigned for, or made a contribution to, ( ) , the elected ( ) County D.A.?

7. Do you know anyone who works in a prosecutors office anywhere (a district attorney, solicitor, attorney general, U.S. Attorney, etc)?

8. Do you know anyone who works for the ( ) Police Dept?

9. Do you have any friends or family members who work in law enforcement anywhere (whether or not they are officers)?

10. Have you ever worked in law enforcement or applied for a job in law enforcement?

11. .Does anyone currently has children in your household ... by children, I mean from ages 1 day to 20 years?

    For those of you who didn't raise their hand to the previous question ... if you are not now the parent of a teenager, have you EVER been the parent of a teenager?

12. Who has grandchildren under the age of 20?

13. Does anyone work or volunteer with children or teenagers, or have you ever done so?

14. Are any of you, in any way, in contact with children who are considered "at risk" children, or have had a difficult background or home life?

15. Are any of you now, or have you ever been foster parents?

16. Whether or not you have been foster parents, have you ever worked with or been around children who are foster children, or who are in the custody of the state?

17. Are any of you blessed to be adoptive parents or grandparents, or do you have children in your family who are adopted?

18. In addition to those who raised your hand in the previous question, do any of you know any families with children who were adopted when they were age 3 or older?

19. Do any of you know adults who were adopted as infants or children, or were ever foster children, or are any of you yourselves adopted or were you ever in the custody of someone other than your biological or adoptive parents (e.g. foster children)?

20. Who here has any medical training or expertise?

21. Who has any legal training or expertise?

22. Who watches CSI Miami, or any TV shows that deal with forensics or crime scene investigation?

23. Anyone else have any special knowledge or interest in forensics (DNA, fingerprints, etc.)

24. Do you watch any television shows that deal with criminal law or prosecutions, whether real cases or fictional dramas?

25. Has anyone ever seen a TV show, movie, or read a book in which the story dealt with child sexual abuse (whether it is true or fictional)?

26. Are any of you now, or have you ever been, “mandated reporters”?

27. Do any of you have any training or experience in psychology, psychiatry, social work, or in any area of mental health?

28. Have any of you served, either professionally or as a volunteer, as a counselor?

29. Who has any experience whatsoever with mental health professionals, that is, you may have interacted with them in your work or volunteer work, on behalf your child or another family member, been involved in counseling, in any way at all ...?

30. Some people don’t have much use for psychologists, and people like that, or have much faith in them ... who here feels that way?

31. Who feels a little suspicious about mental health professionals who testify in court ... or feels that perhaps that is out of place, or has any opinion about mental health testimony in court whatsoever?

32. Does anyone have any knowledge or expertise in the area of child abuse, sexual abuse, or children’s welfare (have you worked in the area, attended classes, read articles, etc.)?

33. Have any of you ever had another person make an “outcry” to you or disclose

that he or she had been the victim of abuse, whether physical, mental, or sexual?

34. Some people feels that “outcrys” or disclosures of abuse are always true ... no one would ever make up something like that ... who feels that way?

35. Does anyone feel that a teenager is more likely to be truthful that a younger child or an adult?

36. Has anyone ever had someone tell you something that you later found out wasn’t’ true, but rather than being mad at them, you felt sorry for them?

37. Who has ever worked, volunteered with, or contributed to any groups that are involved in victim’s assistance or victim’s rights (e.g. a crisis center, hotline, MADD, etc.)?

38. Have you, or has anyone close to you, ever been involved in *or affected by* a situation in which there was sexual assault, unwanted or inappropriate sexual contact, or in which there were allegations of this type of behavior?

39. Have you, or has anyone close to you, ever been involved in *or affected by* a situation in which a child suffers any type of physical, sexual or emotional abuse, or in which there were allegations of this type of behavior?

40. Are you familiar with any situation in which a young person has accused an adult of inappropriate behavior or sexual contact?

41. _Have you ever worked or volunteered or supported in any way any agency or organization that deals with protecting children, or children’s advocacy work?

42. Do you know anyone who has suffered, or who alleges that they have suffered, emotional, physical or sexual abuse as a child or teen?

43. Who has followed any actual criminal court case in the news with special interest ... that is, if there was an article you read it, if it came on the news, you sat down to watch or turn the radio on, etc?

44. Who knows anyone who now attends the following schools, or who has attended them in the past 10 years, or do you know someone who has worked or volunteered at these schools (or have you)?

    (Schools that the child has attended)

45. *Same question for Day Care, Little Leagues, Church, Etc.*

46 Please look around the room ... do you know any of the other prospective jurors in the courtroom?

48. Have you seen anyone else in the courthouse today that you know?

49. I need you to really search your mind and soul, and look deep into your heart, when you think about this question .... due to our beliefs or life experiences, we all have certain cases for which we would not be the most appropriate jurors, or that would be unduly difficult for us to serve as jurors on. Is there any reason that you feel you would not be the most appropriate juror, or that it would be unduly difficult for you to serve, on a case involving allegations of child sexual abuse? If yes, please explain.

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Importance of Jury Questionnaires

BRIEF SUMMARY

Deselection vs. Ordinary Jury Selection Questionnaires

In Criminal Cases

Overview

In criminal practice, not all juror questionnaires serve the same function. The conventional understanding — that a questionnaire is a tool for identifying and seating favorable jurors — describes only one model. A deselection-based questionnaire operates from a fundamentally different strategic premise: rather than asking who should be chosen, it asks who must be removed. That distinction in purpose shapes everything about how the questionnaire is designed, what it asks, and how its responses are used.

I. The Ordinary Selection Questionnaire

A standard juror questionnaire in a criminal case is designed as an affirmative screening tool. Its goal is to surface information about prospective jurors that allows counsel to construct the most favorable jury possible — selecting individuals whose backgrounds, life experiences, and attitudes align with the theory of the case being presented.

Questions in an ordinary selection questionnaire tend to cover a broad range of topics: general background and demographics, prior jury experience, exposure to the case or the parties, familiarity with law enforcement, attitudes toward the legal system, and logistical matters such as hardship or scheduling conflicts. The questionnaire functions as a wide-angle lens — gathering foundational information about the panel as a whole so that attorneys can make informed decisions about who to keep.

The strategic posture of an ordinary questionnaire is essentially optimistic. It assumes a universe of prospective jurors from which a favorable twelve can be drawn, and it sets about identifying them. Both for-cause challenges and peremptory strikes are used to remove those who fall outside acceptable parameters, but the questionnaire itself is oriented toward the affirmative goal of jury construction.

II. The Deselection Questionnaire

A deselection-based questionnaire begins from a different premise entirely. Rather than asking which jurors are most favorable, it is engineered to expose which jurors are most dangerous — and to do so with enough specificity to support a challenge for cause or to guide the careful use of limited peremptory strikes.

This approach reflects a strategic reality that experienced criminal practitioners understand well: in most cases, counsel has more control over who is removed than over who ultimately sits. Peremptory strikes are finite. For-cause challenges are available without limit but require a demonstrated basis. The deselection questionnaire is designed to generate that basis — to surface the attitudes, experiences, and prior exposures that make a juror unacceptable, in terms specific enough to survive a challenge in court.

Core Strategic Difference
The ordinary questionnaire asks: Who is the best juror for my case? The deselection questionnaire asks: Who poses the greatest risk to my client, and how do I prove it?

In practical terms, a deselection questionnaire is narrower in some respects and deeper in others. It may focus intensively on a small number of topics that the case theory identifies as danger zones — for example, attitudes toward a specific type of offense, prior victimization experiences that mirror the alleged facts, or media consumption habits in a high-profile case. Questions are calibrated not just to detect the presence of a bias, but to capture its intensity and inflexibility in ways that support a for-cause argument before the court.

III. Key Differences in Practice

Factor	Ordinary Selection Questionnaire	Deselection-Based Questionnaire
Primary Goal	Identify the most favorable jurors to seat.	Identify which jurors pose the greatest risk and must be removed.
Strategic Logic	Affirmative — build the ideal jury.	Defensive — prevent the worst-case jury.
Question Focus	Broad background, general fairness, logistics, hardship.	Targeted exposure of specific attitudes, experiences, and biases linked to high-risk profiles.
Use of Challenges	Shapes both for-cause and peremptory challenge strategy.	Primarily drives for-cause challenges and the strategic use of limited peremptories.

Design Approach	Covers many topics; relatively balanced across parties.	Narrowly engineered around the case theory and the known danger zones for the defense or prosecution.
Typical Length	Moderate — covers required ground efficiently.	Often longer and more probing on specific topics of concern.
Tone	Neutral and comprehensive.	Diagnostic — designed to expose, not just screen.

IV. Why the Distinction Matters

The difference between these two models is not merely semantic. A practitioner who designs a questionnaire purely as a selection tool may inadvertently fail to generate the record needed to challenge a high-risk juror for cause. Conversely, a questionnaire focused exclusively on deselection may miss opportunities to identify genuinely favorable jurors who could anchor deliberations.

The most sophisticated approach recognizes that a questionnaire must often serve both functions — but that the deselection function demands deliberate, case-specific engineering that a generic selection questionnaire will not provide on its own. In cases where the stakes are high, where the jury pool is potentially contaminated by pretrial publicity, or where the offense carries particular social stigma, designing with deselection as the primary goal is frequently the more urgent and consequential task.

Practical Note for Practitioners

Because peremptory challenges are limited and increasingly subject to legal scrutiny, the for-cause challenge — supported by a well-crafted written record from the questionnaire — has become more important than ever. A deselection questionnaire that successfully removes a high-risk juror for cause achieves more than ten generic questionnaires that merely describe the panel.

V. Conclusion

Ordinary selection questionnaires and deselection-based questionnaires share the same format but pursue different ends. The former builds a jury; the latter protects against one. Understanding which mode is appropriate — and in most complex criminal cases, how to integrate both — is one of the foundational decisions in any serious jury selection strategy. The questionnaire is not a neutral intake form. Its design reflects a theory of the case, a theory of the jury, and a clear-eyed assessment of where the greatest risks lie.

Juror Questionnaires in Criminal Cases

By [Lisa Wayne assisted by AI Claude] | April 28, 2026

Introduction

In an era of 24-hour news cycles, viral social media posts, and pervasive true-crime content, the integrity of the jury selection process has never been more critical — or more vulnerable. Juror questionnaires, once considered a supplementary tool reserved for high-profile cases, are increasingly recognized as an indispensable mechanism for safeguarding the constitutional right to a fair trial. For both prosecutors and defense attorneys, a well-crafted questionnaire is not mere paperwork; it is the first line of defense against bias, prejudice, and the corrosive influence of pretrial publicity.

What Is a Juror Questionnaire?

A juror questionnaire is a well-prepared written document distributed to prospective jurors prior to or during the voir dire process. Unlike the oral questioning conducted in open court, questionnaires allow prospective jurors to respond privately and in writing to a range of questions covering:

- Prior exposure to the case or the parties involved
- Personal or professional relationships with law enforcement
- Views on the criminal justice system, including attitudes toward incarceration, the death penalty, law enforcement or specific offenses
- Experiences with crime — as victims, witnesses, or those accused
- Mental health, hardship, or other factors affecting their ability to serve
- Media consumption habits and social media use
- Attitudes about the nature of the accusation (s)
- Any preconceived opinions about guilt or innocence

The written format is significant. Research in psychology consistently shows that people are more candid on paper — especially about sensitive beliefs — than when answering in open court before strangers, counsel, and a judge. [1]

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[1] It is well established that self-administered questionnaires tend to yield fewer responses in the socially desirable direction than interviewer-administered questionnaires. A study published in *Public Opinion Quarterly* (Kreuter, Presser & Tourangeau, 2008) confirmed this across multiple survey modes, including telephone and web formats.

Why Questionnaires Are More Important Than Ever

1. The Social Media Problem

Perhaps no development has complicated jury selection more than the rise of social media. Prospective jurors today arrive in court having potentially consumed hours of online content about a case — Reddit threads, YouTube deep-dives, podcast episodes, TikTok commentary, and cable news speculation. In many jurisdictions, jurors are not required to disclose their social media use unprompted.

A targeted questionnaire can surface this exposure in ways that brief oral voir dire cannot. Questions about which platforms a juror uses, whether they have followed coverage of the case, whether they have posted or commented about it, and whether they belong to any online communities related to the subject matter are now considered standard practice in sophisticated criminal defense and prosecution strategies.

2. High-Profile Cases Demand It

Recent years have seen a string of nationally prominent criminal trials — from financial fraud prosecutions to law enforcement accountability cases — in which jury composition proved decisive. In these environments, questionnaires are not optional; they are essential. Courts in complex, high-profile matters routinely authorize lengthy questionnaires — sometimes exceeding 50 pages — because oral voir dire simply cannot cover the necessary ground in a reasonable timeframe.

The alternative — relying solely on oral questioning — exposes trials to jurors who harbor undisclosed biases, who may have discussed the case with family or friends, or who are reluctant to admit partiality in a public setting. Questionnaires mitigate this risk substantially.

3. Implicit Bias and the Limits of Observation

Studies on implicit bias have fundamentally altered how legal professionals think about juror selection. A prospective juror may sincerely believe they are impartial while harboring unconscious biases related to race, socioeconomic status, gender, or profession that will shape their deliberations. Thoughtfully constructed questionnaires — often developed in consultation with jury consultants and social scientists — can include validated psychological measures designed to detect attitudes that verbal responses alone would not reveal.

The Constitutional Underpinning

The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to trial by an impartial jury. Courts have interpreted this to require meaningful voir dire — a process sufficient to identify jurors who cannot be fair. Juror questionnaires are a constitutionally grounded tool for fulfilling this obligation.

In *Morgan v. Illinois* (1992), the Supreme Court held that defendants are entitled to ask jurors whether they would automatically impose the death penalty, reinforcing the principle that parties have a right to probe juror attitudes on dispositive issues. Questionnaires operationalize this principle at scale, allowing attorneys to identify potential conflicts before they become grounds for mistrial or appellate reversal.

Practical Benefits for All Parties

For Defense Attorneys

Questionnaires are invaluable for identifying prospective jurors whose life experiences, beliefs, or media consumption make them unlikely to extend the benefit of the doubt to the accused. In cases involving allegations of domestic violence, sexual assault, or drug offenses, questionnaires that probe personal histories and attitudes toward particular crimes can be outcome-determinative.

For Prosecutors

Questionnaires help ensure that jurors who are selected are genuinely willing and able to apply the law as instructed — including, in appropriate cases, imposing serious penalties. They also allow prosecutors to identify jurors who may have philosophical objections to certain laws or punishments that they would not readily disclose in open court.

For Courts

Judges benefit from questionnaires because they streamline voir dire, reduce the time required for oral examination, and create a written record that supports appellate review. When a challenge for cause is disputed, a completed questionnaire provides a documentary basis for the ruling. Courts also find that jurors who complete questionnaires arrive better oriented to the process, reducing the frequency of mid-trial surprises.

For Defendants and the Public

Perhaps most importantly, thorough juror questionnaires reinforce public confidence in the justice system. Verdicts rendered by juries selected through a rigorous, documented process are more likely to be viewed as legitimate — by the parties, by observers, and by history.

Designing an Effective Questionnaire

Not all juror questionnaires are created equal. A poorly designed questionnaire can be as problematic as no questionnaire at all — leading jurors in a particular direction, generating data that attorneys cannot effectively use, or asking questions so broad that responses are meaningless.

Effective questionnaires share several characteristics:

Clarity and Neutrality. Questions should be written in plain language and avoid loaded terminology that signals a preferred answer. Leading questions undermine the diagnostic value of responses and may create grounds for challenge.

Specificity to the Case. Generic questionnaires offer limited utility. Effective questionnaires are tailored to the specific factual and legal issues at stake — a securities fraud case will demand very different questions than a homicide case.

Graduated Scales. Rather than yes/no questions, effective questionnaires often use Likert scales ("strongly agree" to "strongly disagree") to capture the intensity of jurors' attitudes, not merely their direction.

Open-Ended Questions. Closed questions establish whether a juror has a view; open-ended questions reveal its content and strength. A question like "Describe any experiences you or a close family member has had with law enforcement" yields far richer data than "Have you ever had contact with law enforcement? Yes / No."

Hardship and Logistics. Questionnaires should address scheduling conflicts, financial hardship, and health issues early, allowing courts to excuse clearly ineligible jurors before investing time in deeper examination.

Common Pitfalls and How to Avoid Them

Even experienced practitioners make mistakes with juror questionnaires. Common pitfalls include:

- **Making questionnaires too long.** Jurors who are exhausted or frustrated by an overly lengthy document may provide cursory responses. Length should be calibrated to case complexity.
- **Failing to follow up.** Questionnaires are the beginning of voir dire, not the end. Written responses should guide targeted oral follow-up, not replace it.
- **Ignoring what jurors don't say.** A juror who leaves multiple questions blank may be signaling discomfort — a useful data point in itself.

- **Neglecting the digital footprint.** Some jurisdictions now permit attorneys to supplement questionnaire responses with social media research. Where permitted, this can reveal discrepancies between what jurors report and what they have publicly stated.

The Road Ahead

As artificial intelligence tools become more integrated into legal practice, juror questionnaires are beginning to evolve. Legal analytics platforms now offer AI-assisted analysis of questionnaire responses, identifying patterns across large juror pools that human review might miss. While these tools raise legitimate ethical questions about privacy and the boundaries of permissible investigation, they also signal that the questionnaire — far from becoming obsolete — is growing in sophistication and importance.

Courts and bar associations will need to grapple with questions about the permissible use of AI in juror research, the appropriate scope of social media investigation, and whether current voir dire processes are adequate for the media environment defendants and prosecutors now face.

Conclusion

The juror questionnaire is not a bureaucratic formality. It is a carefully calibrated instrument through which the parties — and the court — gain their first meaningful insight into the individuals who will decide a defendant's fate. In an era when public discourse about crime and justice is louder, more polarized, and more pervasive than at any prior point in American legal history, the importance of that instrument has never been greater.

Criminal defense attorneys, prosecutors, and judges who invest in thoughtful, case-specific questionnaires are not simply managing risk. They are honoring the constitutional promise at the heart of the American legal system: that every person accused of a crime will be judged not by passion or prejudice, but by twelve impartial peers.

That promise begins — and sometimes ends — with the questionnaire.

This article is intended for informational and educational purposes and does not constitute legal advice. Attorneys should consult applicable rules of procedure and local court practices when designing juror questionnaires.

FOCUS GROUPS: A SNEAK PEEK AT A JURY'S REACTION TO YOUR CASE

Denise de La Rue

Social science research has taught us that individuals make most decisions based on their emotions, and then after the decision is made, they give logical explanations for it. Dr. Robin Hogarth, who studies decision-making, has termed this "post-decision logic." Never is this phenomenon more evident that when jurors make decisions about the outcomes of cases, about what it means when "justice is served."

We learn a great deal in post-juror interviews about why jurors do the things they do. Unfortunately, many times we learn too little too late to be of any help to our clients. We learn even more when we are able to watch jurors deliberate and hear them discuss our cases in pre-trial research, such as focus groups and summary or mock trials. No matter what the case is about, what the theory is, or who the parties are, there are dynamic consistencies in the ways in which jurors arrive at their view of justice.

Jurors want to do the right thing

Most jurors really want to do the right thing, and certainly consider themselves to be bastions of fairness. This is why voir dire questions like "can you be fair and impartial" rarely elicit any productive information. Who would want to view themselves as fundamentally unfair, let alone admit it in a courtroom? Even the jurors that we *know* without question would never in a million years side with us in most often will not be aware of having an agenda as they come into the courtroom, or the focus group room. In a recent case, one juror did tell the lawyer defending a billion-dollar corporation, "I will be your biggest fan in the jury box," but that kind of self-awareness and admission is rare. (Of course, the corporation's defense lawyer argued stringently that his "biggest fan" was a "fair and impartial juror".)

Even most jurors who *do* believe that one side is good (i.e. the prosecutors) and the other is evil (i.e. the criminal defense lawyers) believe that they will do the right and fair thing. It is very difficult, if not impossible, to change the world view of an individual during the trial of a case. This may seem too basic a point to make to experienced trial lawyers, but far too often, if a juror is personally appealing, has a profession that is normally thought of as making that juror friendly, answers some questions favorably, attorneys are tempted to think, "I can win her over!"

We learn in focus groups what we also know to be true in trial. Jurors who come into the process with a view that fairness means the other side wins, then they will, with those jurors in the box. What we learn in addition in focus groups are the elaborate and creative ways in which jurors can reframe if not reconstruct evidence in order to hold on to their views of fundamental fairness. We learn how damaging these jurors can be, especially if they don't sound as extreme as they truly are, or if they manage to interject their views of the case with certain fear inspiring phrases like "send a message" which may bring jurors you previously had a chance with quickly around to their way of thinking.

Perhaps the primary reason to do a focus group or mock trial is to have the opportunity to see and hear people – who are not lawyers – discuss and evaluate your case and see how they arrive at the decisions we ask them to make, most often by way of a verdict form. Twelve of the most brilliant legal minds in the nation could brainstorm a case for weeks on end, and never be able to think of the case and issues in the way that people who are not lawyers inevitably will. Learning how jurors react to the case, to witnesses, issues, evidence, demonstratives, themes, theories can only be done two ways: In post-trial interviews – a bit too late, or by watching them deliberate and give feedback in focus groups and mock trials.

<u>Focus Groups vs. Mock Trials</u>

Sometimes the terms focus groups and mock trials are used interchangeably – and there are many different formats for each. Generally, a focus group involves fewer participants, is less structured, and involves more input in the way of "talk back" from the participants during the session. It may involve issues in the case, and very little specific evidence. It may be done in an earlier stage of litigation and be phase one of the pre-trial research process. Other times, focus groups may give a summary of each side of the case – in more broad-brush strokes, and allow for a deliberation or moderated discussion at the end of the case. Generally, mock trials are much more structured and follow the format of a trial. Participants provide feedback throughout the exercise in the form of questionnaires, and then deliberate the case at the end, with the aim of reaching a verdict. Presentations are much more detailed and fact intensive.

For the purpose of this discussion, the term "focus group" will be used for the sake of simplicity. Written instruments that are provided at the end of these written materials will involve a hybrid format to give a general idea of how an exercise might be structured. The questionnaires again, will be very general to demonstrate kinds of things we ask and the way in which we gather that information.

<u>What We Learn and What We Do NOT Learn in Focus Groups</u>

- We learn how people who are not lawyers react to our case

- We learn what we think is the most important issue in our case may not be at all important to jurors. Recently I conducted two focus groups for a trial team. One of the lawyers on the trial team thought that it was a pointless exercise – there was only one question that would decide the entire case – did they or did they not believe the alleged victim – and there was no way for us to adequately test her credibility. She was right about one thing: there was only one question that would determine whether jurors voted guilty or not guilty in the case – but she was wrong about what the question was. In *both* groups, jurors got hung up on one word in the jury charge and that word was "entice." The lawyers had no idea that was what would decide the case – and because they would convict if there was "enticement" that jurors may never get to what the lawyers thought was the ultimate question.

- We learn words, catch phrases, colloquialisms, that jurors use that we would never think of (and may be much more descriptive than anything we have thought of)

- We learn what questions jurors have that we need to answer. And make no mistake, if we do not answer their questions, they will not skip over them and think that they must not be important, they will create an answer that makes sense to them.

- We learn what they think of anticipated prosecution theories, and how we might counter (or in some cases do not need to counter) those theories.

- We may learn of witnesses – expert or lay witnesses – that they would like to hear from that we may need to try to find.

- We learn of ways in which they may credit – or discredit – the witnesses that we are planning to present.

- We learn how to simplify – and/or make relevant – complex information.

- We learn how to simplify – and make *real* our own language. If we can incorporate language that focus group jurors use in discussing our case, we will probably provide our real jury with language they will take back to the jury room.

- We learn how jurors react to actual evidence – photographs, recordings, physical evidence – and demonstrative evidence and exhibits. Many times, we learn we need to provide more (most often asked for is a timeline – which may – or may not – be helpful to us.) Sometimes if evidence we thought is helpful is damning – we learn we need to provide less!

- By watching the dynamics of deliberations, we learn how to better arm defense leaning jurors with arguments to counter those by the prosecution leaning jurors who will most likely be in the jury room fighting against us.

- If the case has been in the media and jurors have some knowledge of it, we learn some things they may believe to be true that we need to address in trial. (e.g. in one case involving a celebrity athlete accused of murder, many of the focus group jurors believed that the incident was drug related. Not even the prosecution believed it was drug related. We learned we needed to address that in trial, something we would never have thought of.)

- Jurors think they know more than they do about "the system".

  At any moment in any day, night, or pre-dawn hour you can turn on one of your 752 digital channels and see at least seven or eight "experts" giving their opinions about court cases and legal matters. You can watch trials with "gavel to gavel" coverage. And of course, you can watch courtroom dramas and "reality" shows. Because of this, jurors who watch these shows now think that they have an accurate view of the legal system, and in fact, the law. We used to caution attorneys about throwing around legalisms, well now the jurors are doing it as well. The problem is, rarely do they have it right.

While it isn't the best advocacy to focus your precious time in a closing argument primarily on on legal standards, it is necessary now more than before to spend some time making sure you and the jurors are all on the same page. (Please, assume that they will garner next to nothing from the Court's instructions that you don't spend time making real to them.)

- Jurors love detective work.

  Jurors love good detective work, and they tend to believe that they would be great detectives. They love to say the word "forensic". Position them as the sleuths in your case. In your opening statement, give them questions you want them to ask as they hear the defense case. Give them things that you want them to look for in the evidence. In opening, give them a list of things with a number (i.e. I want you to look for these three things) and watch them start writing down what you are saying. They will.

- Beware of OSJs, that is … Other Similar Jurors. It is perhaps counterintuitive, but we find in pre-trial research, as well as in actual trials, that people who are "similarly situated" to the defendant are perhaps *not* the most empathetic jurors to the defendant's plight. For example, an element of your defense or mitigation is mental illness or developmental disability, be wary of jurors who have a family member with the same diagnosis. "My brother/son has (bipolar disorder, schizophrenia, ASD, etc.) and would never do that, he does not behave like that, etc." It is *possible* the juror would be more sympathetic, but it would be very dangerous to assume that. In addition, that juror is more likely to become the expert in the jury room about whatever the diagnosis and instruct other jurors with the appearance of authority on the matter.

  WE DO **NOT** LEARN IN FOCUS GROUPS:

- A "JUROR PROFILE". I am not a true believer in juror profiles in any case. The only way that it would be helpful in jury selection, in my opinion, is not to develop a profile of our ideal juror, but of our nightmare juror, as we do not get to pick them, we only get to kick them off. But even for those who wish to develop a juror profile of any sort, we do not have the numbers of participants to be able to make such determinations. Statisticians would tell you that with fewer than 200 participants, any prediction we would try to make would not be reliable. For example, if you conducted two focus groups with a total of 24 participants, and every white woman in her 40s who attends church and has a child in elementary school is with us, does not mean that on our actual jury, a juror with the same profile would be make the same decisions about our case. We cannot be confident that those 4-5 focus group jurors would accurately reflect the views jurors with the same qualities in our population of 30,000 (+/-) potential jurors in our venue.

- What our verdict will be. While it is tempting to be most interested in the verdicts the jurors reach, that is not the most beneficial information we receive. We are much more interested in the ways that jurors reach their decisions that what the decisions are. This is the information that we can use to inform our trial strategy. We must remind ourselves that while the verdicts themselves are interesting and somewhat informative, they are not reliably predictive. The reason for this is that we cannot sufficiently replicate in a four-hour focus group, or even two-day mock trial, what will occur in a 1, 2 or 8-week trial. We do not know every witness who will be called, how credible they will appear to jurors, and all the many other trial dynamics. Thus, if we "win" we should not be overconfident, or if we "lose" we should not feel that our fate is sealed. Hopefully, we learn something in the pretrial research that will make us alter or trial strategy, if needed, and this most certainly could improve our chances for a good outcome.

<u>Pro-Tips for Conducting Focus Groups</u>

- The participants or "mock jurors" should never know what side of the case you are on or is sponsoring the research. If they ask, and they will, the answer must be a non-answer. It is very important for presenters who are a part of the trial team to be mindful of this and not tell "war stories" or give their true identities away during the presentations.

- Don’t recruit participants whom you know, and don’t hold the focus groups at a law office that can be identified with the case (unless absolutely necessary, don’t hold it at a law office at all).

- Participants must be recruited and screened for conflicts. This is done more with an eye toward making sure that people will not tell their friends (who are law enforcement, etc.) about what they learned in the focus group. They must be recruited with some demographic identifiers to match the demographics of the jury panel we expect to see.

- Participants must sign a confidentiality agreement and understand that if they violate it, and that violation results in someone on the potential jury hearing about it, they might be explaining themselves to a judge.

- We should not be “in it to win it” we should be in it to learn. No life is changed if we win the focus group. We do not need a pep rally, we need for objective folks to tell us about the problems with our case – how we can lose – so we can fix what we can. While the presentations should be representative of what we expect to occur in court, they should not be developed to reflect your dream day in court. If there is any question – let the bad facts in, withhold the good facts you may not get in to evidence. You are always able to add facts during deliberations or debrief.

Following are some materials that represent those that are used in a focus group about a case in which the prosecution is seeking the death penalty. They are very general and should be edited to reflect issues in a particular case.

This this hypothetical focus group would only be sufficient to address broad brush issues in the case, ideally done as part one of pretrial research with more in-depth research to follow.

Focus Group Format

8:45-9:15	Participants arrive, complete questionnaires, confidentiality agreement (facilitator)
9:15-9:45	Guilt Phase Prosecution Case Summary (Attorney)
9:45-10:15	Moderated discussion of Guilt Phase
10:15-10:45	Aggravation Case Summary (Attorney)
10:45-11:30	Summary of Mitigation Case (Attorney)
11:30-11:45	Stretch Break
11:45-12:10	Brief Jury Charges/Individual Verdict
12:10-1:00	Deliberations
1:00	Final Questionnaire/Adjourn

(*This reflects a focus group that might be done early in the litigation to get an idea of how respondents view a broad-brush presentation of the case)*

(This questionnaire is used to re-screen participants as well as get more information about them and their views)

FIRST QUESTIONNAIRE

Name ______________________________________

1. Do you currently have a summons for jury duty, or are you serving on a jury?

2. Do any of your friends or family members work in any capacity for the news media? If yes, who is that person and what is his/her relationship to you.?

3. Have you ever worked for, volunteered with, or *applied for a job* with any law enforcement or prosecutorial agencies (e.g. Police, sheriff, Department of Corrections, FBI, U.S. Attorney, District Attorney, Attorney General's Office, etc.) If yes, please explain.

4. Do you have friends or family members who work *in any capacity* for law enforcement or prosecutorial agencies? If yes, who, and what office or agency?

5. Do you know anyone who works *in any capacity* in the court system or

6. Do you know anyone who is a witness, or is any way involved in any court case pending in the (venue) area? If yes, please explain.

7. A. Do you know anyone who has died as a result of a homicide, or lost a loved one as a result of a homicide? If yes, please briefly explain.

B. Do you know anyone who has suffered an injury as a result of a criminal act? If yes, please explain.

8. If you are currently employed, where do you work and what do you do there?

What other types of jobs have you had?

9. What is the highest grade in school that you completed?

Please tell us any degrees, major or specialized studies that you have acquired.

10. If any other adults in your household are employed, what do they do?

11. Please tell us about any situation in which you or someone close to you was *the victim of or witness* to a violent crime.

12. Have you ever served as a juror? If yes, what kind of case?

13. Are there any *local* crimes, court cases or legal proceedings have followed?

If yes, please describe.

14. Do you know anyone who is in anyway involved in any pending criminal case cases (as a victim, witness, knows the defendant, prosecutor, defense attorney, judge, etc)? _____ Yes ______ No

If yes, please explain.

15. What is your opinion of prosecutors?

What is your opinion of criminal defense attorneys?

17. If someone is convicted of the deliberate, intentional murder of another person, which best describes the extent to which you support or oppose the person being sentenced to death

1	2	3	4	5	6
Strongly support					Strongly oppose

18. If someone was convicted of a deliberate, intentional murder, what are some factors that would make you more likely to vote for a sentence of the death penalty?

If someone was convicted of a deliberate, intentional murder, what are some factors that would make you more likely to vote for a sentence of life in prison, with no possibility of release?

.

19. As a part of this focus group, you will be told a summary of a real criminal case and asked your opinions about it. Is there any particular case or type of case that you would NOT like to hear about or discuss in a group like this?

CONTRACT OF CONFIDENTIALITY

In return for consideration received, I agree that I will keep all information learned in the focus group regarding the case of <u>(style of case) </u>in strict confidence. I will not discuss any matters learned in the focus group, or that fact that I attended the focus group, with anyone. I understand that I am not released from this agreement unless I have a release in writing.

If I have any questions at any time concerning this contract of confidentiality, I should call (contact of recruiter or facilitator, not attorneys)

I understand that the focus group may be video and/or audio taped, but that the recordings will only be used by those involved in the research, and never shown in public or aired for public view.

I also confirm that I am not currently serving on a jury, and I do not have a summons for jury service. I understand that at any time in the future, if I am called as a juror in the above case, I am to explain to the Court out of the presence of other jurors that I attended this focus group.

____
Signature

____
Date

Name _____________________________________

INDIVIDUAL VERDICT

1. What evidence or arguments are most persuasive that a sentence of death is appropriate in this case?

2. What evidence or arguments are most persuasive that a sentence of life in prison without release is appropriate in this case?

3, If you were a juror in this case, would you vote for a sentence of:

____ The death penalty

____ Life in prison without release

Why would this be your decision?

FINAL QUESTIONNAIRE.

Name ___________________________________

1. After deliberating, what evidence or argument do you believe is the strongest in favor of a death sentence, as opposed to a sentence of life in prison in this case?

2. After deliberating, what evidence do you believe is the strongest in favor of a life in prison sentence, as opposed to a death sentence in this case?

3. Did your verdict change during deliberations? If yes, how?

What convinced you to change your verdict?

4. What advice would you give to the prosecution lawyers in this case?

. What advice would you give to the defense lawyers in this case?

5. What do you believe the real jury *will* decide in this case, in terms of whether the defendant will be sentenced to death, or life in prison without possiblilty of release?

Why are these your thoughts?

6. What else should we know about your feelings or opinions about this case?

True Dat and Jury Consultants: Focus Groups,

Jury Questionnaires, Exit Interviews, and More

Denise de La Rue

1) Focus Groups: Themes That Emerge Time and Time Again
2) Sample Motion for Supplemental Juror Questionnaire
3) Example of short questionnaire with sensitive Issue (child molestation)
4) Example of Lengthy Questionnaire with Publicity Issues (U.S. vs. Eric Rudolph)

FOCUS GROUPS:

Themes That Emerge Time and Time Again

Social science research has taught us that individuals make most decisions based on their emotions, and then after the decision is made, they give logical explanations for it. Dr. Robin Hogarth, who studies decision-making, has termed this "post-decision logic." Never is this phenomenon more evident that when jurors make decisions about the outcome of a case.

We learn a great deal in post-juror interviews about why jurors do the things they do. Unfortunately, many times we learn too little too late to be of any help to our clients. We learn even more when we are able to watch jurors deliberate and hear them discuss our cases in pre-trial research, such as focus groups and summary (mock) trials. No matter what the case is about, what the theory is, or who the defendant is, there are dynamic consistencies in the ways in which jurors arrive at their view of justice.

Following is some of what I have learned from watching hundreds of focus group jury deliberations:

<u>Jurors want to do the right thing</u>

Most jurors really want to do the right thing, and certainly consider themselves to be exemplars of fairness. This is why voir dire questions like "can you be fair and impartial" rarely elicit any productive information. Who would want to view themselves as fundamentally unfair, let alone admit it in a courtroom? Even the jurors that we *know* without question would never in a million years side with us in a lawsuit most often will not be aware of having an agenda as they come into the courtroom, or the focus group room. In a civil case, I have witnessed one juror did tell the lawyer defending a billion dollar corporation, "I will be your biggest fan in the jury box," but that kind of self-awareness and admission is rare. (Of course, the defense lawyer argued stringently that his "biggest fan" was a "fair and impartial juror".)

Even most jurors who *do* believe that prosecutors are doing God's work and criminal defendants and their lawyers are evil believe that by convicting, they *are* doing the right and fair thing.
It is very difficult, if not impossible, to change the world view of an individual during the trial of a case. This may seem too basic a point to make to

experienced trial lawyers, but far too often, if a juror is personally appealing, has a profession that is normally thought of as making that juror plaintiff-friendly, answers some questions favorably, attorneys are tempted to think, "I can win her over!"

We learn in focus groups what we also know to be true in trial. Jurors who come into the process with a view that fairness means any person (accused of child molestation) (with prior convictions) (who belongs to a gang, the Democratic party, Greenpeace, etc) must be guilty, at least of *something* , is going to convict, no matter how compelling the closing argument, or how charismatic the defense lawyer is. What we learn in addition, are the elaborate and creative ways in which jurors can reframe if not reconstruct evidence in order to hold on to their views of fundamental fairness. We learn how damaging these jurors can be, especially if they don't sound as extreme as they truly are, or if they manage to interject their views of the case with certain fear inspiring phrases like "we have to send a message" or “what you are wrong and s/he hurts someone else” which may bring jurors you previously had a chance with quickly around to their way of thinking.

The only way to deal with jurors who have this bias against you, or the world view that in order for fairness to win, you must lose, is to eliminate them from the jury panel. Even though challenges for cause are rare, a certain number of these jurors can provide you with a great record, given a thorough voir dire.

<u>Jurors think they know more than they do about "the system".</u>

At any moment in any day, night, or pre-dawn hour you can turn on one of your 252 digital channels and see at least seven or eight "experts" giving their opinions about court cases and legal matters. You can watch trials with "gavel to gavel" coverage. And of course, you can watch courtroom dramas and "reality" shows. Because of this, jurors who watch these shows now think that they have an accurate view of the legal system, and in fact, the law. We used to caution attorneys about throwing around legalisms, well now the jurors are doing it as well. The problem is, rarely do they have it right.

While it isn't the best advocacy to focus your precious time on legal standards, it is necessary now more than before to spend some time making sure you and the jurors are all on the same page. (Please, assume that they will garner nothing from the Court's instructions that you don't spend time making real to them.)

Again, legal standards and concepts are not the sexiest part of any case, and so your time spent with the jury on them should be approached with creativity, but "leaving it to the judge" will likely not work for you.

Jurors love detective work.

Along with all of the law shows are now the investigative shows, whether they are drama or "reality". This is a good thing. Jurors love good detective work, and they tend to believe that they would be great detectives. They love to say the word "forensic". Position them as the sleuths in your case. In your opening statement, give them questions you want them to ask as they hear the prosecution's case. Give them things that you want them to look for in the evidence. Conduct voir dire on forensics. In opening, tell them that you need their help in your case.

Be the first lawyer to use the word "responsibility."

People are all too enamored with the concept of "personal responsibility." Too often this gets used as a powerful weapon against us, unless we have nothing whatsoever to do with the events, and we really were bowling in Toledo that night. It has unimaginable power in deliberations when one of the jurors on a personal responsibility mission bats about the phrase … other jurors latch on to it because it resonates as a belief that they have independent of the case. The word will be used in deliberation, it's almost guaranteed. The defense lawyer needs to be the champion of that word and concept. In your opening, if not before, make sure that you define this trial as being about RESPONSIBILITY. The government always has a responsibility to get it right when seeking to deprive a person of liberty.

Beware of OSJs

That is … Other Similar Jurors, if there are any, that is jurors who may be similar to the Defendant (or key defense witnesses). It is perhaps counterintuitive, but we find in pre-trial research, as well as in actual trials, that people who are "similarly situated" to the defendant are perhaps *not* the most empathetic jurors to the defendant's plight. This occurs for a variety of psychological reasons which are interesting but not essential to explore or understand, just know to beware.

Sometimes jurors most harshly judge people like them, especially if their conduct is less than intelligent or admirable. "I would never do that, therefore s/he must be guilty." "If it were me, I would testify …."

The best hope in these cases is that the prosecution will be nervous that these jurors might be too empathetic and use their peremptory challenges so that you don't have to.

Likewise, jurors who are similar to the alleged victim or a prosecution witness who is out to bury your client may not always be the worst jurors for you. Keep an open mind and look at things beyond the similarity before you decide you cannot live with them.

<u>It Really is About YOU</u>

Most lawyers really like that one. Maybe not ALL about you .. but who *you* are matters. In the courtroom, please be the person that you are out of the courtroom. Lots of people don't like lawyers. Most everyone likes and trusts moms and dads, soccer coaches, friends they play tennis or golf with, meet for coffee, talk to at the mailbox, have a beer with. Remember the whole person that you are, and be that person when you ask the jury to see the world your way, and do justice for those whom you serve.

It is very difficult, if not impossible, to change the world view of an individual during the trial of a case. This may seem too basic a point to make to experienced trial lawyers, but far too often, if a juror is personally appealing, has a profession that is normally thought of as making that juror plaintiff-friendly, answers some questions favorably, attorneys are tempted to think, "I can win her over!"

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SAMPLE MOTION FOR SUPPLMENTAL JUROR QUESITONNAIRE

(INSERT STYLE OF CASE)

COMES NOW the Defendant by her attorneys, and moves that this honorable court permit the use of a supplemental juror questionnaire for use in jury selection.

1. The use of a questionnaire is particularly important in this case because it (state reason for asking for SJQ, such as has received media attention or contains some sensitive issues that must be addressed by attorneys in voir dire). These matters are not suited for exploration in a courtroom setting in which one juror must give his or her answers in front of the entire panel of jurors because (state reason – the responses are likely to be inflammatory and might taint the panel or jurors will not be comfortable discussing these intensely personal matters in front of other members of their community).

2. A supplemental juror questionnaire is an efficient method for the court and the parties to gather information about the jurors (knowledge of the case) (personal experiences) and while (posing no risk of contaminating the panel) (providing the jurors with as much privacy as possible in communicating this information) .

3. The use of the questionnaire also allows for a more efficient use of the Court's time as it limits the need for individual sequestered voir dire on these issues. The questionnaire responses will alert the Court and counsel as to which jurors it is necessary to speak with individually to further explore their responses, and will eliminate repetitive questioning to each individual.

4. The Defendant requests that the attached questionnaire be given to the jurors when they report to the courtroom for jury selection and that the court instructs the jurors to complete the questionnaire at that time. The Defendant will provide clipboards and pens for court personnel to distribute to the jurors along with the questionnaire so that they jurors may complete the questionnaires in the courtroom while seated in the gallery. This process should take no more than ( ) minutes. The Defendant will have staff available to assist court staff in copying the questionnaires for both parties and the Court, if the Court so desires.

5. After the jurors have completed the questionnaires, general voir dire can begin, reserving any questioning on the issue of (issues addressed in questionnaire). The Court and counsel can be given copies of the completed questionnaire at the beginning of the lunch break, and review them over lunch. Following questioning of the venire, counsel may then request any further follow up that may be necessary based on the written responses to juror questionnaires.

Respectfully submitted,

EXAMPLE OF SHORT SJQ COMPLETED IN COURT ON DAY OF JURY SELECTION

SUPPLEMENTAL JUROR QUESTIONNAIRE

This juror questionnaire has been prepared for your completion, and has been approved by the Court. Please answer each question completely and as accurately as you possibly can. Your complete written answers will save a great deal of time for the judge, the lawyers, and for you. Your answers will have the effect of a statement given to the Court under oath. Your very best, honest effort to answer the questions is needed. There are no right or wrong answers to any of the questions, please answer thoughtfully, thoroughly and candidly.

If there is not sufficient space provided for you to write your full answer, there are blank pages at the end of the questionnaire. When you need to do so, continue your answer on one of those pages.

For some of the questions, limited follow up questions by the Court or the attorneys may be necessary. If there is any question that you would rather not discuss publicly, or would only want to discuss further in private, please place a (*) by that question and/or answer. If it is necessary to discuss that matter further with you, it will not be done in front of other jurors.

Your completed questionnaires care strictly confidential, and will only be provided to me and the lawyers for use during the jury selection process in this case. Do not discuss this questionnaire, or your answers to any of the questions, with anyone, including other prospective jurors, the lawyers, parties, or witnesses.

Thank you very much for your assistance and cooperation.

(SPACES/LINES SHOULD BE ADDED FOR JURORS TO WRITE THEIR ANSWERS)

Name ________________________________ Juror # _____

1. Have you, or has anyone close to you, ever been involved in *or affected by* a situation in which there was child molestation, rape, sexually battery sexual assault, unwanted or inappropriate sexual contact, or in which there were allegations of this type of behavior? If yes, please briefly describe that situation (it is not necessary to give names).

2. Do you know anyone who is a victim of sexual assault or molestation or who has claimed to be a victim of any type of sexual assault or molestation, regardless of whether you know or believe it to be true? If yes, please briefly describe that situation (it is not necessary to give names).

3. Do you know of any situation in which there were allegations of a child being sexually abused by an adult within the family (whether or not charges were filed)? If yes, please briefly describe that situation (it is not necessary to give names)

4. Have you ever given a statement to the police or an investigator regarding a sexual assault, or an alleged sexual assault? If yes, please explain.

5. Have you ever, for any reason at all, given a statement to, been questioned by, or made a report to any child protective agency, DFACS, the police, or anyone about an incident involving a child? If yes, please explain.

6. Have you had any dealings whatsoever with DFACS (Department of Family and Children's Services) or any child protective agency in any state? If yes, please explain

7. Have you, or has anyone you know, ever been involved in, or participated in any way, in an investigation, legal matter, or criminal proceeding in which there is a suspicion or allegation of child abuse? If yes, please explain.

8. Due to our beliefs or life experiences, we all have certain cases for which we would not be the most appropriate jurors, or that would be unduly difficult for us to serve as jurors on. Is there any reason that you feel you would not be the most appropriate juror, or that it would be unduly difficult or you to serve, on case involving allegations of child molestation? If yes, please explain.

9. Is there anything else that you think the Court or the parties should know about you, or you wish to tell them

JURY SELECTION IN CRIMINAL CASES

Karen Jo Koonan
Senior Trial Consultant
NJP Litigation Consulting/West

EVALUATING JURORS:

Every piece of information about a juror is like a piece of a puzzle. The more information you get, the better your understanding of each prospective juror as a complex human being. Essential pieces of the puzzle include:

1. Background Information

Age, residence, occupation, education, family information, prior jury experience, spare time activities.

2. Attitudes About the Criminal Justice System

Which prospective jurors have the most punitive attitudes? Which jurors believe:

- If someone is charged with a crime, they must be guilty;
- Defendants should be required to testify;
- The system makes it too difficult for police and prosecutors to get convictions.

3. Experiences with Crime and Law Enforcement

People who are afraid or who feel vulnerable are often more reluctant to disagree with those in authority.

Victims of crime might see their jury service as an opportunity to punish someone for their own experience.

People who work with or who are related to law enforcement are likely to be more deferential to the police and prosecutors and often feel that it is inappropriate to "second-guess" them.

It is important to ask people about their experience with crime and law enforcement AND to ask them about how they felt about that experience.

4. Case-Specific Issues

Each case has its own particular set of facts that might elicit the biases of certain prospective jurors. It is always important to identify those potential biases, counteract them during the trial, and exercise challenges against those jurors who will be most resistant to seeing the case from the defendant's point of view.

An important rule-of-thumb to follow is: The closer the juror's personal experience is to the facts of the case, the more dangerous s/he is. S/he might be receptive to the prosecution, or s/he might be more receptive to the defendant; it is necessary to find out during jury selection, or you might find out after the trial has been lost.

Do not assume that someone with experiences similar to the defendant will be pro-defense. Remember the battered wife who served on a jury and led the jury to a conviction of a woman who killed her husband, saying, "I was a battered wife, but I didn't have to kill my husband."

5. Personality Characteristics

- **Satisfaction with Life vs. Bitterness:**

  Sense of adequacy and satisfaction about one's life situation, future, and children's happiness, resulting in generosity;

  versus

  Insistence that each individual is basically responsible for her or his own fate, achievements and misfortunes.

- **Empathy vs. Detachment:**

  Capacity to put oneself in another's shoes, to understand her viewpoint, and feel her pain;

  versus

  Inability to identify with others, due to disinterest, denial, or other reasons.

- **Shared vs. Personal Responsibility:**

  View of responsibility for actions as complex and shared with others, society, and unforeseeable events;

  versus

  Insistence that each individual is basically responsible for her or his own fate, achievements and misfortunes.

- **Flexibility vs. Rigidity:**

Thoughtful, flexible, open to dealing with complexity and ambiguity;

versus

Personal need or tendency to rush to decisions, cramming complex realities into large, simple categories.

6. Role on the Jury

The following characteristics affect whether or not a juror will be a significant participant in the deliberations. **They may be good or bad for the defense.**

- **Analytic Ability:**

Capacity to think through distinctions made by attorneys and the judge's instructions.

- **Leadership Potential:**

Traits such as gender, ethnicity, age, experience, intellectual ability, articulateness, personal charm will affect who will be chosen foreperson or who will exert opinion leadership over the other jurors (not always the same person).

- **Social/Negotiating Skills:**

Ability to influence others, not by leadership, but by friendliness, gregarious quality and skill at bringing others along. Pay attention to salespeople, den mothers, and others who have lots of contact with people in their work and home lives.

RATING SCALE

1 Must go; leader for prosecution; will be able to convince others.

2 Leans towards the prosecution, but won't be influential. Might stick to guns [2-] or might be won over by a strong pro-defense argument [2+], but won't be able to convince others.

3 Can live with. Someone who has no emotional stake in the outcome. Receptive, but not leaning toward defense.

4 Leaning in favor of the defense, but won't be influential. Might stick to guns [4+], or might be won over by a strong pro-prosecution argument [4-], but won't be able to convince others.

5 Pro-defense, influential, able to advocate for the defendant's case.

SHIFTING GOALS

1. Getting Information

Open ended questions to explore both the prospective juror's experiences as well as attitudes about those experiences and case issues in general. (See "Probes" attached.)

2. Cause Challenges

Enough opened ended questions to be able to use the juror's own words to argue for cause, followed by closed ended questions designed to pin down the juror's position and resist rehabilitation. Avoid use of the phrase "fair and impartial" unless the judge requires that level of proof of bias. Alternatives include:

- The prosecution starts out a little ahead; with an advantage.
- You would not require proof beyond a reasonable doubt, but some lesser standard.
- Law enforcement officers would be held to a different standard than other witnesses. You would tend to believe them, just because they are officers.

3. Rehabilitation

Closed ended questions designed to get the juror to say they could put their (pro-defense or anti-prosecution) experiences and attitudes aside and judge this case based only on the evidence presented and the judge's instructions.

- You don't know any of the people involved in this case, do you?
- You don't know what happened here?
- You consider yourself a fair minded person, don't you?
- You're willing to listen to all the evidence and decide this case based only on what's presented and not on your negative experience with the police, aren't you?

4. Ignore/Move On

When voir dire time is limited, don't waste time on clear followers.

SAMPLE JUROR QUESTIONNAIRE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF __________________

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ___________________ Defendant.	)	Case No. **JUROR QUESTIONNAIRE**

As a part of your jury duty, I am asking you to complete this questionnaire. Please answer the questions completely and honestly. The information that is contained in this questionnaire becomes part of the Court's permanent record in this case. Your name, as it relates to this questionnaire, will be kept confidential.

Because this questionnaire is part of the jury selection process, you must answer the questions under the penalty of perjury. You must fill out the questionnaire by yourself and not discuss it with anyone else. If you want to make further comments concerning your answers, please use the Explanation Sheet at the back of your questionnaire.

As you answer the questions, please keep in mind that there are no "right" or "wrong" answers. You are only expected to answer the questions to the best of your ability, but please be thorough. If truthful, an "I don't know" or "I can't remember" answer is acceptable. Where dates are requested, approximate dates (month and year) are satisfactory if exact dates are unknown. Complete answers are far more helpful because they shorten the time that it will take to select a jury. Some of the questions may call for information of a personal nature that you may or may not want to discuss in public, i.e. in an open courtroom with the press and/or public present. In any instance where you feel your answer might be embarrassing, you may indicate this by circling the question number and writing "personal" next to the item. Please answer the question on the questionnaire. The Court will give you an opportunity to explain your request for confidentiality.

Please answer all the questions to the best of your ability so that I will not have to return the questionnaire to you to be completed. Please use a black or blue pen when writing your responses and write legibly. Do not write anything on the backside of a page. If you need to make further comments concerning your answers, please use the sheet entitled "Additional Space for Continued Answers" found at the end of the questionnaire and refer to the question number to which your continued answer applies.

From time to time there may be news coverage of cases being tried in this courthouse. I do not know if there will be any additional coverage of this case. In order to ensure a fair trial for both sides in this case, it is necessary that you avoid any contact with the news media and avoid receiving any information about this case or subjects possibly related to it that does not come directly from testimony, evidence, or instructions given in the courtroom.

From this moment forward each of you is ordered not to read, view, listen to, or discuss any news media coverage that might have anything to do with this case: People v. ________, or any subjects possibly related to it. This also means that you are not to allow anyone else to tell you about these things. Should you be exposed to any news media coverage, even by accident, you must immediately inform me of that fact.

You are ordered not to discuss this case, the juror selection process, this questionnaire, or anything about what goes on inside this courtroom with anyone until your service as a juror is completed. This includes other jurors, friends, spouses, family, roommates, co-workers, or anyone. I am aware that it can be extremely difficult not to talk about something you are involved with and which you probably consider very important; however, you must follow this admonition. The only exception allowed is that you may inform your employer and members of your family that you are a potential juror in a case, what the anticipated length of the trial is, and your scheduled appearances in court. Other than that, you may not discuss anything about this case with anyone. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, You Tube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case.

Again, I ask that each of you be as open and candid as possible. I greatly appreciate your complete honesty in all these matters. Sometimes there are people who, in their effort to serve as jurors, believe that I or the attorneys are looking for certain answers to specific questions and respond accordingly. As a result, although they mean well, they are not totally honest and candid. The only things we are looking for are complete and honest answers.

If you believe that for some reason you may have difficulty in filling out the questionnaire, please explain that difficulty when you are given the questionnaire by court staff.

____

Judge of the Superior Court

JUROR QUESTIONNAIRE

General Information

1. Name:____Mr. Mrs. Miss Ms.
   (Last) (First)

2. Your age:_____ Place of birth:____

3. In what neighborhood (or area of the county) do you live?_________________________

4. Which of the following best describes your residence?

   ☐ Rental House ☐ Own Home
   ☐ Rental Apartment ☐ Own Mobile Home
   ☐ Own Condominium ☐ Other:_________________________________
   (please specify)

5. How long have you lived at your current address?_______________________________

6. How long have you lived in _______County?___________________________________

7. If you have lived at your present address for less than five years, please list previous addresses during the past five years. (Please do not give street address, list City/Town and State only): ____

   ____

   ____

8. What other communities have you lived in during your life?_______________________

   ____

9. a. Is English your native language? Yes ☐ No ☐

   b. If No, what is your native language?______________________________________

   c. Do you have difficulty speaking or understanding the English language? Yes ☐ No ☐

   d. If Yes, would this affect your ability to serve as a juror in this case? Yes ☐ No ☐

Work and Educational Background

10. What is your current job status?

    ☐ Working full-time ☐ Working part-time
    ☐ Unemployed ☐ Homemaker
    ☐ Retired. When?________ ☐ Full-time student

11. a. Occupation:_____________________________________ For how long?___________

    b. Employer? (Prior employer if retired) _______________________________________

    ____

    c. What do (did) you do at work? ____

    ____

    ____

d. Is (was) your job considered a management or supervisory position? Yes ☐ No ☐

If Yes, please describe, including how many people you supervise(d): ________________

____

12. Has your occupation changed in recent years? Yes ☐ No ☐

If Yes, what was your prior occupation and for how long? ________________________

____

13. What is the longest time you were employed by the same employer?________________

14. How many employers have you had over the last 10 years?________________________

15. Please list the types of jobs you have had over the period of your working life, including how long you held each position:____

____

____

16. What is the last level of education you completed:

☐ Some high school	☐ Technical/business school
☐ High school graduate	☐ College graduate
☐ Some college	☐ Post graduate work

Please list any degrees you have, if any, the schools and colleges you attended, and your major areas of study: ____

____

17. Do you have any plans to attend school or take classes in the future? Yes ☐ No ☐

If Yes, please explain:____

____

Family Background and Information

18. What is your marital status?

☐ Single and never married	☐ Currently divorced or separated
☐ Married and have been for _____ years	☐ Widowed/widower
☐ Single, married in the past for _____ years	☐ Other:______________________
☐ Single, living with partner for _____ years	

19. Is your spouse/partner employed? Yes ☐ No ☐

If Yes, what does he/she do and where is he/she employed? ________________________

____

If No, what work outside the home had he/she ever done?________________________

____

20. What is the educational background of your spouse or mate:

- ☐ Some high school
- ☐ High school graduate
- ☐ Some college
- ☐ Technical/business school
- ☐ College graduate
- ☐ Post graduate work

Please list any degrees they have, if any, the schools and colleges they attended, and their major areas of study: ____

____

21. What are/were your parents' occupations? (If deceased or retired, please state main jobs during working years.)

Mother
Occupation: ______________________

Father
Occupation: ______________________

Stepmother
Occupation: ______________________

Stepfather
Occupation: ______________________

22. Do you have any brothers or sisters? Yes ☐ No ☐ If Yes, please list:

Gender	Age	Education	Occupation	Spouse Occupation

23. What are the gender, ages, education, occupation, and spouse/partner's occupation of your children, if any?

Gender	Age	Education	Occupation	Spouse Occupation

24. What are the ages, education, occupation, and spouse/partner's occupation of your grandchildren, if any?

Gender	Age	Education	Occupation	Spouse Occupation

25. Does any adult other than your spouse or partner reside in your household? Yes ☐ No ☐

Relationship(s) to you: ______________________________

Occupation(s) & Employer(s): ______________________________

Educational background(s): ______________________________

Hobbies and Activities

26. What is your main source of news?

☐ Internet
☐ Magazines
☐ Newspaper
☐ Radio
☐ Television
☐ Friends, family, co-workers

27. What newspapers, if any, do you read regularly? ______________________________

____

28. What magazines, if any, do you subscribe to or read regularly? ______________________________

____

29. What television shows, if any, do you watch on a regular basis? ______________________________

____

30. What social, civic, environmental, or volunteer organizations do you and/or your spouse or partner belong to, either currently or in the past? ______________________________

____

____

31. What three people do you most admire and why? ______________________________

____

32. What three people do you least admire and why? ______________________________

____

Military Experience

33. a. Have you or anyone close to you ever served in the military? Yes ☐ No ☐

b. Relationship to you: ______________________________

c. Branch and highest rank: ______________________________

d. Dates of service: ______________________________ e. Discharge status: __________

f. Did you/they see combat? Yes ☐ No ☐ If Yes, where? ______________________________

g. Did you/they ever participate in a court martial? Yes ☐ No ☐
If Yes, please explain: ______________________________

____

Legal Experiences

34. a. Have you ever served as a juror before, including on a grand jury or as part of a military court martial? Yes No

b. If Yes, please complete for each case on which you served:

Civil or Criminal	Charges/ Allegations	When/Where	Jury reach a verdict?	Did you serve as foreperson?

c. Is there anything about your experience as a juror that would make you not want to serve again or that affected your opinion about the jury system? Yes No

If Yes, please explain:____

____

____

35. Do you or anyone close to you have any training or work experience in the law or legal system? Yes No If Yes, please explain:____________________________

____

36. Do you know any lawyers, judges or court personnel? Yes No

If Yes, please explain:____

____

Law Enforcement

37. Please read the following list of law enforcement agencies:

Attorney General
Youth Authority
CIA
County Jail
Department of Corrections
District Attorney
Drug Enforcement Agency
FBI
Federal Prisons
Highway Patrol
Immigration and Naturalization
Internal Revenue Service
Juvenile Delinquency Agency
Military Police
Police Department
Probation or Parole Agency
Security/Detective Service
Sheriff's Department
State Prison
United States Attorney
United States Customs
United States Marshal

Have you, or any close friends or relatives ever been employed by or otherwise affiliated with any of the law enforcement agencies listed above, or any other law enforcement organization? Yes ☐ No ☐

If Yes, please list:

Name	Relationship to You	Position	Agency

38. Have you or anyone close to you ever seriously considered, studied, or applied to become a police officer, probation officer, parole officer, or other law enforcement employee?
Yes ☐ No ☐ If Yes, please explain:____

____

39. Have you ever volunteered with a law enforcement agency or gone on a "ride along" with any law enforcement officers? Yes ☐ No ☐ If Yes, please explain:_______________

____

40. In the course of your work, do you have regular contact with any prosecutors, law enforcement agencies, or officers? Yes ☐ No ☐
If Yes, please explain:____

____

41. Would you automatically believe the testimony of a law enforcement officer simply because he or she is a law enforcement officer? Yes ☐ No ☐
If Yes, please explain:____

____

42. Would you automatically disbelieve the testimony of a law enforcement officer simply because he or she is a law enforcement officer? Yes ☐ No ☐
If Yes, please explain:____

____

43. Would you favor the side that had law enforcement officers as witnesses? Yes ☐ No ☐
If Yes, please explain:____

____

44. Would you disfavor the side that had law enforcement officers as witnesses? Yes ☐ No ☐
If Yes, please explain:____

____

____

45. Have you or anyone close to you ever had a particularly positive experience involving law enforcement? Yes □ No □ If Yes, please explain:___________________________

____

____

46. Have you or anyone close to you ever had a particularly negative experience involving law enforcement? Yes □ No □ If Yes, please explain:___________________________

____

____

Criminal Justice Experiences

47. Have you or any family members ever had the occasion to use the services of the District Attorney's Office, such as Family Support, Consumer Fraud or Victim/Witness Division?

Yes □ No □ If Yes, please explain:____

____

48. Have you or any family members ever been involved with any group that concerns itself with victims' rights, crime suppression, and/or criminal justice issues (i.e., Fraternal Order of Police, Mothers Against Drunk Drivers, etc.)? Yes □ No □
If Yes, please name the group and describe your/their involvement:___________________

____

49. a. Have you or anyone close to you ever been the victim of a crime (whether it was reported to the police or not)? Yes □ No □

If Yes, what type of crime(s)?____

____

b. Were you interviewed by the police? Yes □ No □

c. Was anyone prosecuted? Yes □ No □

d. Did you testify in court? Yes □ No □

e. Race/ethnicity of perpetrator(s):____

f. Outcome of the case(s)? ____

____

g. Were you satisfied with how the matter was handled/resolved? Yes □ No □
Please explain:____

____

50. a. Have you or anyone close to you ever witnessed a crime? Yes □ No □

If Yes, please explain:____

____

b. Were you interviewed by the police? Yes ☐ No ☐

c. Was anyone prosecuted? Yes ☐ No ☐ d. Did you testify in court? Yes ☐ No ☐

e. Outcome of the case? ____

____

51. Have you or anyone close to you ever had to make any type of suspect identification (i.e., viewing photos of suspects, attending a line up, etc.)? Yes ☐ No ☐ If Yes, please explain:____

____

52. Have you or anyone close to you ever testified in a criminal case? Yes ☐ No ☐ If Yes, please explain:____

____

53. Have you ever called the police regarding a disturbance or crime at your residence or in your neighborhood? Yes ☐ No ☐ If Yes, please explain:________________________

____

54. a. Have you or anyone close to you ever been physically attacked? Yes ☐ No ☐

If Yes, please explain:____

____

b. Was the attacker a stranger or someone familiar to you/the victim?________________

c. What was the race/ethnicity of the attacker?________________________________

55. Have you or anyone close to you ever been shot at, accidentally or otherwise?

Yes ☐ No ☐ If Yes, please explain:____

____

56. Have you or anyone you know ever been in a situation where you felt your physical safety was threatened by another individual? Yes ☐ No ☐

If Yes, please explain:____

____

57. Have you or anyone close to you lost a loved one or friend due to violence? Yes ☐ No ☐ If Yes, please explain:____

____

58. To your knowledge, have you, any family member or close friends ever been arrested, accused or convicted of a crime?

Yes ☐ No ☐ If Yes, please explain:____

____

Crime Concerns

59. How worried are you about becoming a victim of a violent crime?

Extremely worried ☐ Very worried ☐ Somewhat worried ☐ Not at all worried ☐

Please explain:____

60. Have you ever changed your behavior because of a concern about becoming a crime victim? (For example, changed your commute route or time, decided not to go out alone at night, walked with others rather than alone, etc.) Yes ☐ No ☐

If Yes, please explain:____

61. How serious of a problem do you think crime is in your neighborhood?

Extremely serious ☐ Very serious ☐ Somewhat serious ☐ Not at all serious ☐

Please explain:____

62. Have you ever moved or considered moving because of concerns about crime in your neighborhood? Yes ☐ No ☐ If Yes, please explain:______________________________

63. Do you or any member of your family participate in any neighborhood crime prevention groups? Yes ☐ No ☐ If Yes, please explain:______________________________________

Criminal Justice Attitudes

64. In general, what are your feelings about the criminal justice system?

65. Would your attitudes about the justice system cause you to favor the prosecution or defense before hearing all of the evidence? Yes ☐ No ☐

If Yes, please explain:____

66. Do you believe that if the police and the prosecution have gone to the trouble of arresting a defendant and bringing that person to trial that person is probably guilty? Yes ☐ No ☐

If Yes, please explain:____

67. Do you believe it is possible for someone to be wrongfully convicted of a crime as serious as murder? Yes ☐ No ☐ If No, please explain:__________________________

____

68. Do you think too many criminal defendants go free on "loopholes" or "technicalities"? Yes ☐ No ☐ If Yes, please explain: ______________________________________

____

69. Do you agree with the statement, "Once a criminal, always a criminal"? Yes ☐ No ☐ If Yes, please explain: ____

____

70. In a criminal case, the law says a defendant is presumed to be innocent until the prosecution proves guilt beyond a reasonable doubt. Regardless of this law, do you think that when someone is accused of a serious crime he or she should be required to prove his or her innocence? Yes ☐ No ☐
Please explain:____

____

71. Do you believe criminal defendants should be required to testify? Yes ☐ No ☐

Please explain:____

____

72. Would you be more likely to return a verdict of guilty if you did not hear the defendant testify, even if the judge instructed you not to consider his decision not to testify as evidence? Yes ☐ No ☐ Please explain:____________________________________

____

73. Which do you think is worse, convicting an innocent person or letting a guilty person to free? ____

____

74. Do you think the justice system makes it too hard for police officers and prosecutors to convict people accused of crimes? Yes ☐ No ☐
Please explain:____

____

75. What are your opinions about attorneys who prosecute people accused of crimes?

____

____

76. What are your opinions about attorneys who defend people accused of crimes?

____

____

77. a. Do you watch any TV programs that show real-life or dramatized police activities? Yes ☐ No ☐ If Yes, which shows, and how often do you watch them?_______________

____

b. What is it that you like about these programs?____________________________________

____

78. a. Over the past few years, what criminal cases have you followed or paid attention to?

____

____

b. What was it about those cases that interested you? ____________________________

____

c. What opinions of the criminal justice system did you form as a result of these cases?

____

____

79. If the court instructs you not to discuss the case with anyone until it is finally submitted to you for deliberation at the end of the trial, and then only to discuss it with your fellow jurors, would you have difficulty following that instruction? Yes ☐ No ☐

If Yes, please explain:____

____

80. The same standards for evaluating the testimony of a witness apply to every witness, regardless of whom the witness is and which side he/she is testifying for. Would you have any difficulty following this rule? Yes ☐ No ☐
If Yes, please explain: ____

____

81. If the judge's instructions on the law differ from your own beliefs or opinions, will you have any difficulty applying the law as the judge instructs you, regardless of your own personal views? Yes ☐ No ☐ If Yes, please explain:___________________________

____

Drugs and Alcohol

82. Have you or anyone close to you ever had a substance abuse problem involving alcohol, drugs, or prescription medication? Yes ☐ No ☐

If Yes, please explain:____

____

83. How has drug or alcohol abuse (by anyone) affected your life?_______________________

____

____

84. What are your general feelings regarding the use and sale of illegal drugs?_____________

____

85. Do you live or work near, or regularly travel through an area where there is known drug activity? Yes ☐ No ☐ If Yes, please explain:___________________________________

____

86. Have you or anyone close to you ever been affected by drug-related criminal activity or been involved in any drug-related criminal incidents? Yes ☐ No ☐

If Yes, please explain:____

____

87. Have you or anyone close to you ever filed a complaint with law enforcement or otherwise complained to any public or civic authority about drug activity? Yes ☐ No ☐

If Yes, please explain:____

____

88. How serious of a problem do you think illegal drugs are in _________ County?

Extremely serious ☐ Very serious ☐ Somewhat serious ☐ Not at all serious ☐

Please explain:____

____

89. If you learned that someone had been convicted of selling illegal drugs in the past, would that fact alone cause you to disregard his or her testimony? Yes ☐ No ☐

Please explain:____

____

Guns/Firearms

90. What is your level of familiarity with guns or firearms?_____________________________

____

91. Have you or anyone close to you ever owned a gun? Yes ☐ No ☐

If Yes, please explain, including type(s) of gun and purpose:_________________________

____

92. Have you ever fired a gun or rifle? Yes ☐ No ☐ If Yes, please explain:_____________

____

93. Have you or anyone close to you ever had a gun or rifle pointed at them? Yes ☐ No ☐ If Yes, please explain:____

____

94. Have you ever been in a situation where you had to point a gun at another person for any reason? Yes ☐ No ☐ If Yes, please explain:_____________________________________

____

95. Do you or anyone close to you belong to any organizations that are involved with advocacy for or against firearm ownership? Yes ☐ No ☐

If Yes, please explain:____

____

Race/Ethnicity

96. How much social contact do you have with people of races or ethnicities other than your own?____

____

97. When you were growing up, what was the racial/ethnic makeup of your neighborhood?

____

98. Have you ever had a negative experience with an African-American individual?

Yes ☐ No ☐ If Yes, please explain:________________________________

____

99. Is there any racial or ethnic group with which you do not feel comfortable?

Yes ☐ No ☐ If Yes, please explain:________________________________

____

100. Have you ever been afraid of someone of another race? Yes ☐ No ☐ If Yes, please explain:____

____

101. How much racial discrimination/prejudice do you think African Americans in ______ County face today?
☐ A great deal of discrimination/prejudice
☐ Some discrimination/prejudice
☐ Very little discrimination/prejudice
☐ No discrimination/prejudice

102. Do you believe that certain races or ethnicities are more violent than others?

Yes ☐ No ☐ If Yes, please explain:________________________________

____

Publicity

This case involves [factual summary].

103. Have you read, seen or heard anything about this case? Yes ☐ No ☐

If Yes, please give a detailed account of <u>everything</u> you remember reading, seeing or hearing about this case and the circumstances surrounding it, including where you received the information: ________________________________

____

____

____

104. When you learned about this case, what were your reactions?_______________________

____

____

____

105. If you have been exposed to pretrial publicity about this case, it would be natural to form some opinions about what you have heard. Have you formed opinions about this case? Yes ☐ No ☐ If Yes, what are your opinions?___________________________________

____

____

106. Have you discussed this incident or heard anyone else talk about this incident?

Yes ☐ No ☐ If Yes, please explain what was discussed and with whom:

____

____

____

107. What opinions about _____________ ‘s guilt or innocence have you heard?

____

____

____

108. Have you personally ever expressed or held an opinion about __________ ’s involvement in this case? Yes ☐ No ☐ If Yes, please explain:________________________________

____

____

109. What opinions or feelings have you formed about __________, the person arrested and charged in this case?____

____

110. Do you believe that because _____________ has been charged and is being tried for this killing that he is probably guilty? Yes ☐ No ☐ If Yes, please explain:_____________

____

____

111. Were you or anyone you know acquainted with the deceased victim, ____________ or any member of his family? Yes ☐ No ☐ If Yes, please explain: __________________

____

112. Did you or anyone you know attend any memorial held for ___________________?

Yes ☐ No ☐ If Yes, please explain: ____

____

113. Are you or anyone you know well acquainted with the defendant _______________ or any member of his family? Yes ☐ No ☐ If Yes, please explain:________________________

____

114. If you learned that __________, the defendant, had a prior criminal record, would that fact alone cause you to believe he is guilty of the crimes charged in this case? Yes ☐ No ☐ If Yes, please explain:____

____

115. Do you expect _____________ to testify at his trial? Yes ☐ No ☐

Please explain:____

____

116. What was your reaction when you learned you were a prospective juror in this case?

____

____

117. Based on what you know about this case, have you formed the opinion that ___________ is guilty or not guilty of the murder of ___________________ ?

Guilty ☐ Not Guilty ☐ Unsure ☐

Please explain: ____

____

118. Have you or any member of your family ever lived in or around __________________? Yes ☐ No ☐ If Yes, please explain:____

____

119. Are you familiar with the area in and around _____________? Yes ☐ No ☐ If Yes, please explain:____

____

120. Do you know anyone who lives in ________? Yes ☐ No ☐ If Yes, please explain:

____

____

121. Have you or anyone close to you ever had a negative experience in ______________?

Yes ☐ No ☐ If Yes, please explain:____

____

122. What are your opinions or impressions of the _______ area of the county?

____

____

Case Characteristics

123. Knowing the nature of this case, is there any experience that you, a family member or close friend has had which would affect your ability to serve fairly as a juror in a case such as this? Yes ☐ No ☐

If Yes, please explain:____

____

124. If you are selected as a juror on this case, you may be required to view the death scene and/or coroner's photographs of the victim. Is that something you think you would be able to do? Yes ☐ No ☐

If No, please explain:____

____

Do you think that these types of photos would upset you or influence you so that you would be unable to serve as a juror in this case? Yes ☐ No ☐

If Yes, please explain:____

____

125. Has there recently been a death in your family or has anyone close to you recently died?

Yes ☐ No ☐ If Yes, please state the person's relationship to you and how this would affect your ability to be a juror in this case:____________________________

____

Concluding Questions

126. Do you know any other person called for jury duty in this case? Yes ☐ No ☐

If Yes, please list the person's name and how you are acquainted: ____________________

____

127. Do you have any health problems, emotional difficulties, problems at home or on the job that would affect your service as a juror in this case? Yes ☐ No ☐

If Yes, please explain:____

____

____

128. Are you presently taking any medication which might affect your intellect or emotions?

Yes ☐ No ☐ If Yes, please explain:________________________________

____

129. Please state any reason why you believe that you could not or should not serve as a juror in this case: ____

____

130. Would you like to be a juror in this case? Yes ☐ No ☐ Please explain:______________

____

____

131. Is there anything not covered in this questionnaire, including your present state of mind, that you feel either of the attorneys or the judge should know so that your ability to be a fair and impartial juror in this case can be evaluated? Yes ☐ No ☐

If Yes, please explain: ____

____

132. Are there matters you would like to discuss outside the presence of other jurors?

Yes ☐ No ☐ If Yes, please list the question number (if applicable) or the nature of what you wish to discuss privately:____

____

____

____

133. The following is a list of potential witnesses in this case. If you know or have heard of any of these potential witnesses, please circle the name and provide an explanation in the space provided at the end of the list.

INSERT WITNESS LIST

Please list each person you know and describe how you know them:__________________

____

____

____

____

____

____

I SWEAR UNDER THE PENALTY OF PERJURY THAT THE FOREGOING ANSWERS ARE TRUE AND CORRECT.

____________________________________ __________________________

Signature of Juror Date

Additional Space for Continued Answers

(If you could not sufficiently answer any question in the space provided, please use this space to provide that information. Please include what question number and page number the answer is continued from.)

Writing to Maximize Voir Dire Effectiveness: Using Questionnaires, Motions, and Carefully Crafted Written Questions to Learn About Prospective Jurors

By Juval O. Scott
Attorney Advisor
Defender Services Office, Training Division
Washington, D.C.

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Writing to Maximize Voir Dire Effectiveness: Using Questionnaires, Motions, and Carefully Crafted Written Questions to Learn About Prospective Jurors

By Juval O. Scott
Attorney Advisor
Defender Services Office, Training Division
Washington, D.C.

I. Introduction

"*I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.*"

Thomas Jefferson

Voir dire is taught in law school clinics and trial skills programs throughout the country as something attorneys must learn to do on their feet. While selecting a jury is an invaluable tool that all trial attorneys should know how to do in a skillful and artful manner, the reality is that many courts throughout this country never let the attorney utter a word during this process.

The United States Supreme Court has noted that jury selection is 'particularly within the province of the trial judge.'[1] " When trial counsel is unable to question the venire, they are at a distinct disadvantage in achieving the goal of getting their client a fair trial. Using written motions is one way to minimize the impact of an unfair process. This outline will provide suggestions for getting the judge to use juror questionnaires, crafting motions that will allow counsel to gather additional information, and writing questions for the judge that align with the defense theory of the case when the court won't allow the attorneys to spearhead truth-gathering at the initial stage of trial.

[1] Skilling v. United States, 130 S.Ct. 2896, 2917 (2010).

II. Jury Questionnaires[2]

Death penalty attorneys seem to have significant latitude when it comes to having the court issue a questionnaire before trial. This is likely because the court knows that the condemned will engage in a rigorous appellate process, seeking any and every error in hopes of having the ultimate sentence vacated. Similarly, attorneys in high profile cases seek questionnaires in hopes of learning more about their potential jury pool, and the courts often acquiesce because the threat of a taint to the pool may result in reversal. There's no reason why attorneys can't seek a questionnaire in other types of cases.

Seeking a questionnaire in a non-death and/or high profile case follows the same procedure, but counsel must be methodical when approaching the court. Like everything in litigation, counsel starts with a motion to the judge requesting that additional questions be posed to the jury via questionnaire. There will be resistance, and often times formal objections from the prosecutor (because apparently learning all we can about jurors doesn't benefit all parties). Thus, counsel must first explain to the judge why the form they ordinarily send to jurors is not sufficient. This means counsel must look at the questions on the standard form, evaluate them, and make sure that the questions on the additional form are different and relevant to the case at hand. Submitting a lengthy form with duplicate questions is the quickest way to get the motion denied. If counsel has

[2] Attached this outline is a template of a motion seeking a supplemental juror questionnaire.

identified fifteen questions they would like in addition to the standard form, it is best to submit only those questions[3].

It is equally important that counsel understand the process that the clerk's office uses to disseminate the form they already use. This will allow counsel to further explain how the distribution of their form will not further burden the court staff. While there is nothing in the Constitution that cites the convenience of the clerk's office as a standard for consideration, one can be sure that a failure to explain how the court's efficiency will not be interrupted will result in a denial of the motion to have the questionnaire submitted. Keep in mind that the average judge that disallows attorney-conducted voir dire often sees no utility in having a juror questionnaire in what they deem to be a run-of-the-mill case, so there are competing interests.

When determining what questions are appropriate for the questionnaire, it is important that counsel consider the number of proposed questions, their relevance to the case at hand, and their perceived intrusiveness. Of course counsel would prefer to submit a long questionnaire examining every aspect of a potential juror's life. Unfortunately, the court is likely to see this differently. Remember, counsel has already articulated a basis for the questionnaire, so figuring out to meet that objective in a succinct manner will always be better received.

Having a clear, concise theory of the case is critical. What does counsel need to glean to best assist their client. For a court that has consistently denied these requests,

[3] One obvious exception here is there should be a space for the juror's name to ensure that the standard and supplemental forms both came from the same person.

shorten the questionnaire and focus on one or two points. If the case is more complex—multiple defendants with varying theories of defense, trial lasting more than a week, an excessive amount of exhibits, focusing on one to two points may not be possible under the defense theory. There is no magic formula, so counsel should begin thinking about what their ideal questionnaire will look like as soon as there is a workable theory of the case.

III. Motions

Federal Rule of Criminal Procedure 24(a) gives the court discretion over whether the court or attorney conducts voir dire[4]. Federal Rule of Criminal Procedure 24(a) states: "(1) *In General.* The court may examine prospective jurors or may permit the attorneys for the parties to do so. (2) *Court Examination.* If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper ." Under this Rule, district courts have broad discretion relating to voir dire, so long as the questions presented by the trial court ensure that the defendants have "a fair trial by a panel of impartial, 'indifferent' jurors.[5]"

More often than not, the court is content to conduct jury selection under the mistaken notion that they can elicit enough information to help the parties choose an unbiased and impartial jury, thus depriving defense counsel of the opportunity to

[4] While each state has its own rules of criminal procedure, I used the federal rules as the default because the majority of federal jurisdictions do not allow attorney conducted voir dire. Further, the language in many of the state rules track the federal language.
[5] Irvin v. Dowd, 366 U.S. 717, 722 (1960).

properly assess the pool. What's more is they can do so knowing that the appellate courts fully support their right to deny counsel proper vetting of the jury. This should not go unchallenged.

If the court does not routinely allow attorneys to ask the questions themselves, requesting that a limited portion of voir dire be conducted by defense counsel is a wise move[6]. It's possible that defense counsel will have this motion denied more than once, but when constantly peppered with the requests by multiple attorneys, courts will often give in and finally allow the parties to ask some questions themselves. Remember, counsel can get what counsel doesn't ask for.

File the Motion for Partial Attorney Conducted Voir Dire early enough to ensure adequate time to prepare. With only fifteen or thirty minutes to talk to the jurors, counsel should not waste time with questions or banter that does not assist them with getting rid of the "bad" jurors.

There are other motions that counsel can file to help get rid of unfavorable jurors, convince the court that the process overall is flawed (bolstering counsel's claim that attorney conducted voir dire is appropriate) and/or create reversible error (although admittedly reversible error is not likely). While this is not an exhaustive list, it is certainly a good start.

A. **Request that all Potential Juror Requests for Extensions, Excusals, or Continuances in the Venire for Defendant's Trial be Referred to the Trial**

[6] A memorandum of law supporting a Motion for Partial Attorney Conducted Voir Dire is attached to this outline.

Judge, Together with Notice to both Parties, and an Opportunity to Object or Offer Proper Solutions: Depending on the jurisdiction, potential jurors are told they are excused from service by a courtroom deputy or clerk. The excuses for why they can't show up run the gamut, but often times they are the I-created-some-b.s.-because-I-just-don't-wanna excuse. This plays, in part, into the dynamic of having no jurors of color in the venire. It's not science, but it's a worthy motion and may help set up a future challenge to the court's method for calling jurors to court.

B. **Request to Have All Jurors Requests for Excusals or Continuances be made on the Record with Parties Present**: Filing this motion allows counsel to make a record that potential jurors were improperly dismissed and the dismissal impacted the fairness of the trial. Again, it is possible that counsel will find a pattern in the dismissals. Getting this information on the record will assist appellate counsel, should they choose to challenge this issue.

C. **Request for Early List of Potential Jurors in the Venire One Week Before Trial:** There is nothing like getting the names of the folks that may determine your client's fate in enough time to actually make a meaningful analysis of whether they are someone counsel wants off the jury. The obvious ethical constraints apply, but simple Google searches often reveal key information. It helps to know if there's a vocal anti-Semitic juror in the venire for your Jewish client's trial. Sure he/she will say they can be "fair and impartial", but would wise counsel leave that to chance? People seem far more willing to profess their true feelings on the internet. Counsel simply can't gather the amount of information needed to make the best for cause challenge when searching from their phone the morning of trial. Courts have this information in advance, and sharing it simply requires that they click the print button one Friday earlier than they ordinarily would have.

D. **Request for Voir Dire on Race and Jury Certification of Fairness:** In the Northern District of Iowa, Judge Mark Bennett has each of his jurors watch the "What Would You Do" stolen bicycle video[7] showing glaring differences in the way a black male, white male, and attractive white female are treated when attempting to steal a bicycle in a park. After they watch the video, there is a discussion and each juror signs a certification vowing to act without prejudice[8]. This causes jurors to be more careful in their deliberations, contemplating whether they feel a certain way based upon the facts or their own biases. While Judge Bennett does this regularly, other judges are beginning to warm to this idea. In the Western District of Washington, upon motion by Assistant Federal Defender Kyana Givens, a judge allowed the video to be shown and extensive questioning on the issue of race. There are likely many other instances happening throughout the country. Given what we know about implicit bias, a failure to request that the court address this issue is a missed opportunity.

[7] Long version found at the following link: https://www.youtube.com/watch?v=S0kV_b3IK9M
[8] A copy of the certification used in Judge Bennett's courtroom is attached.

E. **Motion in Limine for Jury Instruction on Implicit Bias:** In conjunction with the aforementioned video and certification, Judge Bennett gives a jury instruction addressing implicit bias[9]. Again, the instruction has the powerful effect of making the jury think long and hard before determining the accused's fate.

IV. Questions Submitted to Judge[10]

"In the midst of chaos, there is also opportunity."

-Sun Tzu

Counsel fought for the questionnaire. They lost. Counsel fought some more for attorney conducted voir dire, and lost again. Counsel keeps fighting because it's not over. If one is unable to convince the court that a questionnaire is appropriate and/or that voir dire is more beneficial when conducted by the attorney, it is critical that counsel submit questions for the judge to ask the venire. Like the questions submitted as part of the questionnaire, they should advance the theory of defense.

The difficulty in advancing the theory of defense through the judge is they view the objective of voir dire different. For them it's simple—get a few folks in the box that don't show any clear bias. Defense attorneys want to knock out anyone that won't be receptive to their theory of defense and/or is clearly looking to screw the client for some not-so-obvious reason. These competing interests are difficult to resolve, but if counsel simply can't get the judge to allow them to ask questions, this is the best alternative.

[9] The instruction Judge Bennett uses is attached.
[10] Sample questions on limited topics are attached.

Note that the court is not required to ask the questions because they were submitted. It is their discretion, so crafting good questions with an explanation of its importance is key. Counsel should be specific with the goal of their questions. Often times the court won't ask the submitted question, but will attempt (good or bad) to get the information a different way. Decide early how the judge can best get the information counsel needs.

V. Conclusion

"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."

-John Adams, 1774

We must continue to fight for defendant's rights in the process that is at the very core of our judicial system. There is no substitute for being able to stand in the well of the court and have a conversation with the people that may be called upon to determine the client's fate[11]. After all, "the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty," which assessment cannot be matched through reliance upon a written record[12]. This in-person voir dire process "affords the trial court a more intimate and immediate basis for assessing the venire member's fitness for jury service.[13]" But, for now we are stuck with the reality that many judges are not yet prepared to allow defense counsel to take control when it comes to voir dire. Well-

[11] Recommended reading, Judge- Versus Attorney-Conducted Voir Dire, Susan Jones, Law and Human Behavior, Vol. 11, No. 2, 1987

[12] Skilling, 130 S.Ct. at 2918.

[13] Id.

crafted, methodical motions and questions from the defense will help counsel discover more about the venire until we reach a time where courts realize the benefit of allowing the parties to talk to the jury and relinquish control.

TEMPLATE: MOTION FOR SUPPLEMENTAL JURY QUESTIONNAIRE. IN THE EVENT THE PROSECUTOR AGREES THAT A QUESTIONNAIRE IS APPROPRIATE, FILE IT AS AN UNOPPOSED MOTION. THE INFORMATION IN THIS MOTION IS A CULMINATION OF INFORMATION GATHERED AND BORROWED (READ STOLEN WITH PERMISSION) FROM COLLEAGUES THROUGHOUT THE YEARS.

CAPTION

MOTION FOR SUPPLEMENTAL JURY QUESTIONNAIRE

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

Thomas Jefferson

CLIENT NAME stands before this Court accused of CHARGE. The allegations include, ADD GENERAL SYNOPSIS OF FACT IN YOUR CASE THAT FRAME THE ISSUE FROM THE DEFENSE PERSPECTIVE. On DATE, a jury make a determination regarding Mr./Ms. CLIENT LAST NAME's innocence.

USE THIS PARAGRAPH TO EXPLAIN TO THE COURT WHY THE ALLEGATIONS AND YOUR THEORY OF THE CASE PRESENT UNIQUE AND/OR SENSITIVE ISSUES THAT WARRANT ADDITIONAL QUESTIONING.

In the interest of ensuring an efficient, but fair process, the proposed questionnaire will aid the parties and this Court in obtaining and receiving information that will be helpful for the exercise of early challenges for cause. AND/OR The questionnaire will allow the prospective jurors to maintain a measure of privacy on the sensitive issues that arise in this case (SEXUAL ABUSE, ALCOHOL ABUSE, OTHER ADDICTIONS, RACE, RELIGION, ETC.—THIS WILL DEPEND ON YOUR THEORY OF THE CASE, BUT BE SURE TO ARTICULATE THE PARTICULAR SENSITIVITY COUNSEL IS CONCERNED

ABOUT)[1]. AND/OR Further, there are mundane issues that must be explored, and the proposed questionnaire will allow the parties and the court to filter through those critical issues while maintaining the voir dire time in court for more substantive issues.

Key to our country's legal processes is the right to a fair and impartial jury chosen from the representative cross-section of the community, as it is guaranteed by the United States Constitution (AND THE STATE CONSTITUTION, IF APPLICABLE).

The Court and the parties are charged with ensuring that peremptory strikes are used in a manner that does not violate the Equal Protection Clause of the Fourteenth Amendment. This questionnaire will assist the court in addressing any challenges brought under Batson v. Kentucky , 476 U.S. 79 (1986), for the inappropriate use of preemptory challenges.

SIGNATURE

[1] See ABA Principles for Juries and Trials, Principle 7(A)(5), 2005

TEMPLATE: MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL ATTORNEY CONDUCTED VOIR DIRE. THIS WILL ACCOMPANY A MOTION SIMPLY MAKING THE REQUEST. DEPENDING ON THE COURT, IT MAY BE WISE TO REQUEST A SPECIFIC TIME FRAME (YOU CAN START WITH 30 MINUTES PER SIDE). IF YOU ARE REQUESTING THAT THE ENTIRE PROCESS BE CONDUCTED BY COUNSEL, YOU WILL CERTAINLY WANT TO REQUEST MORE TIME. THIS MOTION IS A COMBINATION OF INFORMATION GATHERED BY MYSELF AND BORROWED (READ STOLEN WITH PERMISSION) FROM COLLEAGUES THROUGHOUT MY CAREER. FILING THIS MOTION RESULTED IN THE ABILITY TO CONDUCT MY OWN VOIR DIRE, ALTHOUGH IN SOME CASES IT WAS LIMITED. MODIFY (READ UPDATE), STEAL, BORROW, DELETE AS YOU WISH.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL ATTORNEY CONDUCTED VOIR DIRE

INTRODUCTION

One important mechanism for ensuring impartiality is voir dire, which enables the *parties* to probe potential jurors for prejudice.

Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998)(emphasis added)

START WITH THE CLIENT, WHY IS HE/SHE HERE AND SOME BASIC FACTS.

To further the goals of justice, including the right of the accused to have his innocence or guilt determined by a body of his peers that is unbiased and impartial, CLIENT requests that the court permit each side in this case thirty minutes of attorney conducted voir dire as a complement, and in addition to the court's voir dire. Supplemental attorney conducted voir dire, while not statutorily or constitutionally mandated, will add an important dimension to the voir dire process and is in the interest of justice. It will most effectively advance the goal of obtaining an unbiased and impartial jury through the intelligent exercise of peremptory challenges by counsel and full and informed consideration by the court of any challenges for cause which may be made.

ARGUMENT

One right the constitution confers on a defendant is the right to an impartial jury. Voir dire plays a critical function in protecting this constitutional right. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Because of the crucial function of the peremptory challenge in acquiring an impartial jury, a "system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

Rule 24(a) of the Federal Rules of Criminal Procedure grants the court broad discretion in conducting the voir dire examination. Included within the broad discretion is the right to control who conducts the voir dire; the rule specifically provides that the court may either permit counsel to conduct the entire voir dire examination, permit counsel to conduct some voir dire examination to supplement initial voir dire examination by the court, or permit no voir dire examination by counsel and conduct the entire voir dire examination itself. *See* Fed. R. Crim. Pro. 24(a).

The court's discretion under Rule 24(a) is not without limit. It is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931). There are several reasons attorney conducted voir dire advances this goal.

A. ATTORNEY CONDUCTED VOIR DIRE WILL PERMIT THE MOST INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGES.

1. *The Importance of Voir Dire to Peremptory Challenges.*

The dual purpose of voir dire is to provide enough information to exercise challenges for cause and enough information to exercise peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). These challenges are intended to advance the goal of meeting the constitutional requirement of an impartial jury. Challenges for cause are narrow in scope; they "permit rejection of jurors on narrowly specified, provable and legally cognizable bas[e]s of partiality." *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Peremptory challenges, on the other hand, can be exercised "without a reason stated, without inquiry, and without being subject to the court's control." *Id.* at 220. *But see Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, discussed *infra* pp. 10-12. (NEED TO UPDATE)

Because of the narrow scope of challenges for cause, the peremptory challenge is often the most useful and important tool for a litigant in picking an impartial jury. As noted by the Supreme Court in *Swain*, "[t]he voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain*, 380 U.S. at 218-219.

In order for a peremptory challenge to serve its purposes, it must be intelligently exercised. This requires that the parties obtain sufficient information from the potential jurors upon which to base their challenges. *Art Press, Ltd. v. Western Printing Machinery Co.*, 791 F.2d 616, 618 (7^{th} Cir. 1986). As one court has noted, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977). *See also United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980) ("[t]his court has previously stressed that voir dire examination not conducted by counsel has little meaning").

2. *The Contribution of The Attorneys' More In-Depth Knowledge of the Case.*

One reason why a short period of attorney conducted voir dire after the court's general voir dire will contribute to more complete information about the potential jurors is the attorneys' more in-depth knowledge of the case. Important follow-up questions are more likely to occur to an advocate than a judge for several reasons, including the fact that a judge "does not have the advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said" and the fact that "the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry." Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 549 (1975). The Fifth Circuit has recognized:

> While Federal Rule of Criminal Procedure 24(a) gives wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The "federal" practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weaknesses of the case. . . Experience indicates that in the majority of situations questioning by counsel would be more likely to fulfill this need [for information upon which to base the intelligent exercise of peremptory challenges] than an exclusive examination in general terms by the trial court.

United States v. Ible, 630 F.2d 389, 395 (5th Cir. 1980). *Accord United States v. Corey*, 625 F.2d at 707; *United States v. Ledee*, 549 F.2d at 993.

Voir dire conducted solely by the court interferes with the intelligent exercise of peremptory challenges because the court is usually less familiar with the facts and nuances of the case. Attorneys have been working for months on the case. They are most likely to know the areas of questioning that must be explored further in order to uncover the prejudices that are most pertinent to the evidence which will be presented at trial. They also act with an awareness that they will have to base peremptory challenges on the juror's answers.

3. The Contribution of the Attorneys' Different Relationship to Potential Jurors.

Another reason why attorney conducted voir dire—in addition to court voir dire—will elicit more complete information from potential jurors arises from the attorneys' relationship to the jurors. Psychological studies suggest at least two differences between attorney-juror relationships and judge-juror relationships that should enable attorneys to obtain more or different information from some potential jurors. *See* Suggs and Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245, 253-58 (1981).

The first difference which may have an impact is the difference in status between judges and attorneys. Psychological studies suggest two things about the relationship between self-disclosure and the status of an interviewer: people (1) tend to disclose more to a person who is perceived to have higher status than they, but (2) tend to disclose less if the status differential is too great. Suggs and Sales, *supra* at 253. In other words, a person is likely to provide the most self-disclosure to a person who is perceived to have somewhat greater status but not such greater status that the juror finds it impossible to identify with the interviewer. *Id.* at 253-54.

This suggests that supplemental attorney conducted voir dire can add an important dimension to the voir dire process. Potential jurors come from widely varying social backgrounds, ranging from the unemployed, to employed blue collar workers who have only a high school education, to college students, to established and well-educated professionals. For some of these individuals, the relative "status" of judges and attorneys may be such as to make the judge most likely to obtain complete self-disclosure. But for others it may be the status differential with attorneys that will result in complete self-disclosure. By having both attorneys and the court conduct voir dire, self-disclosure is most likely to be maximized.

A second difference in the juror-attorney relationship and the juror-judge relationship is also significant. As one set of commentators has noted, "the judge has an extremely difficult role to fulfill, both intellectually and emotionally. He must be the arbiter of fine points of law, coordinate the activities of all parties to facilitate a just result and remain above interparty rivalries, all of which require that he remain aloof and emotionally detached." Suggs and Sales, *supra* p. 7, at 254. Attorneys are not so constrained. *See id*. This is reflected most superficially by the fact that it is the judge for whom jurors must stand upon his entry into the courtroom, not the attorneys.

This is important to the question of jurors' self-disclosure. Psychological studies show -- consistent with common sense -- that people tend to be less willing to talk and reveal themselves to those who must remain at least somewhat detached. Suggs and Sales, *supra* p. 7, at 254-55. Permitting the attorneys to conduct some follow-up voir dire in addition to the court's voir dire will counter this problem in the voir dire process.

Essentially, attorney conducted voir dire in addition to the court's voir dire takes advantage of both the attorneys' greater knowledge of the underlying facts of the case and the differences between the attorney-juror relationship and the judge-juror relationship. Permitting attorney conducted voir dire in addition to court voir dire will bring the best of both worlds to the process and maximize the information obtained in voir dire.

4. *The Ability Of The Court To Control And Limit Voir Dire Abuse.*

There is a concern expressed by some commentators that attorneys may abuse the voir dire process, either by seeking to improperly ingratiate themselves with jurors or argue their theory of the case or by showing no concern for efficiency. *See* Suggs and Sales, *supra* p. 7, at 250-51. The great advantage of allowing attorney conducted voir dire as a supplement to court voir dire is that the court can fairly and reasonably control and limit such abuse.

If the court begins by conducting its own voir dire, it can reasonably limit the voir dire it allows the attorneys to conduct. If the court has already conducted its own voir dire, the court can legitimately expect the attorneys not to repeat the questions it has already asked and not to simply go on and on in an effort to establish rapport with the jurors. The court can rightfully demand that the attorneys limit themselves to new areas of examination or follow-up examination which has not already been covered and which is clearly relevant to the case at bar.

In addition, the court can legitimately place a specific time limit on attorney conducted voir dire when it begins with its own voir dire. The thirty-minute limit on voir dire, which is proposed in this motion is eminently justifiable when basic voir dire has already been conducted by the court. An attorney who is given only thirty minutes for additional voir dire examination is unlikely to waste his precious thirty minutes on mere prattling attempts at ingratiation which provide little, if any, actual information.

B. ATTORNEY CONDUCTED VOIR DIRE WILL AID THE PARTIES IN COMPLYING WITH THE REQUIREMENTS OF *BATSON V. KENTUCKY*.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause prohibits challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable to impartially to consider the State's case against a black defendant." *Id*. at 83; *See also United States v. Carter*, 111 F.3d 509, 512 (7th Cir. 1997). Thus, peremptory challenges must be made in a non-racially discriminatory manner in order to be constitutional. Discriminatory exercise of peremptory challenges on the basis of gender is also barred. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *United States v. Harris*, 197 F.3d 870, 873 (7th Cir. 1999).

Batson set up a system where a party may establish a prima facie case of discriminatory use of peremptory challenges.[1] First, a litigant must show that the opposing party has exercised peremptory challenges with intent to exclude members of a cognizable racial group or other protected class. *Id.* at 96. Second, a litigant may rely on the fact that the nature of peremptory strikes permits those who are inclined to discriminate to do so. *Id*. Finally, a litigant must show facts and other relevant circumstances that raise an inference that opposing counsel used peremptory strikes to exclude members of the group in question. *Id.* In deciding whether the litigant has made a prima facie showing, the trial court may

[1] After *Batson*, a string of Supreme Court cases extended its reach to parties other than the government. Criminal defendants and civil litigants are thus also barred from discriminating in the exercise of peremptory challenges. See *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

consider all relevant circumstances, including the attorneys' questions and statements during the voir dire examination. Id. at 96-97.

Once a party makes a prima facie showing, the burden shifts to the opposing counsel to offer a neutral explanation for the challenge. *Id*. at 97. "[Counsel] must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id*. at 98 n.20 (*quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

Complete and effective voir dire is a basic premise which underlines the rationale of *Batson* and its progeny -- in two respects. First, a complete and effective voir dire eliminates any need to rely on generalizations and stereotypes about people. As the Supreme Court recognized in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994):

> If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. *Id.* at 1429. Simply put, there is no reason for counsel to rely on stereotypes and generalizations about people if he is permitted to ask specific questions about them. The second way in which a complete and effective voir dire is a necessary premise to the *Batson* decision is that "the voir dire process aids litigants in their ability to articulate race-neutral explanations for their peremptory challenges." *J.E.B.*, 511 U.S. 127, 143-44 n. 17.

Whether a litigant is trying to prove a prima facie case of discrimination or trying to rebut one, an in-depth and extensive voir dire is essential. An attorney who must defend his peremptories should have sufficient information to provide a neutral explanation that will survive a *Batson* challenge. The court in *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994) stated that "the stronger the objective evidence of discrimination, the more we will require by way of verifiable facts" to rebut the challenge. *Id.* at 1429-30. If an attorney is required to explain and point to "verifiable facts", he should be allowed to obtain those facts.

This suggests the need for, and inherent fairness of, allowing attorney conducted voir dire. If an attorney is going to be required to justify the inferences he draws and/or the impressions he gets from a juror's answers, he ought to be allowed to ask appropriate follow-up questions or ask questions in a way which will maximize the information he feels he needs to avoid relying on generalizations and stereotypes. An attorney conducting voir dire is able to do this more effectively than the court because the attorney knows what factors he is concerned about and knows the underlying circumstances of the case and what characteristics in jurors are relevant to those circumstances.

C. ATTORNEY CONDUCTED VOIR DIRE WILL HELP AVOID REVERSIBLE ERROR ON APPEAL.

The denial or impairment of the right to exercise peremptory challenges requires reversal of a conviction, without a showing of prejudice. *Lewis v. United States*, 146 U.S. 370, 376 (1892). A court which insists on conducting all voir dire itself may create grounds for reversal. The Ninth Circuit noted in *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979):

> The trial judge [may] insist on conducting a voir dire examination, but if he does so, he must exercise a sound judicial discretion in the acceptance or rejection of supplemental questions proposed by counsel. Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality.
>
> *Id.* at 1297.

The court went on to reverse the defendant's conviction for failure of the trial court to conduct a voir dire that created "reasonable assurances that prejudice would be discovered if present." *Id.* at 1298.

Other convictions have been reversed for insufficient voir dire as well. *See, e.g., United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987) (failure to ask whether jurors would give greater credence to law enforcement officer testimony); *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987) (failure to ask whether jurors knew any of government's witnesses); *United States v. Ible*, 630 F.2d at 394-95 (failure to ask about jurors' moral or religious beliefs about alcohol); *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) (failure to ask jurors in assault case whether they had ever been victim of crime involving knife or gun); *United States v. Allsup*, 566 F.2d 68, 70 (9th Cir. 1977) (failure to ask jurors about views on insanity defense); *United States v. Segal*, 534 F.2d 578, 581 (3d Cir. 1976) (failure to ask jurors whether they had been employed by agency prosecuting case); *United States v. Dellinger*, 472 F.2d 340, 368-69 (7th Cir. 1972) (failure to ask jurors about attitudes toward Vietnam War, "youth culture", and relationship with law enforcement officers in case arising out of protest demonstration); *United States v. Poole*, 450 F.2d 1082, 1083-83 (3d Cir. 1971) (failure to ask jurors in bank robbery case whether they or any family member had been victim of robbery or other crime).

There will be no possibility of such a reversal if the court permits counsel thirty minutes of voir dire each. A defendant would hardly be in the position to complain about a failure of the court to ask a particular voir dire question when he himself failed to ask the question. Granting counsel thirty minutes for voir dire transfers the burden of asking mandatory voir dire questions to counsel and removes that burden from the court. Any risk of reversal due to insufficient voir dire will thereby be eliminated. *See, e.g,, United States v. Rigsby*, 45 F.3d 120, 125 (6th Cir. 1995) (rejecting claim of error based on failure of court to ask particular voir dire question where defense attorneys were allowed to conduct additional voir dire after initial voir dire by court), *cert. denied*, 514 U.S. 1134 (1995).

<u>CONCLUSION</u>

Ensuring that Mr./Ms. CLIENT'S LAST NAME receives a fair trial is required under the Constitution. This court is uniquely positioned to help achieve that goal by allowing counsel to supplement this Court's questioning of the jury pool.

SIGNATURE LINE

CERTIFICATION
By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of this defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense or the lesser-included offense regardless of the race, color, religious beliefs, national origin, or sex of this defendant.

PROPOSED JURY INSTRUCTION: IMPLICIT BIAS

You must decide during your deliberations whether or not the prosecution has proved the guilt of each defendant on each offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

THIS IS A NON-EXHAUSTIVE LIST OF QUESTIONS I'VE GATHERED FROM VARIOUS SOURCES THAT I SIMPLY CAN'T RECALL AND BORROWED (READ STOLEN WITH PERMISSION) FROM COLLEAGUES THROUGHOUT THE YEARS. ALL QUESTIONS WON'T WORK FOR ALL CASES. IT IS IMPORTANT TO CHOOSE THE WRITTEN QUESTIONS SUBMITTED FOR A QUESTIONNAIRE OR TO THE JUDGE WISELY.

Sample Juror Questions

Attitudes About Alcohol/Drunk Driving/Drug Use

Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk.

Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic.

Do you, your relatives or close associates belong to any organizations which take an official position on the use of alcohol? (MADD, SADD, certain churches, etc.?)

Do you drink alcohol? How often?

What are your feelings about the use of alcohol?

Have you ever known anyone who was arrested for driving while intoxicated (DWI)? Explain.

Have you, your relatives, or close associates become familiar, through work, training, or study, with the effects of alcohol? If so, please explain:

Have you ever taken any courses which addressed the effects of alcohol? If so, please explain:

What is your knowledge, education or training about blood alcohol levels as shown by a blood test or breath test? Please explain:

Do you drive an automobile regularly? What kind of car(s) do you drive?

Have you ever been in an automobile accident? Was anyone injured or killed? Please explain:

How well do you feel the court system deals with alcohol related crimes?

Do you know anyone that has had a drug problem? If yes, please explain:

Attitudes About Domestic Violence

Have you or any member of your family been involved in a domestic dispute in which the police were called? Please explain. Was there any legal action? What was the final outcome of the situation?

How well do you feel the criminal justice system deals with domestic disputes? Please explain:

Attitudes About Guns/Violence

Do you or any of your relatives own or possess any type of weapon(s)? If yes, what type(s) and what was the reason for owning or possessing them?

Have you, any family members or friends ever had any type of bad experience involving a weapon? If yes, please explain:

Have you or any family member ever shot a gun?

What is your experience with firearms?

Have you or any family member ever belonged to any kind of anti-gun or pro-gun club or organization (such as NRA)? If yes, what club or organization? If you/they are no longer a member, please explain why?

What are your feelings about gun control?

Have you or anyone you know ever been shot, accidentally or otherwise? If yes, please explain:

Have you or anyone you know ever been accused of committing an act of violence? If yes, please explain:

Attitudes About Immigration and the Border

How often do you cross the US-Mexico border?

Have you, or anyone in your family, ever done business with anyone located in Mexico? If yes, please explain:

Have you ever known anyone who was accused of smuggling drugs? If yes, please explain:

What are your feelings and opinions about people accused of smuggling drugs?

How strongly do you agree or disagree with this statement: "I know all the items that are in my car"?
How strongly do you agree or disagree with this statement: "most people get fearful and nervous around law enforcement"?

Attitudes About Race/Ethnicity

Do you believe it is ever appropriate to judge someone based on their skin color?

Describe your most significant interaction(s) with a member of another race.

Describe a particularly impactful interaction that you or someone close to you had with a member of another race.

Describe the most serious incident you ever saw where someone was treated badly because of their race.

Describe the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

Describe the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

Have you ever been to the __________ Reservation? If yes, please describe your experience.

What have you heard about the ______________Reservation?

Attitudes About Self Defense

Describe the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

Describe the most frightening experience you or someone close to you had when they were threatened by another person.

What is the craziest thing you or someone close to you ever did out of fear?

What is the bravest thing you ever saw someone do out of fear?
Describe the bravest thing you ever saw someone do to protect another person.

A person must always retreat from provocation. Yes or No. Explain.

Attitudes About Lying

Describe the worst problem you ever had with someone who was a liar.

Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

Tell us about the most serious time that you or someone you know told a lie out of fear.

Tell us about the most serious time that you or someone you know told a lie to protect someone else.

Describe the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

American Bar Association

Defending Liberty
Pursuing Justice

Principles for Juries and Jury Trials

American Jury Project

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PREAMBLE

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 principles that define our fundamental aspirations for the management of the jury system. Each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated that over the course of the next decade jury practice will improve so that the principles set forth will have to be updated in a manner that will draw them ever closer to the principles to which we aspire.

GENERAL PRINCIPLES

PRINCIPLE 1– THE RIGHT TO JURY TRIAL SHALL BE PRESERVED

A. Parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with law.

B. Parties, including the state, have the right to a fair, accurate and timely jury trial in criminal prosecutions in which confinement in jail or prison may be imposed.

C. In civil cases the right to jury trial may be waived as provided by applicable law, but waiver should neither be presumed nor required where the interests of justice demand otherwise.

D. With respect to criminal prosecutions:

1. A defendant's waiver of the right to jury trial must be knowing and voluntary, joined in by the prosecutor and accepted by the court.

2. The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver, personally waives the right to trial by jury in writing or in open court on the record.

3. A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of trial.

4. A defendant may withdraw a waiver of jury, and the prosecutor may withdraw its consent to a waiver, both as a matter of right, if there is a change of trial judge.

E. A quality and accessible jury system should be maintained with budget procedures that will ensure adequate, stable, long-term funding under all economic conditions.

PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:

1. Are less than eighteen years of age; or

2. Are not citizens of the United States; or

3. Are not residents of the jurisdiction in which they have been summoned to serve; or

4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or

5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

C. The time required of persons called for jury service should be the shortest period consistent with the needs of justice.

1. Courts should use a term of service of one day or the completion of one trial, whichever is longer.

2. Where deviation from the term of service set forth in C.1. above is deemed necessary, the court should not require a person to remain available to be selected for jury service for longer than two weeks.

D. Courts should respect jurors' time by calling in the minimum number deemed necessary and by minimizing their waiting time.

1. Courts should coordinate jury management and calendar management to make effective use of jurors.

2. Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both

the number of persons summoned for jury duty and the number assigned to jury panels.

3. Courts should ensure that all jurors in the courthouse waiting to be assigned to panels for the first time are assigned before any juror is assigned a second time.

E. Courts should provide an adequate and suitable environment for jurors, including those who require reasonable accommodation due to disability.

F. Persons called for jury service should receive a reasonable fee.

1. Persons called for jury service should be paid a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care. Courts should be encouraged to increase the amount of the fee for persons serving on lengthy trials.

2. Employers should be prohibited from discharging, laying off, denying advancement opportunities to, or otherwise penalizing employees who miss work because of jury service.

3. Employers should be prohibited from requiring jurors to use leave or vacation time for the time spent on jury service or be required to make up the time they served.

PRINCIPLE 3 – JURIES SHOULD HAVE 12 MEMBERS

A. Juries in civil cases should be constituted of 12 members wherever feasible and under no circumstances fewer than six members.

B. Juries in criminal cases should consist of:

1. Twelve persons if a penalty of confinement for more than six months may be imposed upon conviction;

2. At least six persons if the maximum period of confinement that may be imposed upon conviction is six months or less.

C. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of fewer jurors than required for a full jury, but in no case fewer than six jurors. In criminal cases the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to trial by a full jury, and the consequences of waiver, personally waives the right to a full jury either in writing or in open court on the record.

PRINCIPLE 4 – JURY DECISIONS SHOULD BE UNANIMOUS

A. In civil cases, jury decisions should be unanimous wherever feasible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors. In no civil case should a decision concurred in by fewer than six jurors be accepted, except as provided in C. below.

B. A unanimous decision should be required in all criminal cases heard by a jury.

C. At any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict. In criminal cases, the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to a unanimous decision, personally waives that right, either in writing or in open court on the record.

PRINCIPLE 5 – IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

A. The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.

1. All procedures concerning jury selection and service should be governed by rules and regulations promulgated by the state's highest court or judicial council.

2. A unified jury system should be established wherever feasible in areas that have two or more courts conducting jury trials. This applies whether the courts are of the same or of differing subject matter or geographic jurisdiction.

3. Responsibility for administering the jury system should be vested in a single administrator or clerk acting under the supervision of a presiding judge of the court.

B. Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure:

1. The representativeness and inclusiveness of the jury source list;

2. The effectiveness of qualification and summoning procedures;

3. The responsiveness of individual citizens to jury duty summonses;

4. The efficient use of jurors; and

5. The reasonableness of accommodations being provided to jurors with disabilities.

PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;

2. Upon first appearance at the courthouse; and

3. Upon reporting to a courtroom for juror voir dire.

B. Orientation programs should be:

1. Designed to increase jurors' understanding of the judicial system and prepare them to serve competently as jurors;

2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and

3. Presented, at least in part, by a judge.

C. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury's role, the trial procedures including note-taking and questioning by jurors, the

nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they are under an obligation to refrain from talking about the case outside the jury room until the trial is over and the jury has reached a verdict. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.

4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.

PRINCIPLE 7 – COURTS SHOULD PROTECT JUROR PRIVACY INSOFAR AS CONSISTENT WITH THE REQUIREMENTS OF JUSTICE AND THE PUBLIC INTEREST

A. Juror interest in privacy must be balanced against party and public interest in court proceedings.

1. Juror voir dire should be open and accessible for public view except as provided herein. Closing voir dire proceedings should only occur after a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury.

2. Requests to jurors for information should differentiate among information collected for the purpose of juror qualification, jury administration, and voir dire.

3. Judges should ensure that jurors’ privacy is reasonably protected, and that questioning is consistent with the purpose of the voir dire process.

4. Courts should explain to jurors how the information they provide will be used, how long it will be retained, and who will have access to it.

5. Courts should consider juror privacy concerns when choosing the method of voir dire (open questioning in court, private questioning at the bench, or a jury questionnaire) to be used to inquire about sensitive matters.

6. Courts should inform jurors that they may provide answers to sensitive questions privately to the court, and the parties.

7. Jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.

8. Following jury selection and trial, the court should keep all jurors' home and business addresses and telephone numbers confidential and under seal unless good cause is shown to the court which would require disclosure. Original records, documents and transcripts relating to juror summoning and jury selection may be destroyed when the time for appeal has passed, or the appeal is complete, whichever is longer, provided that, in criminal proceedings, the court maintains for use by the parties and the public exact replicas (using any reliable process that ensures their integrity and preservation) of those items and devices for viewing them.

B. Without express court permission, surveillance of jurors and prospective jurors outside the courtroom by or on behalf of a party should be prohibited.

C. If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors' faces.

PRINCIPLE 8 -- INDIVIDUALS SELECTED TO SERVE ON A JURY HAVE AN ONGOING INTEREST IN COMPLETING THEIR SERVICE

During trial and deliberations, a juror should be removed only for a compelling reason. The determination that a juror should be removed should be made by the court, on the record, after an appropriate hearing.

ASSEMBLING A JURY

PRINCIPLE 9 – COURTS SHOULD CONDUCT JURY TRIALS IN THE VENUE REQUIRED BY APPLICABLE LAW OR THE INTERESTS OF JUSTICE

A. In civil cases where a jury demand has been made, a change of venue may be granted as required by applicable law or in the interest of justice.

B. In criminal cases, a change of venue or continuance should be granted whenever there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. A showing of actual prejudice should not be required.

C. Courts should consider the option of trying the case in the original venue but selecting the jury from a new venue**.** In addition to all other considerations relevant to the selection of the new venue, consideration should be given to whether the original venue would be a better location to conduct the trial due to facilities, security, and the convenience of the victims, court staff, and parties. This should be balanced against the possible inconvenience to the jurors.

PRINCIPLE 10 – COURTS SHOULD USE OPEN, FAIR AND FLEXIBLE PROCEDURES TO SELECT A REPRESENTATIVE POOL OF PROSPECTIVE JURORS

A. Juror source pools should be assembled so as to assure representativeness and inclusiveness.

1. The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.

2. The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population.

3. The court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.

4. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.

5. Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet eligibility requirements.

B. Courts should use random selection procedures throughout the juror selection process.

1. Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection, except when a court orders an adjustment for underrepresented populations.

2. Courts should use random selection procedures in:

   a. Selecting persons to be summoned for jury service;
   b. Assigning jurors to panels;
   c. Calling jurors for voir dire; and
   d. Designating, at the outset of jury deliberations, those jurors who will serve as "regular" and as "alternate" jurors.

3. Departures from the principle of random selection are appropriate:

   a. To exclude persons ineligible for service in accordance with basic eligibility requirements;
   b. To excuse or defer jurors in accordance with C. below;
   c. To remove jurors for cause or if challenged peremptorily in accordance with D. and E. below; or
   d. To provide jurors who have not been considered for selection with an opportunity to be considered before other jurors are considered for a second time, as provided for in Standard

2 D. 3.

C. Exemptions, excuses, and deferrals should be sparingly used.

1. All automatic excuses or exemptions from jury service should be eliminated.

2. Eligible persons who are summoned may be excused from jury service only if:

   a. Their ability to perceive and evaluate information is so impaired that even with reasonable accommodations having been provided, they are unable to perform their duties as jurors and they are excused for this reason by a judge; or
   b. Their service would be an undue hardship or they have served on a jury during the two years preceding their summons and they are excused by a judge or duly authorized court official.

3. Deferrals of jury service to a date certain within six months should be permitted by a judge or duly authorized court official. Prospective jurors seeking to postpone their jury service to a specific date should be permitted to submit a request by telephone, mail, in person or electronically. Deferrals should be preferred to excusals whenever possible.

4. Requests for excuses or deferrals and their disposition should be written or otherwise made of record. Specific uniform guidelines for determining such requests should be adopted by the court.

D. Courts should use sensible and practical notification and summons procedures in assembling jurors.

1. The notice summoning a person to jury service should be easy to understand and answer, should specify the steps required for answering and the consequences of failing to answer, should allow for speedy and accurate eligibility screening, and should request basic background information.

2. Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.

E. Opportunity to challenge the assembled jury pool should be afforded all parties on the ground that there has been material departure from the requirements of the law governing selection of jurors. The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors.

PRINCIPLE 11 – COURTS SHOULD ENSURE THAT THE PROCESS USED TO EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR AND IMPARTIAL JURY

A. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.

1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.

3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

B. The voir dire process should be held on the record and appropriate demographic data collected.

1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualification to serve in the case.

2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit each separately represented party to participate meaningfully in questioning prospective jurors, subject to reasonable time limits and avoidance of repetition.

3. Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.

4. Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.

5. It is the responsibility of the court to prevent abuse of the juror selection examination process.

C. Challenges for cause should be available at the request of a party or at the court's own initiative.

1. Each jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.

2. At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.

3. In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

D. Peremptory challenges should be available to each of the parties.

1. In the courts of each state, the number of and procedure for exercising peremptory challenges should be uniform.

2. The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.

3. The court should have the authority to allow additional peremptory challenges when justified.

4. Following completion of the examination of jurors, the parties should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.

E. Fair procedures should be utilized in the exercise of challenges.

1. All challenges, whether for cause or peremptory, should be exercised so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge.

2. After completion of the examination of jurors and the hearing and determination of all challenges for cause, the parties should be permitted to exercise their peremptory challenges as set forth in D. 4. above. A party should be permitted to exercise a peremptory challenge against a member of the panel who has been passed for cause.

3. The court should not require a party to exercise any challenges until the attorney for that party has had sufficient time to consult with the client, and in cases with multiple parties on a side, with co-parties, regarding the exercise of challenges.

4. No juror should be sworn to try the case until all challenges have been exercised or waived, at which point all jurors should be sworn as a group.

F. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.

1. It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.

2. A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that

the party challenged the juror because of the juror's membership in that group.

3. When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.

4. The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.

5. When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above.

G. The court may empanel a sufficient number of jurors to allow for one or more alternates whenever, in the court’s discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

1. Alternate jurors shall be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as regular jurors.

2. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation.

3. In civil cases where there are 12 or fewer jurors, all jurors, including alternates, should deliberate and vote, but in no case should more than 12 jurors deliberate and vote.

H. Courts should limit the use of anonymous juries to compelling circumstances, such as when the safety of the jurors is an issue or when there is a finding by the court that efforts are being made to intimidate or influence the jury's decision.

CONDUCTING A JURY TRIAL

PRINCIPLE 12 – COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS INSOFAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED

A. The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.

B. Trial judges should use modern trial management techniques that eliminate unnecessary trial delay and disruption. Once begun, jury trial proceedings with jurors present should take precedence over all other court proceedings except those given priority by a specific law and those of an emergency nature.

C. Jurors should be informed of the trial schedule and of any necessary changes to the trial schedule at the earliest practicable time.

PRINCIPLE 13 – THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

A. Jurors should be allowed to take notes during the trial.

   1. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be instructed that after they have reached their verdict, all juror notes will be collected and destroyed.

   2. Jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations.

3. The court should ensure that jurors have implements for taking notes.

4. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate.

5. After the jurors have returned their verdict, all juror notes should be collected and destroyed.

B. Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court's preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute.

1. At the time of distribution, the court should instruct the jurors concerning the purpose and use of their trial notebooks.

2. During the trial, the court may permit the parties to supplement the materials contained in the notebooks with additional material that has been admitted in evidence.

3. The trial notebooks should be available to jurors during deliberations as well as during the trial.

C. In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.

1. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.

2. Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.

3. After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court

should modify the question to eliminate any objectionable material.

4. After the question is answered, the parties should be given an opportunity to ask follow-up questions.

D. The court should assist jurors where appropriate.

1. The court should not in any way indicate to the jury its personal opinion as to the facts or value of evidence by the court's rulings, conduct, or remarks during the trial.

2. When necessary to the jurors' proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions.

3. The court should exercise self-restraint and preserve an atmosphere of impartiality and detachment, but may question a witness if necessary to assist the jury.

a. Generally, the court should not question a witness about subject matter not raised by any party with that witness, unless the court has provided the parties an opportunity, outside the hearing of the jury, to explain the omission. If the court believes the questioning is necessary, the court should afford the parties an opportunity to develop the subject by further examination prior to its questioning of the witness.

b. The court should instruct the jury that questions from the court, like questions from the parties, are not evidence; that only answers are evidence; that questions by the court should not be given special weight or emphasis; and the fact that the court asks a question does not reflect a view on the merits of the case or on the credibility of any witness.

E. The court should control communications with jurors during trial.

1. The court should take appropriate steps ranging from admonishing the jurors to, in the rarest of circumstances, sequestration of them during trial, to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.

2. At the outset of the case, the court should instruct the jury on the relationship between the court, the parties and the jury, ensuring that the jury understands that the parties are permitted to communicate with jurors only in open court with the opposing parties present.

3. All communications between the judge and members of the jury panel from the time of reporting to the courtroom for juror selection examination until dismissal should be in writing or on the record in open court. Each party should be informed of such communications and given the opportunity to be heard.

F. Jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

G. Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids.

H. In civil cases the court should seek a single, unitary trial of all issues in dispute before the same jury, unless bifurcation or severance of issues or parties is required by law or is necessary to prevent unfairness or prejudice.

I. Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.

J. The court may empanel two or more juries for cases involving multiple parties, defendants, or claims arising out of the same transaction or cause of action, in order to reduce the number and complexity of issues that any one jury must decide. Dual juries also may be used in order to promote judicial economy by presenting otherwise duplicative evidence in a single trial.

JURY DELIBERATIONS

PRINCIPLE 14 –THE COURT SHOULD INSTRUCT THE JURY IN PLAIN AND UNDERSTANDABLE LANGUAGE REGARDING THE APPLICABLE LAW AND THE CONDUCT OF DELIBERATIONS

A. All instructions to the jury should be in plain and understandable language.

B. Jurors should be instructed with respect to the applicable law before or after the parties' final argument. Each juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations.

C. Instructions for reporting the results of deliberations should be given following final argument in all cases. At that time, the court should also provide the jury with appropriate suggestions regarding the process of selecting a presiding juror and the conduct of its deliberations.

D. The jurors alone should select the foreperson and determine how to conduct jury deliberations.

PRINCIPLE 15 – COURTS AND PARTIES HAVE A DUTY TO FACILITATE EFFECTIVE AND IMPARTIAL DELIBERATIONS

A. In civil cases of appropriate complexity, and after consultation with the parties, the court should consider the desirability of a special verdict form tailored to the issues in the case. If the parties cannot agree on a special verdict form, each party should be afforded the opportunity to propose a form and to comment upon any proposal submitted by another party or fashioned by the court. The court should consider furnishing each juror with a copy of the verdict form when the jury is instructed and explaining the form as necessary.

B. Exhibits admitted into evidence should ordinarily be provided to the jury for use during deliberations. Jurors should be provided an exhibit index to facilitate their review and consideration of documentary evidence.

C. Jury deliberations should take place under conditions and pursuant to procedures that are designed to ensure impartiality and to enhance rational decision-making.

   1. The court should instruct the jury on the appropriate method for asking questions during deliberations and reporting the results of its deliberations.

2. A jury should not be required to deliberate after normal working hours unless the court after consultation with the parties and the jurors determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.

D. When jurors submit a question during deliberations, the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so.

E. A jury should be sequestered during deliberations only in the rarest of circumstances and only for the purposes of protecting the jury from threatened harm or insulating its members from improper information or influences.

F. When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party or upon the court's own motion. The poll should be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If the poll discloses that there is not that level of concurrence required by applicable law, the jury may be directed to retire for further deliberations or may be discharged.

PRINCIPLE 16 – DELIBERATING JURORS SHOULD BE OFFERED ASSISTANCE WHEN AN APPARENT IMPASSE IS REPORTED

A. If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.

B. If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

C. If there is no reasonable probability of agreement, the jury may be discharged.

POST-VERDICT ACTIVITY

PRINCIPLE 17 – TRIAL AND APPELLATE COURTS SHOULD AFFORD JURY DECISIONS THE GREATEST DEFERENCE CONSISTENT WITH LAW

Trial and appellate courts should afford jury decisions the greatest deference consistent with law.

PRINCIPLE 18 – COURTS SHOULD GIVE JURORS LEGALLY PERMISSIBLE POST-VERDICT ADVICE AND INFORMATION

A. After the conclusion of the trial and the completion of the jurors' service, the court is encouraged to engage in discussions with the jurors. Such discussions should occur on the record and in open court with the parties having the opportunity to be present, unless all the parties agree to the court conducting these discussions differently. This standard does not prohibit incidental contact between the court and jurors after the conclusion of the trial.

B. Under no circumstances should the court praise or criticize the verdict or state or imply an opinion on the merits of the case, or make any other statements that might prejudice a juror in future jury service.

C. At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.

D. Unless prohibited by law, the court should ordinarily permit the parties to contact jurors after their terms of jury service have expired, subject, in the court's discretion, to reasonable restrictions.

E. Courts should inform jurors that they may ask for the assistance of the court in the event that individuals persist in questioning jurors, over their objection, about their jury service.

PRINCIPLE 19 – APPROPRIATE INQUIRIES INTO ALLEGATIONS OF JUROR MISCONDUCT SHOULD BE PROMPTLY UNDERTAKEN BY THE TRIAL COURT

A. Only under exceptional circumstances may a verdict be impeached upon information provided by jurors.

1. Upon an inquiry into the validity of a verdict, no evidence should be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

2. The limitations in A.1 above should not bar evidence concerning whether the verdict was reached by lot or contains a clerical error, or was otherwise unlawfully decided.

3. A juror’s testimony or affidavit may be received when it concerns:

   a. Whether matters not in evidence came to the attention of one or more jurors; or
   b. Any other misconduct for which the jurisdiction permits jurors to impeach their verdict.

B. The court should take prompt action in response to an allegation of juror misconduct.

1. Upon receipt of an allegation of juror misconduct, the court should promptly inform the parties and afford them the opportunity to be heard as to whether the allegation warrants further enquiry or other judicial action.

2. Parties should promptly refer an allegation of juror misconduct to the court and to all other parties in the proceeding.

3. If the court determines that the allegation of juror misconduct warrants further inquiry, it should consult with the parties concerning the nature and scope of the inquiry, including:

   a. Which jurors should be questioned;
   b. Whether the court or the parties should ask the questions; and
   c. The substance of the questions.

4. If the court ascertains that juror misconduct has occurred, it should afford the parties the opportunity to be heard as to an appropriate remedy.

5. If the allegation of juror misconduct is received while the jury is deliberating, the recipient must ensure as quickly as possible that

the court and counsel are informed of it, and the court should proceed as promptly as practicable to ascertain the facts and to fashion an appropriate remedy.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	**Case No. CR-00-S-422-S**
	)	
ERIC ROBERT RUDOLPH	)	

JUROR QUESTIONNAIRE

You are being asked to complete this questionnaire as a time saving device for yourself, the attorneys involved in this case, and the court. This is not a test of your knowledge of the laws of the United States. The rules of law that apply to this case will be explained by the court to those persons who actually are selected as trial jurors.

<u>All</u> of your answers to the following questions will be held in <u>strictest confidence</u>. Your answers will, of course, be reviewed by the court and lawyers, and you may be asked to elaborate upon some of your responses during the individual questioning process that will occur in May. If anything you write when answering the following questions concerns a subject you would prefer to discuss in private during the individual questioning process in May, out of the hearing of any persons other than the judge and lawyers, then please place an asterisk (*) at the beginning of your answer to alert us to your desire for privacy.

For our system of laws to work, it is imperative that your answers be as accurate as possible and <u>truthful</u>. If you have difficulty either reading or writing, one of the Court employees present can assist you. The answer to each question, however, must be yours, and yours alone. Everyone respects your right to express any opinion you hold.

Please be honest, candid, and completely truthful. At the end of this questionnaire, you will be required to swear or affirm that your answers are true and correct. Even so, there are no "right" or "wrong" answers. The sole purpose of this questionnaire is to assist the attorneys for the government and defendant in selecting a fair and impartial jury to try the issues in this case. If this highly important objective of selecting a fair and impartial trial jury is not achieved, the balance of the proceedings will become meaningless. Your full, complete, and truthful cooperation, therefore, is vitally important.

____
C. Lynwood Smith, Jr.
United States District Judge

JUROR No. __________________________

____
JUROR NUMBER

PLEASE <u>PRINT</u> LEGIBLY

(**Note**: If you need more space to complete any answer, blank pages are provided at the end of this questionnaire for your use.)

Background Information

1. Please state your full name: ____

2. Have you been known by any other name(s)? Yes (__) No (__)

   If "Yes," list other name(s) used ______________________________________
   ____

3. What is your race? ____

4. Present marital status:
   - Single (__)
   - Married (__) Date:____________
   - Separated (__) Date:____________
   - Divorced (__) Date:____________

   ____
   (List Spouse's name)

5. Your county of residence:____

6. Do you live in the City of Birmingham? Yes (__) No (__)

7. Do you work in the City of Birmingham? Yes (__) No (__)

8. How often, on average, are you in Birmingham?
   (Please check the response that best applies)

   ____ Never
   ____ Once to several times a year
   ____ About once a month
   ____ 2 to 3 times a month
   ____ More than 3 times a month

YOU	OTHER ADULTS LIVING IN YOUR HOUSEHOLD
9. Your date of birth: ____________	What is his/her relationship to you? ____________________
Your age: ______________	
	His/her date of birth? ______________
	His/her age: ______________
10. Your employer: ______________	His/her employer: ________________
Length of employment: _________	Length of employment: ____________
Job Duties: _________________	Job Duties: ____________________
11. Previous employment: _________	Previous employment:______________
Address: __________________	Address: ______________________
Length of employment: _________	Length of employment: __________
Job Duties: _________________	Job Duties: _________________
Reason for leaving: ___________ ____________________	Reason for leaving: ______________ ____________________

12. If you are not currently employed, please describe other responsibilities that you have (such as care of a child under 10 years of age, care of an aged or infirm person, or school): ____
____
____
____

13. Please tell us the following about your children, step-children, and grandchildren:

Sex	Age	Highest Grade Completed and Occupation	Child or Grandchild

14. Have you, a family member, or a close personal friend ever been discriminated against in any way?

Yes (__)   No (__)

If "Yes", please explain:____

____

15. Has anyone close to you experienced discrimination as a result of his or her race, religion, ethnicity, gender, beliefs, or sexual orientation?

Yes (__)   No (__)

If "Yes", please explain:____

____

16. Have you observed, or in any way been affected by, prejudice based on race, religion, ethnicity, gender, beliefs, or sexual orientation?

Yes (__)   No (__)

If "Yes", please explain:____

____

17. Have you, or has anyone close to you, had any negative experience with, or been affected by, any person or group who you consider to be "extremist"?

Yes (__)   No (__)

If "Yes", please explain:____

____

Participation in Government

18. Are you a registered voter?   Yes (__)   No (__)

19. Check your political party affiliation, if any (please check only one):

___ Democrat
___ Republican
___ Libertarian
___ Other______________________________

20. Do you consider yourself (please check one):

___ Very liberal
___ Somewhat liberal
___ Middle of the road
___ Somewhat conservative
___ Very conservative

21. How often do you vote in any federal, state or local election? (please check one):

___ Never
___ Seldom
___ Often
___ Always

22. What political groups, foundations, and action committees are you a member of, or supportive of?____
____
____

23. Have you ever participated in a protest against any government action?

Yes (__) No (__)

If "Yes," please explain:____
____
____

24. Have you ever had, or do you now have, or do you anticipate having in the future, any claim against the United States Government, or any State or Local Government?

Yes (__) No (__)

If "Yes," please explain:____
____

25. Have you, or anyone close to you, ever been employed by any municipal, county, or state government, or by the United States government?

Yes (__) No (__)

If "Yes", please describe:____

26. Have you, or anyone close to you, ever held an elected or appointed office?

Yes (__) No (__)

If "Yes" as to yourself, please describe your office and when it was held:________

____

____

If "Yes" as to a person close to you, please describe your relationship to that person(s) and the person(s) office:____

____

27. Do you display anything, such as a flag or sign, in your yard, home, or workplace to express your allegiance to our government or any other allegiance?

Yes (__) No (__)

If yes, please describe:____

____

28. What is your opinion of people who display the Confederate Flag?_____________

____

____

Leadership

29. Have you ever written a letter to the editor of a newspaper, or called into a radio or TV talk show, to express an opinion on any issue?

Yes (__) No (__)

If "Yes," please describe:____

____

____

30. Do you participate in any Internet "chatrooms," "blogs," or discussion forums?

Yes (__) No (__)

If "Yes", please describe:____

____

____

31. Would you describe yourself more as a follower or a leader? (please check one):

___ Follower
___ Leader

a. In what type of situation(s) are you more likely to be a <u>leader</u>? (Include any leadership positions.)____
____
____

b. In what type of situation(s) are you more likely to be a <u>follower</u>?__________
____
____

32. Please complete the following:

a. Name the two people who are publicly known that you <u>most</u> admire or respect:
1. ________________________________
2. ________________________________

b. Name two people who are publicly known that you least admire or respect.
1. ________________________________
2. ________________________________

Religious Affiliation

33. Are you a member of, or do you attend, any church, synagogue, mosque, or place of worship?

Yes (__) No (__)

a. If "Yes," which one? ____

b. How often do you attend? ____

c. What positions do you hold, and in what activities do you/your family participate? ____
____

d. Are you a member of or do you participate in any other groups or activities associated with a particular religion or philosophy other than the one mentioned above?
Yes (__) No (__)

If "Yes", please explain:____

____

____

34. How often have you read the Bible in the last year? (Circle one)

    1. several times a day
    2. once a day
    3. several times a week
    4. once a week
    5. less than once a week
    6. once a month
    7. less than once a month
    8. have not read in the last year

35. How important is your faith to you? Would you say it is:

___ Extremely important and I make major life decisions based on my faith
___ Important, but I consider other issues, too
___ Not very important in my daily life

Education, Special Skills and Occupation

36. What is the highest grade you completed in school? (Check one)

___ Below 8th Grade
___ 12th Grade or GED
___ College 1 year
___ College 2 years
___ College 3 years
___ College 4 years
___ Post Graduate

Name of High School: ____

Did you graduate? Yes (__) No (__)

What were your favorite subjects? ____________________________________

____

____

Your least favorite subjects? ____

____

37. If you attended school after high school, please complete the following:

a. Write the name(s) of the college (or colleges) you attended ______________________________

b. What was your major course of study? ______________________________

c. Are you presently a student? Yes (__) No (__)

If "Yes", what are you studying?______________________________

38. What do you consider to be your most important or significant informal learning experience (i.e., something you learned out of school)? ____________________
____
____

39. Please circle any of the following fields in which you have experience or training, then describe your training or experience in the following blank lines.

Auditing/Compliance	Chemistry	Criminal Law
Criminal Justice	Crime Scenes	Ethics
Forensics	Firearms/weapons	Forestry
Identification procedures	Health Care/Medicine	Law Enforcement
Mountaineering	Outdoor survival skills	Psychiatry
Psychology	Religion	Sociology
Social Work	Social activism training seminars (examples: abortion rights, pro-life, voting rights, gay rights)	

Please describe the experiences or training that you circled:________________
____
____

40. Have you, or has someone close to you, had any experiences with psychiatrists, psychologists, or other mental health professionals?

Yes (__) No (__)

If "Yes," please explain:____

____

____

41. If you could change your work or profession, what would you change it to? _____

____

Military Service

42. Have you, or any member of your family, ever served in any branch of the armed forces of the United States of America (including the National Guard or Reserves)?

Yes (__) No (__)

a. If you served in the armed forces, what were the approximate dates of your service? ____
b. What was your discharge status? ______________________________
c. What branch of the service were you in? ________________________
d. Were you in active combat? Yes (__) No (__)

If "Yes", where?____

Experience with Law and Law Enforcement Officials

43. Have you, or any member of your family, ever been employed by an attorney?

Yes (__) No (__)

If "Yes," please give name of attorney and nature of attorney's practice: ____

____

44. Have you ever received any training in law?

Yes (__) No (__)

If "Yes," briefly describe the nature of that training and the duration of that training: ____

____

45. Do you have relatives or close friends who have had any training in law?

Yes (__) No (__)

If "Yes", please state your relationship to that person and describe your communications with that person touching upon law-related subjects: __________

____

____

46. Have you, or any friends or acquaintances, applied for a job with, or been employed in, law enforcement, or served in a volunteer capacity (for example, as a police officer, constable, auxiliary deputy sheriff, secretary in police department)?

Yes (__) No (__)

If "Yes" as to yourself, please explain: ______________________________

____

If "Yes" as to a friend or acquaintance, briefly describe their relationship to you, the dates and nature of the employment, and your communications with that person touching upon law-related subjects:______________________________

____

____

47. Whether or not you are employed by, or volunteered for, a law enforcement or other investigative agency, have you ever had any contact with anyone in such an agency through your work, in your neighborhood, or in your social life?

Yes (__) No (__)

If "Yes", please explain: ______________________________________

____

____

48. Have you, your spouse, any member of your family, or a friend, ever worked in a prison, a jail or detention center, or for a security agency, a detective agency, or other law enforcement position?

Yes (__) No (__)

If "Yes" list position and date (s) held:______________________________

____

49. Please tell us how much confidence you have in the work of each of the following organizations:

Alabama Bureau of Investigation	___ Total ___ Some ___ None
Birmingham Police Department	___ Total ___ Some ___ None
FBI (Federal Bureau of Investigation)	___ Total ___ Some ___ None
ATF (Federal Bureau of Alcohol, Tobacco, and Firearms)	___ Total ___ Some ___ None

50. Have you ever notified the police or any authority about any sort of wrong-doing?

Yes (__) No (__)

If "Yes", please explain: ____
____

Was the person you reported known to you? Yes (__) No (__)

If "Yes", what was the relationship: ______________________________________
____

51. Have you, your spouse, any member of your family, or a friend, ever been connected with the U.S. Attorney's Office, or the State District Attorney's Office of Jefferson County, Alabama, or any other county?

Yes (__) No (__)

If "Yes," please explain: ____
____

52. Do you, or any member of your family, or a friend, know anyone who works in the criminal defense field, including attorneys, investigators, law clerks, paralegals, or secretaries?

Yes (__) No (__)

If "Yes," please explain: ____
____
____

53. Have you, or any member of your family, or a close personal friend, ever been associated with, or worked with, any program that was dedicated to the rehabilitation of persons who have been convicted of a crime?

Yes (__) No (__)

If "Yes," please explain: ____
____
____

54. Have you, any of your family members, or close personal friends ever been employed by, or volunteered in any way, with a victim's support or advocacy group, or a group that advocates changes in the criminal laws?

Yes (__) No (__)

If "Yes", please explain: ____
____
____

Prior Jury Service or Experience

55. Please respond to the following:

a. Have you served on a jury before?

Yes (__) No (__)
[If "No," skip to the next question: # 56]

b. If "Yes," which kind of jury have you served on?

___ Civil
___ Criminal
___ Both

c. If the case was a CRIMINAL trial, please give the following information for each CRIMINAL jury you served on

	Case #1	Case #2	Case #3
Type of Case	______________	______________	______________
How long ago:	______________	______________	______________
Reach Verdict?	Yes (___) No (___)	Yes (___) No (___)	Yes (___) No (___)
What was the verdict?	______________	______________	______________
Did jury set Punishment?	Yes (___) No (___)	Yes (___) No (___)	Yes (___) No (___)
Were you the foreperson?	Yes (___) No (___)	Yes (___) No (___)	Yes (___) No (___)

d. If other than Criminal: Type of Case ____________ When _____________
____

e. In general, how much did you participate in that jury's decision? (Check one)

_____ Less than other jurors

_____ More than other jurors

f. What stands out in your mind about your jury experience, whether positive or negative, or both:____
____
____
____

56. Other than your prior jury service, have you ever been interested in the outcome of any criminal case?

Yes (__) No (__)

If "Yes," please state the case or cases in which you were interested, and why you were interested. For instance, were you interested because of something you read in newspapers or books, or something you viewed on television or heard on the radio? ____
____
____

57. Have you or your spouse ever been a grand juror?

Yes (__) No (__)

If "Yes", please explain: ____

____

____

____

Prior Experience with the Legal System and the Courts

58. Have you, any member of your family, or an acquaintance, ever been accused of a crime?

Yes (__) No (__) I think so (__) I don't know (__)

If "Yes" or "I think so," please state details: ______________________________

____

____

59. Were you, any member of your family, or any acquaintance, ever a witness in a criminal case?

Yes (__) No (__) I think so (__) I don't know (__)

If "Yes" or "I think so," please briefly state details: ________________________

____

____

____

60. Have you, any member of your family, or a friend, ever been the victim of a crime?

Yes (__) No (__)

If "Yes," please briefly state details: ____________________________________

____

____

Was the perpetrator of the crime caught? Yes (__) No (__)

If "Yes," did the matter ever go to trial? Yes (__) No (__)

If "Yes," please give details: ____

____

____

If "Yes," did you work with the police and/or prosecutor in trying to solve the crime or in the trial or resolution of the case?

Yes (__) No (__)

If "Yes," please explain:

61. Do you know anyone who has been injured or died as the result of a crime?

Yes (__) No (__)

If "Yes," what is or was the person's relationship to you? ____________________
____

And if "Yes," please describe the circumstance(s) :__________________________
____

62. Do you know anyone who was killed or injured as the result of a blast or explosion?

Yes (__) No (__)

If "Yes", please explain:____
____
____

63. Have <u>you</u> ever witnessed, or experienced, any type of a blast or explosion?

Yes (__) No (__)

If "Yes", please explain:____
____
____

64. Have you, any member of your family, or any acquaintance, ever been arrested?

Yes (__) No (__)

If "Yes," please describe what happened: _________________________________
____
____

a. Are you presently under indictment or legal accusation for a misdemeanor or felony?

Yes (__) No (__)

b. Are you currently on felony deferred adjudication or probation?

Yes (___) No (___)

65. Have you, or anyone you know, ever served time in a jail or penitentiary?

Yes (__) No (__)

If "Yes" as to <u>yourself</u>, please explain: ____________________________________
____

If "Yes" as to <u>someone you know</u>, what relation is, or was, that person to you?___
____

For what crime is, or was, that person serving time? _______________________

66. Have you ever had a pleasant (or an unpleasant) experience involving a law enforcement officer, including the filing of a complaint, or writing a letter, or making a statement in support of (or critical of) a law enforcement officer?

Yes (__) No (__)

If "Yes," please explain:____
____
____

67. Have you ever been an eyewitness to any crime or criminal event, and been asked to tell what you saw or heard (even if you didn't testify in court)?

Yes (__) No (__)

If "Yes," please explain: ____
____

68. Have you ever been questioned by, or given a statement to, the police or an investigator of any kind (other than for a traffic accident)?

Yes (__) No (__)

If "Yes," please explain:____

____

69. Have you ever given an affidavit, deposition, or testimony of any kind, in a court proceeding or related matter?

Yes (__) No (__)

If "Yes," please explain:____

____

70. What is your opinion of attorneys who <u>prosecute</u> persons accused of crimes? ___

____

____

71. What is your opinion of attorneys who <u>defend</u> persons accused of crimes? _____

____

____

Leisure/Organizations

72. What are your hobbies, favorite recreations, or pastimes? ___________________

____

73. What are your spouse's hobbies, favorite recreations, or pastimes? ___________

____

74. List any newspapers and magazines you subscribe to, or that you buy off the rack:

____

____

75. Name the last book you read, or that you are presently reading: _______________

____

76. What TV show or shows do you regularly watch? __________________________

____

____

77. What radio station do you listen to most often? ____________________________

78. List any bumper stickers or decals on any vehicle in your household: __________
____
____

79. What bumper stickers have you seen that you like or admire? _______________
____
____

80. Do you have a vanity (or personalized) license plate on your vehicle?

Yes (__) No (__)

If "Yes," please state what it says: _____________________________________
____

81. Please list any organizations or groups of which you are a member, or the meetings of which you attend. This includes church or religious organizations, professional, political, social service, community, special interest, hobby, sports, or recreational groups.
____
____
____
____

82. If you volunteer with, or donate money to, any organization(s), please list those organizations: ____
____

Opinions on Firearms and Crime

83. Do you favor gun registration? Yes (__) No (__)

84. How concerned are you about the use of illegal drugs in our society?

___ I am more concerned than anyone I know
___ I am more concerned than most people I know
___ I am concerned to the same degree as most people I know
___ I am less concerned than most people I know
___ I am less concerned than anyone I know

85. There is a move in some areas of the country to legalize marijuana; in fact, some states are permitting the use of marijuana for medical purposes. What is your reaction to the legalization of marijuana? ______________________________
____
____

86. What is your opinion about people who use marijuana for recreational (non-medical) purposes? ____
____
____

87. How serious do you think crime is in your neighborhood? (Check one)

___ Very serious
___ Somewhat serious
___ Not a serious problem

88. Is there a crime prevention group in your neighborhood?

Yes (__) No (__)

If "Yes," do you participate in it?

Yes (__) No (__)

If "Yes," please explain: ______________________________________
____
____

89. How worried, or concerned, are you about the crime problems in society? (Check one)

___ I am more concerned than anyone I know
___ I am more concerned than most people I know
___ I am concerned to the same degree as most people I know
___ I am less concerned than most people I know
___ I am less concerned than anyone I know

90. What do you think are the reasons that people commit most of the violent crimes in our society? ____
____

91. What do you think makes a person dangerous? ____________________
____

92. What do you think makes a person violent? ______________________
____

93. Is it ever okay for a person to take the law into his or her own hands?

Yes (__) No (__)

If "Yes," please describe when it is appropriate: ____________________________
____
____

Publicity about this case

You are being considered as a juror in the case of United States v. Eric Robert Rudolph. The case involves an explosion at the New Woman All Women's Health Care Clinic in Birmingham, Alabama on January 29, 1998. In the explosion a Birmingham police officer, Robert D. Sanderson, was killed; and a nurse, Emily Lyons, was severely injured. On February 14, 1998, Eric Robert Rudolph was charged with the bombing. On May 31, 2003, Eric Robert Rudolph was arrested by local police in Murphy, North Carolina. There has been much publicity surrounding this case and Mr. Rudolph.

It is not at all improper for you to have heard or read about this case, or to have had discussions and expressed thoughts and opinions about it. We simply need to know what you have read, heard, discussed, or thought about the case.

94. If you have heard or read anything about this case, please indicate where you heard or read about it. (Check all that apply)

___ T.V. News or T.V. Documentaries
___ Radio News
___ Newspaper
___ Magazines
___ Books
___ Internet or E-mail
___ Conversations

95. How would you describe the amount of media coverage you have seen about this case? (Check one)

___ Very much (went out of your way to read about it and watch news accounts of it).

___ Quite a bit (read a few articles or watched a few television specials).

___ Not too much (just basic coverage on the nightly news or morning news).

___ None or hardly at all (just heard about it).

96. When was the last time you saw or heard any media coverage about this case?
____

97. Please tell us everything you remember reading about the case in the newspaper, or hearing or seeing about the case on television, radio, or the Internet (or from any other source): ____
____
____
____
____
____
____
____
____

98. In addition, what do you remember reading, hearing, or seeing about Eric Robert Rudolph and/or his family? ____
____
____
____
____
____

99. What comments, if any, do you recall hearing made in the media by any officials, prosecutors, law enforcement officers, or defense attorneys? ________________
____
____
____

100. What, if anything, have you seen or heard from any victims or families/friends of victims in this case? ____
____
____
____
____

101. What kinds of things have you heard people in the community say about the case or about Eric Robert Rudolph? ____
____
____
____
____

102. What kinds of things have you said in conversations about the case or Eric Robert Rudolph? ____
____
____
____

103. What else do you know, or think you may know, about this case? _____________
____
____
____

104. Based on what you know about the case at the present time, do you, or any member of your family, or a friend, know anybody on the criminal defense team or the prosecution team, including attorneys, investigators, law clerks, paralegals, or secretaries?

Yes (__) No (__)

If "Yes," please explain: ____
____
____

105. Based on what you have read, heard, seen, or discussed about this case, which of the following best describes whether you believe Eric Robert Rudolph is guilty or not guilty of the charges against him:

___ Definitely guilty
___ Probably guilty
___ Possibly guilty
___ Possibly not guilty
___ Probably not guilty
___ Definitely not guilty
___ Don't know

The New Woman All Women's Health Center bombing on January 28, 1998

106. Were you aware of the bombing at the New Woman All Women's Health Center at the time it happened?

Yes (__) No (__)

If "Yes," please state how: ____
____

107. Did you, or any member of your family, or close friends, provide assistance of any kind to people participating in the rescue efforts associated with the bombing of the New Woman All Women's Health Center on January 28, 1998?

Yes (__) No (__)

If "Yes," please explain: ____

____

____

108. Did you, or any member of your family, or close friends, give any money, gifts in kind, or any form of assistance to victims of the bombing?

Yes (__) No (__)

If "Yes," please explain: ____

____

____

109. Have you visited the New Woman All Women's Health Center site since the time of the bombing?

Yes (__) No (__)

If "Yes," please explain: ____

____

____

Opinions about Evidence

110. The evidence in this case might include testimony and photographs that describe and depict injuries and damage caused by violent crime. Does the possibility of exposure to that type of evidence affect your ability to decide this case fairly and impartially on the basis of the evidence presented, and, the law as explained by the judge?

Yes (__) No (__)

If "Yes," please explain: ____

____

Opinions about Abortion

111. Do you have an opinion about whether or not abortion should be legal in this country?

Yes (__) No (__)

If "Yes," please describe your opinion and the basis for it: ____________________
____
____

112. Does your religion or philosophy take a position on the issue of abortion?

Yes (__) No (__)

If "Yes," what is that position? ____
____
____

113. To what extent do you agree or disagree with the position taken by your religion or philosophy? ____
____
____

114. Have you read or purchased literature or books that are written from either the pro-life or pro-choice perspective?

Yes (__) No (__)

If "Yes," please describe: ____
____
____

115. Have you seen or purchased films, videos, or other recordings that were produced with either a pro-life or pro-choice perspective?

Yes (__) No (__)

If "Yes," please describe: ____
____
____

116. Have you been involved with any type of social activism (such as letter writing, demonstrating, petitions) that involves the issue of abortion?

Yes (__)   No (__)

If "Yes," please explain: ____
____
____

117. Do you now, or have you ever, belonged to any organizations, or attended any meetings or forums, that deal with the issue of abortion?

Yes (__)   No (__)

If "Yes," please explain: ____
____
____

118. Have you ever followed any cases or news stories that deal with an event that happened at an abortion clinic, involving a doctor performing abortions, or anything related to abortion?

Yes (__)   No (__)

If "Yes," please explain: ____
____
____

119. Have you ever felt threatened, intimidated, or annoyed by any person or group protesting abortion?

Yes (__)   No (__)

If "Yes," please explain that situation: ________________________________
____
____

Opinions on the Death Penalty

The Court is asking questions regarding your feelings about the death penalty because the death penalty is one of the possible sentences for a person convicted of certain of the charges contained in the indictment in this case. The other possible punishment is life in prison without the possibility of release.

The case may proceed in two stages.

During the first stage of the trial, the jury will determine whether the defendant is guilty or not guilty of one or more of the offenses charged in the indictment, including the capital count.

If the defendant is found guilty of an offense for which the death penalty may be imposed, there will be a second stage of the trial for the jury to determine the sentence to be imposed.

The court will sentence the defendant according to the decision of the jury.

In any case in which the charge carries a possible penalty of death, the law requires that jurors answer questions regarding their views, beliefs, and opinions about the possible penalties.

120. What are your feelings about the death penalty?

____
____
____
____
____
____

121. What purpose, if any, do you think the death penalty serves in our society? _____
____
____
____
____

122. Have you ever had any contact or involvement with any organization(s) that support or are opposed to the death penalty?

Yes (__) No (__)

If "Yes," please describe: ____
____

123. Have your opinions about the death penalty ever been different than they are now?

Yes (__) No (__)

If "Yes", how: ____
____
____

124. Do you think the death penalty in Alabama is used too often or too seldom?

Too often ___ Too seldom ___

Why? ____
____
____

125. What is your best argument for the death penalty? ______________________
____
____
____

126. What is your best argument against the death penalty? __________________
____
____
____

127. Please circle the number that best reflects your opinion about the death penalty:

Strongly Favor								**Strongly Oppose**	
1	2	3	4	5	6	7	8	9	10

For Question 128 below, please check the line that most accurately states your view about the death penalty:

128. Where one person intentionally kills another person:

__ The death penalty is always justified.

__ The death penalty may or may not be justified, depending on the circumstances of the case.

__ The death penalty is never justified.

For Questions 129 through 132 below, please check the line that most accurately expresses the extent of your agreement with the statement that is made:

129. Anyone who plans and commits a murder should get the death penalty:

__ STRONGLY AGREE
__ AGREE SOMEWHAT
__ DISAGREE SOMEWHAT
__ STRONGLY DISAGREE

130. Anyone who murders a law enforcement officer should get the death penalty:

__ STRONGLY AGREE
__ AGREE SOMEWHAT
__ DISAGREE SOMEWHAT
__ STRONGLY DISAGREE

131. Anyone who commits an act of terrorism in which someone dies should get the death penalty:

__ STRONGLY AGREE
__ AGREE SOMEWHAT
__ DISAGREE SOMEWHAT
__ STRONGLY DISAGREE

132. A person's background does not matter when it comes to whether or not he should be sentenced to death for a murder:

__ STRONGLY AGREE
__ AGREE SOMEWHAT
__ DISAGREE SOMEWHAT
__ STRONGLY DISAGREE

133. What articles, books, movies or television programs have you read or seen which address the death penalty, or in which the death penalty is a part of the story?
____
____
____

What effect did these have on you? ______________________________
____
____

134. What does your religion or philosophy teach about the death penalty? __________
____
____
____

135. What affect does this teaching have on your own views? ____________________
____
____
____

Concluding Questions

136. As a result of having been asked to fill out this questionnaire, have you now formed any opinions about this case?

Yes (__)   No (__)

If "Yes,", please explain: ____
____

137. Do you have any religious, moral, or ethical considerations that would prevent you from sitting in judgment of another person?

Yes (__)   No (__)

If "Yes," please explain: ____
____

138. Do you want to be a juror in this case?

Yes (__)   No (__)

Why, or why not? ____
____

139. What did you think when you received the jury summons for this case? _________
____
____

140. What kinds of things did you say to others, or did others say to you, regarding your possible jury service in this case? ______________________________________
____
____
____

141. Please list anything you believe the Court and lawyers should know about you, that you think is important with reference to your ability to serve as a juror in this criminal case: ____
____
____
____

142. Do you have any projects in progress at your job that would affect your ability to concentrate, if you were selected to serve as a juror in this case for a period as long as three or four months, beginning the end of May or early-June, 2005?

Yes (__) No (__)

If "Yes," please explain: ____
____
____

143. Do you have any mental disability or impairment that would interfere with your ability to serve, or prevent you from serving, as a juror during the trial of this case?

Yes (__) No (__)

If "Yes," please explain: ____
____
____
____

144. Do you have any physical disability or impairment, or any other health problem(s) (e.g., sight, hearing, emotional, etc.), which might affect your ability to serve as a juror during the trial of this case?

Yes (__) No (__)

If "Yes," briefly state the nature of your health problems: ____________________
____
____
____

145. Do you have any medical conditions that require regular or frequent medication, or regular or frequent medical care and attention?

Yes (__) No (__)

If "Yes," please explain: ____
____
____
____

146. Is there any other reason, that you have not been asked about, that would interfere with your ability to serve, or that you believe would cause you to be unable to serve, as a juror for a period as long as 8 weeks, beginning in mid- to late-May, 2005?

Yes (__) No (__) Don't know/No Opinion (__)

If "Yes," please explain: ____
____
____
____

OATH OR AFFIRMATION

I hereby declare, under the penalties of perjury, that all of my answers to the foregoing questions, and that all information I have provided herein, is true, correct, and complete.

______________________________ ______________________

JUROR SIGNATURE JUROR NUMBER

ADDITIONAL ANSWER SHEETS
(Please Make Reference to the Number of the Question Being Answered)

AI AND JURY SELECTION

NACDL's 2026 National Voir Dire College

June 4-6, 2026 | New York, New York

Predicting Juror Predisposition Using Machine Learning: A Comparative Study of Human and Algorithmic Jury Selection

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Abstract

Prior studies on the effectiveness of professional jury consultants in predicting juror proclivities have yielded mixed results, and few have rigorously evaluated consultant performance against chance under controlled conditions. This study addresses that gap by empirically assessing whether jury consultants can reliably predict juror predispositions beyond chance levels and whether supervised machine-learning (ML) models can outperform consultant predictions.

Using data from N mock jurors who completed pre-trial attitudinal questionnaires and rendered verdicts in a standardized wrongful-termination case, we compared predictions made by professional jury consultants with those generated by Random Forest (RF) and k-Nearest Neighbors (KNN) classifiers. Model and consultant predictions were evaluated on a held-out test set using paired statistical tests and nonparametric bootstrap procedures.

We find that supervised ML models significantly outperform professional jury consultants under identical informational constraints, while offering greater transparency, replicability, and auditability. These results provide an empirical benchmark for evaluating human judgment in jury selection and inform ongoing debates about the role of data-driven decision support in legal contexts. To support reproducibility and auditability, all code and data will be made publicly available upon publication.

CCS Concepts

• **Computing methodologies** → **Supervised learning**; • **Applied computing** → *Law*; *Psychology*; • **Social and professional topics** → Professional ethics.

Keywords

jury selection, voir dire, jury consultants, human versus algorithmic decision-making, machine learning, accountability, legal decision-making, fairness and transparency

ACM Reference Format:

Ashwin Murthy, Ramesh Krishnamaneni, Sean Chacon, Kelsey Carlson, and Ranjita Naik. 2026. Predicting Juror Predisposition Using Machine Learning: A Comparative Study of Human and Algorithmic Jury Selection. In . ACM, New York, NY, USA, 13 pages. https://doi.org/10.1145/nnnnnnn.nnnnnnn

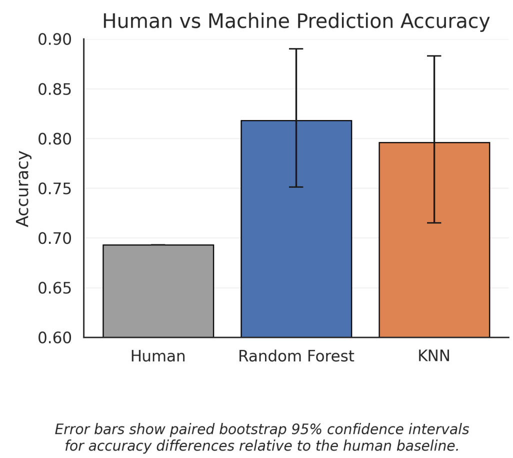

Figure 1: Comparison of predictive accuracy between professional jury consultants (majority vote) and machine-learning models. Error bars denote 95% paired bootstrap confidence intervals relative to the human baseline.

1 Introduction

The Sixth and Seventh Amendments protect the right to an impartial jury in criminal and civil proceedings. Voir dire is the primary mechanism through which that right is safeguarded: attorneys question prospective jurors to determine whether their beliefs or experiences might affect their ability to judge a case fairly. In practice, however, voir dire unfolds under severe informational constraints, brief questioning, short questionnaires, and rapid judgments formed under pressure.

To mitigate these constraints, litigants, particularly in high-stakes trials, often retain professional jury consultants, sometimes referred to as practitioners of “scientific jury selection.” These consultants typically analyze juror questionnaires, demographic information, and qualitative impressions to advise attorneys on juror strikes and trial strategy. Despite the growing institutionalization of this practice, several structural limitations persist.

First, cost and access sharply constrain the reach of jury consulting. Trial consulting services are expensive and are therefore disproportionately available to well-resourced litigants. Prior scholarship notes that comprehensive consulting engagements can cost tens of thousands of dollars or more, effectively placing such services beyond the reach of public defenders, legal aid organizations, and many small firms [8, 19]. This economic barrier raises concerns that purportedly "scientific" jury selection tools may exacerbate existing inequalities in the justice system rather than mitigate them.

Second, trial consultant judgments are largely grounded in professional experience and qualitative interpretation rather than standardized, empirically validated predictive models. As a profession, trial consulting lacks uniform credentialing requirements, specialized training standards, or the use of standardized assessments when advising on jury selection decisions [11]. This absence of formal regulation and methodological standardization contributes to an opaque decision-making process in which consultant recommendations are difficult to independently evaluate, replicate, or compare across cases. As Lecci and colleagues argue, the esoteric and idiosyncratic nature of trial consulting places the burden on the profession to empirically demonstrate its efficacy, an obligation that can only be met through systematic, quantitative validation rather than post hoc claims of success.

Finally, and most critically, there remains a lack of robust empirical validation of consultant accuracy. While consultants are widely used in practice, few studies have rigorously tested whether their predictions of juror proclivities outperform chance under controlled conditions, or whether they generalize across cases and populations. Existing empirical findings are mixed, with some studies questioning whether consultant judgments meaningfully exceed baseline prediction strategies [9, 17, 18]. As a result, the evidentiary foundation for scientific jury selection remains limited relative to its influence in modern trial practice.

These limitations raise fundamental questions about the reliability, fairness, and accountability of prevailing approaches to jury selection, motivating the need for systematic, empirically grounded alternatives capable of being evaluated, audited, and replicated.

Advances in artificial intelligence (AI) and machine learning (ML) offer one potential response to these challenges. ML models have demonstrated strong performance in predicting judicial outcomes, identifying latent legal patterns, and capturing nonlinear relationships that human judgment struggles to synthesize [2, 14]. Research on human–algorithm interaction further suggests that algorithmic predictions are often viewed as more consistent and objective once users are exposed to their performance [12].

At the same time, applying ML to juror assessment raises significant constitutional and ethical concerns. Equal-protection doctrine, including *Batson v. Kentucky* (1986), prohibits evaluating prospective jurors on the basis of race or sex. Yet research in algorithmic fairness shows that predictive models can encode discriminatory proxy signals even when sensitive features are removed [6]. Scholars in computational law argue that bias in ML systems is often multidimensional, requiring careful auditing of error patterns and decision behavior to ensure legal and normative legitimacy [15, 16]. Accordingly, ML-based approaches to voir dire must be evaluated not only for predictive performance but also for transparency, replicability, and error structure.

Despite these developments, juror-level prediction remains underexplored. Psycholegal research has established that pretrial attitudes reliably forecast verdict direction across legal contexts [13, 17], yet few studies have built predictive models using such data, and almost none have directly compared algorithmic predictions to those made by professional jury consultants under identical informational constraints.

In this study, we conduct a controlled, juror-level comparison of professional jury consultants and supervised machine-learning models using the same pretrial questionnaire information. Figure 1 provides a high-level preview of the central finding: under identical conditions, ML models achieve substantially higher predictive accuracy than consultant majority votes. The remainder of the paper systematically evaluates the robustness, statistical significance, and structure of these performance differences.

Accordingly, we investigate the following research questions:

- **RQ1:** Do professional jury consultants predict juror verdict leanings at rates that exceed chance?
- **RQ2:** Do supervised machine-learning models predict juror verdict leanings more accurately than professional jury consultants when provided with identical pretrial questionnaire information?
- **RQ3:** Do machine-learning models exhibit more consistent and systematic error patterns than professional jury consultants on individual jurors?
- **RQ4:** Are attitudinal factors more influential than demographic characteristics in predicting juror verdict leanings?

2 Related Work

Our work draws on four intersecting bodies of scholarship: (1) empirical research on juror decision-making and voir dire, (2) critiques and evaluations of scientific jury selection and trial consulting, (3) comparisons of human and algorithmic judgment, and (4) machine learning in legal decision-making and fairness-sensitive contexts.

2.1 Juror Decision-Making and Voir Dire

A large body of psycholegal research has examined how jurors form decisions and the role of pre-trial attitudes in shaping verdicts. Decades of empirical work demonstrate that juror beliefs, values, and prior experiences systematically influence trial outcomes, even before evidence is presented [3–5]. Attitudinal factors such as beliefs about fairness, responsibility, and authority have been shown to predict verdict direction across civil and criminal contexts.

Within this literature, voir dire has been studied as a mechanism for identifying and managing juror bias. Experimental work suggests that expanded voir dire can affect juror decisions, though its effectiveness varies by case type and judicial intervention [17]. Related studies have shown that pre-trial attitudes, combined with the applicable standard of proof, can meaningfully predict verdicts, reinforcing the relevance of questionnaire-based juror assessment [13].

2.2 Scientific Jury Selection and Trial Consulting

Professional jury consulting, often framed as "scientific jury selection," applies social-scientific insights to jury selection and trial strategy. Descriptive accounts document how consultants use demographic, attitudinal, and experiential information to advise attorneys [8, 19]. However, the empirical evidence supporting consultant effectiveness remains limited and mixed.

Early evaluations questioned whether consultant predictions reliably outperform chance or attorney intuition [11, 18]. More recent legal scholarship has reiterated this critique, noting the absence of systematic benchmarking, standardized training, or transparent validation practices within the profession [9]. Despite widespread use in high-stakes litigation, few studies have directly compared consultant predictions against quantitative models under controlled conditions, leaving core claims of scientific validity largely untested.

2.3 Human Judgment, Noise, and Expert Prediction

Research in judgment and decision-making has documented substantial variability and noise in expert assessments across domains. Even trained professionals often struggle to integrate multiple probabilistic cues consistently, leading to unstable or idiosyncratic judgments [7]. Work in organizational psychology similarly shows that structured statistical models frequently outperform human experts in selection and prediction tasks by reducing noise and enforcing consistent aggregation rules [10, 20].

At the same time, studies of algorithm appreciation suggest that people may prefer algorithmic advice once its consistency and performance are made explicit [12]. These findings motivate empirical comparisons between human and algorithmic judgment, particularly in domains where expert authority has historically gone unchallenged.

2.4 Machine Learning, Law, and Fairness

Recent work has applied machine learning to legal prediction tasks, including forecasting judicial decisions using textual and structured data [2, 14]. While these studies demonstrate the predictive capacity of ML in legal contexts, they also raise concerns about interpretability, bias, and normative legitimacy.

Research on algorithmic fairness emphasizes that predictive accuracy alone is insufficient in high-stakes legal settings. Models may encode proxy discrimination even when sensitive attributes are excluded [6], and discrimination can emerge across intersecting demographic dimensions [16]. In response, transparency and accountability frameworks, such as model cards, have been proposed to support responsible evaluation and governance of ML systems [15].

Equal-protection doctrine further constrains the use of predictive tools in jury selection. In *Batson v. Kentucky*, the U.S. Supreme Court prohibited the use of race-based peremptory challenges, underscoring the legal risks of both human and algorithmic decision-making processes that rely on protected characteristics [1]. These constraints highlight the importance of auditing, benchmarking, and careful governance when introducing data-driven tools into voir dire.

2.5 Positioning of the Present Work

Despite extensive research on juror attitudes, trial consulting, and algorithmic prediction, few studies have conducted direct, head-to-head comparisons between professional jury consultants and machine-learning models using identical information and paired evaluation. The present study addresses this gap by empirically benchmarking consultant judgments against supervised ML models under controlled conditions, while explicitly separating predictive performance from normative and legal permissibility.

By situating algorithmic prediction as a transparent, auditable benchmark rather than a replacement for human judgment, this work contributes to ongoing debates about the role of data-driven tools in legally and ethically constrained decision-making contexts.

3 Methods

3.1 Study Design and Data Collection

We conducted a controlled mock-trial experiment using an online crowdsourcing platform, following established methodologies in empirical legal and psycholegal research (e.g., Salerno et al., 2021). Participants were recruited to serve as mock jurors in a standardized wrongful-termination case.

Each juror ($N = 410$) completed a pre-trial questionnaire designed to capture three classes of variables: (1) demographic characteristics (e.g., age, gender, education, employment status), (2) experiential factors (e.g., prior jury service, workplace experience, exposure to discrimination claims), and (3) attitudinal measures assessing beliefs about workplace fairness, discrimination, corporate responsibility, and individual accountability. Attitudinal items were measured using multi-point Likert scales.

Participants then reviewed a standardized case vignette summarizing the relevant facts, legal claims, and arguments presented by both parties. After reviewing the materials, jurors rendered a verdict decision: *plaintiff*, *defense*, or *neither*. To avoid imposing an artificial binary choice that could introduce label noise, jurors were explicitly offered the *neither* option. For predictive modeling, only definitive plaintiff or defense verdicts were retained as ground-truth labels; jurors selecting *neither* were excluded from subsequent analyses.

3.2 Human Jury Consultant Predictions

Three professional jury consultants independently reviewed the same juror questionnaires and case materials. Consultants were blind to jurors' actual verdicts and to one another's predictions. Based solely on pre-trial information available during voir dire, each consultant classified jurors as either *plaintiff-leaning* or *defense-leaning*. No constraints were imposed on consultants' reasoning strategies, mirroring real-world jury consulting practice.

Inter-rater reliability among consultants was assessed using Cohen's κ, yielding moderate agreement ($\kappa = 0.76$). Consultant predictions are reported using majority-vote aggregation.

3.3 Feature Engineering and Preprocessing

Questionnaire responses were preprocessed prior to model training. Demographic variables were encoded using one-hot encoding to avoid imposing ordinal assumptions, while Likert-scale attitudinal variables were ordinally encoded to preserve their monotonic structure.

Because several attitudinal measures exhibited moderate correlations, models were evaluated under two feature configurations: (1) a full-feature configuration including all demographic and attitudinal variables, and (2) a random-subspace configuration in which models were trained on randomly sampled subsets of predictors. This design enabled assessment of robustness to feature redundancy and multicollinearity.

All preprocessing steps were fit exclusively on the training data and applied unchanged to the test set.

3.4 Supervised Machine-Learning Models

We evaluated two supervised machine-learning models that represent complementary inductive biases and are well-suited to structured questionnaire data: Random Forests (RF) and k-Nearest Neighbors (KNN).

Random Forests (RF) are ensemble bagging methods that aggregate predictions across multiple decision trees trained on bootstrapped samples of the data. By combining recursive partitioning with feature subsampling, RF models can capture non-linear interactions and higher-order dependencies among juror characteristics while remaining relatively robust to multicollinearity and noise. Random Forests are widely used in applied social-science and legal prediction tasks due to their strong performance on tabular data and their ability to provide stable predictions without strong parametric assumptions.

k-Nearest Neighbors (KNN) is a non-parametric, instance-based classifier that assigns labels based on the majority class among the k most similar observations in feature space. Unlike tree-based models, KNN makes minimal assumptions about the global structure of the data and instead relies on local similarity relationships. As such, KNN provides a useful contrast to Random Forests by emphasizing proximity-based reasoning rather than learned decision boundaries.

Together, these models span two distinct predictive paradigms ensemble-based global modeling and local instance-based inference, allowing us to assess whether juror-leaning predictions are driven by stable global patterns or by localized clusters of similar jurors.

Both models were trained using identical feature representations, training procedures, and evaluation protocols, enabling direct and controlled comparison with one another and with human jury consultant predictions.

3.5 Training and Evaluation Protocol

The dataset was partitioned into a fixed training set of 273 jurors and an independent held-out test set of 137 jurors, each with 29 features. Model development, including hyperparameter tuning, was conducted exclusively on the training data using 5-fold cross-validation.

Hyperparameters for each model were optimized via grid search within the cross-validation loop. The best-performing configuration was then retrained on the full training set and evaluated once on the held-out test set. This procedure ensured that all reported test-set results reflect strictly out-of-sample performance.

Model performance was evaluated using standard classification metrics, including accuracy, precision, recall, and area under the ROC curve (AUC). To contextualize algorithmic performance, machine-learning predictions were compared directly with jury consultant predictions on the same test-set jurors, enabling head-to-head comparison under identical informational constraints.

3.6 Limitations and Scope

The present study evaluates predictive accuracy under controlled experimental conditions and does not claim deployment readiness. While fairness and subgroup analyses are critical for real-world use, they are outside the scope of this work and are identified as priorities for future research.

3.7 Evaluation Metrics

Model performance was evaluated on a fixed, independent held-out test set of 137 jurors. We report standard classification metrics including accuracy, precision, recall, and F1-score. Accuracy is emphasized as the primary metric to facilitate direct comparison with binary human consultant judgments.

To quantify uncertainty and avoid reliance on asymptotic assumptions, we estimated confidence intervals using nonparametric bootstrapping. Specifically, the test set was resampled with replacement for 5,000 bootstrap iterations. For each resample, model predictions were recomputed and evaluation metrics were recorded. The resulting empirical distributions were used to estimate mean performance and 95% confidence intervals.

To enable statistically grounded comparison between machine-learning models and professional jury consultants, we conducted paired analyses on identical test-set jurors. Differences in accuracy between each model and the consultant majority vote were assessed using paired bootstrap resampling, yielding confidence intervals for accuracy deltas. In addition, McNemar's test was applied to paired predictions to evaluate whether observed differences in error patterns between models and consultants were statistically significant.

All reported confidence intervals and statistical tests were computed exclusively on held-out test data, and no information from the test set was used during model training or hyperparameter tuning.

4 Results

4.1 Overall Predictive Performance

Table 1 reports predictive performance for the human jury consultant majority vote, Random Forest (RF), and k-Nearest Neighbors (KNN) models on the held-out test set of 137 jurors. Both machine-learning models substantially outperformed the human consultant baseline in terms of accuracy, precision, recall, and F1-score.

The human consultant majority vote achieved an accuracy of 0.693. In contrast, the Random Forest model achieved an accuracy of 0.818, while the KNN model achieved an accuracy of 0.796. Improvements were consistent across precision and recall, indicating that gains were not driven by asymmetric error tradeoffs.

Table 1: Predictive performance on the held-out test set (137 jurors). ΔAccuracy reflects paired differences relative to the human consultant majority vote, with 95% bootstrap confidence intervals.

Model	Accuracy	Precision	Recall	F1	ΔAccuracy vs Human	McNemar p
Human (Majority Vote)	0.693	0.720	0.756	0.738	–	–
Random Forest	0.818	0.827	0.859	0.843	0.123 [0.058, 0.197]	0.001
KNN	0.796	0.784	0.885	0.831	0.101 [0.022, 0.190]	0.026

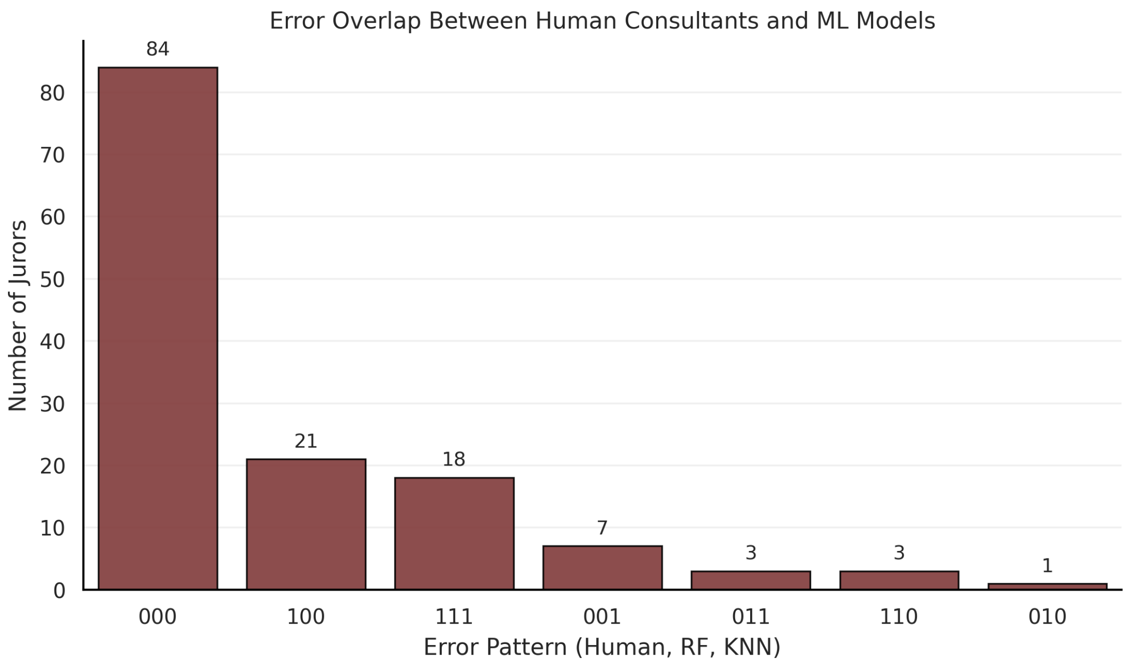

Figure 2: Error overlap patterns across human consultants, Random Forest, and k-Nearest Neighbors models. Each bar represents the number of jurors corresponding to a specific error pattern, where 1 indicates an incorrect prediction and 0 indicates a correct prediction (ordered as Human, RF, KNN).

4.2 Comparison with Human Jury Consultants

To directly compare model performance against professional jury consultants, we evaluated paired accuracy differences on identical test-set jurors. Random Forest improved accuracy by 12.3 percentage points relative to the consultant majority vote, with a 95% paired bootstrap confidence interval of [0.058, 0.197]. KNN achieved a 10.1 percentage point improvement, with a corresponding confidence interval of [0.022, 0.190].

Importantly, confidence intervals for both models exclude zero, indicating that observed performance gains are unlikely to be attributable to sampling variability alone.

4.3 Statistical Significance of Error Differences

We further assessed whether models and consultants differed in their error patterns using McNemar's test. Random Forest predictions differed significantly from consultant predictions ($p = 0.001$), with substantially more cases in which the model was correct and the consultant was incorrect than vice versa ($b = 21, c = 4$). KNN predictions also differed significantly from consultants ($p = 0.026$), though with a smaller margin ($b = 24, c = 10$).

Together, these results indicate that machine-learning models not only achieve higher overall accuracy than professional jury consultants but also make systematically different and more frequently correct judgments on individual jurors under identical informational constraints.

4.4 Confusion Matrix Analysis

Figure 3 presents row-normalized confusion matrices for the human jury consultant majority vote, Random Forest, and k-Nearest Neighbors models. Both machine-learning models reduce misclassification rates for plaintiff- and defense-leaning jurors relative to consultants. Random Forest exhibits the most balanced improvements across outcome classes, while KNN shows particularly strong performance on plaintiff-leaning jurors. These results indicate that model gains reflect broad reductions in error rather than asymmetric trade-offs between false positives and false negatives.

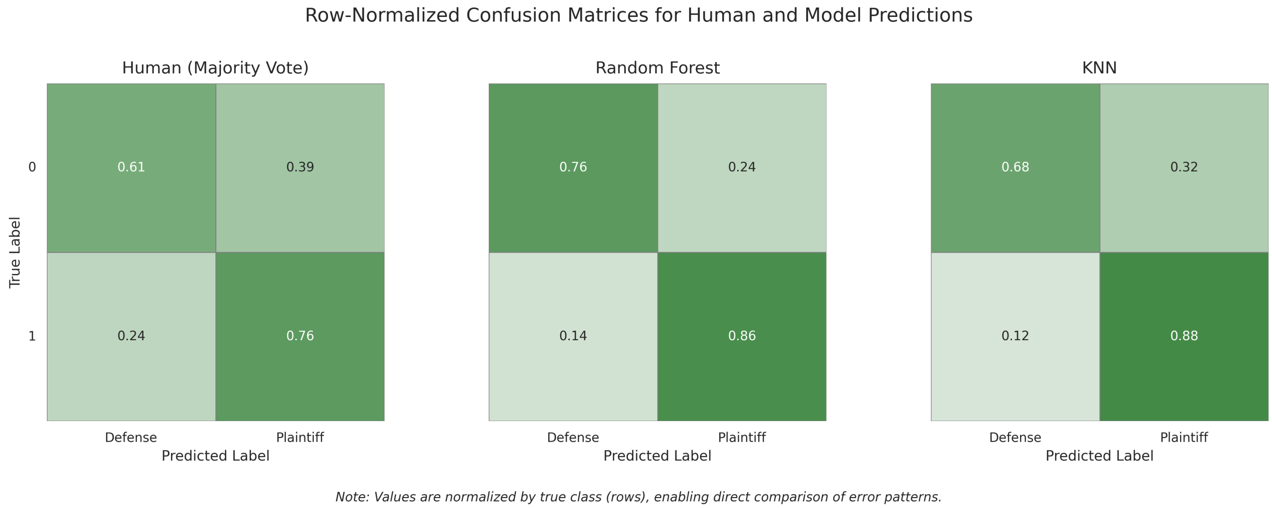

Figure 3: Row-normalized confusion matrices comparing the human jury consultant majority vote, Random Forest, and k-Nearest Neighbors predictions on the held-out test set. Values indicate the proportion of jurors within each true class assigned to each predicted class, enabling direct comparison of error patterns across decision systems.

4.5 Error Structure and Predictive Consistency

To further characterize differences between human and algorithmic judgment, we examined patterns of agreement and disagreement on individual jurors. Figure 2 summarizes error overlap across the human consultant majority vote, Random Forest, and k-Nearest Neighbors models.

The most common pattern corresponds to unanimous agreement across predictors, indicating broad consensus on a majority of jurors. Notably, a substantial number of cases reflect instances in which both machine-learning models correctly predicted juror leanings while the consultant majority vote erred. In contrast, cases in which the consultant was correct and both models were incorrect were comparatively rare. A smaller subset of jurors was misclassified by all predictors, suggesting the presence of inherently ambiguous cases rather than random noise.

These error patterns complement the McNemar test results, indicating that the observed performance gains reflect systematic differences in predictive consistency rather than isolated improvements in aggregate accuracy.

4.6 Attitudinal Versus Demographic Predictors

To assess the relative influence of attitudinal and demographic factors, we conducted both performance-based ablation analyses and feature-importance inspections. Models trained exclusively on attitudinal variables achieved identical predictive performance to models that additionally included demographic attributes such as race and gender (Table 2), indicating that demographic features do not materially contribute to predictive accuracy in this setting.

Figure 4 summarizes aggregate feature importance by feature type for the Random Forest model. Attitudinal variables account for the overwhelming majority of total importance, whereas demographic attributes contribute substantially less to the model's predictions.

Inspection of individual feature importances further reveals that the most influential predictors correspond to jurors' beliefs about workplace fairness, discrimination, and responsibility attribution (Figure 5). Demographic variables, when included, exhibit comparatively low importance and do not appear among the most predictive features.

Taken together, these findings suggest that predictive signals arise primarily from jurors' expressed attitudes rather than demographic characteristics, supporting the use of attitudinally grounded models under legally constrained jury-selection contexts.

Robustness to Feature Redundancy. To assess robustness to correlated predictors and multicollinearity, we conducted a random-subspace analysis in which models were trained on randomly sampled subsets of attitudinal features while holding the training and test sets fixed. Across both Random Forest and KNN models, predictive performance degraded gradually as the number of available features decreased, without sharp drops indicative of reliance on a narrow feature subset. Even when trained on only 50% of available predictors, both models retained substantial predictive accuracy. Performance variability also decreased as more features were included, indicating increased stability. Full results are reported in Appendix C. These findings suggest that model performance reflects distributed attitudinal signal rather than dependence on a small number of correlated variables.

Sensitivity to Demographic Features. All primary results exclude protected demographic attributes such as race and gender. As a robustness check, we re-estimated all models including these features while holding the training, evaluation, and comparison procedures constant. Inclusion of demographic attributes did not materially change predictive performance, relative rankings between models and human consultants, or statistical significance (Appendix X).

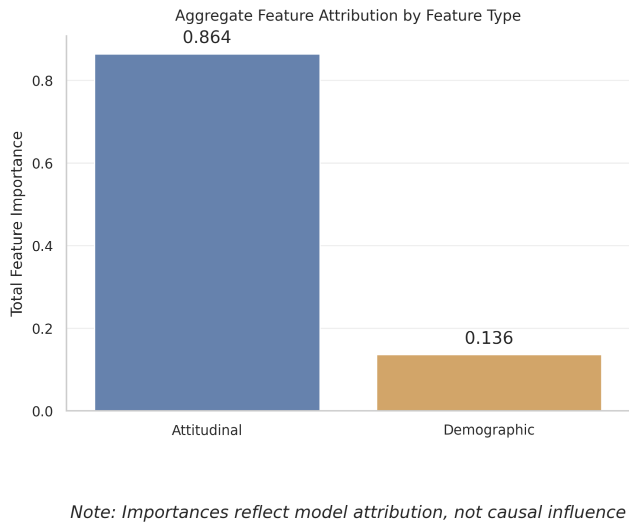

Figure 4: Aggregate feature importance by feature type for the Random Forest model. Attitudinal variables account for the majority of predictive importance, while demographic attributes contribute substantially less.

These findings indicate that the observed performance gains are not driven by the explicit inclusion of protected characteristics.

5 Discussion

This study provides a controlled, empirical comparison between professional jury consultants and supervised machine-learning models tasked with predicting juror verdict leanings from pre-trial questionnaire data. Under identical informational constraints and evaluated on the same held-out jurors, both Random Forest and k-Nearest Neighbors models significantly outperformed the consultant majority vote. These results have implications for the empirical foundations of scientific jury selection, the role of data-driven tools in trial preparation, and the ethical governance of predictive technologies in legal settings.

5.1 Interpreting the Performance Gap

The observed performance gap between machine-learning models and professional jury consultants suggests that juror questionnaire data contain systematic predictive structure that is not fully exploited by human judgment alone. Ensemble-based and instance-based models appear better able to aggregate weak but collectively informative signals across multiple attitudinal and experiential variables, yielding more consistent predictions across jurors.

Importantly, these gains are not marginal. Paired bootstrap confidence intervals for accuracy differences exclude zero for both models, and McNemar tests indicate statistically significant differences in error patterns. This suggests that models are not merely optimizing different tradeoffs but are correctly classifying cases in which consultants systematically err.

These findings align with broader evidence that humans struggle to integrate multiple probabilistic cues consistently, particularly under time pressure and without formal aggregation rules. In contrast, machine-learning models apply stable decision rules across cases, reducing variance introduced by subjective interpretation.

5.2 Implications for "Scientific" Jury Selection

Professional jury consulting is often described as a form of "scientific jury selection," yet the field has historically lacked large-scale, controlled validation of predictive accuracy and standardized evaluation frameworks. While our results indicate that professional consultants perform better than chance, the absence of systematic benchmarking, replication, and agreed-upon performance standards raises questions about whether current practices merit the label "scientific." These findings underscore the need for greater empirical scrutiny to assess when, and under what conditions, consultant judgments can be reliably validated.

This is not a critique of consultant expertise per se. Jury consultants bring contextual knowledge, courtroom experience, and qualitative judgment that are not captured by questionnaire data alone. Rather, the present findings suggest that claims of scientific rigor would benefit from stronger empirical grounding and transparent validation practices. Viewed in this light, quantitative models may serve as a complementary tool—introducing structure, consistency, and testability into a largely subjective process—and as a practical alternative in settings where access to human expertise is limited by cost or resource constraints.

5.3 Decision Support, Not Automation

We do not argue that machine-learning models should replace human judgment in jury selection. Rather, our results support a framing of ML as a *decision-support and auditing tool.* Predictive models can serve as external benchmarks against which human judgments are evaluated, helping identify blind spots, inconsistencies, or overconfidence in consultant recommendations.

Such a role is particularly important given the high stakes of jury selection and the constitutional constraints governing it. By providing reproducible and auditable predictions, ML systems may improve accountability without displacing human legal reasoning or strategic decision-making.

5.4 Fairness, Law, and Constitutional Constraints

Improved predictive accuracy does not imply normative legitimacy. Jury selection in the United States is governed by constitutional protections, including equal-protection doctrine and the prohibition against race- and sex-based exclusion articulated in *Batson v. Kentucky*. Predictive models trained on juror data may inadvertently encode proxy signals for protected characteristics, even when sensitive attributes are excluded.

While the present study does not conduct subgroup or fairness audits, these results underscore the need for such analyses before any real-world deployment. Performance advantages alone cannot justify the use of predictive systems in contexts where discriminatory impact is legally and ethically impermissible. Future work must therefore integrate fairness auditing, race-sensitivity testing, and legal compliance checks as first-class components of evaluation.

Table 2: Predictive performance with and without demographic features.

Model	Attitudinal Only	Attitudinal + Demographic
Random Forest (Accuracy)	0.818	0.818
KNN (Accuracy)	0.796	0.796

Figure 5: Top predictive features identified by the Random Forest model, ranked by Gini importance. The most influential predictors correspond to jurors' attitudinal beliefs about workplace fairness, discrimination, and responsibility attribution, while demographic attributes exhibit comparatively low importance.

5.5 Ethical and Legal Considerations

Any application of machine-learning techniques to jury selection operates within a stringent constitutional and ethical framework. Equal-protection doctrine including the prohibition against race- and sex-based exclusion articulated in *Batson v. Kentucky* places clear limits on how juror information may be used in practice. At the same time, prior research has shown that predictive models can encode discriminatory proxy signals even when protected attributes are excluded from training data.

The present study does not conduct subgroup performance analyses, race-sensitivity tests, or fairness audits. As such, it does not claim that the observed predictive gains satisfy constitutional or ethical requirements. Rather, the findings should be interpreted as evidence about comparative predictive performance under controlled conditions, not as validation of legally permissible deployment.

These constraints underscore the importance of separating performance benchmarking from normative legitimacy. Any real-world use of predictive tools in voir dire would require rigorous fairness auditing, sensitivity analyses, and legal review to assess disparate impact, proxy discrimination, and compliance with constitutional standards. Removing protected attributes may be a necessary step toward responsible model design, but it is not sufficient on its own to guarantee fairness or legality.

5.6 Access and Institutional Equity

These findings also have practical implications for access and institutional equity in jury selection. Traditional jury consulting services are costly and disproportionately available to well-resourced litigants, potentially amplifying existing inequalities in trial preparation. In contrast, transparent and standardized machine-learning–based decision-support tools could lower barriers to empirically grounded juror assessment, making such analyses more accessible to public defenders, small firms, and courts.

Importantly, any such use should be framed as advisory rather than determinative. Predictive tools may help flag attitudinal patterns that human evaluators overlook, while remaining subject to human judgment and legal oversight. Existing frameworks from computational law and responsible AI provide pathways for courts to regulate and audit these systems, ensuring that algorithmic assistance enhances rather than undermines procedural fairness.

Notably, including race and gender as features did not materially alter model performance, suggesting that the observed predictive gains are primarily associated with attitudinal information rather than the explicit use of demographic attributes.

6 Limitations and Future Directions

Several limitations warrant caution. First, the study relies on a mock-trial design with jurors recruited online, which may limit generalizability to real-world venire members. While online samples are widely used in empirical legal research, they may differ from courtroom jurors in terms of attentiveness, experience, and deliberative context.

Second, the analysis is restricted to a single civil wrongful-termination case. Juror attitudes and consultant strategies may vary across legal domains, evidentiary structures, and stakes. Extending this framework to additional civil and criminal contexts would help assess the stability of attitudinal predictors and comparative performance across case types.

Third, the models and consultant evaluations rely exclusively on structured questionnaire data. In practice, jury selection often incorporates additional signals, including open-ended responses, oral voir dire, and qualitative impressions. Integrating richer or multimodal inputs—such as free-text explanations, audio from voir dire, or interactional cues—may further improve predictive performance and warrants future investigation.

Finally, the present study focuses on predictive accuracy under controlled conditions and does not evaluate fairness, calibration, or downstream legal impacts. Although performance benchmarking is a necessary first step, any real-world application would require rigorous fairness auditing, race-sensitivity testing, and legal review prior to deployment.

Future research should also examine how machine-learning–based decision-support tools influence attorney judgment in practice, how such tools might be regulated by courts, and whether algorithmic insights can be incorporated into structured voir dire procedures to improve transparency and accountability without undermining constitutional protections.

7 Conclusion

This study provides a controlled empirical comparison between professional jury consultants and supervised machine-learning models tasked with predicting juror verdict leanings from pre-trial questionnaire data. Under identical informational constraints, Random Forest and k-Nearest Neighbors models achieved significantly higher predictive accuracy than the consultant majority vote.

These findings challenge the assumption that professional jury consultants reliably outperform simple, transparent predictive models and underscore the importance of empirical benchmarking in a domain that has long claimed scientific grounding. At the same time, predictive accuracy alone does not establish normative legitimacy. Machine-learning systems are not a panacea and must be governed carefully, particularly in light of constitutional constraints and ethical concerns surrounding jury selection.

Rather than advocating automation, this work highlights the potential role of machine-learning models as auditable, reproducible benchmarks and decision-support tools for evaluating human judgment in voir dire. Used responsibly, such benchmarks may contribute to more empirically grounded and accountable trial practices while preserving the central role of human legal decision-making.

8 Ethical Considerations in Mock Juror Recruitment

Mock jurors were recruited via an online platform commonly used for jury research. Participants were compensated in accordance with applicable minimum wage, time, and labor laws, and all other relevant legal and ethical requirements in the jurisdictions of both the participants and the authors were followed.

Generative AI Disclosure Statement

The authors used generative AI tools to assist with code structuring, data analysis workflows, and visualization formatting. All experimental design decisions, model implementations, statistical analyses, and interpretations of results were performed by the authors. Generative AI tools did not autonomously generate research hypotheses, conduct analyses, or determine conclusions.

Acknowledgments

We thank the participating jury consultants and volunteer jurors for their time and contributions to this study. This research received no external funding. The authors declare no conflicts of interest.

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Table 3: Top RF feature-importance scores (rounded to four decimal places).

Feature	Type	Importance
To what extent do you agree or disagree with the following statement? Diversity initiatives unfairly advantage certain groups	Attitudinal	0.1549
Employers should consider race as one of several factors in hiring and promotion decisions	Demographic	0.1359
When someone says "I don't see color," it indicates racial bias	Attitudinal	0.1248
In an employment discrimination case, which side will have a harder time convincing you?	Attitudinal	0.1190
People who sue companies are primarily motivated by financial gain	Attitudinal	0.1010
Employment outcomes are mostly due to merit rather than bias or privilege	Attitudinal	0.0834
Losing a job is not a big deal for someone willing to work hard	Attitudinal	0.0480
A company's HR department is there to help employees	Attitudinal	0.0393
People fired unfairly should move on instead of filing lawsuits	Attitudinal	0.0388
A company's HR department exists to protect the company, not employees	Attitudinal	0.0369
Companies would never fire a good employee unfairly	Attitudinal	0.0348
Corporations are unfairly criticized for prioritizing profits	Attitudinal	0.0300
Too many corporations behave unethically to make money	Attitudinal	0.0258
Losing a job causes significant distress for most people	Attitudinal	0.0197

Table 4: Random-subspace robustness analysis for RF and KNN models. Each configuration reports mean test accuracy across 50 randomly sampled feature subsets.

Model	Subspace	# Features	Mean Acc.	Std. Dev.
Random Forest	50%	8	0.714	0.036
Random Forest	70%	12	0.768	0.024
Random Forest	90%	15	0.802	0.013
KNN	50%	8	0.723	0.054
KNN	70%	12	0.779	0.028
KNN	90%	15	0.796	0.016

A Feature Importance Details

Table 3 reports the top RF feature-importance scores used to assess the relative influence of attitudinal and demographic predictors (RQ3). Importance values are computed using the Gini-importance criterion.

B Learning Curves and Sample-Size Sensitivity

As a robustness check, we examined learning curves for the RF and KNN models by varying the size of the training set while evaluating performance using cross-validation. Both models exhibit near-perfect training accuracy across sample sizes, reflecting high model capacity, while cross-validated accuracy improves monotonically as additional data is incorporated. This pattern indicates that the performance gains reported in the main analysis are not driven by overfitting to a small training subset, and that additional data would likely further improve generalization. RF converges faster than KNN, consistent with ensemble methods' ability to stabilize predictions in high-dimensional settings.

C Random Subspace Robustness Analysis

To evaluate sensitivity to feature redundancy and multicollinearity, we trained RF and KNN models on randomly sampled subsets of attitudinal predictors, using 50%, 70%, and 90% of available features. For each configuration, models were trained and evaluated 50 times using the same fixed training and held-out test sets.

Table 4 reports mean test accuracy, standard deviation, and observed ranges across random subspaces. Both models exhibit gradual performance degradation as fewer predictors are included, with no evidence of abrupt failure or dependence on a narrow subset of features. RF models demonstrate lower variance across subspaces than KNN, consistent with the stabilizing effects of ensemble learning.

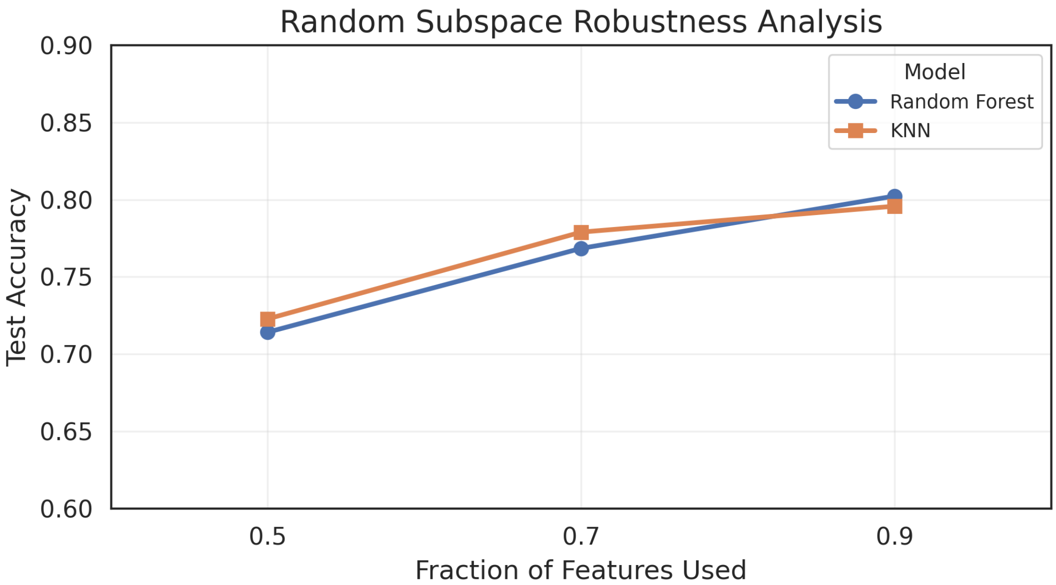

Figure 6: Test accuracy as a function of the fraction of attitudinal features used for RF and KNN models. Accuracy degrades gradually as fewer predictors are available, with no abrupt collapse, indicating robustness to feature redundancy and multi-collinearity.

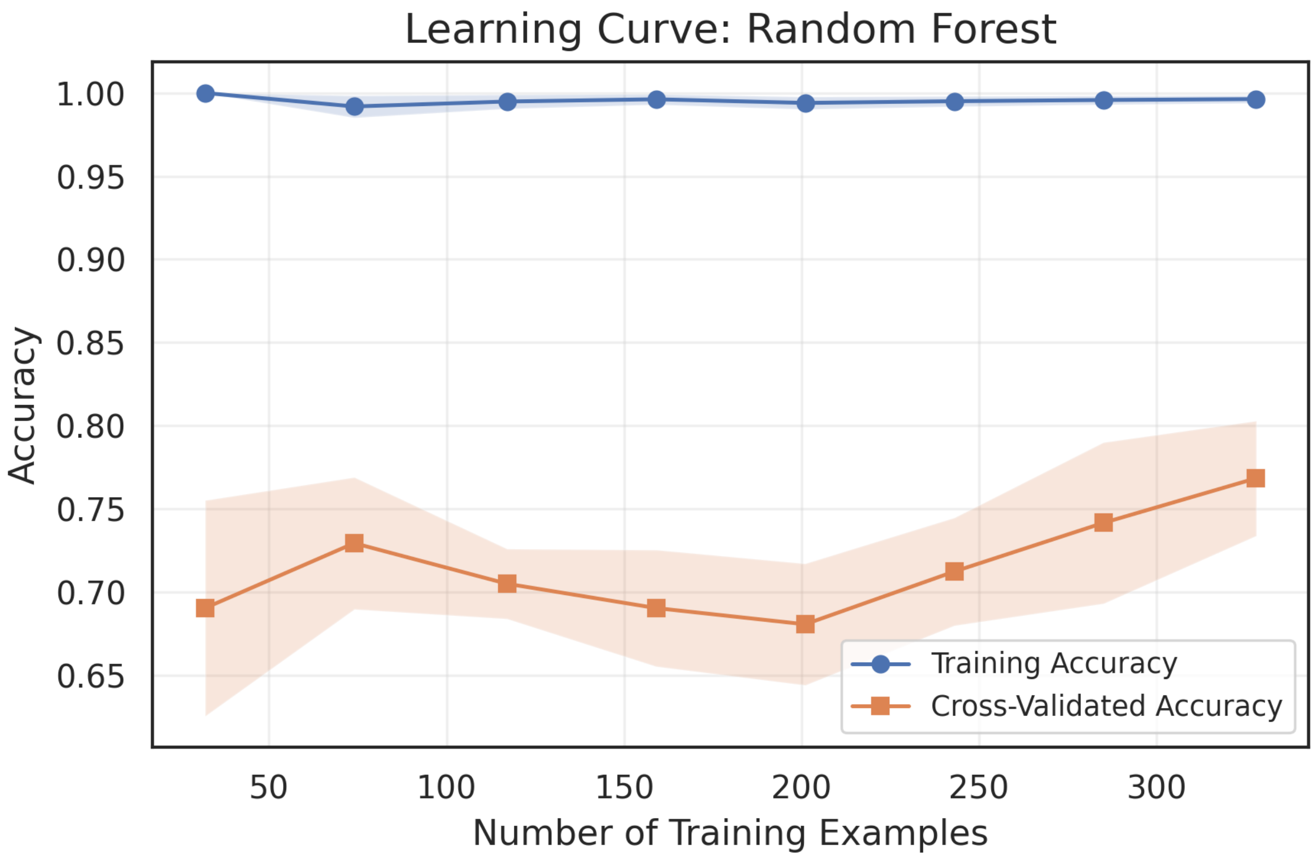

Figure 7: Learning curve for the RF model, showing training and cross-validated accuracy as a function of training-set size. Shaded regions denote ±1 standard deviation across cross-validation folds.

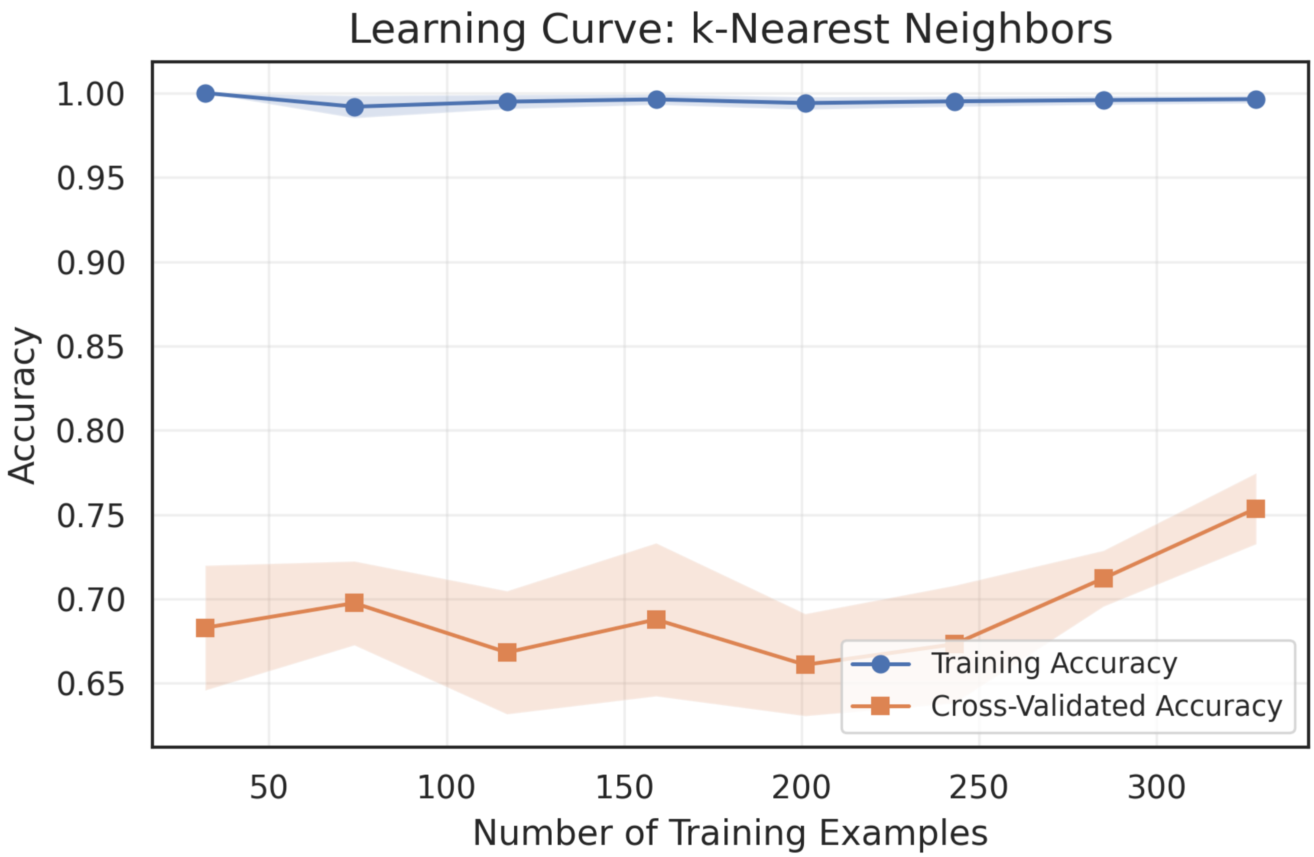

Figure 8: Learning curve for the KNN model, showing training and cross-validated accuracy as a function of training-set size. Shaded regions denote ±1 standard deviation across cross-validation folds.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 517 **July 9, 2025**

Discrimination in the Jury Selection Process

A lawyer who knows or reasonably should know that the lawyer's exercise of peremptory challenges constitutes unlawful discrimination in the jury selection process violates Model Rule 8.4(g). It is not "legitimate advocacy" within the meaning of Model Rule 8.4(g) for a lawyer to carry out a trial strategy that would result in unlawful juror discrimination. A lawyer may not follow a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer knows or reasonably should know that the conduct will constitute unlawful juror discrimination. However, a lawyer does not violate Rule 8.4(g) by exercising peremptory challenges on a discriminatory basis where not forbidden by other law.

I. Introduction

In a series of decisions beginning with *Batson v. Kentucky*, 476 US. 79 (1986), the Supreme Court has held that trial lawyers in both criminal and civil cases are forbidden from exercising peremptory challenges based on certain specified criteria such as the prospective juror's race or gender, because doing so violates prospective jurors' equal protection rights under the Fourteenth Amendment.[1] Some state laws or decisions expand on the U.S. constitutional restriction on exercising discriminatory peremptory challenges.[2] At the same time, it is clear that, under state and federal law, not all discrimination is forbidden in this context. For example, courts have permitted lawyers to exercise peremptory challenges based on a prospective juror's age, marital status, or socioeconomic status.[3]

Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept,

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[1] Powers v. Ohio, 499 U.S. 400, 409 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Flowers v. Mississippi, 588 U.S. 284 (2019). Although the Supreme Court has not addressed the issues, some lower courts have found that *Batson* also apples to peremptory challenges based on prospective jurors' religion or sexual orientation. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014) (sexual orientation); United States v. Brown, 352 F.3d 654 (2d Cir. 2003) (religion).

[2] *See, e.g.*, CAL. CODE OF CIVIL PROCEDURE § 231.7; *see* note 1, *supra* (citing decisions applying *Batson* to jury challenges based on prospective jurors' religion and sexual orientation).

[3] *See, e.g.*, Sanchez v. Roden, 808 F.3d 85, 90 (1st Cir. 2015) ("Age is not a protected category under Batson"); United States v. McAllister, 693 F.3d 572, 579 (6th Cir. 2012) (unemployment is a permissible ground for striking a juror); United States v. Omoruyi, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate Batson").

> decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment [5] to Rule 8.4 states, in pertinent part: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)."[4]

Rule 8.4(g) presents two principal questions regarding discriminatory challenges. First, in light of Comment [5], when does a lawyer's unlawful exercise of peremptory challenges on a discriminatory basis violate Rule 8.4(g)? Second, given the statement that lawyers may engage in legitimate advocacy consistent with the Model Rules, does a lawyer violate Rule 8.4(g) by exercising peremptory challenges on discriminatory bases where not forbidden by other law?

II. Background

The Preamble to the Model Rules provides: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[5] This captures the concept that, in the context of adjudications, lawyers are expected to serve as advocates within the bounds of the law. The applicable law includes statutes, judicial rules, and judicial opinions, including opinions issued pursuant to courts' supervisory authority, as well as rules of professional conduct.

Rules of professional conduct establishing limits on lawyers' advocacy in the adjudicative context are essentially of two kinds. Some rules simply incorporate other legal standards, thereby subjecting lawyers to professional discipline for violating other law.[6] Many other rules establish different or additional restrictions, whether because additional restrictions are needed to protect the truth-seeking process, to prevent overreaching, or to require lawyers to steer clear of lines drawn by the criminal law, or for other reasons.[7]

When considering whether to impose restrictions on advocacy beyond existing law, rules may reflect a balance between parties' interest in legitimate advocacy and countervailing considerations. In some contexts, constitutional provisions or other laws have been considered.

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[4] The guidance provided by the current Comment [5] predates the adoption of Rule 8.4(g) and initially related to Rule 8.4(d) which proscribes "conduct that is prejudicial to the administration of justice." Comment [3] to the earlier version of Rule 8.4 provided: "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

[5] ABA MODEL RULES OF PROF'L CONDUCT, Preamble, para. [2].

[6] For example, Rule 3.4(a) provides that "[a] lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."

[7] *See, e.g.*, Rule 3.4(f) (subject to exception, a lawyer may not request a witness not to voluntarily give relevant information to another party); Rule 3.6 (restricting lawyers' extrajudicial communications about pending litigation); Rule 4.2 (restricting lawyers' communications with represented persons); *see also* ABA Formal Op. 09-454 (explaining that Rule 3.8(d), requiring prosecutors to disclose evidence and information that tends to negate the guilt of the defendant, is more demanding than constitutional case law in some respects, and "thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution").

For example, rules such as Rule 3.6 restricting lawyers' extrajudicial speech reflect consideration of lawyers' First Amendment free speech rights,[8] and rules restricting criminal defense advocacy reflect consideration of criminal defendants' Sixth Amendment right to effective assistance of counsel.[9]

The drafters of Rule 8.4(g) intended that, as a general matter, the rule would not necessarily be coextensive with other law.[10] ABA Formal Opinion 493 (2020) approvingly cites cases where, without relying on other legal restrictions, courts have sanctioned lawyers for harassment. But at the same time, Comment [3] to Rule 8.4 recognizes that "[t]he substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g)."

III. Unlawful Discriminatory Peremptory Challenges

A. Use of Unlawful Discriminatory Peremptory Challenges is not Legitimate Advocacy Under Rule 8.4(g).

Rule 8.4(g) prohibits lawyers from engaging in "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." It permits "legitimate advice or advocacy consistent with these Rules." Striking prospective jurors on discriminatory bases in violation of substantive law governing jury selection is not legitimate advocacy. Conduct that has been declared illegal by the courts or a legislature cannot constitute "legitimate advocacy." Put another way, a lawyer who violates *Batson* has engaged in unlawful discrimination in the jury selection process which, by definition, cannot be deemed "legitimate" conduct.

Comment [5] states that a trial judge's finding of unlawful juror discrimination is not, alone, enough to prove a violation in a discipline proceeding. Paragraph [14] of the Scope section to the Rules explains that the Comments are guidance for how the Model Rules should be interpreted. Comment [5] to Rule 8.4 provides guidance on the evidentiary burden in a disciplinary prosecution. A judge's finding of a *Batson* violation, under the procedures set forth in the case

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[8] *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (addressing First Amendment limits on state rule of professional conduct corresponding to Model Rule 3.6).
[9] *Cf.* Grievance Comm. v. Simels, 48 F.3d 640 (2d Cir. 1995) (interpreting state counterpart to Model Rule 4.2 in light of the constitutional right to effective assistance of counsel).
[10] In Opinion 493 titled *Model Rule 8.4(g): Purpose, Scope and Application*, this Committee explained:

> Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace. Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate paragraph (g), the reverse may not be true. For example, a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g). The isolated nature of the conduct, however, could be a mitigating factor in the disciplinary process.

law,[11] does not automatically equate with a Rule 8.4(g) violation, particularly given the higher burden of proof that may apply in disciplinary proceedings.[12]

A disciplinary hearing may yield more complete information and enable the lawyer to offer a more fulsome explanation for exercising peremptory challenges than may have been available during jury selection in the trial in question.[13] For example, to preserve client confidentiality, the lawyer may have provided limited information about the reasons for peremptory challenges or the judge may have needed to make a quick ruling without a full and fair evidentiary hearing. In addition, the extent and severity of unlawful juror discrimination is relevant to a disciplinary authority's decisions, including whether to investigate the matter at all.

B. Rule 8.4(g) applies only if the lawyer knew or reasonably should have known that the lawyer's peremptory challenges were unlawful.

A lawyer's unlawful exercise of peremptory challenges does not violate Rule 8.4(g) unless the lawyer "knows or reasonably should know" that the exercise of a peremptory challenge is impermissibly discriminatory. Many rules incorporate a knowledge standard, and "knows" is a defined term in the Model Rules.[14] There may be situations where a lawyer violates *Batson* but does not know it, because the lawyer erroneously believes that the lawyer's genuine bases for exercising peremptory challenges do not discriminate based on impermissible attributes. In that event, the question will be whether the lawyer "reasonably should have known" that the lawyer's conduct was impermissible. Rule 1.0(j) defines "reasonably should know" to mean that "a lawyer of reasonable prudence and competence would ascertain the matter in question." Ordinarily, when a lawyer decides whether to exercise peremptory challenges, rather than deferring to or relying on someone else, the lawyer will know the genuine reasons for the challenges. Even so, the lawyer may be mistaken about the legal significance of these reasons. In that event, the question will be

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[11] Under *Batson*, if the objecting party at trial establishes a *prima facie* case that the opposing party purposefully discriminated in exercising peremptory challenges, the party exercising the challenges "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 94, 98. The neutral explanation must be "based on something other than the race [or gender] of the juror" and must have "facial validity." Hernandez v. New York, 500 U.S. 352, 360 (1991). The trial judge will then decide whether the objecting party has proven "purposeful discrimination." *Batson*, 476 U.S. at 94. This requires the trial judge to determine "whether . . . the proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the striking party instead exercised peremptory strikes on the basis of race." *Flowers*, 588 U.S. at 2244.

[12] *Accord* ODC v. Anonymous, 2025 WL 524221 (Pa. Feb. 12, 2025) (holding that the ODC is required "to establish attorney misconduct with evidence that is sufficient to satisfy a clear and convincing evidence standard of proof"); 22 N.Y.C.R.R. 1240.8(b)(1) (requiring proof by a "fair preponderance of the evidence" to sustain disciplinary charges).

[13] The history of what is now Comment [5] to Model Rule 8.4 (previously Comment [3]) suggests that the "*Batson* exception" to Model Rule 8.4(g) was based on concerns voiced by the ABA Criminal Justice Section that a trial judge's subjective decision in the midst of trial to disbelieve a lawyer's neutral explanation for striking a juror should not become conclusive evidence in a later disciplinary prosecution over discriminatory conduct. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 860 (Art Garwin ed. 2013). In addition, Comment [5] is limited to a "trial judge's" finding of juror discrimination. It says nothing about how a decision by another court (such as an appellate court or a court conducting a habeas review) based on a more fulsome record should be treated if that court finds that a lawyer engaged in unlawful juror discrimination. *See Flowers*, *supra* note 1.

[14] Rule 1.0(f) defines knowing conduct as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

whether "a lawyer of reasonable prudence and competence" would have known that the challenges were impermissible.

Whether the lawyer has the requisite culpability will be a more difficult question when, to promote the attorney-client relationship or for reasons of trial strategy, the lawyer defers to others' judgment. Suppose that a client directs a lawyer to exclude certain prospective jurors, or a lawyer's jury consultant recommends striking certain members of the jury venire, and those prospective jurors are members of a particular race or gender. If the client or jury consultant volunteers or acknowledges that the reason is race- or gender-based, then the lawyer who implements the client's instruction or the consultant's suggestion would be knowingly discriminating. That a lawyer acts at a client's direction does not make otherwise unlawful conduct legitimate. When clients ask lawyers to engage in unlawful conduct, the Model Rules require lawyers to refuse.[15]

A harder question is raised in this scenario when peremptory challenges, on their face, are or are reasonably likely to be discriminatory, but the client or jury consultant offers other, nondiscriminatory reasons for exercising them. Where the lawyer does not personally intend to discriminate on the basis of a protected class but may be advancing someone else's intent to do so, the "reasonably should know" standard imposes a duty of inquiry. If, upon inquiry, the lawyer ascertains that the client or consultant has sincere reasons that are legitimate, not impermissibly discriminatory, then the lawyer may exercise the peremptory challenges; if an objection is made, or the judge questions the lawyer's motivations *sua sponte*, the lawyer may advance those reasons. But if a reasonably competent and prudent lawyer would know that the reasons are pretextual, and that the proposed exercise of peremptory challenges is unlawful, then the lawyer must refrain from relying on the client or consultant. *Cf.* ABA Formal Op. 513 (2024) (discussing lawyers' duty of inquiry under Rule 1.16(a)).

A similar question about the lawyer's culpability may be raised when the lawyer relies on software in making decisions about jury selection. Suppose, for example, that a lawyer uses an artificial intelligence-assisted program to rank prospective jurors and, unbeknownst to the lawyer, the program applies rankings in a manner that would constitute unlawful discrimination (e.g., based on the prospective jurors' race or gender). It is conceivable that the lawyer could strike jurors for unlawfully discriminatory reasons, constituting purposeful discrimination in violation of *Batson*, even if the lawyer had no intention of doing so (for example, if the AI-assisted program

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[15] Model Rule 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the *objectives* of representation and, as required by Rule 1.4, shall consult with the client as to the *means* by which they are to be pursued." (emphasis added). Decisions about how and when to exercise peremptory challenges falls squarely within the "means" of carrying out the representation. *See* ABA CRIMINAL JUSTICE STANDARDS, THE DEFENSE FUNCTION, Standard 4-5.2(d) ("Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include . . . what jurors to accept or strike . . . and how evidence should be introduced."); *see also* United States v. Boyd, 86 F.3d 719 (7th Cir. 1996) (exercise of peremptory challenges is decision for lawyer). Therefore, even where unlawful juror discrimination is client-directed, the lawyer has no obligation under the Model Rules to follow that direction. On the contrary, the lawyer would have an obligation to consult with the client about the manner in which the lawyer is legally permitted to conduct jury selection and explain any relevant constraints on the lawyer's ability to carry out the client's desired strategy. *See* Model Rule 1.2(a); 1.4(a)(5) (requiring the lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law").

also provided seemingly neutral reasons for rankings).[16] Whether a lawyer "reasonably should know" that the peremptory challenges were impermissibly discriminatory will depend on the circumstances. In the context of an AI-assisted program, lawyers should conduct sufficient due diligence to acquire a general understanding of the methodology employed by the juror selection program. *See* ABA Formal Op. 512 (2024) ("lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations").

IV. Rule 8.4(g) Does Not Prohibit a Lawyer's Discriminatory, But Lawful, Exercises of Peremptory Challenges

As Opinion 493 recognized, the types of discrimination covered by Model Rule 8.4(g) extend beyond unlawful discrimination. But Model Rule 8.4(g) also permits "legitimate advocacy" provided the advocacy does not violate substantive law or other rules of professional conduct. In the context of jury selection, a trial lawyer whose peremptory challenges are discriminatory but lawful has not violated Model Rule 8.4(g).

This interpretation is consistent with both the history and purpose of Model Rule 8.4(g). As detailed above, Comment [5] to Model Rule 8.4 cautions against a finding of discrimination based solely on a trial court's finding about exclusion of a particular prospective juror. In addition, the drafters specifically considered, and referred to, the application of Rule 8.4(g) to trial lawyers' exercise of peremptory challenges but made no suggestion that the rule was meant to impose restrictions beyond those recognized in the law of peremptory challenges. The rule also specifically exempts legitimate advocacy.

The purpose of the Model Rules is to articulate clear and understandable standards of conduct to which lawyers can adhere. *See* Model Rules, Scope [14]. Applying Model Rule 8.4(g) to conduct that complies with the substantive laws of jury selection but still may constitute "discrimination" under a different definition would create a vague and unworkable standard for the interpretation of Model Rule 8.4(g) and would risk deterring conduct which could arguably be characterized as legitimate advocacy.

Courts recognize that jurors' attributes such as age and marital status that are not forbidden grounds for exercising peremptory challenges are, conversely, permissible, race-neutral bases for such challenges.[17] Although courts are empowered to supervise the conduct of lawyers – which includes amending and adopting rules of professional conduct – there is nothing in the text or

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[16] To the extent the lawyer's intent impacts the analysis of whether the juror discrimination was "unlawful" under the applicable laws in the lawyer's jurisdiction, that is a question beyond the scope of this Opinion.

[17] *See supra* note 3. Other guidance encourages lawyers to refrain from striking jurors for reasons that may go beyond unlawful discrimination. *See* ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION 3-6.3(b) ("The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity.") and 4-7.3(b) (encouraging defense lawyers to avoid doing the same). These standards, however, are meant to be aspirational and are not intended to override existing law surrounding juror discrimination.

history of the Model Rules that suggests that Model Rule 8.4(g) was intended to establish further restrictions on the use of peremptory challenges in jury selection.

Conclusion

A lawyer who knows or reasonably should know that the lawyer's exercise of peremptory challenges constitutes unlawful discrimination in the jury selection process violates Model Rule 8.4(g). It is not "legitimate advocacy" within the meaning of Model Rule 8.4(g) for a lawyer to carry out a trial strategy that would result in unlawful juror discrimination. A lawyer may not follow a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer knows or reasonably should know that the conduct will constitute unlawful juror discrimination. However, a lawyer does not violate Rule 8.4(g) by exercising peremptory challenges on a discriminatory basis where not forbidden by other law.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Sample Case Summaries

STATE OF NEW YORK v. JOSEPH WANG

Count 1: Vehicular Assault with a weapon to wit: an automobile. (Felony)

Count 2: Leaving the Scene of an Accident (Misdemeanor)

Count 3: Failure to Report an Accident (Misdemeanor).

FACTS:

On September 25, YR-1, at approximately 12:45–1:00 p.m., Martin Higgins, a protester participating in a permitted ICE demonstration in front of the Wells Fargo Bank Building on Main Street in downtown New York City, was struck by the right front of a white four-door sedan traveling southbound. The vehicle struck Higgins at an estimated 25–35 mph, well above the posted 15 mph speed limit. Witnesses observed the car slow momentarily after impact before accelerating and fleeing southbound on Main Street. Higgins suffered a fractured pelvis, three broken ribs, traumatic brain injury, and permanent hearing loss. He underwent two surgeries and spent nineteen days hospitalized.

The vehicle was described as a white domestic sedan with a license plate beginning with 'J' and containing '0.' A witness reported seeing a cracked right front headlight consistent with impact. Joseph Wang, a tenured Professor of Law at NYU Law School, drives a white YR-2 Ford four-door sedan with vanity plate JAW-007. Police discovered the vehicle bore a dent and fresh paint transfer on the right front consistent with a pedestrian collision. Cell tower records show Wang's phone connected to a downtown tower between 12:40–1:10 p.m. on September 25, contradicting his initial claim he was on campus.

Wang admits meeting Mike Calhoun (Director of Legal Services) and Alice Ratliff at the Legal Aid Office from 11:30 a.m.–1:00 p.m., including lunch at a restaurant several blocks away. Calhoun reported that Wang made hostile remarks about protesters, calling them "reckless fanatics who deserve what's coming to them," though Wang claims this is a gross distortion and he only said they were being reckless. Calhoun initially did not disclose these statements to police due to his friendship with Wang.

Wang claims the vehicle damage occurred on September 28 when he backed into a concrete post at the law school parking lot. He states he saw a white compact car speeding south on Main Street near the Legal Aid Office at 12:45 p.m. and drove back to campus at 1:20 p.m., where he later visited the Faculty Health Clinic with suspected food poisoning.

Wang has a prior misdemeanor conviction for reckless driving three years prior, involving aggressive driving through a pedestrian crosswalk. No witness has positively identified Wang as the driver, though several testified his physical build and hair color resembled the driver.

Wang worked in the DHS legal department as a supervising attorney during the first Trump administration.

PROSECUTION'S THEORY

Joseph Wang intentionally struck Martin Higgins with his vehicle on September 25, YR-1. Wang's white sedan, license plate JAW-007, matches witness descriptions and there is a dent and paint transfer consistent with the assault. Cell tower records place Wang downtown at the time of the incident, showing that he first lied about his whereabouts. His hostile statements about protesters, "reckless fanatics who deserve what's coming to them," demonstrate motive and consciousness of guilt. Wang deliberately fled the scene, as witnesses observed the vehicle accelerating after impact. His prior reckless driving conviction establishes a pattern of aggressive and dangerous driving and has been ruled to be admissible during trial.

DEFENSE'S THEORY

Joseph Wang is innocent. The State relies entirely on circumstantial evidence and cannot prove beyond a reasonable doubt that Wang was the driver. No witness positively identified Wang as the driver, only that he "resembled" the driver in build and hair color. Thousands of white four-door sedans exist in New York City. While Wang's license plate contains 'J' and '0,' witness testimony is unreliable regarding the plate's exact configuration. The vehicle damage occurred on September 28 when Wang backed into a concrete post, three days after the incident. Calhoun and Ratliff place Wang at the Legal Aid Office and restaurant from 11:30 a.m. through 12:45 p.m. Wang saw a different white compact car speeding south at 12:45 p.m. as he was leaving. Cell tower location data is imprecise and consistent with Wang's presence at the restaurant, only blocks from the tower. Wang's comments about protesters were mischaracterized by Calhoun, who only spoke up out of fear that he would lose his job or freedom.

STATE OF ALABAMA v. MIGUEL RODRIGUEZ

State Criminal Fact Pattern – NACDL Voir Dire Training Exercise

Count 1-Sexual assault on a child (Pattern)[1]

FACTS:

Miguel Rodriguez, stepfather to Alayna Simpson (DOB February 22, YR-15), is charged with Forcible Sexual Abuse for alleged repeated sexual contact with Alayna occurring over approximately one year and a half, beginning when she was 14 years old. The alleged abuse took place in Anycounty, Alabama.

Alayna disclosed the abuse to her mother, Denise Simpson, after Rodriguez moved out of the home. She reported that Rodriguez began assaulting her when Denise was out of town and continued on nights when Denise worked late shifts. Alayna described touching over and under clothing, including forced contact with Rodriguez's penis, and one incident in his car in a wooded area. She stated she remained silent due to threats from Rodriguez and fear that no one would believe her. She only told her mother now, because her mother found marijuana in her bedroom, and she needed to explain why she was self-medicating for her stress and anxiety.

During Detective Taylor's interrogation, Rodriguez made admissions to possible accidental sexual contact while sleeping in the same bed, though he denied some of the more explicit acts Alayna described.

Rodriguez has not been granted permanent residence[2]. He has a prior accusation (not conviction) of marijuana possession under one ounce. Denise has recently begun dating a new boyfriend. Cell phone records show that on the day Alayanas claimed to be in the wooded area with Miguel, she was texting a friend and her cell phone location is nowhere near a wooded area. Alayna's friend,

[1] Sexual assault pattern for purposes of this fact problem means more than once in any 5 years. No statue of limitations. Conviction of pattern triggers a minimum mandatory sentence of 10 years.

[2] For purposes of this fact problem, "permanent residence" refers to a non-citizen who is legally authorized to live and work in the United States, also known as a Lawful Permanent Resident or Green Card holder.

Janice, told police that Alayna asked her to lie about drugs and that Alayna lied about having a boyfriend.

PROSECUTION'S THEORY

The state will prove that Miguel Rodriguez repeatedly sexually abused Alayna Simpson over an extended period, exploiting her vulnerability as a teenager living in his home. Alayna's disclosure to her mother, coupled with Rodriguez's own admissions during police interrogation, establish guilt beyond a reasonable doubt. Rodriguez deliberately targeted times when Denise was absent or working late to commit these acts. His threats silenced Alayna for months, demonstrating consciousness of guilt. Rodriguez's admissions to Detective Taylor are credible evidence of his repeated criminal conduct, and the minor victim's account is consistent with patterns of child sexual abuse.

DEFENSE'S THEORY

Miguel Rodriguez maintains his innocence. His interrogation confession was coerced through hours of aggressive police pressure and tactics. Denise Simpson, motivated by anger over Rodriguez's affair and their failed relationship, defaulted to believing Alayna despite knowing that Alayna was struggling and lying regularly. Alayna lied to get rid of Miguel and to cover up her drug use. Cell phone records place Alayna in a residential neighborhood —not the location where she claimed the car assault occurred—at the time of the alleged incident. Denise's own account to the defense investigator differs significantly from the police report, claiming Alayna described abuse only 8-10 times, not the extensive ongoing pattern she reported to police. Alayna's credibility is undermined by evidence she is willing to lie, her hidden drug use, and secret relationships.

NACDL VOIR DIRE EXERCISE FACT PATTERN

Count One: First Degree Murder

Count Two: Second Degree Murder

Count Three: Felon in Possession

UNITED STATES v. MARCUS JOHNSON

FACTS:

On March 15, 2024, a shooting occurred outside a convenience store in Chicago at approximately 9:15 p.m. A bystander, 67-year-old Robert Chen, was struck in the chest. He was transported to the hospital where her later died from a single gunshot wound to the chest. Surveillance video from the store and nearby businesses captured a shooting but the video quality is poor and pixelated, particularly regarding facial features.

Marcus Johnson, a 28-year-old African American male, was arrested three days later based on witness statements describing "a Black male in a red jacket, associated with the Disciples gang." Johnson owns a red jacket. Two witnesses picked Johnson out of a photo array. A .9mm Glock handgun was recovered from Johnson's apartment with no fingerprints or DNA. Johnson has a prior 2019 conviction for armed robbery of a 7-11. He successfully completed probation in 2023.

Johnson denies involvement. He claims he was at home watching television and suggests the shooting may be gang retaliation related to a dispute between competing organizations in the area. He acknowledges knowing people in local gangs but denies any affiliation. Johnson intends to testify and knows that this means prior convictions will be admissible.

PROSECUTION'S THEORY

Marcus Johnson is a gang member that terrorizes the neighborhood and community. His reign of terror ended with his arrest, after the fatal shooting of Robert Chen. Robert Chen, caught up in the crossfire of a gang-related shooting, was an innocent victim of gang violence. Marcus Johnson broke the law by even possessing a gun as a convicted felon. Multiple witnesses identified Johnson at the scene wearing a distinctive red jacket, the sign of his gang. Surveillance video corroborates the timing and location. Johnson's motive is rooted in gang activity and territorial disputes in the neighborhood.

DEFENSE'S THEORY

Overworked police, motivated by public pressure and community fear of escalating gang violence rushed to the conclusion that Marcus Johnson was the shooter in the violent death of Robert Chen. Armed with nothing more than grainy video footage, unreliable cross-racial identifications, and circumstantial evidence, police arrested a surprised and scared Marcus Johnson. A search of his apartment revealed a handgun - - belonging to his roommate. Marcus' DNA and fingerprints are not on the gun because they are not his gun. The government confuses presence in a gang-affiliated area with presence at the crime scene. Reasonable doubt exists as to both charges.