

# 13<sup>TH</sup> ANNUAL FREE WINTER CLE



UNIVERSITY OF  
ARKANSAS | School of Law

**Saturday, March 3, 2018**

8:00 a.m.-12:00 p.m.

Registration 8:00 a.m.-8:30 a.m.

## **2018 Free Winter CLE Presents**

2 Hours General CLE plus 1 Hour Ethics CLE

### **ARK CLE Board Program #TRL61129**

#### *Use, Analysis and Best Practices for Voir Dire*

**Clint Saxton**

Attorney at Law, Memphis, Tennessee

#### *Practical Demonstration of Voir Dire Skills*

**Clint Saxton**

Attorney at Law, Memphis, Tennessee

#### *Ethical Considerations in Preparing and Submitting Pleadings, Motions and Briefs to Trial and Appellate Courts*

**Howard Brill**

Former Arkansas Supreme Court Chief Justice

# 13<sup>TH</sup> ANNUAL FREE WINTER CLE



## 2018 Free Winter CLE

*Jury Selection Tool Kit*

*Appendix A*

**Clint Saxton**

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# **JURY SELECTION TOOLKIT**

**Free Winter CLE**

**University of Arkansas  
School of Law  
March 3, 2018**

***Prepared and Presented by:***

**Clint Saxton  
Memphis, Tennessee**

# JURY SELECTION

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**ATTACHMENT A: Sample Memorandum in Support of Motion to Submit Jury Questionnaire**

**ATTACHMENT B: Sample Joint Motion to Submit Jury Questionnaire (Questions Attached)**

**ATTACHMENT C: Sample Memorandum in Support of Motion to Allow Counsel to Voir Dire the Jury Panel**

**ATTACHMENT D: Sample Defendant's Proposed Voir Dire Questions**

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**ATTACHMENT F: Sample Long Form Questionnaire**

**ATTACHMENT G: Sample Outlines**

- 1. Criminal – defense**
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**ATTACHMENT H: Transcript of Limited Voir Dire**

**ATTACHMENT I: Article: *Taking the Voodoo Out of Voir Dire*, Trey Cox, Lynn Tillotson Pinker & Cox, LLP, Dallas, Texas**

**ATTACHMENT J: Sample Motion to Strike Juror for Cause;Memorandum of Points and Authorities in Support Thereof**

# JURY SELECTION

## I. INTRODUCTION

In 1813, the United States Supreme Court specifically observed:

It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice...they ought to stand perfectly indifferent between the parties...

*Mima Queen and Child v. Hepburn*, 11 U.S. 290, 297 (1813) (Marshall, C.J.). Juror selection is not about finding a “good” juror. The real goal of the process is to find prospective jurors who should **not** be on the jury because of the personal views that they may have that would make it difficult or impossible for them to render a verdict in your client’s favor.

**A. Federal Rule.** Currently, Fed. R. Civ. P. 47(a) provides:

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

**B. State Rule.** Some states have specific rules, others do not. When a state has a specific rule, it often parallels the federal rule.

**1. California Civil Rule.** The Trial Jury Management and Selection Act, sections 190-237 of the California Code of Civil Procedure, provides the legal framework for voir dire. The statute describes the essential purpose of voir dire, methods of questioning by the judge and trial lawyers, the basis for challenges for cause, and the number of peremptory challenges available to the litigants in different types of cases.

To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the

same area by counsel. The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed. The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an "improper question" is any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. In civil cases, the court may, upon stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence.

Cal. Code. Civ. P. § 222.5

In civil cases, three-fourths of the jurors (i.e., 9 out of 12) must agree upon the verdict. Ca Const. Art. I, § 16; Ca Civ Pro § 618 It is not necessary for the same nine jurors to agree on all elements of the verdict. Thus, where a special verdict is submitted to the jury (or special interrogatories with a general verdict), all jurors participate in answering each question. The identical nine need not agree on each answer. *Resch v. Volkswagen of America* 36 Cal.3d 676, 679, 205 Cal.Rptr. 827, 828 (1984)

## **2. California Criminal Rule.**

In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors

by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

Cal. Code. Civ. P § 223

3. **California Recent Changes.** Recently the California Legislature has passed a bill that will make certain changes to voir dire. One of the goals of this bill is to strengthen protections against potential bias among prospective jurors to ensure a fair and impartial jury.

- a. Judges must allow a brief opening statement by each counsel before beginning the oral questioning phase of voir dire.
- b. Judge must allow reasonable time for parties to evaluate responses to written questionnaires, if used.
- c. In civil trials, the judge should provide parties with both an alphabetical list of the jurors and a list of the order in which they will be called.
- d. The scope of voir dire must have reasonable limits and the judge cannot impose unreasonable or arbitrary time limits on examination.
- e. The judge may not have a blanket policy of a time limit for voir dire.

A.B. 1403, Comm. on Judiciary, Reg. Sess. (Ca. 2011)

- C. **Judges have varying individual practices.** Although all of us may agree on the laws and rules stated above, how does an attorney go about insuring his or her client has the case decided on the law and the facts? This effort is complicated by the different procedural approaches taken by state and federal courts. By way of example, there are six U.S. District Court judges in the Western District of Tennessee and no two judges have the same jury selection process. Some allow jury

questionnaires, while others do not. Some allow thorough questioning by attorney, while others allow very limited lawyer involvement. Some limit the scope of questioning more than others. This situation is not limited to the Western District of Tennessee. Virtually every federal judge has his or her own procedure for the selection of jurors. MOORE'S FEDERAL PRACTICE ¶ 47.10[3][a]. Generally, state court voir dire is more lawyer participation friendly than in federal practice.

1. **Trial judge has wide discretion.** Universally, the trial court has wide discretion in the jury selection process and will be reversed only upon a showing that the trial court abused its discretion. The trial court “must afford a party full and fair opportunity to ascertain whether prospective jurors ‘stand indifferent in the cause,’ but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so.” *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983); *see Hawthorne v. VanMarter*, 2008 Va. Cir. LEXIS 165 (Va. Cir. Ct. Dec. 23, 2008) (applying principle to state civil case); *Goins v. Angelone*, 226 F.3d 312 (4th Cir. 2000) (trial courts “retain great latitude in deciding what questions should be asked on voir dire”) *But see id.* (“some cases may present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court’s refusal to question prospective jurors specifically about racial prejudice during voir dire.”) (quoting *Ristaino v. Ross*, 424 U.S. 589, 595 (1976)).
2. **Goal of trial attorney is to obtain useful information in selecting jurors.** Given the broad discretion of the trial judge, the goal of the trial attorney is to use varying methods and strategies, as discussed below, to *persuade* the trial judge in any venue to listen and to allow your suggestions to aid the court in obtaining a fair and impartial jury.
3. **The bench can sometime have a different perspective.** Your suggestions to the trial judge may be met with resistance. The reluctance of the trial judge could stem in part from a judicial belief that counsel are trying to gain an unfair advantage through the juror selection process. One federal appellate court described what it saw as competing goals of the bench and bar:

Court and counsel have somewhat different goals in voir dire. The court wants a fair and impartial jury to be chosen and to move expeditiously to the presentation of evidence. Counsel want a jury favorable to their cause—fair or not—and voir dire aids them in exercising peremptory challenges and challenges for cause. Counsel have an additional purpose in voir dire moreover and that involves exposing jurors to various arguments they intend to make at trial. Counsel view voir dire as an opportunity for advocacy similar to, albeit not the equivalent of, openings or summations. This additional purpose has led to a long struggle between bench and bar—in both the states and federal courts, *see, e.g., United States v. Barnes*, 604 F.2d 121, 142 n.10 (2d Cir.

1979); *United States v. L'Hoste*, 609 F.2d 796, 801-03 (5th Cir. 1980); *United States v. Bryant*, 471 F.2d 1040, 1043-45 (D.C. Cir. 1972) (per curiam)—in which the bar has sought the right to question jurors at great length. Thus far, federal courts have successfully resisted such attempts. See *United States v. Diez*, 736 F.2d 840, 844 (2d Cir. 1984); see also Fed. R. Crim. P. 24(a); Fed. R. Civ. P. 47(a).

*United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002). This might be a particularly cynical view, but it is not uncommon. Therefore, you should pursue several different options for juror selection—jury questionnaires, written questions for the judge, and oral voir dire. Any or all could be reasonable and fair alternatives, depending on the situation.

## II. GENERAL CONSIDERATIONS

**A. Scope of inquiry.** While the trial court has wide and broad discretion in controlling and limiting voir dire, that discretion is not without limits and is subject to the parties' rights to an impartial jury.

- 1. Stock questions insufficient.** *Art Press, LTD v. Western Printing Machinery Co.*, 791 F.2d 616, 618-19 (7th Cir. 1986) (finding trial courts' five stock questions insufficient, court should permit a reasonably extensive examination of prospective jurors, and error is demonstrated by showing the voir dire did not reasonably assure that bias and prejudice would be discovered). The trial court has an affirmative duty to pose questions designed to elicit the information beyond that which would disqualify a jury for cause. MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a] (citing *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7th Cir. 1980) (holding questioning must go beyond "stock question" such as name, address, occupation, spouse's occupation, level of education, acquaintance with parties and attorneys)).
- 2. Questions should be aimed at finding prejudices.** Questions during voir dire process must be probing enough to reveal a prospective juror's prejudices. MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a] (citing *Harold v. Corwin*, 846 F.2d 1148, 1150 (8th Cir. 1988) (holding a trial court's discretion is not without limits and the trial court "should be on guard" to assist counsel in exercising his or her peremptory and cause challenges)). The wide latitude afforded the trial judge jury selection only requires that the voir dire not be so general that it fails to probe adequately the possibility of bias and prejudice. MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a] (citing *Waldorf v. Shuta*, 3 F.3d 705, 710 (3d Cir. 1993)); see also *United States v. Blyden*, 431 Fed. App'x 133 (3d Cir. 2011) (same).
- 3. Trial court required to allow question if lack of inquiry makes the trial "fundamentally unfair."** The trial court's discretion is broad, but circumstances may exist, especially in criminal cases, when inquiry is

absolutely necessary. “A proffered voir dire question is not constitutionally required simply because it ‘might be helpful in assessing whether a juror is impartial’; instead a question is constitutionally compelled only where the ‘failure to ask [that] question[] ... render[s] the defendant’s trial fundamentally unfair.” *Beuke v. Houk*, 537 F.3d 618, 637 (6th Cir. 2008) (quoting *Mu’Min v. Virginia*, 500 U.S. 415, 425-26 (1991)).

**B. Form of inquiry.** As a general rule, there is no requirement that a specific form of a question be utilized, or that the number of questions or time limit requests of attorneys be granted. See *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 884-85 (8th Cir. 2006) (no right to particular question); *Ratliff v. Schiber Trucking Co.*, 150 F.3d 949, 955-56 (8th Cir. 1998) (upholding 20 minutes each side limitation). However, as pointed out below, certain “form of the question” or phraseology should be utilized to withstand objections.

**1. Questions should be simple and concise.** If you are to convince a judge to use a questionnaire, the questions “should be simple and easy to understand and the questionnaire not too long.” Barbara M.G. Lynn (U.S. District Judge), *From the Bench: A Case for Jury Questionnaires*, LITIGATION, Summer 2007, at 3. Except for “highly unusual cases,” the questionnaire should not exceed four pages (the questionnaire in *United States v. Lay and Skilling* was 14 pages). *Id.* Likewise, submitting fewer written questions to the court will increase the chances they will be read to the jury. With time limitations from 15-30 minutes for oral voir dire, you do not have time for a lengthy or leisurely question and answer exercise.

**2. Inquiry should be case-specific.** Your questions should be as specific as possible to the important issues presented by each case.

**a. Examples for the defendant.** In an employment case the defendant company should always inquire about the following (non-inclusive):

- Juror, family or close friend victim of discrimination, mistreatment at work, grievance filed, union membership – or any like experiences relate to case.
- Feelings about corporations
- Business Judgment Rule
- Good faith belief that policy was violated
- Burden of Proof
- Sympathy
- Experience with Company
- Listen to all of the proof before coming to a conclusion

**b. Examples for the plaintiff.** Plaintiff may well want to inquire about (again non-inclusive):

- Preponderance of the evidence vs. Beyond a reasonable doubt
- Feelings about damages, i.e. awarding mental anguish
- Punitive Damages
- Juror, family or close friend accused of discrimination, mistreatment at work, grievance filed against them—or any like experiences relate to case.

3. **Esoteric questions have limited value.** Most parties to an employment case do not have the luxury of assistance from a jury consultant. Therefore certain questions to jurors may be interesting, but not particularly helpful. For instance:

- What best describes your feelings about 9/11? Angry, Sad, Stuff Happens?
- Compared to five years ago, how do you rate your quality of life?
- What television programs do you regularly watch?
- Do you know how to fly, or have you ever flown or owned a plane or other aircraft?
- What was the last book you read?

These types of questions might be helpful to a psychologist, and some judges will allow them. If you will not have the time or expertise to analyze the answers effectively, however, they may be of little use to you. Additionally, time restraints can make it very difficult if not impossible to evaluate the answers prior to oral voir dire, and to delve more deeply into the subjects during voir dire. State courts are generally more liberal in the type of questions and the length of time of oral voir dire.

4. **Proper Questions.**

- a. **Questions about applicable general propositions of law are proper.** The primary purpose of voir dire is to empanel an impartial jury through questions that permit counsel's intelligent exercise of challenges. See *United States v. Fish*, 928 F.2d 185, 186 (6th Cir. 1991) ("Judges need not use every question submitted by counsel; they need only use those to which an anticipated response would afford the basis for a challenge for cause."). Thus, questions for which the anticipated answer would afford a basis for a challenge for cause are permissible. Accordingly, it is proper to ask a juror about his opinion/beliefs concerning a proposition of law (i.e. defendant is presumed to be innocent) as long as the anticipated response could be the basis of a cause challenge, and refusal to allow such an inquiry may be reversible error. *United States v. Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973); *Hayes v. Commonwealth of Kentucky*, 175 S.W.3d 574 (Ky. 2005) (finding reversible error where court refused voir dire

regarding defendant's Fifth Amendment right not to testify).  
Examples:

- A challenge for cause "would be sustained if a juror expressed his incapacity to accept the proposition that a defendant is presumed to be innocent despite the fact that he has been accused in an indictment or information." *Blount*, 479 F.2d at 651.
- It would be error for the trial judge to disallow questioning a juror to determine if "he could accept this proposition of law on an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire." *Id.*; but see *United States v. Wooton*, 518 F.2d 943, 946-47 (3d Cir. 1975) (finding no error for the trial court to preclude question regarding jurors' acceptance of a proposition of law, stating "it is not necessary to inquire as to whether a juror will refuse to do that which he swears or affirms he will do.").

b. **Side effect of preconditioning jury does not render proper question improper.** "It matters not that the putting of the question might also, as appellee contends, have constituted anticipatory argument to precondition the jury. This is an unavoidable consequence of the voir dire jury examination." *Blount*, 479 F.2d at 651-52; see also *United States v. Hill*, 735 F.2d 152, 155 (6th Cir. 1984) (citing *Blount* and holding that error was not corrected by the trial court instructing the jury on the presumption of innocence when the court refused to allow the defendant to inquire as to whether or not a juror could accord such rights to the defendant in a criminal trial).

c. **Questions about propositions of law in hypothetical form can be proper.** It is also proper to pose a hypothetical question that correctly refers to the applicable law to aid counsel in determining whether a prospective juror consciously disagrees with the applicable law and is unable to follow it. *Pait v. State*, 112 So.2d 380 (Fla. 1959) (holding a hypothetical question making a correct reference to the law of the case was proper to aid in determining the qualifications of prospective jurors). Examples:

- In the employment law context, plaintiffs should be permitted to inquire, for example, about preponderance of the evidence and awarding damages for mental anguish.
- Likewise defendants should be able to question jurors concerning the business judgment rule, companies on equal footing with individuals, enforcement of company policy or any other issue covered by an applicable jury instruction.

5. **Improper questions.** Just as some areas of inquiry are not proper, the form of the question can be improper.

a. **Hypothetical questions about evidence are improper.** It is improper to ask hypothetical questions containing evidence a party

intends to introduce when those questions are asked for the purpose of ascertaining how the juror will decide based on that evidence. This type of question is objectionable and improper, regardless of whether the hypothetical question truthfully states the testimony or evidence to be presented. WARD WAGNER, JR., *ART OF ADVOCACY—JURY SELECTION* §2.05[4] (citing *State v. Taylor*, 875 So.2d 58, 64 (La. 2004) (holding it improper to pose a hypothetical question designed to elicit in advance what will be the decision under a certain state of evidence or upon a given state of facts)); *see, e.g., State v. Williams*, 89 So.2d 898, 905 n.2 (La. 1956) (improper for defense counsel to ask jurors whether, if the police had certain scientific investigative equipment available and the defense could show that “officers for reasons that are unexplained deliberately failed to use these available scientific instruments,” the jurors would have bias against that defense). It is improper to ask prospective jurors what their verdict would be if certain facts were proved and engage in questions aimed at guessing the verdict, rather than seating a fair jury. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753 (Tex. 2006) (improper to inquire what juror’s decision would be if proof shows seat belt not worn).

- b. “Stake-out” questions are improper.** A “stake-out” question asks a juror to pre-commit to a way of voting depending on a given situation. Courts have described the tests for whether a question is an improper “stake-out” question in various ways:

(1) Does the question “ask a juror to speculate or precommit to how that juror might vote based on any particular facts”? or (2) Does it “seek to ‘discover in advance what a prospective juror’s decision will be under a certain state of the evidence’”? or (3) 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’”?

*United States v. Johnson*, 366 F. Supp. 2d 822, 845 (N.D. Iowa 2005) (internal citations omitted); *see United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir. 1998) (“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*.”) (referring to *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that questions are permissible to determine whether a juror “will automatically vote for the death penalty in every case”)). These questions can be contrasted with **proper** case-specific questions that ask jurors if they “could (not would)” fairly consider certain facts in light of applicable legal principles. *See id.*; *see also United States v. Fell*, 372 F. Supp. 2d 766, 770 (D. Vt. 2005) (noting that, “rather than reject all case-specific questions, a trial court should allow such

questions to be asked when they are reasonably directed toward discovering juror bias).

- c. **Inflammatory questions are improper.** Courts have also ruled that questions using prejudicial or inflammatory questions are improper. *City of Springdale v. Thompson Sales Co.*, 71 S.W.3d 597 (Mo. 2002) (holding that suggestion that ruling for plaintiff would raise taxes); *Wiley v. State*, 183 S.W.3d 317, 331 (Tenn. 2006) (prosecutor's reference to the victim as a "good guy" and "murder" victim had been "cut to shreds" improper); *Carrol v. State*, 327 So.2d 881 (Fla. Dist. Ct. App. 1976) (finding that questions about whether a juror wanted to "sock it" to an insurance company, whether he had dealings with people who were trying to get money to which they were not entitled, and whether a juror wearing glasses was a tripper or faller were improper).

**C. Motions in limine.** In certain situations, a motion in limine can be a useful tool to insure proper voir dire questioning by opposing counsel and prevent the discussion of evidence or facts that should not come in as evidence at trial.

1. **Advance warning from opposing side.** If the opposing party informs you of a contentious or controversial position before trial, a motion in limine may be warranted before voir dire. *See, e.g., People v. Karim*, 853 N.E.2d 816, 836 (2006) (trial court granted State's motion in limine to prohibit defendant from discussing his theory of defense in voir dire).
2. **Controversial evidentiary issues at trial.** Likewise, consider a general motion, for example, to prevent questioning directed at discovering how a juror will decide the case based on the facts. Many trial judges "reserve" ruling on motions in limine until they hear testimony and understand the "context" of the testimony. In such situation, most judges will not allow opposing counsel in opening statement to mention the facts or issues that are the subject of the pending motion in limine. The same procedure or practice should apply to voir dire. *See* WARD WAGNER, JR., ART OF ADVOCACY—JURY SELECTION § 2.02.
3. **Past experiences with counsel.** If you have had past experiences with opposing counsel and anticipate improper questioning as in the past, a motion should be filed.

**D. Specific Topics.**

1. **All Persons (including Corporations) Are Equal before the Law.**
  - a. **Questions.** Consider questions that probe prospective jurors' attitudes about corporations. Several studies indicate that jurors harbor negative feelings and attitudes toward companies—especially

large corporations—as opposed to the individual plaintiff. See Ken Broda-Bahm and Kevin Bouilly, *How to Deal with the Many Types of Anti-Corporate Jurors*, THE NATIONAL LAW JOURNAL (Feb. 2, 2007) (“Juror distrust of corporations and their executives is well-known. this bias follows corporations into the courtroom whether as plaintiff or defendant.”).

i. **Questionnaire.** Examples of possible questions on a jury questionnaire include:

- What are your feelings, favorable or unfavorable, about large corporations?
- Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?  
Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, please explain)
- How do you feel about the legal proposition that an individual and a corporation are to be treated the same and be on equal footing in a court of law?

ii. **Written Question for Judge.** An example of a possible question to submit to the judge to ask the jury is:

- Under the law and instructions I will give you at the end of the trial, all parties, whether an individual or a large corporation, stand equal before the law and are to be dealt with as equals in a court of law. Do any of you, based on your life experiences or for any reason, feel it would be hard or difficult for you to follow this legal proposition in deciding this case?

iii. **Oral Voir Dire.** Examples of possible questions for oral voir dire include:

- How do you feel, good or bad, about large corporations?
- I anticipate that Judge Jones will instruct you that all parties that come into court are to be treated equally and be on the same footing. In other words, individuals and corporations are to be treated the same and neither party should have an advantage or disadvantage just because who they are. How do you feel about that legal proposition? Can you follow that proposition? Any problems in applying that proposition?

b. **Argument in Support for “Equal Footing” Proposition.** If the judge hesitates to allow inquiry along these lines, it is prudent to have on hand material that supports your right to make this inquiry. Several sources are possible:

- i. **Preliminary Instruction.** Check to see if preliminary instructions are normally given by judge. If so, this legal proposition is often included in the model instructions.
- ii. **Closing Instruction.** This legal proposition is routinely given, and the model jury instructions in most jurisdictions have a version.
- iii. **Legal Argument.** Have ready the case law that supports:
  - The right to ask a juror about his opinion/beliefs concerning a proposition law (i.e. defendant is presumed to be innocent) as long as the anticipated response could be the basis of a cause challenge. *United States v. Hill*, 735 F.2d 152, 155 (6th Cir. 1984); *United States v. Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973). Criminal defense attorneys always ask about reasonable doubt and presumption of innocence. Civil plaintiffs' attorneys always ask about the preponderance of the evidence and feelings about awarding damages. Defense attorneys in employment cases are entitled to ask about legal propositions equally important to the jury's decision-making, including equal treatment of individuals and corporations.
  - The right to probe enough to exercise intelligently peremptory and cause challenges. *Harold v. Corwin*, 846 F.2d 1148, 1150 (8th Cir. 1988). *See generally* MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a].
  - The right to ask more probing questions than basic stock questions. *Art Press, LTD v. Western Printing Machinery Co.*, 791 F.2d 616, 618-19 (7th Cir. 1986); *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7th Cir. 1980). *See generally* MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a].
- iv. **Studies.** Several independent studies demonstrate that substantial juror bias against corporations exists. For instance:
  - Studies show as many as 67% of potential jurors believe corporations do not generally act in an ethical manner. Kathy Kellerman Communication Consulting, October, 2007, Issue 6 (citing Vinson, D.E. & Perlut, D. (2003), *The American jury's view of corporate America: It's not a pretty picture*, Washington, D.C: National legal Center for the Public Interest).
  - Studies show between 73% and 61% of jurors believe that if a company is being sued, it has done something wrong. *Id*; Jones, Susan, Ph.D., *Jury Research Institute, Alamo, CA*, July 13, 2006.
  - Studies show that 77% of jurors believe that corporations should be held to a higher standard of responsibility than individuals. *Id*.
- v. **Rebuttal.** If counsel objects, contending that you are trying to precondition the jury, *Blount* has the response: "It matters not that

the putting of the question might also, as appellee contends, have constituted anticipatory argument to precondition the jury. This is an unavoidable consequence of the voir dire jury examination.” *United States v. Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973).

## 2. **Business Judgment Rule.**

a. **Questions.** The Business Judgment Rule is the most important legal proposition for the defense in employment cases. Some jurors, however, are predisposed against this proposition, and could not follow a jury instruction that stated that a company has a right to make its own policies, regardless of the personal opinions of the juror. Consider questions aimed to reveal those biases from jurors.

i. **Questionnaire.** Examples of possible questions on a jury questionnaire include:

- If, after hearing all the evidence, you determine that Plaintiff has not proven age discrimination, but you think the manner in which Plaintiff was terminated was unfair or too harsh (in other words, there was something about the termination that you did not like or would have done differently), would you have any difficulty finding that there was no age discrimination?  
Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, please explain)
- The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair, or even based on erroneous facts—as long as those decisions are not discriminatory, or otherwise unlawful. Would you have any trouble or problem following such an instruction, based on some life experience or feelings about corporations?  
Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, please explain)
- Do you agree or disagree with the proposition that a corporation has the right to make decisions....  
Agree \_\_\_\_\_ Disagree \_\_\_\_\_ (If disagree, please explain)
- Do you think you might be tempted to substitute your own views of company policy for FedEx policy?  
Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, please explain)

ii. **Written Question for Judge.** An example of a possible question to submit to the judge to ask the jury is:

- A corporation may make employment decisions for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its action is not for a discriminatory

reason. Based on any reason, would you have a problem or difficulty in following that instruction and reach a decision based on that proposition?

iii. **Oral Voir Dire.** An example of a possible question for oral voir dire is:

- Before you go to deliberate this case Judge Jones will instruct you on the law that you are to follow in making that decision. I anticipate it will instruct you that FedEx has the right to make employment decisions for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its action is not for a discriminatory reason. How do you feel about that legal proposition? Will you have any problem, hesitation or reluctance to follow that instruction?  
Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, please explain)

b. **Argument in Support of the Business Judgment Rule Proposition.** If the judge hesitates to allow inquiry along these lines, it is prudent to have on hand material that supports your right to make this inquiry. Several sources are possible:

- i. **Jury Instruction.** In employment cases, this instruction is routinely given, and the model jury instructions in most jurisdictions have a version. (See Attachment D with compilation of law on Business Judgment Rule from various federal circuits)
- ii. **Legal Argument.** Have ready the case law that supports:
  - The right to ask a juror about his opinion/beliefs concerning a proposition law (i.e. defendant is presumed to be innocent) as long as the anticipated response could be the basis of a cause challenge. *United States v. Hill*, 735 F.2d 152, 155 (6th Cir. 1984); *United States v. Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973). Criminal defense attorneys always ask about reasonable doubt and presumption of innocence. Civil plaintiffs' attorneys always ask about the preponderance of the evidence and feelings about awarding damages. Defense attorneys in employment cases are entitled to ask about legal propositions equally important to the jury's decision-making, including whether a juror has the ability to follow the business judgment rule or whether he has a predisposition against it.
  - The right to probe enough to exercise intelligently peremptory and cause challenges. *Harold v. Corwin*, 846 F.2d 1148, 1150 (8th Cir. 1988). See generally MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a].
  - The right to ask more probing questions than basic stock questions. *Art Press, LTD v. Western Printing Machinery Co.*, 791 F.2d 616, 618-19 (7th Cir. 1986); *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7th Cir. 1980). See generally MOORE'S FEDERAL PRACTICE ¶ 47.10 [4][a].

- iii. **Studies.** Several independent studies demonstrate that substantial juror bias against corporations exists, and in particular a natural bias against following a company's own policies instead of the "fairness" instincts of some jurors. For instance:
    - Studies show that 71% of jurors feel it is more important to see that "justice is done" than it is to follow "the letter of the law." 37 Mo. Prac., Employment Law & Prac. § 16.2 at 496-97 (2005 ed.) (citing the "expansive attitudinal data" of Dispute Dynamics, Inc., developed by Dr. Dan Gallipeau).
    - Studies show that, in a dispute between an employee and an employer, 88% of jurors tend to believe the employee and 12% of jurors tend to believe the employer. *Id.*
  - iv. **Rebuttal.** If counsel objects, contending that you are trying to precondition the jury, *Blount* has the response: "It matters not that the putting of the question might also, as appellee contends, have constituted anticipatory argument to precondition the jury. This is an unavoidable consequence of the voir dire jury examination." *United States v. Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973).
3. **Other possible topics.** Depending on the case, other topics may be important enough to warrant specific questions, either in a jury questionnaire, through written questions from the judge, or through oral voir dire. Some examples might include:
- a. **Good faith belief of a company that a policy has been violated.**  
An employer is free from liability as long as it had a good faith belief that company policy was violated, even if mistaken in such belief. *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994); *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (holding irrelevant the fact that the parties claiming sexual harassment by another employee were "lying through their teeth").
  - b. **Having the jury to withhold judgment until the close of evidence.**
  - c. **Reminding the jury to avoid sympathy in its verdict.**

### III. JURY QUESTIONNAIRES

- A. **Questionnaires Proper.** Jury questionnaires are permitted pursuant to Fed. R. Civ. P. 47(a) as a "supplement" to the examination and as a means to ask "additional questions" to prospective jurors, but the use of questionnaires is left to the broad discretion of the trial court subject to an abuse of discretion standard. *United States v. United States Dist. Ct.*, 464 F.3d 1065, 1071 (9th Cir. 2006) (holding the trial court may engage in extensive voir dire, including the use of questionnaires and/or individual voir dire).

1. **Federal courts.** The Fourth Circuit has found no error when a trial judge refuses to allow a jury questionnaire, as long as the jury selection process is otherwise fair. *See, e.g., United States v. Sorto*, No. 97-4043, 1998 U.S. App. LEXIS 7800 at \*6-7 (4th Cir., Apr. 21, 1998). Nevertheless, it is common practice in many district courts in the Fourth Circuit to allow jury questionnaires in both civil and criminal matters.
2. **State courts.** In Virginia criminal matters, a party is not entitled to the use of jury questionnaires, and their use has been traditionally disfavored. *See, e.g., Green v. Commonwealth*, 266 Va. 81, 96, 580 S.E.2d 834, 843 (2003) (“Moreover, we have previously held that the use of a juror questionnaire outside the courtroom would undermine the value derived from a trial court's opportunity to observe and evaluate prospective jurors first hand.”). The Supreme Court has explained its rationale:

Three weeks before trial, [defendant] submitted to the court a two-page “Juror’s Personal Data Questionnaire” and moved the court to order each venireman to complete and return it before trial. The court denied the motion and noted that some of the questions on the questionnaire were impermissible and that others could be answered by reference to an information sheet returned by all prospective jurors.

The trial court ruled correctly. [Defendant’s] argument in favor of the questionnaire was that it would “save some time” at voir dire. As laudable as that aim might be, we think the use of a pretrial questionnaire would pursue it at too high a price. We observed in *Pope v. Commonwealth*, 234 Va. 114, 123-24, 360 S.E.2d 352, 358 (1987), *cert. denied*, 485 U.S. 1015 (1988), that “the trial judge has the opportunity, which we lack, to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand.” For that reason, we entrust to trial judges wide judicial discretion in deciding the sensitive question whether a challenged prospective juror “stand[s] indifferent in the cause,” Code § 8.01-358, and we will not disturb the exercise of that discretion unless “manifest error appears in the record.” *Pope*, 234 Va. at 124, 360 S.E.2d at 358. To the extent a pretrial juror questionnaire would probe a juror’s attitudes outside the courtroom, it would detract from the trial judge’s “opportunity ... to observe and evaluate ... prospective jurors first hand.” In our view, the opportunity to see and hear the veniremen, when questioned during voir dire, is crucial to the effective discharge of the trial judge's responsibility.

*Strickler v. Commonwealth*, 241 Va. 482, 489-490 (1991). Notwithstanding this reasoning, some state trial courts will allow jury questionnaires. *See, e.g., Winchester Homes, Inc. v. Hoover Universal, Inc.*, 30 Va. Cir. 22, 23

(Va. Cir. Ct. 1992) (Gerald Bruce Lee, J.) (noting the “valuable trial time” saved if jury voir dire can be handled expeditiously with jury questionnaires).

## **B. Benefits to Court and Jurors.**

1. **Faster jury selection.** Information provided in the questionnaire shortens the selection process. For cause challenges based on questionnaires will save time and even a possible trip to the courthouse for jurors. Barbara M.G. Lynn (U.S. District Judge), *From the Bench: A Case for Jury Questionnaires*, LITIGATION, Summer 2007, at 3.
2. **More privacy for jurors.** Jury questionnaires provide protection to jurors from answering embarrassing questions and disclosure of what could be considered “private” information. Jurors do not have to worry about giving a politically incorrect answer or one that might seem ridiculous to others. This is especially true if sensitive issues are present in the case. Using a Jury Questionnaire is consistent with the juror privacy principles set forth by the American Bar Association that suggest jurors “provide answers to sensitive questions privately to the court, and the parties.” American Jury Project, *Principles for Juries and Jury Trials* 8-9 (2005) (see also Comment to Principle 7).
3. **More honest answers.** Jurors are more likely to be honest and open with their answers than in the unfamiliar confines of the courtroom. Jurors are less likely to mime or adopt another juror’s answer to the same question. Lynn, *From the Bench: A Case for Jury Questionnaires*, *supra*, at 4 (citing G. Thomas Munsterman, et al., *Jury Trial Innovations* (2d ed. 2006)).

## **C. Benefits to Parties and Counsel.**

1. **More time for counsel to prepare for effective oral voir dire.** Questionnaires allow counsel to learn about each juror prior to meeting them face to face and reduce time spent in voir dire gathering biographical information.
2. **More complete information from jurors.** Parties receive information not likely disclosed by judge or attorney questioning. Questionnaires are a valuable tool in evaluating jurors in advance.
3. **More and better information allows counsel to make better decisions.** Both parties are placed in a better position to exercise peremptory and for cause challenges based on more complete and honest answers. Questionnaires also aid an attorney in preparing for responses to Batson Challenges.

4. **Better ability to consider settlement in eleventh hour.** An advance view of the jury panel may affect a party's decisions about settlement positions before the trial begins, and could avoid time and expense to the parties, the court, and the jurors.

#### **D. Practical Steps.**

1. **Trial judge's practice and procedure concerning questionnaires.** Check with court clerk, law clerk, or other sources at the courthouse, as well as asking other attorneys who have tried cases before that judge.
2. **Consult with opposing counsel for agreement.** The best chance of having a questionnaire allowed is through agreement with opposing counsel. Because the questionnaire benefits both sides equally—you are not changing the jurors, after all; simply finding more about them—then agreement should be likely.
3. **Agreed questions and motion.** Likewise, an agreed set of questions will increase the chances of the judge allowing the questionnaire. (*See* Attachment B for a sample Joint Motion with agreed questions).
4. **If no agreement, file your own motion with proposed questionnaire.** If you must request a questionnaire over objection from opposing counsel, a shorter, less imposing questionnaire is more likely to be granted. (*See* Attachment A for a sample Memorandum in Support of Motion to Submit Questionnaire).
5. **Broach issue early on with trial judge.** No good reason exists to wait until the last minute to suggest a jury questionnaire. If the trial judge is initially opposed, you have time to collect material to convince the judge to reconsider. Consider raising the issue at a status conference or the pretrial conference, if one occurs far enough in advance of trial.
6. **Offer to bear costs.** Costs include copying costs and postage and mailing costs, if appropriate. Try to minimize the inconvenience to the court in distributing the questionnaires.
7. **Obtain as much "advance" time as possible.** Questionnaires are not as valuable if they are returned to you just before the panel is seated. You need time to review the answers, prepare follow-up questions, and consider cause strikes based on the written answers.

### **IV. WRITTEN QUESTIONS**

- A. **Written Questions Proper.** Fed. R. Civ. Pro. 47(a) provides for the submission of written questions to the trial judge during the jury selection process.

*Feitzer v. Ford Motor Co.*, 622 F.2d 281 (7th Cir. 1980) (holding that the trial court abused its discretion in not asking jurors written questions submitted by the defendant even though jurors had provided questionnaires; the questionnaires and six questions asked by the judge were not sufficient to permit a reasonably extensive examination of the prospective jurors.) Written questioning is a must when trial judge allows no or very limited oral voir dire by attorney.

## **B. Benefits to Court and Jurors.**

1. **Avoids misstatement of law by trial counsel.**
2. **Better information to jurors.** Written questions from the judge aid jurors at the beginning of trial as to what evidence will help them in deciding, as opposed to attempting to recall evidence in the jury room.

## **C. Benefits to Parties and Counsel.**

1. **Statements from judge carry more authority.** Jurors put more weight on what judge says than from attorney. In fact, jurors have been told what attorneys says is not evidence, so they are likely to pay less attention to counsels' statements than they are to the court's.

## **D. Practical Steps.**

1. **Review trial judge's preliminary instructions and "stock" questions for form and substance.**
2. **Try to make proposed questions as if the judge wrote them.** Write the questions to track closely model or approved instructions, or instructions that you know the judge has given before.
3. **Limit number of questions submitted.** No more than two is a good guideline.
4. **Consult with opposing counsel for agreement or joint motion.** The best chance of having written questions given is if they are proposed by agreement with opposing counsel.
5. **File motion where allowed.** See example for Memorandum in Support of Motion for Oral Voir Dire, *infra* at V.E.5.

# **V. ORAL VOIR DIRE**

## **A. Oral Voir Dire Proper.**

1. **Federal courts.** In federal court the rule providing that the trial court may permit attorneys to conduct an oral examination of prospective jurors confers upon the trial court broad discretion as to the manner in which voir dire is conducted and the type and scope of questions to be asked. Fed. R. Civ. P. 47(a); see *James v. Continental Ins. Co.*, 424 F.2d 1064, 1065 (3d Cir. 1970) (holding the denial of request for oral voir dire appropriate when the motion provided no information regarding the questions to be asked, failed to delineate the nature and scope of the proposed examination and did not explain why the voir dire conducted by the court was not sufficient). The Chief Judge for the Eighth Circuit noted one rationale for voir dire conducted by counsel, stating:

The grave danger of a voir dire controlled solely by the judge is found in the unnecessary reversal of cases where the judge offers allegedly neutral, flat and non-penetrating questions to potential jurors.

*Harold v. Corwin*, 846 F.2d 1148, 1152 (8th Cir. 1988) (Lay, C.J., concurring) (citing *United States v. Davis*, 583 F.2d 190, 198 (5th Cir. 1978)); *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974); *United States v. Dellinger*, 472 F.2d 340, 360-70 (7th Cir. 1972); *United States v. Banks*, 687 F.2d 967, 982 (7th Cir. 1982) (Swygert, J., dissenting) (“trial judge[‘s] ... questions [were] general, rhetorical ...[and] totally insufficient.”); *United States v. Hill*, 738 F.2d 152, 153-54 (6th Cir. 1984) (“voir dire... tends to be extensive and probing, operating as a predicate for the exercise of peremptories ... ‘one of the most important rights secured ...’”) (quoting *Swain v. Alabama*, 380 U.S. 202, 218-19 (1964)); *United States v. Rossbach*, 701 F.2d 713, 716 (8th Cir. 1983) (“[a] searching voir dire is a necessary incident to the right to an impartial jury ...”) (citation omitted)). Judge Lay continued:

The rigid, inflexible control suggested by my colleagues in *Hicks* and adopted by many federal trial judges is to have the lawyers submit written questions for the court to propound to the jury. My trial experience compels me to conclude that this is akin to taking a bath with your clothes on or listening to the London Philharmonic play Beethoven’s Fifth with ear plugs in the ear. I think most lawyers will agree that this is mere rhetorical exercise and totally ineffective. The neutral response from the prospective juror does little to inform the lawyer as to the possibility of latent prejudice. These responses are a far cry from the spontaneity of the give and take between lawyers and jurors in an informal, relaxed, and probative discussion of the subject matter.”

*Id.* at 1153.

2. **State court.** As noted above, the Virginia Rule 3A:14 (criminal) and Code § 8.01-385 (civil) provide for counsel-conducted oral voir dire, although the manner and extent of the voir dire lies within the discretion of the trial court.

## **B. Benefits to Court and Jurors.**

1. **Better information to jurors.** Oral voir dire provides a more complete preview and guide as to what important legal and factual issues that will be presented. It is better for jurors to have an understanding of the important issues before evidence is presented rather than being informed of the issues only after the evidence has been presented, and then trying to recall the evidence.
2. **Increased odds of obtaining a fair and impartial jury.** Jurors provide more candid answers to attorney than they do to judges and are more likely to disclose their true feelings to attorneys. *Harold v. Corwin*, 846 F.2d 1148, 1154 (8th Cir. 1988) (Lay, C.J., concurring). See also Kathy Kellerman Communication Consulting, *Online Research Update Issue 3* (Aug. 2007) <<http://www.kkcomcon.com/ROJR0807-3.htm>> (citing S.W. James, *Judge Versus Attorney Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW AND HUMAN BEHAVIOR, 131-46 (1987)).

## **C. Benefits to Parties and Counsel.**

1. **More candid information disclosed.** Oral voir dire provides attorneys with more complete information upon which to make more intelligent decisions regarding the exercise of peremptory and for cause challenges. See *Harold*, 846 F.2d at 1154; Kathy Kellerman Communication Consulting, *supra* V.B.2.
2. **Opportunity to follow-up on information provided in questionnaires and court questioning.**

## **D. Purpose.** The primary goal is to discover which jurors are biased or prejudiced against your client so you can intelligently exercise your cause or peremptory challenges. The second goal is to identify jurors who will be most receptive to your case.

## **E. Practical Steps.**

1. **Know trial court's policies on attorney questioning.** Form of question he or she prefers. Feelings about "commitments" and "promises." Time allowed.
2. **Observe oral voir dire in another case conducted by your judge.**

3. **Review questionnaires approved by the trial judge, his other standard preliminary instructions, and “standard” questions used by trial judge in his questioning.** This process will allow you to form a basis for why the court’s questions are insufficient and to formulate questions that you want to ask in oral voir dire.
4. **Consult with opposing counsel for agreement or joint motion.** This process will likely increase your chances of persuading the trial court to grant your request.
5. **File motion where allowed.** See Attachment C and review *James v. Continental Ins. Co.*, 424 F.2d 1064, 1065 (3d Cir. 1970) (holding “adequate” information must be submitted to the trial court to exercise its discretion ... questions and nature and scope of proposed examination should be disclosed to the trial court.)
6. **Obtain information about opposing counsel and his or her style, content, form of questions and scope exhibited during oral voir dire.** Consider filing a motion in limine. See General Considerations – Motions in limine, *supra* Sec. II.C.
7. **Obtain questionnaire or jury list as soon as possible.**
8. **Questionnaires – Information Sheets.** Study, study, study. You should be familiar with each juror and be able to recall important information without notes.
9. **Juror list (general information).** Prepare list of prospective jurors in alphabetical order with pertinent information listed, e.g. name, occupation, employer, spouse’s employment, questionnaire numbers, and condensed answers.
10. **Juror list (rank).** Rank your unfavorable jurors.
11. **Cause and Batson list.** If a questionnaire is provided, prepare list in order with number of questionnaire answer and response. Have copy of questionnaire tabbed with question and answer highlighted for trial judge.
12. **Prepare analogies for voir dire based on your audience.** See Oral Voir Dire – Use of Analogies, *infra* Sec. V.H.
13. **Prepare outline.** Sample outline based on 15 to 30 minute voir dire. An example might be:

**I. Introduction.** Yourself, trial team and corporate representative.

**II. Personalize client.**

- A. Corporations act through employees.
- B. Corporate representative accused of [...] discrimination.
- C. Honor to represent corporation and more importantly, Jane Doe

**III. Facts of case and theme.**

**IV. Purpose.**

- A. Best juror for this case.
- B. Criminal, breach of contract, car wreck.
- C. Your own impartiality.
  - a. Sports
  - b. Talent contest
  - c. Food
  - d. Prejudices okay. Does not make you a bad person.
- D. No wrong answers.
- E. Not to Pry. Private talk with Judge.

**V. Questionnaires.**

- A. Thanks
- B. Read them
- C. Candid

**VI. Legal Propositions.**

- A. Equal footing – Jury instruction – analogy
- B. Business Judgment – Jury instruction – analogy
- C. Good faith belief – Jury instruction – analogy
- D. Sympathy – Jury instruction – analogy

**VII. Questions specific to case.** E.g., experience in hiring, terminating an employee.

**VIII. Follow-up to jury questionnaire answers.**

**IX. Making objections.** Rules to follow and analogy.

**X. All the evidence in** – Jury instruction – analogy

**XI. Evidence from stand.**

- F. Specific Questioning Techniques To Deal with Tough Issues.** The following tips are borrowed from Trey Cox, an attorney with Lynn Tillotson Pinker & Cox, LLP, in Dallas, Texas. They cannot be rewritten or paraphrased any better than Mr. Cox has done, so they are set forth as they are in his presentation entitled Taking the Voodoo Out of Voir Dire:

1. **Ask a direct question to potentially unfavorable juror.** One way to introduce an issue is to address a question to a juror you have identified as a potentially unsympathetic juror. Ask how he or she feels about a certain topic. Because our time is usually limited, focus your efforts on trying to extract bases for casual strikes against the unfavorable jurors. Target the leaders first; you can try to ascertain whether a potential juror is unfavorable or a leader before trial by looking at juror questionnaires or the juror card themselves.
2. **Ask the entire venire a direct question.** If you decide to start by a question to the entire panel, ask it in a manner that encourages a response. For example, asking, “How many of us feel ... ?,” or “How many agree that ... ?,” while raising your hand and smiling, will be more effective than simply reading from your notes, “does anyone think that ... ?” “Does anyone have a problem with ... ?” Or “is everyone willing to ... ?” If several people raise their hands, note the responses for the record, and then ask each juror additional questions individually.
3. **Ask a question posing alternatives.** Another effective method is to introduce an issue by asking the question that suggests alternative responses. For example, “For example, Mr. Jones, let’s talk for a minute about companies. How do you feel about Acme Manufacturing Co.’s policy that provides for automatic termination for falsifying timecards? The policy is automatic even if you’re a long term employee with a clean record. Some people might feel that a company has a right to set their own rules while other people might think that way was too harsh and not fair. Which of these statements best describes how you feel about the policy?” Use this technique with a juror you believe is potentially unfavorable and a leader. When you describe the “positive” position that supports your side of the issue, use terms that make the alternative less attractive. When you describe the “negative” position, use terms strong enough to set up a causal challenge, but not so extreme that the unfavorable juror would feel uncomfortable adopting such a position. The objective is to get the unfavorable juror to select a negative stance.
4. **Flush out.** Once your target adopts a negative position, bind the juror to it so he or she cannot back away later. You need the juror firmly tied to the position for your casual challenge. Be careful not to push the unfavorable jurors so far that he or she recognizes that the extreme stance is ludicrous. After the juror adopts a negative position, thank him or her. The venire members will probably see that this position is against the defendant’s interest and expect you to be antagonistic. Instead, explain to the jury system is built on honesty and say that you sincerely appreciate the jurors candor. Do this before moving to any other jurors.

5. **“Loop” to identify other unfavorable jurors.** To expand your inquiry, “loop” the negative jurors’ position into a question to the entire venire. For example, “How many of us agree with Mr. Jones that all chiropractors are quacks?” People are more willing to agree with someone else than be the first to express an opinion. Again, be careful not to go too far: you don’t want other potentially negative jurors to back down and adopt a less extreme alternate position. Occasionally, when you use the “looping” technique, you discover a juror who takes a more extreme position than the first juror or who has deeper feelings of the top. When that happens, you may want to loop off at the more extreme position rather than that of the original juror. The objective is to get as many unfavorable jurors as possible to agree with the most extreme position possible.
6. **“Lock-in” negative jurors for causal challenge.** While you are flushing out the views of each juror and looping to others, be sure to lock each unfavorable juror into the extreme position. You typically will not want to establish the causal challenge at this point, but rather simply lock the juror into his or her position. The more solidly you lock the juror, the less chance he or she will escape challenge later and the more comfortable other jurors will be joining with his or her views.
7. **Turn to positive jurors.** Next, you may want to open the discussion to jurors who do not agree with a negative position. Take this opportunity to educate the panel about your case themes or the controversial issues. Allowing the “positive group” to respond to the “negative group” gives you a preview of jury deliberations.
8. **Inoculate.** After you address the controversial issues with your positive jurors, inoculate them against your opponent’s challenges. Use leading questions to get a juror to assure the court that he will weigh the evidence objectively and follow the court’s instructions. For example, if a juror states that he suffers from an old back injury and knows it’s just a matter of time before surgery is necessary, you may want to inoculate him against a subsequent attack. You could ask, “even though you know first hand how painful injuries like these are, can you still follow the court’s instructions and require the plaintiff to prove each element of damages, including future medical expenses, by a preponderance of the evidence?”

## **G. Use of Analogies.**

1. **Use of non-legalese language.** Jurors are in a strange environment and using legalese talk only compounds their anxiety or confusion. Speak to the jury as though you are addressing a respected, non-lawyer family member in your living room.

2. **Analogies.** Use of analogies is not only a good example of not talking legalese, but also an excellent tool for the jury to understand legal principles with which they are not familiar.
- a. **Prejudice, fair and impartial.** When the trial judge asks a juror if he or she will be impartial, almost all jurors will agree. They do not want people to think they are prejudicial and certainly do not want to admit that to a judge. After a juror has told a judge the he or she can be fair and impartial, the last thing a juror wants to hear is another question from a lawyer asking him or her if they can be fair and impartial. To illustrate the concept of being fair and impartial, consider the following:
- i. **Sports.** “I graduated from the University of Alabama. I love the school and I’m a huge Tide fan. But, I’ve never seen the Tide be guilty of pass interference or holding. Do you think I’d be a good candidate to referee for a University of Alabama game? I don’t think I’m too bad of a fellow and there is nothing wrong for me having those feelings. I know the rules and could do a pretty good job calling the Virginia-Virginia Tech game.”
- ii. **Food.** “I hate liver. My mother made me eat it. I threw ketchup all over it. There is not enough ketchup to ever get me to like it. I’m not a bad person because I do not like liver, but I would not be the best juror in a trial where one side is trying to persuade me that liver tastes good. I might be a good juror for ice cream or fried chicken.”
- iii. **Similar subjects.** Officiating your child’s basketball game. Judging a talent show when a close friend is a contestant.
- b. **Corporations and individuals deserving equal footing and/or Business Judgment Rule.** “Florida and Vanderbilt are playing football on television. You have no allegiance to either team. Vanderbilt is a 35-point underdog. How many of you are going to pull for Vanderbilt, the underdog? There is nothing wrong with pulling for the underdog, but what would you think of the proposition that the referee decides to penalize Florida for pass interference and holdings when no infraction occurred to make things more even? Is that fair? We all agree that rules should be equal and Florida should not be penalized unless it is deserved.”
- c. **Wait until all the evidence is presented before rendering a decision.** “Two young twin boys are playing outside. One brother runs inside to his mother and says, ‘Tommy is being mean to me.’ Mom immediately says to Tommy, ‘You go to your room for the rest of the day.’ How many of you think Mom acted properly?”

## H. Dealing with Emails

The modern workplace relies on email as a major form of communication. Many of the emails sent or received are work related. Others are not. In the event of litigation, the substance of an informal and ill-informed email can greatly impact a finding of liability or the damages awarded. The following examples provide suggestions on how to mitigate problematic emails during the *voir dire*.

- “How many of you use email on a regular basis? Of those who use email, how many of you have ever pushed the ‘send’ button and wished that you hadn’t? Why not?”
- “How many of you engage in ‘water cooler talk’ at work? Mr. Smith. I saw you raise your hand. Could you explain to me what ‘water cooler talk’ means to you? Do you always know for sure what you are talking about or are there rumors and speculation involved? Do you ever engage in the same type of ‘water cooler talk’ over email? When you send that type of email, do you know for certain what you are talking about or are you just shooting the bull with your coworkers?”
- “How many of you have either sent or received an email where statements were made based on hearsay and rumor and the hearsay and rumor turned out to be wrong? How did you feel? A big oops?”
- “How many of you have ever sent an email that was misconstrued or misunderstood after you sent it? Maybe the recipient didn’t pick up on your tone or understand that you were joking around? Mr. Smith. I saw you raise your hand. Could you please tell me about one of your experiences?”
- “How many of you send or receive emails from co-workers on a regular basis? Do you ever joke around with your co-workers over email? Ever speculate or comment about something work related without really knowing the facts? How many of you believe that something written in an email between co-workers is any different than gossip at the water cooler between the same two co-workers? Does the fact that it is written down change anything? How many of you believe that an email like that is an ‘official company document’?”
- “How many of you believe that an email is permanently deleted when you hit ‘delete’ on your computer?”
- “How many of you have a ‘funny guy’ co-worker who sends out a lot of emails? Do you take his emails seriously? What if he references things about work? Mr. Smith. I saw you raise your hand. Why not?”

## **I.           Suggestions.**

1. **First Impression.** “You never get a second chance to make a first impression.” Jurors do not miss anything. Jurors’ observations of your client, your trial team and you begins when you get out of your car the first day of trial. Your conduct will be observed and scrutinized going through security, in the hallways, during breaks, in the bathrooms, in the courtroom and leaving the courthouse. Your trial team and client should be cautioned about this phenomenon.
2. **Courthouse Intelligence.** Do your homework by first gathering all the information you can about the trial judge’s jury selection practice and procedures, including but not limited to: jury questionnaires and procedures for answering; preliminary instructions usually given, questions usually asked by the court; trial court’s attitude and procedures toward attorney voir dire, i.e. it is it allowed, time limit, limitation on form of question and scope of questions; how many jurors on panel, treatment of alternatives, “striking” procedure (i.e. how many called for first round of questioning, where and order of seating, “alternating” strikes v. all three simultaneously at the end, “back strikes” allowed); address jurors by name or number, movement allowed by attorney; policy about approaching the bench, how much information or facts given the jury by the trial court; trial judge’s feelings about “commitments” and “promises.”
3. **Be polite.** Remember what your mother taught you. Jurors watch your interaction with the court staff. “Thank you” and “I appreciate that” go a long way. How you conduct yourself rubs off on your client.
4. **Alternate open ended and leading questions.** Use open ended questions to gain information (i.e. “how do you feel about...”), and leading questions to educate (i.e. “Judge Jones will instruct you about the laws and will tell you that all parties come into court on equal footing.”).
5. **Guidance from court.** Whatever questions you may have about a trial judge’s policies and procedures about jury selection, you best find out prior to trial. Use status conferences or pre-trial conferences as an opportunity to find the answers from the trial judge.
6. **Consult your client.** Before making challenges, always consult your client. The jury will appreciate your client being part of the team and demonstrate lack of arrogance on your part. Your client’s “bad vibes” about a juror are probably justified. Not much fun if client not consulted and juror that he or she did not like turns out to be the foreman of a jury returning an unfortunate verdict.
7. **Know your opponent.** How does she or he conduct voir dire? If he or she is known for “staking out” jurors, uses voir dire for argument, takes liberty with

the law/instructions, strongly consider a written motion in limine or, at least, an oral motion/discussion at the pre-trial conference.

8. **Know your jurors.** Questionnaires or jury list with limited information should be studied and reviewed. You should be able to address them by name and relate information you know about them, e.g. “Mr. Jones, I noticed that you own a landscape business in Benton and have had some human resources training in hiring. Tell me how you apply that training.”
9. **Avoid legalese.** Jurors will likely not understand what you are talking about, and may think you are “talking down” to them. They may well take the “legalese” as your attempt to show them how smart you are.
10. **Do not attempt to change a juror’s mind.** We’ve all been told we can’t change anyone but ourselves. It is a waste of valuable time to convince a juror is wrong about his feelings that he was mistreated at work. If anything, thank him for his candid answers and tell him you admire an individual who sticks with how he feels about something.
11. **Don’t be repetitive.** Do your best to vary questions with each juror. Avoid asking the same question to each juror, row by row. “Individual” conversation will let jurors know that you feel they are an important part of the process.
12. **Avoid “strong/overbearing” leaders.** Highly opinionated jurors are very dangerous. You may well think a particular juror is solidly in your corner and will be a strong advocate in the jury room. What if that strong-willed retired manager at a large corporation felt he was mistreated?
13. **Listen.** Maintain eye contact with jurors and listen intently to their answers. Have your co-counsel, paralegal, client, or secretary take notes on answers, mannerisms, facial expressions, eye contact—or lack of—body language, and general reaction to question. This is valuable information in exercising and defending your peremptory challenges.

## VI. STRIKING JURORS

### A. Cause Challenges.

1. **Generally, jurors may be challenged for cause if they are not fair and impartial.** As the Supreme Court stated in *Dennis v. United States*:

“Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”

*Dennis v. United States*, 339 U.S. 162, 172 (1950) (quoting *United States v. Wood*, 299 U.S. 123, 145-46 (1936)). There are therefore no rigid tests for determining when a juror crosses the line from neutral to biased or prejudiced.

a. **Examples of phraseology.** Courts have phrased the test in various ways:

- “To challenge a juror for cause, a party must show actual partiality growing out of the nature and circumstances of the case.” *Allen v. Brown Clinic, P.L.L.P.*, 531 F.3d 568, 572 (8th Cir. 2008) (citing *United States v. Tucker*, 137 F.3d 1016, 1029 (8th Cir. 1998)).
- “The critical issue in deciding a challenge for cause is whether the juror ‘could be fair and impartial and decide the case on the facts and law presented.’” *United States v. Smith*, No. 07-4426, 2008 U.S. App. Lexis 24446 \*5 (4th Cir., Dec. 2, 2008) (quoting *United States v. Capers*, 61 F.3d 1100, 1105 (4th Cir. 1995)).
- A predisposed prior belief is a bias requiring disqualification “only if it were irrational or unshakeable, so that the prospective juror ‘would be **unable** to faithfully and impartially apply the law.’” *Thompson v. Altheimer & Gray*, 248 F.3d 621, 625 (7th Cir. 2001) (Posner, J.) (emphasis in original) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). Bias would be clear if, for example, a juror added at the end of an answer, “Nothing will ever convince me that . . . .” *Id.*
- To reverse a district court’s refusal to strike a juror for cause, an appellant “‘must demonstrate that the juror in question exhibited actual bias: That is, either an express admission of bias, or proof of specific facts showing such a close connection to the circumstances of the case that bias must be presumed.’” *United States v. Khoury*, 901 F.2d 948, 955 (11th Cir. 1990) (quoting *Ward v. United States*, 694 F.2d 654, 665 (11th Cir. 1983)).
- A juror holding “a preconceived view that is inconsistent with an ability to give an accused a fair and impartial trial, or who persists in a misapprehension of law that will render him incapable of abiding the court’s instructions and applying the law, must be excluded for cause.” *Sizemore v. Commonwealth*, 11 Va. App. 208, 211, 397 S.E.2d 408, 410 (1990).

b. **The trial court has wide discretion in deciding challenges for cause.** The district court has broad discretion “because it is in the best position to assess the demeanor and credibility of the prospective jurors.” *United States v. Elliott*, 89 F.3d 1360, 1365 (8th Cir. 1996) (citing *United States v. Graves*, 5 F.3d 1546, 1554 (5th Cir. 1993)); *Jackson v. Commonwealth*, 267 Va. 178, 191 (2004) (“because the trial judge has the opportunity, which [the appellate courts] lack, to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand, the trial court’s exercise of judicial discretion in deciding challenges for cause will be not disturbed on appeal, unless manifest error appears in the

record”) (quotation omitted). However, the trial court’s exercise of discretion has certain limits. “‘If there be a reasonable doubt whether the juror [is prejudiced], that doubt is sufficient to insure his exclusion. . . . It is not only important that justice should be impartially administered, but it should also flow through channels as free from suspicion as possible.’” *Brooks v. Commonwealth*, 24 Va. App. 523, 529 (Va. Ct. App. 1997) (quoting *Wright v. Commonwealth*, 73 Va. (32 Gratt.) 941, 943 (1879)).

- c. **“I think” answers are not necessarily grounds for removal.** Many, if not most, jurors respond to questions about their ability to be fair and impartial with answers like “No, I don’t really think that I would be biased.” *Miller v. Francis*, 269 F.3d 609, 618 (6th Cir. 2001). “These are not equivocal responses from the typical venire person. . . . [Jurors] assert their personal beliefs that they are unbiased, but leave it to the judge to make the final determination. In other words, venire members commonly couch their responses to questions concerning bias in terms of ‘I think.’ Therefore, the use of such language cannot necessarily be construed as equivocation.” *Id.*
- d. **Speculation about bias is not sufficient grounds for removal.** When counsel does not argue that a juror was actually biased, but rather that the juror “could very well have been actually biased,” that speculation is insufficient for striking a juror for cause. *United States v. Roberson*, 282 Fed. App’x 582, 584 (9th Cir. 2008).
- e. **Questions that merely ask the jurors if they believe they will be partial are not sufficient.** A party is entitled to explore the potential source of the bias, rather than rely on the court’s plain question whether a juror believes he could be fair. In *Littlejohn v. United States*, the trial judge committed reversible error by asking a compound question a) whether the jurors had been previously employed by law enforcement and b) whether that would affect their ability to be impartial, but instructing them not to identify themselves unless the answer to both a) and b) were affirmative. *United States v. Littlejohn*, 489 F.3d 1335, 1345 (D.C. Cir. 2007). As the appellate court stated:

[W]hether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror’s own assessment of self-righteousness without something more. . . . [S]uch self-evaluation is particularly troublesome when jurors are asked about the potential bias caused by their employment history. Even the most scrupulous juror may not recognize that lingering loyalty [to a past employer], friendship of persons still employed there, or knowledge of agency procedures may color his or her judgment.

*Id.* (internal quotations omitted).

- f. **Implied bias may be grounds for a cause challenge.** Implied bias exists “where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.” *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007) (quotation omitted). In those cases, there is no way to **know** whether the circumstances of a particular juror might affect his decision, but “permitting such a juror to serve would introduce into the jury room an extraneous influence that could materially color the deliberations. The juror in question would be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror.” *Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998). Put another way, a district court “is required to strike for cause any juror who is shown to lack impartiality or the appearance of impartiality.” *United States v. Elliott*, 89 F.3d 1360, 1365 (8th Cir. 1996).
  - i. **Examples of circumstances.** “Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.” *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring).
  - ii. **Only used in unusual cases.** The doctrine of implied bias only applies to “‘extreme situations’ where the circumstances make it highly unlikely that the average person could remain impartial.” *United States v. Smith*, No. 07-4426, 2008 U.S. App. LEXIS 24446 \*5 (4th Cir., Dec. 2, 2008) (citing *United States v. Turner*, 389 F.3d 111, 117 (4th Cir. 2004)).
- g. **Challenge for cause based on questionnaire.** In California, the Court may excuse for cause a prospective juror whose written response to a juror questionnaire indicates a bias against one of the parties. A challenge for cause can be based **solely** upon a juror’s responses to their juror questionnaire. *People v. Avila*, 38 Cal. 4<sup>th</sup> 491, 529-531 (Cal. 2006).

- 2. **Codification of standard for striking for cause.** Some jurisdictions have codified the test for when a juror should be excused for cause, and you should check if a standard has been set out by the legislature. Some examples include:

- a. **California statutes.**

- (1) **Actual bias** - Challenge for cause based upon actual bias, defined as “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” Cal. Code Civ. Proc. § 225(b)(1)(C).

**(2) Implied bias** - Cal. Code Civ. Proc. § 229(b) lists challenges for cause based upon implied bias, defined in § 225(b)(1)(B) as “when the existence of the facts as ascertained, in judgment of law disqualifies the juror.”

- b. Alabama statute.** “That he has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict.” Code of Ala. § 12-16-150(7).
  - c. New York state statute.** A challenge for cause is proper if a juror “has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial” NY CLS CPL § 270.20(b).
  - d. Arkansas state criminal statute.** The Arkansas Code contains a definition of “actual bias” in the provisions on *criminal* proceedings: “Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging.” Ark. Code. Ann. § 16-33-304(b)(2)(A) (Criminal Proceedings—Challenge to Trial Jurors). No similar definition appears in the provisions on *civil* proceedings. *Cf.* Ark. Code. Ann. § 16-33-202 (Civil Proceedings—Challenge for Cause).
  - e. Tennessee state statute.** A Tennessee statute exists but it does not explain the required standard for excusing a juror: “That a state of mind exists on the juror’s part that will prevent the juror from acting impartially shall constitute such cause.” Tenn. Code Ann. § 22-1-105 (Discharge of Unqualified Jurors—Reasonable or Proper Cause).
- 3. Examples.** In many cases, the appellate court reviews the actual colloquy between the juror and the judge or attorney to reveal any bias. Some lessons can be gleaned from various actual examples:
- a. “I would do my best” is sufficient to deny a strike for cause:**

The Court: Well, do you think that experience which your friend had would interfere in any way with your thinking or judgment?

Juror Dorris: It might.

The Court: Well, I know all things are possible. But if you took an oath to say that you would well and truly try this case as between the Government and these people who are accused, wouldn’t that do away with the ‘might’ part, and you would do your best?

Juror Dorris: I think it would. I would do my best.

The Court: That is all we all can do, is our best.”

*United States v. Ploof*, 464 F.2d 116, 118 n.3 (2d Cir. 1972) (holding that the trial court did not abuse its discretion in not striking juror). A juror should be struck for cause if, although she stated that she would **attempt** not to base her judgment on information she had gained through the news media, she could not **assure** the court that she would render her verdict based solely on the evidence adduced at trial. *DeHart v. Commonwealth*, 19 Va. App. 139, 142 (Va. Ct. App. 1994) (noting that the juror’s “answers raised a reasonable doubt as to her qualification to serve as a juror, a doubt that should have been resolved by granting [defendant’s] motion to strike her for cause”).

**b. The last “Yes” trumps all earlier equivocation:**

The Court: It would be your sworn obligation to decide this case based simply on what’s presented here in this room, and both parties are entitled to that. Could you do that?

Prospective Juror Varno: Honestly, I don’t think so.

The Court: You think you might favor one side over the other here?

Prospective Juror Varno: I’m not sure. I’m sorry.

The Court: Well, no, you’re doing exactly what you’re supposed to be doing, and that is discussing with us things in your life that may affect your ability to be open-minded here. But, Miss Varno [sic], if you were called to serve as a juror you would hear the testimony of the witnesses and look at the exhibits, and then you and the other jurors would have to determine the truth, the facts of this case. In doing that, you’d have to set aside anything that would interfere with your ability to be fair and open-minded. Could you do that?

Prospective Juror Varno: I think so.

The Court: Okay. And when you say “I think so,” it would be your sworn obligation to do that. Could you do that?

Prospective Juror Varno: Yes.

*United States v. Brodnicki*, 516 F.3d 570, 572, 574-75 (7th Cir. 2008) (holding that the trial court did not err in denying to excuse this juror).

**c. If the question to get the last “Yes” is not asked, the juror might be excused for cause.** The following excerpt is from the same case where the judge pressed another juror to get commitment, but did not press this juror:

The Court: Well, both sides here are entitled to a fair trial, and that would require you to sit and listen to the

testimony of the witnesses that are presented in this case and the exhibits that you're asked to look at and make a decision based simply on that and put aside this terrible experience you had. Could you do that?

Prospective Juror Lane: Well, I have had experience too with the police. I was locked up for a rental car because they didn't have the papers in it.

The Court: I see.

Prospective Juror Lane: And they handled me with force, you know, that I think they shouldn't have did [sic].

The Court: Do you think that that--do you think that you could be fair and open-minded in this case?

Prospective Juror Lane: I'm not really sure, Judge.

The Court: Okay. Well, I appreciate your honesty and we'll excuse you. You can go back to the jury room.

*United States v. Brodnicki*, 516 F.3d 570, 573-75 (7th Cir. 2008) (holding that the trial court did not err in excusing this juror).

4. **Method to establish bias for cause.** Once you have identified a juror who may have predetermined biases or prejudices against your client, you should establish that bias concretely for a cause challenge. The following steps are an example of a good way to prove to the judge that a juror should be removed for cause. Thank you to Trey Cox of Lynn Tillotson Pinker & Cox, LLP, in Dallas, Texas, for allowing me to share these steps from his presentation entitled Taking the Voodoo Out of Voir Dire.
  - a. **Step 1.** When a juror has expressed a strong opinion that gives rise to a challenge for cause, start by repeating the juror's answer: "Let me make sure I understand what you are saying . . . ."
  - b. **Step 2.** Then ask why he or she feels this way. This should be the only time you ask an open-ended question in a challenge for cause.
  - c. **Step 3.** When doing your challenge for cause, after the one "why" question, always ask closed-ended questions, and use metaphors which provide a socially acceptable way to admit bias. Ask questions like:
    - Would it be fair to say that this is a strong opinion you have about this issue?
    - You'd agree with me that you have had this opinion or feeling for quite some time?
    - Are you the kind of person who stands by his guns, or are you more of a "wishy-washy" type of person?

- Given what you said before (or based on your questionnaire), would the defendant start with a bit of an edge?
  - Would the plaintiff have a little steeper hill to climb to prove its case?
  - Would the defendant be starting a little bit behind the plaintiff?
  - If this trial was a race, would we be starting one step behind?
  - If you were in my shoes, representing John Smith, would you want a person with your views sitting as a juror?
- d. **Step 4.** After the juror has agreed to some level of bias, you then have to raise (and solidify against rehabilitation) the level of commitment. Ask questions like:
- So, even if the evidence calls for it, you feel that you probably could not vote in favor of ... ?
  - So, even if the Court instructed you as to the law on this issue, you believe you would be unable to vote in favor of ... ?
  - I do not like oysters. When I was young my mother told me I would like them, but I didn't. Today, no matter how many experts tell me oysters taste good, and even if a nutritionist told me oysters are great to build strong bones and healthy teeth, I still do not like oysters. That is what we mean by a bias or prejudice—a strong opinion that is not likely to change. So, it would be fair to say that on the issue of [...], you would start the trial with a prejudgment or strong opinion that lawyers refer to as a bias or prejudice? Would you agree that prejudgment or bias is so much a part of you that it would prevent you from giving a fair judgment on our side of the case?
  - Do you feel that in this case, with your strong feelings on the issue of [...] you would not be an impartial and fair judge of some parts of this case?
  - So, would it be fair to say that no matter whether it was me or the judge or someone else that asked you to leave that opinion aside, you feel so strongly about this, you would not be able to set your opinion aside on this issue?

## B. Peremptory Challenges.

1. **Number of peremptory strikes.** Generally, peremptory challenges give a party the right to strike a certain number of jurors—three, in federal and Virginia courts—for any undisclosed reason, unless race or gender are improper motivation for the challenges. Fed. R. Civ. P. 47(b); 28 U.S.C. § 1870; Va. Code § 8.01-359. See *Batson v. Kentucky*, 476 U.S. 79, 87-89 (1986).
2. **Multiple parties.** In federal court, the granting of additional challenges is left to the discretion of the trial court. 28 U.S.C. § 1870; *Standard Indus.*,

*Inc. v. Mobil Oil Corp.*, 475 F.2d 220 (10th Cir. 1973). However, if defendants' positions are **adverse** to one another, courts have ruled that failure to provide additional challenges is an abuse of discretion and reversible error. *John Long Trucking, Inc. v. Greear*, 421 F.2d 125 (10th Cir. 1970); *see also Tidemann v. Nadler Golf Cart Sales, Inc.*, 224 F.3d 719, 725 (7th Cir. 2000) (holding that where two defendants received three strikes each and plaintiffs did not demonstrate why procedure was "patently unfair," no abuse of discretion occurred); *Bayless v. Boyer*, 180 S.W.3d 439, 448 (Ky. 2005) (holding that defendant doctors had "sufficiently antagonistic" interests to warrant additional strikes).

3. **Alternate jurors.** True alternate jurors have been eliminated by the Federal Rules of Civil Procedure. They now provide that there just must be at least six and no more than 12 members, and each juror must participate unless excused. Fed. R. Civ. P. 48. The verdict must be unanimous in federal jury trials. The Arkansas rules provide for no more than two alternate jurors. Ark. R. Civ. P. 47(b). The verdict must be agreed upon by nine of the twelve jurors. Ark. R. Civ. P. 48.
4. **Failure to excuse for cause.** Peremptory challenges are discretionary and so it would follow that a party should not be compelled to use a peremptory challenge on a juror that should have been excused for cause. However, it appears that appellate review only exists when a party has no more peremptory challenges left and a challenge for cause is warranted. *Walzer v. St. Joseph State Hosp.*, 231 F.3d 1108, 1112 (8th Cir. 2000) (holding that by choosing to use her peremptory challenge rather than taking her chances on appeal, the plaintiff did not lose a peremptory challenge, but rather she used the challenge in line with a principal reason for peremptory challenges—to help secure the constitutional guarantee of trial by impartial jury). This legal proposition can lead to a "damned if you do, damned if you don't" result.
5. **Suggestions.**
  - a. **Know the strike process.** Some courts require alternating strikes, while others have simultaneous exercise of strikes. In the alternating process, it is very important to know which potentially adverse jurors are left in the pool. Always consider holding back your final strike as insurance against a very unfavorable candidate.
  - b. **Make a record.** Counsel should always note objections with specific reasons in order to preserve the record for appeal.
  - c. **Note:** *See also* Oral Voir Dire – Suggestions, *supra* Sec. V.I.

## C. **Batson Challenges.**

1. **Some peremptory strikes are prohibited.** A peremptory strike cannot be made on the basis of certain characteristics of the juror.
  - a. **The Constitution prohibits peremptory strikes based on race/ethnicity.** In *Batson v. Kentucky*, 476 U.S. 79, 87-98 (1986), the Supreme Court held that the racially discriminatory exercise of peremptory challenges by a prosecutor violated the equal protection rights of both the criminal defendant and the challenged juror. The Supreme Court extended *Batson*'s prohibition against the racially discriminatory use of peremptory strikes to civil actions in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-31 (1991). The rule has been extended to cover national origin/ethnicity. See *Hernandez v. New York*, 500 U.S. 352 (1991). A party does not have to be a member of the covered group to complain about a juror being struck. See *Powers v. Ohio*, 499 U.S. 400 (1991).
  - b. **Gender based strikes are also prohibited.** *Batson* has been extended to cover challenges based upon gender, as the Supreme Court has held that the exercise of peremptory challenges based on gender violates the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994).
2. **Other characteristics are generally not protected, but check your local jurisdiction for exceptions to this rule.** Not all characteristics or membership in defined classes prohibits use of a peremptory strike under *Batson*. Some examples include:
  - a. **Age.** *Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000) (declining to extend *Batson* to peremptory challenges based on age).
  - b. **Religion.** *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999) (no precedent exists dictating extension of *Batson* to religion); *U.S. v. Stafford*, 136 F.3d 1109 (7th Cir. 1998) (strike based on specific religious beliefs permissible); *U.S. v. DeJesus*, 347 F.3d 500 (3d Cir. 2003) (strike based upon juror's heightened religious involvement permissible); *United States v. Girouard*, 521 F.3d 110, 113 (1st Cir. 2008 (noting that *Batson* has never been extended to religion); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994) (holding that *Batson* does not apply to religion-based peremptory strikes). But see *United States v. Somerstein*, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (extending *Batson* to religion-based challenge); *United States v. Berger*, 224 F.3d 107, 119-20 (2d Cir. 2000) (not reaching whether *Batson* applies to religion, but even assuming it did, peremptory strike of juror who was a rabbi did not violate *Batson*); *United States v. Greer*, 968 F.2d 433, 437-38 (5th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 962 (1993) (defendants were not denied the opportunity to use their peremptory challenges

effectively where trial court refused to make prospective Jewish jurors identify themselves).

- c. **Obesity.** *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (no *Batson* challenge based on obesity), *cert. denied*, 516 U.S. 1044 (1996).
  - d. **Young adults.** *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993) (young adults are not a cognizable group for purposes of a *Batson* challenge)
  - e. **Disabilities.** *United States v. Harris*, 197 F.3d 870 (7th Cir. 1999) (finding the use of peremptory challenges to exclude jurors with disabilities not unconstitutional); *Donelson v. Fritz*, 70 P.3d 539, 544 (Colo. Ct. App. 2002) (same); *People v. Falkenstein*, 732 N.Y.S.2d 817, 8-- (N.Y. App. Div. 2001) (same) (citing *Harris*).
3. **Exceptions can exist based on local jurisdiction.** California state law prohibits strikes based upon sexual orientation. *See People v. Garcia*, 77 Cal. App. 4th 1269, 1280 (Cal. App. 4th Dist. 2000).
4. **Procedure for reviewing *Batson* challenges.** *Batson* challenges are analyzed through a Three-Step Process: (1) the party bringing the challenge must establish a *prima facie* case of impermissible discrimination; (2) once the moving party establishes a *prima facie* case, the burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and (3) the court then determines whether the moving party has carried his/her ultimate burden of proving purposeful discrimination. *See Hernandez v. New York*, 500 U.S. 352, 358-59(1991).
- a. **Non-striking party must state a *prima facie* case.** To establish a *prima facie* case of discrimination, the moving party must demonstrate that:
    - i. the prospective juror is a member of a protected group;
    - ii. the opposing party exercised a peremptory challenge to remove the juror; and
    - iii. the facts and circumstances surrounding the exercise of the peremptory challenge raise an inference of discrimination.If the moving party fails to establish a *prima facie* case, the opposing party is not required to offer an explanation for the exercise of the peremptory challenge.
  - b. **Burden shifts to striking party to provide a non-discriminatory reason.** Once a *prima facie* case is established, the challenged party needs to offer facially nondiscriminatory reasons for the strike. The party cannot rely on a mere denial of discriminatory intent, and a “gut feeling” by the lawyer generally is not enough to meet the burden. *See United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989);

*Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993); *United States v. Casper*, 956 F.2d 416, 418 (3d Cir. 1992). On the other hand, the reasons need not be “persuasive or even plausible.” The persuasiveness of the challenged party’s reasons is not relevant until the third part of the inquiry, when the trial court determines whether the moving party has carried its burden of proving purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

- c. **The trial court determines whether the objecting party has established discrimination.** The trial court has the duty to determine whether the party objecting to the peremptory challenge has established purposeful discrimination. This finding turns largely on the court’s evaluation of the credibility of the justification offered for the peremptory challenge. A court must undertake “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Batson*, 476 U.S. at 94.

5. **Timeliness of *Batson* Challenges.** “The case law is clear that a *Batson* objection must be made as soon as possible, and preferably before the jury is sworn.” *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir.), *cert. denied*, 519 U.S. 903 (1996). Since one of the remedies for a successful challenge might be to seat the struck juror, as a practical matter, the challenge needs to be made and heard before the panel members have left the courthouse.

6. **Practical pointers for *Batson* challenges.**

- a. **Making out a *prima facie* case.** If you want to bring a *Batson* challenge, the following information will be helpful to have:
  - Demonstrate numerical use of strikes in a discriminatory manner (e.g. used 2/3 strikes to remove only two African Americans).
  - Point out that the other side struck jurors with the same race as your client.
  - Use side-by-side comparisons of struck jurors with accepted jurors (e.g. point out that the only question answered by struck white juror was that he had prior jury experience, while two African American jurors who said they had prior jury experience were not struck).
  - Factor in the number of cause challenges, especially if they tended to focus on one group.
  - Point out disparate questioning during voir dire, including the number and types of questions aimed a particular group.
  - End your challenge by asking that the other side provide race/gender neutral reasons for each challenged strike. Once the other side has provided its neutral reason, the issue of whether you made out a *prima facie* case becomes moot.

- b. Responding to a *Batson* challenge.** Some issues to consider to prepare for a *Batson* challenge to one of your strikes include:
- A mere denial of discriminatory intent does not meet the burden, nor does the attorney's claim of a "gut feeling" about a juror.
  - Although the step two burden is technically met by an explanation that is not plausible, you will enhance your chances of winning at step three if you offer a plausible explanation.
  - Be prepared to offer distinguishing reasons for striking the juror that are not shared by jurors who were not struck (e.g. if you are going to say it was because the person had declared bankruptcy in the past, be sure that you did not accept a juror from another race/gender who had also declared bankruptcy).
  - Take detailed notes of non-verbal cues such as body language or facial expressions made in response to your questions, lack of attentiveness on the part of a particular juror, etc. These behaviors may provide legitimate reasons for your strike, and you will need to be able to articulate what types of behavior you or members of your team observed.
  - Point out the number of challenges that you directed at members of other groups; factor in the number of challenges for cause if they were directed at groups other than the group made the basis of the challenge.
- c. Preparing for *Batson* challenges before jury selection occurs.** If you have the benefit of a jury questionnaire prior to trial, you can prepare a list of jurors in alphabetical order and reference answers from the questionnaires for each juror that would provide a neutral reason for striking that person. You can have the questionnaires with the answer made the basis for your strike tabbed and highlighted for easy review by the court. Additional neutral reasons can be added to the list based upon answers given during voir dire.

**A**  
**Memorandum in Support of Motion  
to Submit Jury Questionnaire**

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF JUSTICE

JOHN "UNDERDOG" DOE,

Plaintiff,

vs.

GIANT CORPORATION,

Defendant.

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CIVIL ACTION NO. 2528

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**MEMORANDUM IN SUPPORT OF THE MOTION TO  
SUBMIT JURY QUESTIONNAIRE**

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COMES NOW THE Defendant Giant Corporation ("Giant Co.") and moves this Court pursuant to Fed. R. Civ. P. 47 to allow the examination of prospective jurors through the use of a juror questionnaire. The proposed questionnaire is to be submitted to the pool of prospective jurors in advance of voir dire and will narrow and focus the oral voir dire by the judge and the parties.

Fed. R. Civ. P. 47 allows the examination of prospective jurors through questions of the parties as the Court deems proper. "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective juror such additional questions of the parties or their attorneys as it deems proper." Fed R. Civ. P. 47(a). Defendant contends the juror questionnaire should be used to "supplement the examination" and serve as a means to ask "additional questions" to the prospective jurors as noted in Fed. R. Civ. P. 47(a).

The parties are entitled to a trial by an unbiased tribunal. *Gray v. Mississippi*, 481 U.S. 648, 668, 95 L. Ed. 2d 622, 107 S.Ct. 2045 (1987). Voir dire serves the purpose of assuring the right to an unbiased jury is protected. *United States v. Ortiz*, 315 F.3d 873, 888 (8<sup>th</sup> Cir. 2002). Voir dire determines which jurors are to be struck for cause and assists counsel in using their peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991). A district court is required to strike "for cause" any juror who is shown to lack impartiality or the appearance of impartiality. *United States v. Elliot*, 89 F.3d 1360, 1365 (8<sup>th</sup> Cir. 1996). An adequate voir dire will remove biased jurors who cannot consider the evidence without bias. *Lopez v. United States*, 451 U.S. 182, 188, 68 L.Ed. 2d 22, 101 S.Ct. 1629 (1981). In order to identify bias, a juror's beliefs must be identified, as should their ability to set aside those beliefs and impartially consider the evidence. *Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7<sup>th</sup> Cir. 2001).

An adequate voir dire requires a probing inquiry into relationships or interests which may cause unconscious or unacknowledged biases. *Darbin v. Nourse*, 664 F.2d 1109 (9<sup>th</sup> Cir. 1981). Probing inquiry into strong feelings or prejudices is required. *Id.* The use of written questionnaires provides jurors with a less public means of answering relevant yet sensitive questions. For example, a prospective juror who was recently terminated from a position might be embarrassed or angry and thus reluctant to disclose this information in open court. 37 Mo. Prac., *Employment Law & Practice*, §16:28 (2005 ed.). This type of juror could have biases based upon their situation which would not allow them to objectively evaluate this case. *Id.* More probing oral voir dire should take place outside the presence of the panel in order to determine bias and to keep from contaminating the jury pool in its entirety. *Id.* One juror's negative experiences, if discussed in front of the entire venire, can impact the other jurors'

opinions. *Id* at §16:29. In order to keep from contaminating the entire venire, questions of a sensitive nature that are directly relevant to the facts of this case should be asked in questionnaire form and followed up on by further questioning outside the presence of the panel.

If further inquiry must be conducted in front of the entire panel, individual follow up could be had without specifically detailing the sensitive information. Barbara Lynn, *From the Bench, A Case for Jury Questionnaires*, LITIGATION, v. 33, No. 4, p. 4 (Summer 2007). Either way, the use of questionnaires minimizes the risk of embarrassment, increases disclosure, and protects the entire panel from contamination by identifying issues before they are addressed in open court. *Id.*(citing G. Thomas Munsterman et. al., *Jury Trial Innovations* (2d ed. 2006))(acknowledging jurors tendency to mime one another's answers). Finally, written questionnaires can allow for the disclosure of recent life traumas which could influence a juror's ability to participate in the trial process, but are too raw to discuss in an open forum. 37 Mo. Prac., at §16:28. Many of these jurors can be struck for cause.

The use of a written questionnaire would also cut down on the time spent in the voir dire process. *Lynn*, at 4. As a preliminary matter, the lengthy biographical and identifying information will already be known to and reviewed by counsel when the oral voir dire begins. Once the panel is present in the courtroom, substantive voir dire can begin. The written questionnaire responses also allow for greater focus on which jurors and which issues need follow up. *Id.* Each juror does not need to be asked each question individually. The responses will allow more targeted inquiries to specific jurors. Motions to strike "for cause" based upon the questionnaire responses could also be helpful in cutting down the length of the voir dire process. *Id* at 3. This practice could eliminate unnecessary trips to the courthouse by jurors who will be struck for cause. *Id.*

Giant Co. must establish whether each prospective juror can accept and apply the legal propositions relevant to this case. *United States v. Hill*, 735 F.2d 152, 155 (6<sup>th</sup> Cir. 1984); *United States v. Blount*, 497 F.2d 650, 651-52 (6<sup>th</sup> Cir. 1973). One such proposition is the “business judgment rule” that allows Giant Co. to make its decisions for either a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as they were not made for a discriminatory reason. Studies show 71% of jurors believe it is more important to see that “justice is done” than to follow the “letter of the law.” 37 Mo. Prac., *Employment Law & Practice*, §16:28 (2005 ed.)(citing studies by Dan Gallipeau, Ph.D., Dispute Dynamics Inc., Los Angeles, CA). Between 73% and 61% of jurors believe that if a company is being sued, it has done something wrong. *Id.*; Jones, Susan, Ph.D., *Jury Research Institute*, Alamo, CA, July 13, 2006. A whopping 77% of jurors believe that corporations should be held to a higher standard of responsibility than individuals. *Id.* Giant Co. must probe the prospective jurors regarding their ability to follow the letter of the law in their deliberations of this case. These views, if expressed and explored in front of the entire panel, could contaminate the entire panel. A questionnaire is a necessary tool in gathering this information outside the collective ear of the panel.

Defendant has reviewed the Court’s standard questions to the venire. While the questions are helpful, they do not adequately probe the prospective jurors’ feelings about large corporations and they do not adequately probe the jurors’ own experiences with discrimination or unfair treatment in the workplace. Giant Co. needs to probe the venire about any past experiences with Giant Co. itself, and well as the venire’s ability to avoid sympathy in their decision making process. All of the foregoing areas are not adequately addressed in the Court’s standard voir dire questions, nor are the propositions of law relevant to this case such as the business judgment rule addressed above.

Defendant Giant Co. proposes that the attached questionnaire be mailed to the prospective jurors and returned to the court by mail in advance of the trial date. Giant Co agrees to absorb the expenses associated with both the preparation and the mailing of the document. In order to assure the venire of the confidentiality of the questionnaires, they will either be turned in to the court after their use or destroyed by counsel for the parties. The questionnaires should significantly shorten the length of the voir dire procedure and will minimize juror discomfort and privacy issues as the completed questionnaires will only be reviewed by trial counsel.

Dated this the 31<sup>st</sup> day of October, 2008.

Respectfully submitted,

By: s/ Perry Mason  
Perry Mason

**B**

**Joint Motion to Submit  
Jury Questionnaire  
(with questions attached)**

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE

ANDREW WILSON

Plaintiff,

vs.

FEDEX CORPORATION,

Defendant.

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CIVIL ACTION NO. 07-2528-JPM

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**JOINT MOTION TO SUBMIT JURY QUESTIONNAIRE**

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COME NOW THE PARTIES Plaintiff Andrew Wilson and Defendant FedEx Corporation ("FedEx") and move this Court pursuant to Fed. R. Civ. Pro. 47 to allow the examination of prospective jurors through the use of a juror questionnaire. The proposed questionnaire is to be submitted to the pool of prospective jurors in advance of voir dire scheduled at 9:30 a.m. Monday, November 17th. Fed. R. Civ. P. 47 allows the examination of prospective jurors through questions of the parties as the Court deems proper. Defendant contends the juror questionnaire should be used to "supplement the examination" and serve as a means to ask "additional questions" to the prospective jurors as noted in Fed. R. Civ. Pro. 47(a).

The parties have agreed to the questions in the proposed questionnaire and a copy is attached to this motion. The use of the questionnaire should significantly shorten the length of the voir dire procedure for both parties and minimize juror discomfort and privacy issues as the completed questionnaires will only be reviewed by trial counsel. Jurors will be informed the completed questionnaires will be destroyed upon the completion of the trial.

Dated this the 31<sup>st</sup> day of October, 2008.

Respectfully submitted,

By: s/ Sarah F. Henry  
Sarah F. Henry (Bar No. 20797)  
Federal Express Corporation  
3620 Hacks Cross Road  
Building B, 3rd Floor  
Memphis, TN 38125  
Telephone: (901) 434-3000

AND

By: s/ Edgar Davison  
Edgar Davison, Esq.  
Crone & Mason, PLC  
The Clark Tower  
5100 Poplar Avenue, Suite 3200  
Memphis, Tennessee 38137  
901.683.1850

### JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: \_\_\_\_\_

Age: \_\_\_\_\_ Gender: Male \_\_\_\_\_ Female \_\_\_\_\_

1. Occupation: \_\_\_\_\_ For how long: \_\_\_\_\_

Who is your present employer: \_\_\_\_\_

What is your title or position: \_\_\_\_\_

What do you do at work: \_\_\_\_\_

Is your job considered a management position? YES \_\_\_\_\_ NO \_\_\_\_\_

Do you supervise anyone at your job? YES \_\_\_\_\_ NO \_\_\_\_\_

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES \_\_\_\_\_ NO \_\_\_\_\_

If yes, please explain:

2. What is your marital status?

\_\_\_\_\_ Single and never married

\_\_\_\_\_ Currently married and have been for \_\_\_\_\_ years

\_\_\_\_\_ Married in the past for \_\_\_\_\_ years

\_\_\_\_\_ Single, but living with domestic partner for \_\_\_\_\_ years

\_\_\_\_\_ Widowed/widower, married in the past for \_\_\_\_\_ years

\_\_\_\_\_ Other

3. What is the last level of education you completed?

\_\_\_\_\_ Grade school or less

\_\_\_\_\_ Some high school

\_\_\_\_\_ High school graduate or GED

\_\_\_\_\_ Some college

\_\_\_\_\_ College graduate

\_\_\_\_\_ Post graduate work

4. Do you have any special or professional licenses?

\_\_\_\_ YES \_\_\_\_ NO

If yes, please describe:

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?

\_\_\_\_ YES \_\_\_\_ NO

a) If Yes, what does he/she do and where is he/she employed?

b) If No, what work outside the home has he/she ever done?

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?

\_\_\_\_ YES \_\_\_\_ NO

If Yes, please explain:

7. Have you ever served as a juror in the past?

\_\_\_\_ YES \_\_\_\_ NO

If Yes, please explain:

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?

\_\_\_\_ YES \_\_\_\_ NO

If Yes, please explain:

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?

\_\_\_\_ YES \_\_\_\_ NO

If yes, what was the nature of the dispute?

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender or national origin?

\_\_\_\_ YES \_\_\_\_ NO

If yes, please explain:

11. Have you ever filed a grievance or claim regarding any employment related issues?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

15. Have you or anyone you know ever worked for FedEx?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

16. Have you heard, or read anything suggesting that FedEx is either a good company to work for or a bad company to work for?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain how that has impacted your opinion of FedEx:

17. Do you currently or anyone you know ever worked for a competitor of FedEx (e.g., UPS, DHL, Airborne Express)?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

18. Have you or anyone you know ever had a personal or business experience with or financial interest in FedEx that would affect your ability to render a fair and impartial verdict in this case?

19. Have you ever had any negative experiences with FedEx?

\_\_\_\_ YES \_\_\_\_ NO

If yes, please explain:

20. What are your personal feelings—good or bad—about large corporations?

21. What are your feelings about FedEx?

\_\_\_\_ Very positive \_\_\_\_ Positive \_\_\_\_ Indifferent \_\_\_\_ Negative \_\_\_\_ Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?

\_\_\_\_ YES \_\_\_\_ NO

If yes, please explain:

23. If, after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination?

24. Do you think you might be tempted to substitute your own views of company policy for FedEx's policy?

\_\_\_\_ YES \_\_\_\_ NO

Please explain why or why not:

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain and identify any union position held:

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

**C**

**Memorandum in Support of Motion  
to Allow Counsel to Voir Dire  
the Jury Panel**

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF JUSTICE

JOHN "UNDERDOG" DOE,

Plaintiff,

vs.

GIANT CORPORATION,

Defendant.

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CIVIL ACTION NO. 2528

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**MEMORANDUM IN SUPPORT OF THE MOTION TO  
ALLOW COUNSEL TO VOIR DIRE THE JURY PANEL**

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COMES NOW THE Defendant Giant Corporation ("Giant Co.") and moves this Court pursuant to Fed. R. Civ. P. 47, to allow counsel for the parties to examine prospective jurors through oral voir dire. Fed. R. Civ. P. 47 allows the examination of prospective jurors through questions of the parties as the Court deems proper. "The court may permit the parties or their attorneys to conduct the examination of prospective jurors..." Fed R. Civ. P. 47(a).

The parties are entitled to a trial by an unbiased tribunal. *Gray v. Mississippi*, 481 U.S. 648, 668, 95 L. Ed. 2d 622, 107 S.Ct. 2045 (1987). Voir dire serves the purpose of assuring the right to an unbiased jury is protected. *United States v. Ortiz*, 315 F.3d 873, 888 (8<sup>th</sup> Cir. 2002). Voir dire determines which jurors are to be struck for cause and assists counsel in using their peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991). A district court is required to strike "for cause" any juror who is shown to lack impartiality or the appearance of impartiality. *United States v. Elliot*, 89 F.3d 1360, 1365 (8<sup>th</sup> Cir. 1996). An adequate voir dire will remove biased jurors who cannot consider the evidence without bias. *Lopez v. United States*, 451 U.S. 182, 188, 68 L.Ed. 2d 22, 101 S.Ct. 1629 (1981).

In order to identify bias, a juror's beliefs must be identified, as should their ability to set aside those beliefs and impartially consider the evidence. *Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7<sup>th</sup> Cir. 2001).

Questions which invite either an admission or denial of prejudice are necessary, but not enough to reveal relationships or interests which may cause unconscious or unacknowledged biases. *Darbin v. Nourse*, 664 F.2d 1109 (9<sup>th</sup> Cir. 1981). A more probing inquiry is required. *Id.* Probing inquiry into subjects of the litigation about which the venire may have strong feelings or prejudices is critical to an adequate voir dire. *Id.*

Effective voir dire reveals subtle factors which can influence a juror. *Harold v. Corwin*, 846 F.2d 1148, 1154 (8<sup>th</sup> Cir. 1988). Many of these factors are not brought out when lawyers are precluded from participating in the voir dire. *Id.* Attorney conducted voir dire is more effective than judge conducted voir dire in eliciting candid responses from jurors. Kathy Kellerman Communication Consulting, *Online Jury Research Update*, August, 2007, Issue 3 <<http://www.kkcomcon.com/ROJR0807-3.htm>>, (citing Jones, S.W., Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 *Law and Human Behavior*, 131-146 (1987)).

Jurors feel pressure to illicit the perceived "right" answer to a judge who conducts voir dire. *Id.* Jurors feel more comfortable giving candid responses to questions from counsel based in part upon the more relaxed, self disclosive manner of counsel conducted voir dire. *Id.* In most cases, prior to voir dire, the judge has admonished the venire to be fair and open minded. 3D MOORE'S FEDERAL PRACTICE §47.10[3][f]. After that admonishment, it is difficult for a juror to admit to the judge they cannot be impartial. *Id.* Prospective jurors would have a much

greater chance of admitting an actual bias when asked by counsel for the parties in a less authoritative and punitive manner by a person standing at eye level. *Id.*

Furthermore, counsel that have spent weeks or months preparing a case for trial will generally have a greater knowledge of the facts of the case. *Harold v. Corwin*, 846 F.2d at 1152. If the Judge conducts voir dire it will necessarily be less probing into the issues that align with the facts of the case. *Id.* Furthermore, even if the Judge asks probing questions of the venire, cold answers to the Judge are not the sort of spontaneous give and take between attorney and juror that highlight a juror's biases. *Id.* at 1153. Honest answers to probing questions about which the venire may have strong feelings or prejudices is critical to an adequate voir dire. *Id.*

The submission of written questions by counsel for the court to propound to the venire is ineffective in eliciting bias as well. *Id.* Such a practice has been likened to taking a bath with clothes on or listening to Beethoven's Fifth played by the London Philharmonic with ear plugs. *Id.* The neutral responses from the jurors to judge posed questions do little to inform the parties about latent prejudices. *Id.* See also, *Art Press, LTD., v. Western Printing Machinery Co.*, 791 F.2d 616,618-19 (7<sup>th</sup> Cir. 1986); *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7<sup>th</sup> Cir. 1980).

In this case, Giant Co. has a need to identify potential biases against corporations and determine whether the jury panel can consider the facts of this case in an impartial manner. Studies show as many as 67% of potential jurors believe corporations do not generally act in an ethical manner. Kathy Kellerman Communication Consulting, *Online Jury Research Update*, November, 2007, Issue 1, <<http://www.kkcomcon.com/ROJR1107-1.htm>>, (citing Vinson, D.E. & Perlut, D. (2003), *The American Jury's View of Corporate America: It's not a Pretty Picture*, Washington, D.C: National legal Center for the Public Interest). Furthermore, studies show between 73% and 61% of jurors believe that if a company is being sued, it has done something

wrong. *Id.*; Jones, Susan, Ph.D., *Jury Research Institute*, Alamo, CA, July 13, 2006. A whopping 77% of jurors believe that corporations should be held to a higher standard of responsibility than individuals. *Id.*

Giant Co. must establish whether each prospective juror can accept and apply the legal propositions relevant to this case. *United States v. Hill*, 735 F.2d 152, 155 (6<sup>th</sup> Cir. 1984); *United States v. Blount*, 497 F.2d 650, 651-52 (6<sup>th</sup> Cir. 1973). One such proposition is the “business judgment rule” that allows Giant Co. to make its decisions for either a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as they were not made for a discriminatory reason. Studies show 71% of jurors believe it is more important to see that “justice is done” than to follow the “letter of the law.” 37 Mo. Prac., *Employment Law & Practice*, §16:28 (2005 ed.)(citing studies by Dan Gallipeau, Ph.D., Dispute Dynamics Inc., Los Angeles, CA). Giant Co. must probe the prospective jurors regarding their ability to follow the letter of the law in their deliberations of this case.

Defendant has reviewed the Court’s standard questions to the venire. While the questions are helpful, they do not adequately probe the prospective jurors’ feelings about large corporations and they do not adequately probe the jurors’ own experiences with discrimination or unfair treatment in the workplace. Giant Co. needs to probe the venire about any past experiences with Giant Co. itself, and well as the venire’s ability to avoid sympathy in their decision making process. All of the foregoing areas are not adequately addressed in the Court’s standard voir dire questions, nor are the propositions of law relevant to this case such as the business judgment rule addressed above. Defendant Giant Co.’s areas of projected voir dire questioning are outlined in the attached document.

**D**

**Sample – Defendant’s Proposed  
Voir Dire Questions**

**DEFENDANT'S PROPOSED VOIR DIRE QUESTIONS**

1. Do you know the Plaintiff or her attorneys?
2. Do you know Defendant or his attorneys?
3. Have you or any members of your family ever been employed by \_\_\_\_\_ or \_\_\_\_\_?
4. Do you believe that you or any member of your family or any friend or acquaintance have ever been discriminated against by an employer because of age, sex, race, disability or national origin?
  - a) If so, do you feel that you would have a tendency to favor the Plaintiff in this case?
  - b) If so, do you feel that you would in any way have difficulty rendering a fair and impartial verdict in this case?
5. Have you ever been a plaintiff in a lawsuit, including a divorce or family law matter?
6. Have you, a friend or any members of your family ever filed a discrimination charge or lawsuit against anyone?
7. Has any company for which you have worked ever been sued for a claim of age or race discrimination?
8. Have you or any member of your family ever been fired from an employment position?
  - a) If so, did you form an opinion as to whether the employer's action was for any reason unfair?
  - b) If so, do you feel that you would have a tendency to favor the Plaintiff in this case?
  - c) If so, do you feel that this tendency to favor Plaintiff would in any way affect your ability to render a fair and impartial verdict in this case?
9. Have you ever done business with \_\_\_\_\_ or \_\_\_\_\_?
10. Do you or any member of your family have any reason to complain about \_\_\_\_\_ or \_\_\_\_\_?
11. Do you believe that there is anything inappropriate about a company consolidating its operations when it is losing money?
12. Do you believe there is anything inappropriate about a company that is losing money streamlining operations, even if that means elimination of regional offices and jobs in those regional offices?
13. Do you feel that an employer may fire someone for the purpose of reducing costs and streamlining operations without incurring liability?
14. Do you feel that when an employer is reducing costs and expenses, it must attempt to relocate employees before discharging them?
15. Do you feel an employer in reducing costs and expenses, must attempt to relocate employees rather than eliminating jobs?

16. In this case, Plaintiff says that at age 49 she was discriminated against because of her age, race and national origin. Defendants deny these claims. Do you feel that because of the nature of Plaintiff's claims or for any other reason, you might tend to favor Plaintiff in this case?
17. Would you rather read a book or watch a video if you want to learn how to do something?
- a) if so, would you have difficulty in rendering a fair and impartial verdict in this case?
18. In this case, Defendants say Plaintiff was terminated not because of her age, but because the office in which she worked and her position were eliminated as a result of nationwide efforts to streamline the company's operations and reduce multimillion dollar losses because at the time Plaintiff's position was eliminated there were no similar positions available for Plaintiff. Plaintiff contends these reasons are false. Do you feel that because of the nature of the reasons stated by Defendants, or for any other reason, you would have difficulty in rendering a fair and impartial verdict in this case?
19. Have you or any member of your immediate family ever been required by an employer to involuntarily accept early retirement whether for economic reasons or any other reason?
- a) If so, do you resent the employer because of it?
- b) If so, do you feel you tend to favor the Plaintiff in this case?
- c) If so, would you have difficulty in rendering a fair and impartial verdict in this case?
19. Do you resent any of your present or past employers because the employer did not give you a position or promotion you feel you should have been given?
- a) If so, do you feel this experience and feeling might cause you to tend to favor the Plaintiff in this case?
- b) If so, do you feel you would in any way have difficulty rendering a fair and impartial verdict in this case?
20. Do you think an employee should be required to permit an employee to remain employed until the employee reaches normal retirement age in all cases except in cases of the employee's conduct?
21. Do you believe an employee may be fired only for cause (e.g. for stealing, embezzlement, etc.?).
22. Do you believe that if an employee has been discriminated against, she should recover a sum of money equal to all future incomes she would have received from the employer without having to look for and find other employment?
23. Do you know of any reason why you could not be fair to \_\_\_\_\_ or \_\_\_\_\_?
24. If, after hearing all the evidence, you determine that Plaintiff has not proven discrimination because of age, race or national origin but, you think the manner in which Plaintiff was discharged was unfair (in other words, there was something about the discharge that you did not like), would you have any difficulty finding that there was no age, race or national origin discrimination?
25. How many jobs have you had in the last ten (10) years?

26. How long did you hold each job?
27. Have you ever been fired from a job?
28. Did you ever leave a job feeling forced out?
29. Have you ever been disciplined on the job or put on probation?
30. Have you ever belonged to a union?
  - a) If so, which union?
  - b) How long did you belong to the union?
  - c) Did you hold an office in the union?
  - d) Have you ever been involved in a union arbitration?
31. Do you play on any sports teams?
32. What organizations do you belong to?
33. Have you ever worked for any government agency?
34. Have you ever been part of the civil service?
35. What do you do in your spare time?

# **E**

## **Sample Defendant's Proposed Voir Dire Questions by Judge**

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE

JANE DOE

PLAINTIFF,

v.

ACME CORPORATION

DEFENDANT.

Case No. CV10 123456  
Assigned to Hon. Joe Johnson

**DEFENDANT'S PROPOSED JURY  
VOIR DIRE BY JUDGE JOHNSON**

Defendant hereby submits the following proposed jury voir dire questions for the Court to ask, but reserves the right to ask appropriate follow-up questions when necessary. In addition, Defendant is of the opinion that a written Jury Questionnaire, containing all or some of the questions posed below, would greatly expedite the voir dire process. Accordingly, ACME hereby requests the opportunity to present such a questionnaire to the jury venire.

1. What is your current employment status?
2. If employed, what is your occupation and job duties?
3. Who is your current employer?
4. For how long?
5. Generally, how would you describe your experience with your current or most recent employer? Very Satisfactory? Satisfactory? Unsatisfactory? Very Unsatisfactory? Neutral?
6. Are any of you here currently responsible for hiring and firing employees at work? If yes, please explain.
7. Have any of you ever worked in a human resources department or been responsible for that aspect of a business? If yes, please explain.
8. Have any of you or someone close to you ever been laid off, terminated, or otherwise lost a meaningful job in the last few years? If so, did you consider the circumstances to be improper or unfair?



1           9. Does anyone believe that employment policies are not always applied  
2 equally among employees? If yes, please explain.

3           10. Does anyone believe that employees who have been at a company for a  
4 long time deserve a bit of leniency when they violate company policies? If yes, please  
5 explain.

6           11. Do any of you think that, in a dispute at work, that employers generally do  
7 not give their employees enough of the benefit of the doubt? If yes, please explain.

8           12. Have you or any of your family or close friends ever been subject to  
9 treatment on the job that you considered to be discriminatory? If yes, please explain.

10          13. Have you or anyone close to you ever managed or owned a business?

11          14. Do any of you believe that an employer does not have a right to conduct  
12 its business as it sees fit, so long as it does not do so in a manner that breaks the law?

13          15. Does anyone think you might be tempted to substitute your own views of  
14 how a company should conduct its business for those of ACME, even if ACME did  
15 not break the law?

16          16. Does anyone have a problem with a company following its policies, even  
17 if the policy is different than what you would do if you were running the business?

18          17. It is not your job as a juror to substitute your judgment for how you think  
19 a particular situation should have been handled, even if you don't agree with how it  
20 was handled. It is not your job to second-guess ACME's decision-making on how to  
21 carry out its business decisions and company policies. Your job is to determine  
22 whether these decisions and policies were carried out as a result of unlawful motives,  
23 such as race discrimination. Will you have any problem in doing that?

24          18. Do you believe you will be able to make a decision in this case based on  
25 whether plaintiff can present evidence of racially discriminatory conduct as opposed  
26 to whether you agree with the company's actions?

27          19. Have you ever served on a jury?  
28

1           20. If so, was it civil or criminal? Did you serve as the jury foreman on any  
2 jury?

3           21. If you have served on a jury, was a verdict reached? In favor of  
4 Plaintiff/Prosecution? In favor of Defendant?

5           22. Has or is anyone here a member of a labor union? If so, which one(s)?  
6 Have you ever filed a union grievance?

7           23. Has or does anyone here work for a law firm? If so, which one(s)? What  
8 is your job?

9           24. Do you have any formal education or work experience in any of the  
10 following areas: Human Resources/Personnel? Law? Business? Management?  
11 Mental Health/Psychology? Accounting? Mathematics?

12           25. Have you ever filed a grievance in the workplace due to an issue with a  
13 co-worker or employer? IF YES, please describe.

14           26. Have you or has someone close to you ever been involved in a lawsuit for  
15 money damages or part of a class action lawsuit? IF YES, please describe.

16           27. What do you think of people who bring lawsuits?

17           28. Does anyone here think that some people file lawsuits when they don't  
18 get what they want?

19           29. Does anyone here think that some people can't take responsibility for  
20 their own actions and blame others, which sometimes leads to filing a lawsuit?

21           30. Does anyone believe that just because a lawsuit has been filed, the  
22 plaintiff must be entitled to receive at least some amount of money?

23           31. Do any of you believe that just because a lawsuit has been brought,  
24 ACME is probably liable for something?

25           32. Would you tend to identify with the employee or with the employer in a  
26 lawsuit between those parties? Please explain.

27           33. What are your personal feelings—good or bad—about large  
28



1 corporations?

2 34. Does anyone here feel that large corporations get away with too much in  
3 today's business world? If yes, please explain.

4 35. Does anyone here feel that large corporations are not regulated enough by  
5 the government? If yes, please explain.

6 36. Has anyone here ever protested or boycotted the services or products of a  
7 large corporation or company? If yes, please explain.

8 37. Individuals and corporations are to be treated equally and are entitled to a  
9 fair and impartial trial based on the same legal standards. Do you have any personal  
10 feelings that would prevent you from treating a large corporation equally to an  
11 individual?

12 Dated: November 28, 2011

Respectfully submitted,

13 /s/ John Doe

14 By: \_\_\_\_\_

15 John Doe  
16 Counsel for Defendant  
17 ACME CORPORATION  
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**F**

**Sample Long Form Questionnaire**

Jury Questionnaire/Voir Dire—

DIRECTIONS

The integrity of our legal system depends upon the fairness and impartiality of jurors. This questionnaire has been prepared to assist the Court and the parties in determining whether or not you may have had personal experiences or knowledge about the issues to be decided by the jury. Acquaintance with any of the parties, the lawyers or potential witnesses should also be disclosed.

This questionnaire is part of the public record of a public trial. Please answer the questions honestly and with great care. Your full and complete answers are desired. Please note that there are no right or wrong answers to any question. In the event that the questions call for sensitive personal information that you do not wish to disclose, please indicate that in your response. You will be provided an opportunity to speak with the judge and the attorneys outside the presence of other jurors.

Please fill out this questionnaire completely in pen or ink. Since we need to make copies, do not write on the back of any page. If you need more room to answer any question, continue on the bottom or side of the page or on the last page (noting the question number). Please complete this questionnaire by yourself and do not consult with anyone else.

	JUDGE OF THE SUPERIOR COURT
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PART I: BACKGROUND INFORMATION

PLEASE ANSWER THE FOLLOWING QUESTIONS ABOUT YOURSELF

1. Name \_\_\_\_\_

2. Age \_\_\_\_\_

3. Marital Status

PLEASE CHECK ALL THAT APPLY

- ☐ Single
- ☐ Married
- ☐ Living with partner
- ☐ Separated
- ☐ Divorced
- ☐ Widowed

4. Please check one      Male \_\_\_\_\_ Female \_\_\_\_\_

5. Place of residence

PLEASE LIST THE LOCATION OF YOUR CURRENT ADDRESS AND THE PART OF TOWN OF YOUR RESIDENCE AND HOW LONG YOU HAVE LIVED THERE.

CITY	PART OF TOWN	FROM	TO
_____	_____	_____	_____

6. Current employment status

- ( ) Employed full-time  
 ( ) Employed part-time  
 ( ) Homemaker  
 ( ) Student  
 ( ) Unemployed—looking for work  
 ( ) Unemployed—not looking for work  
 ( ) Retired

7. If you are employed:

(a) Where do you work?

\_\_\_\_\_

(b) What is your occupation?

\_\_\_\_\_

(c) What is your job title?

\_\_\_\_\_

(d) How long have you had this job?

\_\_\_\_\_

(e) Do you supervise other employees?

( ) Yes ( ) No

(f) If yes, how many employees do you supervise directly ( ) and indirectly ( )?

(g) Do you have the authority to hire or fire other employees?

( ) Yes ( ) No

(h) Briefly describe your responsibilities at work.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(i) Has anybody ever made a complaint about you as a supervisor?

( ) Yes ( ) No

If yes, please describe.

\_\_\_\_\_

\_\_\_\_\_

(j) Have you ever made a complaint to a supervisor?

☐ Yes ☐ No

If yes, please describe.

(k) Has anybody ever made a complaint within a company that you discriminated against a person on the job?

☐ Yes ☐ No

If yes, please describe.

(l) Have you ever made a complaint within a company that you or someone else had been discriminated against on the job?

☐ Yes ☐ No

If yes, please describe.

(m) Has anybody filed a lawsuit or a complaint with a government agency that you discriminated against a person on the job?

☐ Yes ☐ No

If yes, please describe.

(n) Have you filed a lawsuit or a complaint with a government agency that you had been discriminated against on the job?

☐ Yes ☐ No

If yes, please describe.

8. (a) Have you ever owned your own business?

☐ Yes ☐ No

If yes, how many employees did you have?

\_\_\_\_\_ 0 employees \_\_\_\_\_ 4-9 employees

\_\_\_\_\_ 1-3 employees \_\_\_\_\_ 10 or more employees

(b) Have you ever worked for someone else as an independent contractor?

☐ Yes ☐ No

If yes, please describe.

- (c) Have you ever been an officer or member of the Board of Directors of a corporation?

( ) Yes ( ) No

If yes, please describe.

9. Have you ever been employed in any of the following occupations or has your work ever included any of the following responsibilities or have you ever received any training in any of these areas?

Human Resources/Personnel \_\_\_\_\_ Yes \_\_\_\_\_ No

Labor Relations \_\_\_\_\_ Yes \_\_\_\_\_ No

10. Please list any other jobs you have held during the past ten years that you can recall.

EMPLOYER	JOB TITLE	FROM	TO

11. Education

PLEASE CHECK THE HIGHEST GRADE YOU COMPLETED

- ( ) Grade school  
( ) High school  
( ) Vocational or technical school  
( ) Junior college (two year)  
( ) College (four year)  
( ) Post-graduate or professional school

12. If you attended college, vocational or technical school, what was your:

(a) Major subject(s)?

\_\_\_\_\_

(b) Name and location of school(s)?

\_\_\_\_\_

13. (a) Please list and briefly describe any classes, correspondence courses, seminars or workshops you have taken since you left school.

\_\_\_\_\_

- (b) Have you ever had any training, advanced education, or employment in any aspect of finance, economics, accounting, or business administration?  
( ) Yes ( ) No  
If yes, please describe.

14. (a) Have you ever served in any branch of the U.S. military?  
( ) Yes ( ) No  
(b) If yes, please list the branch of service and your highest rank.

15. Are you a member of any trade or professional association, union, civic club, religious, or other organization?  
( ) Yes ( ) No  
(a) If yes, please list all of the organizations to which you belong.

- (b) Please list any office you currently hold or have held in the past in these or other organizations.

ORGANIZATION	OFFICE HELD	FROM	TO

16. (a) Do you belong to any private club, civic, professional, or fraternal organization that limits its membership on the basis of race, ethnic origin, sex, sexual orientation, national origin, or religion?  
( ) Yes ( ) No  
(b) If yes, please list the organization(s).

17. Do you have children?  
( ) Yes ( ) No

18. If you have adult children, please list their names, ages, and occupation, if any:

NAME	AGE	OCCUPATION

19. If there are other adults living in your home other than your spouse, partner, or children, please list their occupations and employers.

OCCUPATION	EMPLOYER

20. If you have children living at home, will caring for them interfere with your ability to serve on this jury?

( ) Yes ( ) No

21. (a) Do you have any health problems which could affect your ability to serve on this jury?

( ) Yes ( ) No

(b) If yes, please explain.

---

22. (a) Have you or any members of your household ever had any health problems that were caused by stress?

( ) Yes ( ) No

(b) If yes, please explain.

---

23. (a) Have you ever filed a workers' compensation claim?

( ) Yes ( ) No

(b) If yes, please briefly describe the complaint.

---

24. (a) Have you or your spouse/partner ever been under stress because of problems at work?

( ) Yes ( ) No

(b) If yes, when did this problem(s) take place?

---

25. (a) Do you take any prescription medication of any kind?

( ) Yes ( ) No

(b) If yes, does the medication affect your mental alertness or cause any physical discomfort?

( ) Yes ( ) No

26. (a) Do you have any religious or other beliefs that would make it difficult for you to sit in judgment on another person?

( ) Yes ( ) No

(b) If yes, please explain.

27. Please list your hobbies.

28. (a) Which television programs do you watch most often?

(b) Which television talk shows, if any, do you watch?

(c) Which magazines do you read?

(d) Do you read business news or business periodicals three or more times a week?

( ) Yes ( ) No

PART II: YOUR SPOUSE OR PARTNER'S BACKGROUND

PLEASE ANSWER THE FOLLOWING QUESTIONS ABOUT YOUR SPOUSE OR PARTNER.

29. Name

30. Current employment status

( ) Employed full-time

( ) Employed part-time

( ) Homemaker

( ) Student

( ) Unemployed—looking for work

( ) Unemployed—not looking for work

( ) Retired

31. If he or she is employed:

(a) Where does he or she work?

(b) What is his or her occupation?

(c) What is his or her job title?

(d) How long has he or she had this job?

(e) Does he or she supervise other employees?

( ) Yes ( ) No

- (f) Does he or she have the authority to hire or fire other employees?  
( ) Yes ( ) No
- (g) Has anyone ever made a complaint about him or her as a supervisor?  
( ) Yes ( ) No  
If yes, please describe.  
\_\_\_\_\_  
\_\_\_\_\_
- (h) Has your spouse or partner complained within the company that he or she has been discriminated against on the job?  
( ) Yes ( ) No  
If yes, please describe.  
\_\_\_\_\_  
\_\_\_\_\_
- (i) Has your spouse or partner filed a lawsuit or a complaint with a government agency that he or she has been discriminated against that person on the job?  
( ) Yes ( ) No  
If yes, please describe.  
\_\_\_\_\_  
\_\_\_\_\_
- (j) Briefly describe his or her responsibilities at work.  
\_\_\_\_\_  
\_\_\_\_\_
- (k) Has anybody complained within the company that your spouse or partner discriminated against that person on the job?  
( ) Yes ( ) No  
If yes, please describe.  
\_\_\_\_\_  
\_\_\_\_\_
- (l) Has anybody filed a lawsuit or a complaint with a government agency that your spouse or partner discriminated against that person on the job?  
( ) Yes ( ) No  
If yes, please describe.  
\_\_\_\_\_  
\_\_\_\_\_

32. Please list any other jobs he or she has held during the past ten years.

EMPLOYER	JOB TITLE	FROM	TO

33. Has your spouse or partner owned his or her own business?  
☐ Yes ☐ No  
If yes, how many employees did the business have?  
\_\_\_\_\_
34. Has your spouse or partner been an officer or director of a corporation?  
☐ Yes ☐ No  
If yes, please describe.  
\_\_\_\_\_  
\_\_\_\_\_
35. Has your spouse or partner ever been self-employed or worked for someone else as an independent contractor?  
☐ Yes ☐ No  
If yes, please briefly describe the nature of his or her work.  
\_\_\_\_\_  
\_\_\_\_\_
36. Education  
PLEASE CHECK THE HIGHEST GRADE YOUR SPOUSE OR PARTNER COMPLETED.  
☐ Grade School  
☐ High School  
☐ Vocational or technical school  
☐ Junior college (two year)  
☐ College (four year)  
☐ Post-graduate or professional school
37. If your spouse or partner attended college, vocational or technical school, what was his or her:  
(a) Major subject(s)?  
\_\_\_\_\_  
(b) Name and location of school(s)?  
\_\_\_\_\_  
\_\_\_\_\_
38. Please list and briefly describe any classes, correspondence courses, seminars or workshops your spouse or -partner has taken relating to sexual harassment, employment law, or psychology.  
\_\_\_\_\_  
\_\_\_\_\_

39. (a) Has your spouse or partner ever served in any branch of the U.S. military?  
( ) Yes ( ) No

(b) If yes, please list the branch of service and his or her highest rank.

40. (a) Is your spouse or partner a member of any trade or professional association, union, civic club, religious, or other organization?  
( ) Yes ( ) No

(b) If yes, please list all of the organizations to which he or she belongs.

41. Does your spouse or partner belong to any private club, civic, professional, or fraternal organization that limits its membership on the basis of race, ethnic origin, sex, sexual orientation, national origin, or religion?  
( ) Yes ( ) No

(a) If yes, please list the organization(s).

42. (a) Which magazines does your spouse or partner read?

(b) Does your spouse or partner read business news or business periodicals three or more times a week?  
( ) Yes ( ) No

43. (a) Has your spouse or partner ever been under stress because of problems at work?

( ) Yes ( ) No

(b) If yes, when did your spouse or partner experience problems like this?

### PART III: FAMILIARITY WITH JUDICIAL SYSTEM

44. (a) Have you ever served as a juror before?

( ) Yes ( ) No

(b) If yes, please list the court(s), the type of case(s), and the approximate date(s).

COURT (state / federal)	Criminal or Civil	Type of Case	Date

(c) Were you ever the foreperson?

- ( ) Yes ( ) No
- (d) Have any of the juries on which you have served been "hung" (unable to reach a verdict)?  
( ) Yes ( ) No
- (e) Did you enjoy your previous experience(s) as a juror?  
( ) Yes ( ) No
45. (a) Have you ever been to court before, other than for jury service?  
( ) Yes ( ) No
- (b) If yes, please describe the circumstances.  
\_\_\_\_\_  
\_\_\_\_\_
46. Have you ever testified in a trial or court proceeding?  
( ) Yes ( ) No
47. Have you ever had your deposition taken?  
( ) Yes ( ) No
48. (a) Have you or any member of your household or family, or any close friends, ever sued or been sued?  
( ) Yes ( ) No
- (b) If yes, how was the case resolved?  
\_\_\_\_\_  
\_\_\_\_\_
49. (a) Have you ever thought you might have a reason to file a lawsuit but decided not to?  
( ) Yes ( ) No
- (b) If yes, please describe the circumstances.  
\_\_\_\_\_  
\_\_\_\_\_
50. During trial, it may become necessary for the attorneys to approach the bench or discuss a point of law outside the hearing of the jury. Will it bother you that the law sometimes does not allow jurors to hear discussion of legal points?  
( ) Yes ( ) No

**PART IV: MISCELLANEOUS**

51. Which of the following is your main source of news?  
( ) Television  
( ) Radio  
( ) Newspaper(s)  
( ) Magazine(s)
52. Please rate how much you agree or disagree with each of the following statements.
- (a) Sexual harassment in the workplace is being blown way out of proportion.  
( ) Strongly Agree  
( ) Somewhat Agree  
( ) Somewhat Disagree

- ( ) Strongly Disagree  
(b) There are too many lawsuits today.  
( ) Strongly Agree  
( ) Somewhat Agree  
( ) Somewhat Disagree  
( ) Strongly Disagree  
(c) Sexual harassment in the workplace is one of the most serious problems facing female employees today.  
( ) Strongly Agree  
( ) Somewhat Agree  
( ) Somewhat Disagree  
( ) Strongly Disagree  
(d) Most women are sexually harassed in the workplace.  
( ) Strongly Agree  
( ) Somewhat Agree  
( ) Somewhat Disagree  
( ) Strongly Disagree  
(e) Not enough is being done to eliminate sexual harassment in the workplace.  
( ) Strongly Agree  
( ) Somewhat Agree  
( ) Somewhat Disagree  
( ) Strongly Disagree  
(f) Most individuals accused of sexual harassment at work probably did it.  
( ) Strongly Agree  
( ) Somewhat Agree  
( ) Somewhat Disagree  
( ) Strongly Disagree  
(g) To what extent do you think attorneys are trustworthy or untrustworthy?  
( ) Very Trustworthy  
( ) Somewhat Trustworthy  
( ) Somewhat Untrustworthy  
( ) Very Untrustworthy  
Why is that?  
\_\_\_\_\_  
\_\_\_\_\_  
53. (a) Have you ever had any dealings with an attorney?  
( ) Yes ( ) No  
(b) If yes, please explain.  
\_\_\_\_\_  
\_\_\_\_\_  
54. Do you think lawyers feel that the rules others have to live by do not apply to them?  
( ) Yes ( ) No  
55. What is your main complaint or annoyance about lawyers?  
\_\_\_\_\_

56. (a) How do you feel about the size of money awards given in trial today?  
( ) Too large  
( ) OK  
( ) Too small  
(b) Please explain.

57. Have you or anyone close to you ever worked for:

	YES	NO	Who was the worker?
(a) A lawyer or law firm?			
(b) A counselor, psychotherapist, psychologist or psychiatrist?			
(c) The court system?			

58. (a) Have you, or has anyone close to you, ever been falsely accused or written up by a supervisor at a place of employment?  
( ) Yes ( ) No  
(b) If yes, what happened and how did you feel?

59. Do you feel that lawyers are more likely than other employers to sexually harass their employees?  
( ) Yes ( ) No

60. Do you think there is more, less, or about the same amount of sexual harassment today as there was 10 years ago?  
( ) More  
( ) Less  
( ) Same Amount

61. (a) Have you ever read any books or magazine articles about sexual harassment?  
( ) Yes ( ) No

- (b) If yes, please explain.

62. Do you feel that employers nowadays have gotten the message about the seriousness of sexual harassment in the workplace?  
( ) Yes ( ) No

PART V: ABOUT THIS CASE

63. (a) In this case, the plaintiff (the person who filed the lawsuit) claims that she has been harassed on the basis of her sex while she worked for defendant. Do you have any preconceptions or feelings one way or the other about how this kind of situation should be decided?

( ) Yes ( ) No

- (b) If yes, please explain.

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64. (a) Have you heard, seen, or read anything about this case?

( ) Yes ( ) No

- (b) If yes, please explain.

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65. (a) Do you know anyone who may be involved in a situation like what you have heard so far about this case?

( ) Yes ( ) No

- (b) If yes, please explain.

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66. (a) Do you have a superior of the opposite sex?

( ) Yes ( ) No

- (b) If yes, how do you feel about the supervisor?

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- (c) If yes, do you think that supervisor treats men and women equally?

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67. (a) Are you familiar with the Anita Hill-Clarence Thomas hearing?

( ) Yes ( ) No

- (b) If yes, have the Anita Hill-Clarence Thomas hearings changed your opinions or perceptions regarding allegations of sexual harassment in the workplace?

( ) Yes ( ) No

68. (a) Are you familiar with Paula Jones's allegations against President Clinton?

( ) Yes ( ) No

- (b) If yes, has Paula Jones's claim against President Clinton changed your opinions or perceptions regarding allegations of sexual harassment in the workplace?  
( ) Yes ( ) No
69. (a) Have you ever been involved in a situation at work involving sexual harassment?  
( ) Yes ( ) No  
(b) If yes, please explain in general terms.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
70. (a) Have you ever felt that you or someone you worked with had been sexually harassed at work?  
( ) Yes ( ) No  
(b) If yes, please explain in general terms.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
71. (a) Have you ever had to quit a job because you felt you were being treated unfairly?  
( ) Yes ( ) No  
(b) If yes, please describe generally.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
72. Have you, your spouse/partner, close friend and/or member of your family/household ever been employed as a legal secretary or paralegal?  
( ) Yes ( ) No
73. (a) Have you, your spouse/partner, close friend and/or member of your family/household ever had any training on the handling of sexual harassment in the workplace?  
( ) Yes ( ) No  
(b) If yes, please describe what training you received.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
74. (a) Do you feel that most large business discriminate against women?  
( ) Yes ( ) No  
(b) If yes, please explain.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
75. If you work for a business, has employer implemented a policy against sexual harassment?

- ☐ Yes ☐ No
76. Has your employer implemented an internal complaint procedure to investigate and respond to sexual harassment complaints?  
☐ Yes ☐ No ☐ Does not apply
77. Have you ever been accused of sexual harassment?  
☐ Yes ☐ No
78. Have you, your spouse, partner, close friend, or any member of your family/household ever made a complaint of sexual harassment at work?  
☐ Yes ☐ No
79. Have you or has any one close to you, i.e., spouse, partner, significant other, sibling, parent, child, ever been sexually harassed, discriminated against, sexually assaulted, or victim of a sex crime by a man?  
☐ Yes ☐ No
80. (a) Given the nature of this case, is there anything in your background and experience that would make it difficult for you to be fair and impartial?  
☐ Yes ☐ No  
(b) If yes, please explain.  

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81. Do you feel people should be awarded money for psychological pain?  
☐ Yes ☐ No
82. Do you feel that too much money is awarded for claims of emotional distress?  
☐ Yes ☐ No
83. (a) Do you believe there is any limit of money that should be awarded for emotional distress?  
☐ Yes ☐ No  
(b) If yes, please explain.  

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84. Do you know what punitive damages are?  
☐ Yes ☐ No
85. (a) Is there any reason why you could not award punitive damages, that is, damages to punish the defendant or deter the defendant from engaging in this behavior again?  
☐ Yes ☐ No  
(b) If yes, please explain.  

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86. When you read about large punitive damages, do you feel that the juries awarded too much in punitive damages?  
☐ Yes ☐ No

87. (a) Are there any matters that you would like to bring to the attention of the judge and lawyers that you do not want to discuss in the presence of other potential jurors?

( ) Yes ( ) No

(b) If yes, please describe.

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88. (a) Will you agree to obey the judge if you are ordered not to read, view, or discuss any news media coverage of this case?

( ) Yes ( ) No

(b) If no, please explain.

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I declare under penalty of perjury that all of my answers to the questions in this questionnaire and the attached explanation sheets are true to the best of my knowledge.

Executed at \_\_\_\_\_ (city), \_\_\_\_\_ (state), this \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_.

_____ (SIGN YOUR FULL NAME)	
_____ (PRINT YOUR FULL NAME)	

#### EXPLANATION SHEET

Please use this space to complete your answers to any of the questions or to provide any additional information that you think may be important to the judge or the attorneys in this selection process. Please feel free to add additional sheets if necessary.

Thank you very much for your cooperation.

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**Sample Outlines**

# CRIMINAL VOIR DIRE – DEFENDANT

## I. INTRODUCTION

- **FOCUS:** You should begin your *voir dire* by introducing yourself, your client (perhaps with your hand placed on your client's shoulder), and the defense team. You should follow by explaining that you are trying to determine if any of the prospective jurors have preconceived beliefs, or prejudices, that might prevent them from being fair and impartial jurors *in this particular case*. You might state, or perhaps ask a question that gets across the point, that although all citizens have a duty to serve on a jury, it does not necessarily follow that all citizens would make fair and impartial jurors in every type of case.

Successful accomplishment of this initial phase of the *voir dire* examination requires:

- That you be courteous, friendly, empathetic and, above all, non-condescending;
- That you explain that all of us (yourself included) have prejudices - that is, strongly held views on certain topics from which we are not likely to budge and that this is a natural, appropriate human trait;
- That, as part of this explanation, you disclose to the prospective jurors one or two examples of your own prejudices that would prevent you from being fair in certain situations (for example, you could be a fair and impartial referee in a basketball game, but not if your favorite team were a participant); and
- That you emphasize that you have no desire to pry into their personal lives and that you tell them that they may, whenever they wish, ask the judge to allow them to answer questions solely in the presence of the judge and the lawyers.

Your *voir dire* should avoid the use of “legalese.” The words “accused”, “prosecution” and “jury selection” are preferable to “defendant”, “government” (or “state”), and “voir dire”.

It is crucial that, upon eliciting a strongly held opinion that will prevent a prospective juror from being fair and impartial, you thank the prospective juror for his candor. ***And, it is equally crucial that you be sincere in expressing your thanks.*** Without candor on the part of prospective jurors, the process cannot work. Showing even the slightest hint of disdain for the position advanced by a potential juror will only keep the other potential jurors from speaking freely about their own personal convictions for fear of being publicly chastised. Along the same line, you should never ask that a prospective juror be excused for cause in the presence of the other members of the venire panel.

## II. EXPERIENCE WITH CRIME

- **FOCUS:** To determine potential juror's past experiences with crime, and to determine how such experience will affect their judgment in this case.

**BASIS:** "You can have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate." 1-43 T.P.I. Criminal 43.40 (2007).

"You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have." 1-100 CALCRIM 105 (2011).

"Do not let bias, sympathy, prejudice, or public opinion influence your decision." 1-100 CALCRIM 101 (2011).

**EXAMPLE:** "It is important that I find out if you, your loved ones, or your close friends have been victims of a crime. My house was broken into while my wife and daughters was sleeping upstairs and, of course, I cannot help but think – even years later – that something worse than a purse being stolen off the kitchen table could have occurred. I am not sure, therefore, that I could be a fair and impartial juror in a home burglary case. This is the kind of experience I want to find out about. (The following questions would be asked of any prospective juror who answers the inquiry in the affirmative.) Has anyone else here been the victim of a crime? (Wait for a show of hands, then direct the follow questions to the individual jurors who have been victims of crime)."

**EXAMPLE:** "Ms. Jackson, you raised your hand. How did you feel after the crime? Did they catch the person who did it? What happened to him? How do you feel about how the criminal justice system handled the case?"

**EXAMPLE:** "Ms. Jackson, given the frightening experience that you just described, what is your feeling about the rights of individuals who are accused of a crime? (Allow Ms. Jackson to explain)."

**EXAMPLE:** "Do you believe that persons accused of a crime have too many rights under the law? Please understand that, if you feel that way, especially considering the particular experience that you have had, I certainly will understand, and I certainly will not judge you. It is important, though, for me to know. (Depending on the answer, it may be necessary to use leading questions to establish a challenge for cause based on the proposition that, given the prospective juror's personal experience, she will not be able to presume that someone arrested and charged with a crime is innocent. You may decide that, as to some of the jurors, it is best to explore the effects of his or her personal experience after you have first addressed the topic the presumption of innocence – the next subject addressed in this sample *voir dire*.)"

**Practice Pointer:** *The prosecution will have already questioned the panel members about whether their family members or close friends have ever been arrested or convicted. You may have some follow up questions, and, if so, you may want to ask those questions at this point. On the other hand, you may want to wait until later in the voir dire, perhaps even at the end, to ask those questions. To some extent, this is a matter of preference and, of course, the nature of the case may influence your decision as to both whether and when to ask follow up questions about criminal activity in which the jurors' family members engaged.*

### III. INDICTMENT; PRESUMPTION OF INNOCENCE; OPEN MIND THROUGHOUT TRIAL

- **FOCUS:** These three topics are so intertwined that they should be treated as a single topic. It is important to remind the jurors of the concept of “innocent until proven guilty” and to point out that an indictment does not make it more likely that the defendant is guilty of the crime. Point out that jurors must keep an open mind during the trial, and use this line of questioning to identify jurors who may have trouble doing so.

**BASIS:** “[A] challenge for cause would be sustained if a juror expressed his incapacity to accept the proposition that a defendant is presumed to be innocent despite the fact that he has been accused in an indictment or information.” *United States v. Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973).

“You should consider *all of the evidence* in light of your own observations and experience in life.” 1-1 T.P.I. Criminal 1.08 (2007).

“The law presumes that the defendant is innocent of the charge against him.” 1-2 T.P.I. Criminal 2.01 (2007).

“The indictment in this case is the formal written accusation charging the defendant with the crime. It is not evidence against the defendant and does not create any inference of guilt.” 1-1 T.P.I. Criminal 1.05 (2007).

“The defendant is presumed to be innocent.” 1-2 Virginia Model Jury Instructions – Criminal Instruction No. 2.100 (2011).

“The fact that the defendant has been indicted by a grand jury is not evidence against him, and you should not consider it.” 1-2 Virginia Model Jury Instructions – Criminal Instruction No. 2.330 (2011).

“A defendant in a criminal case is presumed to be innocent.” 1-100 CALCRIM 103 (2011).

“The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant because he has been arrested, charged with a crime, or brought to trial.” 1-100 CALCRIM 103 (2011).

“In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.” 1-100 CALCRIM 103 (2011).

**EXAMPLE:** This example covers all three topics, and will be broken down into parts to demonstrate how they work together to address these important topics.

**a. The Indictment**

“Judge Jones has already talked to you about the indictment. I want to discuss it some more with you. When I read or hear that a person has been indicted, I have a tendency, at least initially, to think there’s a good chance that the person indicted has done something wrong. And, I am a lawyer. I have an understanding of indictments that non-lawyers don’t have.

Mr. Smith, what is your reaction when you read or hear or see on TV that a person has been indicted for a serious crime? (The answer often will likely to be something like this: “I think that the government must have some pretty good evidence that the guy did what he was charged with. Otherwise, they would not have charged him. Of course, that does not mean he’s guilty. He still gets a trial.”).

Let me ask some of the rest of you if you share Mr. Smith’s view. Ms. Harris, how about you? (Ask several prospective jurors. They may well share Mr. Smith’s view.)”

**b. The Presumption of Innocence**

“Mr. Smith, you have heard Judge Jones instruct you that, under the law, my client, James Henry, is presumed innocent. Why do you think an accused, such as Mr. Henry in this case, is presumed innocent under the law? (Allow juror to answer. The hope here is that the prospective juror will say something like, “I guess because we need to keep an open mind and let the accused person start with a clean slate.” If you do not get this response, try to steer the prospective juror to this point.)

Do you think that this fundamental legal principle that the accused is presumed innocent is a good thing? Why? (Ask several other jurors this “why” question so that you can get several members of the jury to reinforce the point that our criminal justice system will not work unless the accused is presumed innocent, as the law requires.)”

**c. Circle Back to the Indictment**

“Mr. Smith (or perhaps you might want to direct your questions to another prospective juror at this point), let’s go back to the fact that James Henry has been indicted. How are you supposed to presume that an accused person is innocent when you also know that the Grand Jury has seen fit to have him indicted for a serious crime? (Allow juror to explain.)

Mr. Smith, did you know that there is no judge in the Grand Jury room? Did you know that the accused is not present during the Grand Jury proceedings? (NOTE: Of course, if your client has actually testified before the Grand Jury, then you should rephrase the question to point out that the accused is not present except when he himself is being questioned.)

Did you know that the accused does not have the right to present evidence or call witnesses before the Grand Jury? Did you know that the only lawyers who are present before the Grand Jury are the prosecutors?

Did you know that the Grand Jury, in order to indict an individual, does not have to have proof beyond a reasonable doubt? For that matter, it is not even necessary for the prosecution to show that the accused person committed the crime by a preponderance of the evidence, the standard used in a civil case. The Grand Jury only has to have probable cause, based on the evidence that the prosecution has presented to it, that a crime has been committed and that the accused committed that crime. Were you aware of this?

Mr. Smith, do you feel that you now have a better understanding of what an indictment is? (You should ask some of the others the same question.)

Mr. Smith, now that you know more about what an indictment is, do you have a greater, or a lesser, appreciation of why the accused in a criminal case is presumed innocent?

Do you think that you can put out of your mind the notion that, if a man is indicted, there is a good chance that there is something to it? Will this be hard for you to do?"

***Practice pointer:*** *If the potential juror states that they will not be able to put the indictment out of their mind, and will not be able to consider defendant innocent until proven guilty, be prepared to move to strike the juror for cause.*

#### **d. Keeping an Open Mind**

"Ms. Lee, let me ask you some questions please. Have you known or heard about people being accused of doing something wrong when, in fact, they were innocent? (Develop the facts and ask appropriate follow up, and do the same with other prospective jurors.) Have you had to determine whether someone who has been accused of wrongdoing really did the thing that he was accused of? Maybe one of your children accusing his brother or sister of something? (Or, if the prospective juror is an employer, ask about one employee accusing another of misbehavior.)

How did you determine whether the accusation was true? (Allow juror to explain.) In other words, you made sure that you considered all of the facts before you made up your mind? Because you wanted to be fair to both sides and ultimately be right in your conclusion?

Mr. Jenkins, let me ask you some questions please. If you were falsely accused of a crime, would you want your case to be decided by jurors who did what Ms. Lee said she did when she had to decide whether an accusation was true? In other words, would you want the jury to listen to both sides and to consider all of the pertinent evidence before making up their minds?”

**e. Return to the Concept of Presumption of Innocence and to the Indictment**

“Mr. Jenkins, would you want to be presumed innocent under the law?”

Mr. Jenkins, I now want to go back to the first question I asked Mr. Smith. You will recall that I was asking him about the indictment. Now that we have talked about the indictment, the Grand Jury process, and the presumption of innocence, how do you feel about the fact that my client, James Henry, has been indicted? (Allow juror to explain.)

How difficult is it going to be for you to attach no significance to the fact that he has been indicted and to presume Mr. Henry innocent? Are you going to be thinking that, because Mr. Henry has been indicted, there must be something behind it? (Ask this of other jurors. Be prepared, when a juror indicates that it will be difficult to apply the presumption of innocence, to use leading questions to develop a challenge for cause.)”

**III. HIGHER BURDEN OF PROOF IN CRIMINAL CASE**

- **FOCUS:** Point out the higher burden of proof necessary for a criminal conviction, because the defendant’s personal freedom is at stake. Also, explore whether individual jurors would have difficulty acquitting the defendant if the higher burden of proof is not satisfied.

**BASIS:** “The state has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but remains on the state throughout the trial of the case. The defendant is not required to prove his innocence.” 1-2 T.P.I. Criminal 2.02 (2007).

“The presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the crime beyond a reasonable doubt.” 1-2 Virginia Model Jury Instructions – Criminal Instruction No. 2.100 (2011).

“A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.” 1-100 CALCRIM 103 (2011).

**EXAMPLE:** “This, of course, is a criminal case. This is not a civil case in which one person is seeking money from another for, let’s say, injuries suffered in a car accident. In a civil case, the person suing, the plaintiff, has to prove only that he is entitled to recover

money by a preponderance of the evidence. That is a “more likely than not” standard. In the car accident case, for example, the plaintiff has to persuade the jury only that the evidence shows that the defendant, more likely than not, negligently caused the accident. That is substantially different from a criminal case, in which the prosecution must prove to the jury that the accused is guilty beyond a reasonable doubt.

Mr. Gordon, why do you think the law holds the prosecution to a higher burden of proof in a criminal case than in a civil case? (The answer likely will, and certainly should, acknowledge that, in a criminal case, the accused’s freedom is at stake.) Do you think that is a good thing or a bad thing for the prosecution to have this higher burden in a criminal case? (Ask others so that you will get several potential jurors to discuss this.)

Mr. Gordon, are you familiar with the Casey Anthony case – the case down in Florida in which a young woman was accused and tried for allegedly killing her little girl? (It is a good idea to use current events when you can make it work.) Were you, like me, surprised when the jury found Casey Anthony not guilty?

How do you feel about the jurors who decided the Casey Anthony case? (Ask others as well. Be looking for non-verbal cues, as well as statements, that indicate hostility toward, or at least displeasure with, those jurors.) Of course, we were not in that courtroom down in Florida and did not hear and see all of the evidence that the jury heard and saw.

If in this case you ultimately believe that the prosecution has failed to carry its burden of proving that my client, James Henry, is guilty beyond a reasonable doubt, are you going to feel defensive about it? Are you going to worry about how your family, friends, co-workers, or neighbors think about you? Are you going to be concerned that they may be wondering how you let that fellow get off?

Sometimes we learn, or at least believe, that a guilty man has gone free. Sometimes we learn that an innocent man has been convicted. Which of these two events - a guilty man going free or an innocent man being convicted - bothers you the most?

Will you feel uncomfortable voting to acquit Mr. Henry even if you think that, more likely than not, he is guilty but just not guilty beyond a reasonable doubt? By the way, this is something that I ask potential jurors in any criminal case. I am not suggesting that the evidence will rise to the level of showing that Mr. Henry is probably guilty. I am simply trying to find out whether you personally could apply this important legal principle in a case like this one. (Pursue this line of questioning with other potential jurors as well.)”

#### IV. MEANING OF “REASONABLE DOUBT”

- **FOCUS:** Explaining the concept of reasonable doubt.

**BASIS:** “Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as the certainty of guilt.” 1-2 T.P.I. Criminal 2.03 (2007).

“A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.” 1-2 Virginia Model Jury Instructions – Criminal Instruction No. 2.100 (2011).

“Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.” 1-100 CALCRIM 103 (2011).

**EXAMPLE:** “Some of you may have heard in watching TV shows of talk of proof beyond *any* doubt. But, that of course is not the burden that the prosecutor bears in a criminal case. Judge Jones and Mr. Prosecutor have already talked to you about this. A person may have a doubt about something that is not a reasonable doubt. If at the time you complete your deliberations, you believe that James Henry is guilty, but you have some slight doubt that is not reasonable, you must, in accordance with the instructions Judge Jones will give you, find Mr. Henry guilty. The prosecution is not required to eliminate every nagging doubt a juror might have.

And, as we have just discussed, if you believe on the other hand that Mr. Henry is probably guilty, but you have a doubt that is in fact reasonable, you must find him not guilty.

As you can see, the meaning of “reasonable doubt” is important.

When Judge Jones gives you his instruction at the end of the case, he will give you the definition of reasonable doubt that you are to use in your deliberations. Judge Jones will tell you that proof beyond a reasonable doubt means evidence that is so convincing that you would not hesitate to rely on and act on that evidence when making the most important decisions in your lives.

Mr. Carter, I am not going to pry and ask you what the decisions were, but are you able to identify in your own mind the most important decisions you have ever had to make? (Mr. Carter answers/nods). On those occasions, did you consider the pros and cons very carefully? And, did you make sure you were firmly convinced you were right before making your final decision?

Will you feel comfortable, in deciding this case, insisting that the prosecution convince you of Mr. Henry’s guilt to the very same extent that you had to be convinced when making those important decisions?”

## **V. CREDIBILITY OF WITNESSES**

- **FOCUS:** The questioning here – and, indeed, even the decision whether you should even get into this topic – is so dependent upon the particular circumstances of the case that it is difficult to provide sample questions that are particularly meaningful. Some version of the following nonetheless might provide a helpful starting point.

**BASIS:** “You are the exclusive judges of the credibility of witnesses and the weight to be given to their testimony . . . [Y]ou are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.” 1-42 T.P.I. Criminal 42.04 (2007).

“You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence.” 1-2 Virginia Model Jury Instructions – Criminal Instruction No. 2.500 (2011).

“You alone must judge the credibility and believeability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience.” 1-100 CALCRIM 105 (2011).

**EXAMPLE:** “Ms. Lee, you told me earlier that you have had to decide whether one person’s accusation of another was correct. There have been times when you said that you listened to both sides and got all of the facts before making your decision. When you had to do this, did you find yourself having to decide whether one person was telling the truth and another was not, or whether one person was more believable than another?

What did you consider to be helpful in deciding which of the two individuals was telling the truth? [Here, depending on the nature of your case, you may want to focus on motive to lie, inconsistent statements (or maybe you want to establish that inconsistent statements can be innocent), evidence coming from disinterested witnesses, common sense, etc.]

In this particular case, you will be called upon to determine that someone is telling the truth and someone else is lying. There is no way of getting around it. Will you be uncomfortable making this determination? (Of course, many cases do not squarely present a somebody-has-to-be-lying scenario. You should ask this question, if at all, only when that scenario is a certainty.)”

## VI. SPECIFIC CRIME CHARGED IN THE INDICTMENT

- **FOCUS:** Sometimes the evidence will suggest that, apart from the specific crime charged in the indictment, your client has generally been something less than a solid citizen. Something like the following colloquy may be appropriate.

**EXAMPLE:** “Mr. Smith, you understand that the indictment charges Mr. Henry with a particular crime – namely, (identify the specific crime charged) - and that the jury chosen for this case will be called on to decide if he is guilty of that specific crime?

In this case, you are going to hear evidence that Mr. Henry has hung out with some pretty tough folks; that he frequently uses extremely vulgar profanity, and that, generally speaking, he has not led an exemplary life – and that is putting it mildly. One of the great things about our country is that we do not lock people up just because they are bad citizens. A man loses his freedom only if he is convicted of the particular crime that is charged in the indictment.

Will this evidence that Mr. Henry has had a tendency to hang out with some bad guys, that he engages in vulgar cussing and, in general, has been far from a stellar citizen keep you from deciding his guilt or innocence solely on the basis of the crime charged in the indictment? (Allow Ms. Smith to answer.) In other words, you won't succumb to the temptation of thinking something like this: "Well, I do have a reasonable doubt about whether he committed this particular crime, but, my goodness, I need to vote guilty anyway because he ought to be in jail just for being a bad person"?

You understand that that kind of reasoning runs completely counter to the way our criminal justice system is supposed to work?"

- **FOCUS:** You may also find yourself in a situation in which the evidence shows, or at least suggests, that your client may have committed a crime other than the one charged in the indictment. For instance, you may have a case in which your client, who was charged under a federal statute prohibiting the solicitation of another individual to murder a federal witness, has remarked to an informant who was secretly taping the conversation: "Just by talking about this [possibly having the witness killed], we are guilty of conspiracy to murder." Solicitation of another to commit murder may be, in your state, different from conspiracy to murder. The elements of these two offenses may be different. Your defense may be that, notwithstanding the fact that your client had indeed made the above-quoted remark, he never ultimately formed the requisite intent to have the federal witness killed. Of course, the mere fact that your client had even *thought* about having someone killed would, itself, be a terrible fact, and that terrible fact would be made worse by his admission that his talking about it to another made him "guilty of conspiracy to murder." You would need to address this on the front end. The following line of questioning may provide guidance in such a situation.

**EXAMPLE:** "Mr. Smith, in this case, the jury will be called upon to decide whether Mr. Henry is guilty of solicitation to murder. One of the key issues that the jury will have to decide is whether Mr. Henry ever formed the intent to have the other individual killed. The jury is going to hear tapes of conversations that my client had with a man named John Harper, who, unbeknownst to Mr. Henry, was cooperating with the prosecution. In some of these conversations, these two men talked about possibly having a man named William Parker killed.

I am sure you agree with me that even talking about such a thing is horrible. But talking about it, without more, is not a crime. Do you understand that?

In one of their earlier conversations, Mr. Henry said to Mr. Harper, “Just talking about this makes us guilty of conspiracy to murder.” Will these taped conversations keep you from focusing on whether Mr. Henry is guilty of solicitation of murder, the crime that is specifically charged in the indictment?

The crime charged here is not conspiracy to murder, but solicitation to murder. Do you understand that? (Allow juror to answer.) If you find that the prosecution has filed to prove the elements of solicitation to murder, will you still be tempted to find Mr. Henry guilty any way simply because he considered himself in his early conversations to be conspiring to murder?”

## VII. CONSTITUTIONAL RIGHT NOT TO TESTIFY

- **FOCUS:** In cases in which we have not called our client to the stand, we chose not to address the subject in *voir dire*. It was the judgment call that we thought appropriate in those particular cases. In those cases, we put on no proof at all. In closing argument, we explained to the jury that the Court will instruct them that an accused has a Constitutional right not to testify and that we were invoking that right. We then stated that the prosecution had failed to come even close to proving guilt beyond a reasonable doubt, and we thereafter proceeded to explain why. In some cases, however, it may be a good idea to address this topic during *voir dire*. The colloquy below is taken verbatim from Randi McGinn, Esq. “Addressing the Ten Scariest Issues in *Voir Dire*,” 29-Aug Champion 26 (National Association of Criminal Defense Lawyers Aug. 2005).

**BASIS:** “The defendant has not taken the stand to testify as a witness but you shall place no significance on this fact.” 1-43 T.P.I. Criminal 43.03 (2007).

“The defendant does not have to testify, and exercise of that right cannot be considered by you.” 1-2 Virginia Model Jury Instructions – Criminal Instruction No. 2.150 (2011).

“A defendant has an absolute constitutional right not to testify . . . do not consider, for any reason at all, the fact that the defendant did not testify.” 1-300 CALCRIM 355 (2011).

### **EXAMPLE:**

- Q: How many of you are aware of the constitutional right that says an accused person can never be called as a witness against himself or herself at trial?
- Q: What do you think of that rule? Why do you think that rule exists?
- Q: If someone were falsely accused of a crime, can you think of a situation where he/she might not want to testify at the trial? [*Again, bounce off as many jurors as possible to flesh out this answer*].
- Not a very good witness

- Not very smart or educated
- Easily misled by the prosecutor
- Fear
- Too much pressure
- Embarrassed about his/her past
- The state has not proven its case

When you get the inevitable answer, “Because he/she is guilty,” try the following response:

- Q: You know, that may be the reason in some cases and that is the very thing I am concerned you may think in this case if I make the decision that Mr./Ms. \_\_\_\_\_ should not testify. Unfortunately, if I decide he/she should not testify, the law does not allow us to tell you why that decision has been made. That means you will not get to know if it was because he/she was afraid, or would not make a very good witnesses or any other reason. How will you feel if you cannot know the reason I have decided he/she should not testify?
- Q: What will you think about Mr./Ms. \_\_\_\_\_ if I make the decision he/she should not take the stand?
- Q: Since the law does not let me tell you the reason, how will you deal with your curiosity about that?
- Q: Would it be fair to guess or speculate about the reason I have decided he/she should not testify, if you are not allowed to know?

## VIII. ACCUSED’S PREVIOUS RECORD

- **FOCUS:** How you deal with this topic is going to depend on your particular case. The factors to consider will include your defense theory, the similarities or differences between the previous offense and the crime charged, how long ago the previous offense took place, your client’s age at that time, and the particular situations surrounding the commission of the previous offense. On this topic, I again have borrowed verbatim from Ms. McGinn.

### **EXAMPLE:**

- Q: What do you think about someone who has admitted breaking the law in the past?
- Q: Once a person has admitted breaking the law, can they ever be trusted again?
- Q: How many of you have ever known someone that made a mistake in the past and then straightened out his/her life?

- Q: Tell me about that person. How do you feel about him/her now? Would you trust him/her?
- Q: If something turned up missing at your house and that person was there, would you suspect him/her? Why or why not?
- Q: The reason I am asking you about these things is because (client's name) is someone who made a mistake (or some mistakes) in the past. When he/she was younger, he/she stole some money, was caught, admitted his/her guilt and went to prison. Since then he/she has worked very hard to overcome that mistake. That past mistake is one of the reasons the police suspected him/her in this case ... but he/she did not commit this crime. I am concerned that because of that past mistake, you may not listen to what he/she has to say. How do you think this past mistake will affect you in listening to the evidence in this case?
- Q: Have you ever heard of an innocent person being picked up and falsely accused by the police because of a past criminal record? Why do you think that happens?
- Q: How are you going to keep the kind of biases the police have against ex-felons from affecting your decision in this case?"

## IX. OTHER TOPICS OF INQUIRY

- **Law Enforcement**

- "Could you apply the same standard when judging the credibility of a police officer that you would apply in judging the credibility of an ordinary person?"
- "If a police officer gave one version of a statement and the defendant gave another version, how would you decide which version to believe?"
- "If the judge were to instruct you that you could not give the police officer's testimony greater credence than the testimony of the lay witness, would you be able to follow that instruction?"
- "Has anyone had a particularly positive experience with a law enforcement officer? Is there any possibility you might give more weight to the testimony of a law enforcement officer because of that experience?"

- **Informants**

- "During the course of this trial, you may hear that a witness is testifying as a result of a plea bargain in which the witness agreed to cooperate with the government in exchange for leniency. How do you feel about the idea that

prosecutors can reduce charges or sentences in exchange for information or testimony against others?”

- “What would you want to know about such a witness to help you evaluate the witnesses’ credibility?”
- “The judge will give you instructions on how to evaluate the credibility of cooperating witnesses. If the judge instructs you to view a witness’ testimony with extra caution because of the benefits the witness has received from the government, is there anyone who would have trouble following that instruction?”

# PERSONAL INJURY VOIR DIRE – PLAINTIFF

## I. INTRODUCTION

- **FOCUS:** Introduce yourself as the attorney. Tell the jury who you are, where you live, who your partners are, and what community organizations and projects you participate in. Be sure to introduce any other lawyers or staff sitting at counsel table with you. Ask the jury if they know you.

**EXAMPLE:** “Good morning. My name is John Smith. I’m an attorney here in Memphis, Tennessee. I grew up in West Memphis, Arkansas. My wife is named Jane Smith. She is from West Memphis as well. I practice with the firm of Smith, Jones and Snow, PLLC. My partners are Eddie Jones and Jim Snow. Could you please raise your hand if you think that we have ever met? Sitting at the table with me is Julie Watson. Ms. Watson is a paralegal who works with our firm. Do any of you know her?”

- **FOCUS:** Introduce your client. Tell the jury briefly about each member of your client’s family. Tell the jury where your client works, the job she performs, the civic organizations in which she is involved, where she went to school and where she goes to church. Humanize your client while determining whether the jury knows her.

**EXAMPLE:** “I have the honor of representing Sally Johnson. Mrs. Johnson is married with one child. Her husband is named Bill Johnson. Her daughter, Leah Johnson, is 10 years old and attends Memphis Elementary. Mrs. Johnson works at Memphis Factory as a widget maker. She has worked there for the past twenty years. Mrs. Johnson grew up here in Memphis and is a life-long member of Memphis Church. Mrs. Johnson is also very active in the Memphis Service Organization. Do any of you know Mrs. Johnson? How about the members of her family?”

## II. STATEMENT OF FACTS

- **FOCUS:** The rules of civil procedure in most jurisdictions allow you to make a brief non-argumentative statement of the facts and the issues to be decided.

**BASIS:** “At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the jury of the general nature of the case.” Tenn. R. Civ. P. 47.01 (2011).

**EXAMPLE:** “This case is about a car crash that took place on June 2, 2010. Two cars collided at the intersection of Main Street and Cooper Road here in Memphis, Tennessee. Mrs. Johnson’s leg was broken so badly that the bone pierced through the skin. Mrs. Johnson also cracked three teeth, hurt her neck and

hit her head on the steering wheel. Do any of you know anything about the collision?”

### III. PURPOSE OF VOIR DIRE AND JURY SELECTION

- **FOCUS:** Explain the reason for the *voir dire* process so that the jurors better understand it. Assure the jurors that although you may ask some personal questions it is not your intent to embarrass them.

**EXAMPLE:** “I’m sure this process is new to many of you. For some of you, this may be the first time you’ve ever been inside a courtroom. So I want to explain what we are doing here. The jury selection process is designed to help the attorneys pick folks who are best suited to try this type of case. I want to assure you that it is not my intention to embarrass anyone or to pry into your personal business for no reason. But due to the nature of this case and to the many different life experiences people have, I may need to ask you some questions that you might consider too personal.

If for any reason you are not comfortable answering my questions in front of everyone here, just say so. We can ask the judge to let us come up to the bench, just you, me and the Defendant’s attorney, and we can talk about it up there in private. Again, I’m not trying to embarrass anyone. I just need to find out who the best folks are to hear this case.”

### IV. PREPONDERANCE OF EVIDENCE STANDARD VERSUS BEYOND A REASONABLE DOUBT

- **FOCUS:** Explain the preponderance standard in a simple way. Speak slowly. Use your hands “tipping the scales” to explain it.

**BASIS:** “A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true.” CACI Instruction No. 200 (2010).

“The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.” 1-3 Virginia Model Jury Instruction – Civil Instruction No. 3.100 (2010).

“The term ‘preponderance of the evidence’ means the amount of evidence that causes you to conclude that an allegation is probably true.” 1-2 T.P.I. Civil 2.40 (2007).

**EXAMPLE:** “Most of us have heard the term ‘beyond a reasonable doubt’ all of our lives. That is the burden of proof in a criminal case which the government

has to carry to convict someone of a crime. It is a pretty high standard. This case is a civil case and has a different burden of proof. It is called a preponderance of the evidence standard. Judge Donald will instruct you on the definition of a preponderance of the evidence, but what it means in plain language is more likely than not. It has been compared to pushing the ball across the fifty yard line or tipping the scales ever so slightly. Do any of you have a problem finding for Mrs. Jones if you determine that proof of both liability and damages is more likely true than not?"

- **FOCUS:** Isolate jurors who may be a problem and be sure to follow up with additional questioning. Put problematic jurors in a position to be dismissed for cause by the court.

**EXAMPLE:** "Some people think that the preponderance standard makes it too hard for the defense to win. Even unfair in a way. Other people think that the preponderance standard is about right. How many of you are closer to the people who believe the preponderance standard might be a little unfair? How many of you are closer to the people who think it is okay?"

"Mr. LaFleur. I saw you raise your hand. Tell me about that."

"Mr. LaFleur. Are you the type of person who is steadfast in his beliefs or are you willing to change to fit what is expected of you?"

- **FOCUS:** Confirm the preponderance standard. Make sure that the jury understands that it is agreed upon by all of the parties involved.

**EXAMPLE:** "Anyone else with any problems with 'more likely than not?' It's the way we all hope you will make your decisions with regard to liability and damages in this case. The Defendant's attorney agrees you should decide the case on that basis no matter how many doubts you have. The Judge will tell you that it is the law. We gladly accept this burden. Does anyone have a problem with that?"

## V. **BIAS/PREJUDICE**

- **FOCUS:** Point out how potential bias/prejudice held by individual jurors may disqualify them from serving on the jury. The illustration below uses college football as an example. The illustration should be modified based upon the individual attorney's interests and the interests of the jurors in general. Refer back to this analysis as you question jurors in order to have them admit that they should be dismissed for cause by the court.

**BASIS:** "You must not let bias, prejudice, or public opinion influence your decision." CACI Instruction No. 113 (2010).

“You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the Court.” 1-2 Virginia Model Jury Instructions – Civil Instruction No. 2.220 (2010).

“Jurors must be as free as humanly possible from bias, prejudice, or sympathy and must not be influenced by preconceived ideas about the facts or the law.” 1-1 T.P.I. Civil 1.01 (2007).

“And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy.” 2d-9 Federal Pattern JI 9<sup>th</sup> Circuit – Civil 1.1A (2011).

**EXAMPLE:** “I am looking for individuals who are best suited to serve as jurors in this matter. Many times folks are better suited for different types of cases. Some might be better suited for a contract dispute or a criminal matter rather than a personal injury case. This can be based on their background and interests, and on things that have happened to them in the past.

I’m a prime example of this. Are any of you college football fans? I love college football. I grew up in Louisiana and have been a fan of the LSU football team as long as I can remember. My entire family is LSU fans.

Now, when I’m watching LSU play, I never see the fouls that the referees call against LSU, and for the life of me I can’t understand how they miss all those fouls committed by the other team! In my eyes, the only reason why LSU loses a game is because of poor officiating.

Given my feelings for LSU, how many of you think I would not be the best choice to referee a LSU football game? (Solicit answers from the jurors. Ask a specific juror what he/she thinks, and have others confirm it). Why not? (Solicit answers from the jurors. Too biased in favor of LSU. Can’t be fair/impartial). You all agree that I’m probably not the best person to call one of those games because of my feels about LSU and my history. Does this make me a bad person? It means that my feelings toward LSU are too strong for me to be fair and impartial. I’ll always have a tendency to favor LSU over their opponents.

The same is true in this case. Based on your background and interests, some of you might be better suited for this case than others, where some of you may be better suited for a different type of case. We are just trying to find the folks that are best suited for this type of case.”

- **FOCUS:** It is highly recommended that you submit a questionnaire to the jury prior to conducting voir dire. That will enable you to focus on a few individuals to determine whether they will be favorable to your client.

**EXAMPLE:** “Mr. White. I see where you stated in your questionnaire that you have been a defendant in a personal injury lawsuit. Could you please tell me about that?”

- **FOCUS:** Regardless of whether you are allowed to use a questionnaire, be sure to ask broad questions and then follow up.

**EXAMPLE:** “How many of you have been involved in a lawsuit? How many of you have been a plaintiff in a lawsuit? How many of you have been a defendant in a lawsuit? Mr. Jackson. I saw you raise your hand. Could you please tell me about that?”

Mr. Jackson. What conclusions did you draw from your experience as a defendant in a lawsuit? Do you feel that you were treated fairly? Do you feel that our justice system is broken?

Mr. Jackson. In light of your views and experiences, do you think that you might be like me and LSU football? That you may not be the best person to be a juror in this case?”

**EXAMPLE:** “How many of you have been involved in a car accident where someone was injured?”

Mr. Bailey. I saw you raise your hand. Were you the one injured in the accident? Tell me about that. Were you compensated for your injury?

Mr. Bailey. In light of your experience, do you think that you are the best person to be a juror in this case?”

## **VI. DAMAGES**

- **FOCUS:** Your case is about what you spend the most time on. You do not want the jury to focus on liability. You want them to focus on how much money to award your client. Spend *at least one half of your time* discussing damages.

## **VII. TORT REFORM**

- **FOCUS:** Ask the jury about their feelings on tort reform. Research shows that 20-30% of jurors will have strong feelings on the subject. Find out who they are in your jury pool. If possible, position unfavorable jurors to be dismissed for cause by the court.

**EXAMPLE:** “How many of you are familiar with tort reform? How many of you think that it is a good thing? How many of you think that it is a bad thing? How many of you are somewhere in the middle?”

Mr. Green. I saw that you raised your hand when I asked whether you think tort reform is a good thing. Please tell me more about that.

Mr. Green. Do you think that your views on tort reform may impact the likelihood that you would award Mrs. Johnson money to compensate her for the car crash? Tell me more about that.”

## VIII. PAIN AND SUFFERING

- **FOCUS:** Ask the jury about their feelings on pain and suffering. Damages for pain and suffering have been targeted by tort reform proponents and jurors are likely to have strong feelings on the issue. Identify problematic jurors and position them to be dismissed for cause by the court.

**BASIS:** “No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on your common sense.” CACI Instruction 3905A.

“If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant: . . . (2) any physical pain and mental anguish he suffered in the past and may be reasonably expected to suffer in the future.” 1-9 Virginia Model Jury Instructions – Civil Instruction No. 9.000 (2010).

“Pain and suffering encompasses the physical discomfort caused by an injury. Mental or emotional pain and suffering encompasses anguish, distress, fear, humiliation, grief, shame or worry.” 1-14 T.P.I. Civil 14.10 (2007).

“In determining the measure of damages, you should consider: . . . the mental, physical, and emotional pain and suffering experienced and which with reasonably probability will be experienced in the future.” 2d-9 Federal Pattern JI 9<sup>th</sup> Circuit – Civil 5.2 (2011).

**EXAMPLE:** “Many people would have a little trouble giving money for pain and suffering because it doesn’t make the pain and suffering go away. Other people think money for pain and suffering is okay. How many of you are a little closer to the people who think money for pain and suffering is okay? How many of you are in the other group?”

Mr. Smith. I saw you raise your hand. Please tell me more about that.

If the proof shows Mrs. Johnson suffered pain as a result of her injuries, would you have *any reluctance at all* in awarding her damages that would adequately compensate her?”

## **IX. LOST INCOME, LOST EARNING CAPACITY AND MEDICAL EXPENSES**

- **FOCUS:** Ask the jury for their feelings on lost wages, medical expenses, lost earning capacity, etc. Doing so will focus the jury on all of the damages that could potentially be awarded while directing their attention away from the issue of liability.

**BASIS:** “To recover damages for past lost wages, the plaintiff must prove the amount that she has lost to date. To recover damages for the loss of the ability to earn money as a result of the injury, the plaintiff must prove the reasonable value of that loss to her.” CACI Instruction 3903D (2010).

“To recover damages for past medical expenses, the plaintiff must prove the reasonable cost of reasonably necessary medical care that she has received. To recover damages for future medical expenses, the plaintiff must prove the reasonable cost of reasonably necessary medical care that she is reasonably certain to need in the future.” CACI Instruction 3903A (2010).

“If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant: (1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration; . . . (5) any medical expenses caused in the past and that probably will be caused in the future; (6) any earnings she lost because she was unable to work at his calling; (7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future.” 1-9 Virginia Model Jury Instructions – Civil Instruction No. 9.000 (2010).

“The next element of damages that the plaintiff can recover is the value of the ability to earn money that has been lost in the past and the present cash value of the ability to earn money that is reasonably certain to be lost in the future.” 1-14 T.P.I. Civil 14.13 (2007).

“The next element of damages that the plaintiff may recover is for reasonable and necessary expenses for medical care, services, and supplies actually given in the treatment of a party as shown by the evidence and the present cash value of

medical expenses reasonably certain to be required in the future.” 1-14 T.P.I. Civil 14.11 (2007).

“In determining the measure of damages, you should consider: . . . the reasonable value of necessary medical care, treatment, and services received to the present time; the reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future; the reasonable value of wages, earnings, and earning capacity . . . lost to the present time; [and] the reasonable value of wages, earnings, and earning capacity which with reasonable probability will be lost in the future . . .” 2d Cir. 9 Federal Pattern Jury 9<sup>th</sup> Circuit – Civil 5.2 (2011).

**EXAMPLE:** “If the proof shows that Mrs. Johnson suffered lost wages as a result of the crash, how many of you would be reluctant to award Mrs. Johnson’s lost wages to her? How many would not?”

## **X. INJURIES SUSTAINED**

- **FOCUS:** Go through each aspect of your client’s damages individually. This should take a significant amount of time. It is a way of placing focus on the damages that your client sustained before your opening.

**EXAMPLE:** “How many of you know someone who has broken the large bone in his leg where the bone broke through the skin?”

“Mr. Brown. I saw you raise your hand. Tell me more about that. Did your friend have to take time off work? Did the injury cause him a lot of pain? How did it impact his relationship with his family? How did it impact him emotionally? What medical treatments did he receive? Did he ever really fully recover? How long did it take for him to fully recover?”

**EXAMPLE:** “How many of you know someone who has suffered from multiple cracked teeth?”

“Mr. Ryan. I saw you raise your hand. Tell me more about that. Did your friend have to take time off work? Did the injury cause him a lot of pain? How did it impact his relationship with his family? How did it impact him emotionally? What medical treatments did he receive? Did he ever really fully recover? How long did it take for him to fully recover?”

**EXAMPLE:** “How many of you know someone who has injured his head and neck in a car crash?”

“Mr. Gray. I saw you raise your hand. Tell me more about that. Did your friend have to take time off work? Did the injury cause him a lot of pain? How did it

impact his relationship with his family? How did it impact him emotionally? What medical treatments did he receive? Did he ever really fully recover? How long did it take for him to fully recover?"

# EMPLOYMENT DISCRIMINATION VOIR DIRE – DEFENDANT CORPORATION

## I. INTRODUCTION

- **FOCUS:** Introduce yourself, your trial team and the company’s representative. Use the opportunity to tell the jury who you are, where you live and who your partners are.

**EXAMPLE:** “Good morning. My name is David Johns. I’m an attorney here in Memphis, Tennessee and I work for the Jones & Smith law firm. Also here with me today are attorneys Mark Lucas and Karen Thomas, and paralegal Linda Lewis, who also work for Jones and Smith, and we have the honor of representing XYZ Corporation and Johnny Manager, one of XYZ’s district managers.”

- **FOCUS:** Introduce your client, usually a corporation, and the corporate representative. Humanize your corporation as quickly as possible through the individual being charged with discrimination.

**EXAMPLE:** “We have the honor of representing XYZ Corporation and, more importantly, Johnny Manager, one of XYZ’s district managers, who will be seated at the table with me during this trial. A corporation can only act through the individual people that work for it. So, even though XYZ Corp. is named as defendant in this lawsuit, Mr. Manager is the actual person that Ms. Plaintiff is accusing of racial discrimination and harassment. He is the person she claims mistreated her.”

## II. STATEMENT OF FACTS

- **FOCUS:** Give a brief statement of the facts. Limit comments to the evidence that will actually be presented, but tell the company’s story rather than simply stating what the evidence will show.

**EXAMPLE:** “Ms. Plaintiff used to work for XYZ Corp. as a delivery driver, but her employment ended on March 15, 2010 after she was involved in what XYZ determined to be her second preventable accident. Now, XYZ has policies in place that are designed to prevent this sort of thing from happening, and after investigating her last accident, XYZ decided Ms. Plaintiff had not followed its policies. As a result, she lost her job as a delivery driver. If you are selected to sit on the jury in the case, you will have to decide whether or not Ms. Plaintiff lost her job because of discrimination.”

### III. PURPOSE OF VOIR DIRE AND JURY SELECTION

- **FOCUS:** Explaining the reason for the *voir dire* process (which is likely an unfamiliar and intimidating process for most jurors). Explain that you may ask some personal questions, but assure that you are not trying to embarrass anyone and that you will be as discreet as possible.

**EXAMPLE:** “I’m sure this process is new to many of you. For some of you, this may be the first time you’ve ever been inside a courtroom. So I want to explain what we are doing here. This jury selection process is designed to help the attorneys pick folks that are best-suited to try this type of case. I want to assure you that it is not my intention to embarrass anyone or to pry into your personal business for no reason. But due to the nature of this case and to the many different life experiences people have, I may need to ask you some questions that you might consider too personal.

If, for any reason, you are not comfortable answering my questions in front of everyone here, just say so. We can ask the judge to let us come up to the bench, just you, me and Mr. Plaintiff’s Attorney, and we can talk about it up there in private. Again, I’m not trying to embarrass anyone. I just need to find out who are the best folks to hear this case.”

### IV. BIAS/PREJUDICE

- **FOCUS:** Pointing out how potential bias/prejudice held by individual jurors may disqualify them from serving on this jury. (The illustration below uses college basketball as the example, but the illustration should be modified based upon the individual attorney’s interests and activities, and the interests of the jurors in general.)

**BASIS:** “Do not let bias, prejudice or sympathy play any part in your deliberations.” Fifth Circuit Civil Pattern Jury Instruction 2.13

“Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.” Diamond-8 Modern Federal Jury Instructions-Civil 1.01

“And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.” 2diam-9 Federal Pattern JI 9th Circuit - Civil 1.1A

“You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the court.” 1-2 Virginia Model Jury Instructions - Civil Instruction No. 2.220

“You will be asked questions [by the Court and] by the attorneys. Although some of the questions may seem to be personal, they are intended to find out if you have any knowledge of this particular case, if you have any opinion that you cannot put aside or if you have had any experience in life that might cause you to identify yourself with one party or another. Jurors must be as free as humanly possible from bias, prejudice, or sympathy and must not be influenced by preconceived ideas about the facts or the law. The parties are entitled to jurors who approach this case with open minds until a verdict is reached. Each party has a right to request that a certain number of prospective jurors be excused.” 1-1 T.P.I. Civil 1.01

“Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.” 1-1 California Forms of Jury Instruction 113

**EXAMPLE:** “I am looking for individuals for the best jurors to hear this case. Many times folks are better suited for different types of cases. Some might be better suited for a contract dispute or a criminal matter rather than an employment case. This can be based upon their background and interests, and on things that have happened to them in their past.

I’m a prime example of this. Are any of you college basketball fans? I love college basketball. I grew up in Memphis and have been a fan of the Memphis Tiger basketball team as long as I can remember. My parents and my in-laws are Tiger fans, my brother and sister are Tiger fans, and my oldest child attends the U of M and is a Tiger fan. I earned both my undergrad and my law degrees from the U of M. I even met my wife there. So, I’m a BIG fan.

Now, when I’m watching the Tigers play, I never see the fouls that the referees call against the Tigers, and for the life of me I can’t understand how they miss all those fouls committed by the other team! Our team never travels with the ball, and the opponent is forever stepping out of bounds, but the refs don’t call it. In my eyes, the only way the Tigers lose a game is because the refs blew the calls.

Now, given my feelings for the Tigers, how many of you think I would not be the best choice to referee a Tiger basketball game during the March Madness tournament? (Solicit answers from the jurors. Ask a specific juror what s/he thinks, and have others confirm it). Why not? (Solicit answers from the jurors. Too biased in favor of the Tigers. Can't be fair/impartial). You all agree I'm probably not the best person to call one of those games because of my feelings about the Tigers and my history with the University. Does this make me a bad person? It just means that my feelings toward the Tigers are too strong for me to be fair and impartial. I'll always have a tendency to favor the Tigers over their opponents.

The same is true in this case. Based on your background and interests, some of you might be better suited for this case than others, where some of you may be better suited for a different type of case. We are just trying to find the folks that are best suited for this type of case."

## V. CORPORATION ON EQUAL FOOTING

- **FOCUS:** Pointing out that a corporate defendant must be considered on equal footing with the plaintiff, and cannot be favored or disfavored just because it is a large corporation.

**BASIS:** "In this case, the defendant is a corporation. The mere fact that one of the parties is a corporation does not mean it is entitled to any lesser consideration by you. All litigants are equal before the law, and corporations, big or small, are entitled to the same fair consideration as you would give any other individual party." 4-72 Modern Federal Jury Instructions-Civil P 72.01; Fifth Circuit Civil Pattern Jury Instruction 2.13

"All parties are equal before the law and a [corporation] [partnership] is entitled to the same fair and conscientious consideration by you as any party." 2d-9 Federal Pattern JI 9th Circuit - Civil 4.1

"CORPORATION NOT TO BE PREJUDICED The fact that a corporation is a party must not influence you in your deliberations or in your verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards." 1-1 T.P.I. Civil 1.04

**EXAMPLE:** "Let's say the Green Bay Packers are playing the Chicago Bears in a football game, and Green Bay is way out in front. What would you think about the referees decided to even things up and level the playing field by never calling pass interference or holding against Chicago, even though they continue to call those penalties on Green Bay? Would that be fair? Why not? (Rules are rules,

and they apply equally to both teams). It would not be fair to hold one team to a different set of rules than the other. The same is true in the law. Under the law, a corporation is to be treated the same as an individual. You cannot hold one party to a different set of rules than the other.”

**EXAMPLE:** “How many of you have heard the phrase ‘Justice is blind?’” (Solicit answers from a juror or two who raise their hands. Look for answers that track the jury instructions – all parties are equal, all given fair consideration. If no one responds, proceed). “‘Justice is blind’ means that both parties to a lawsuit – the plaintiff and the defendant – are treated equally. It doesn’t matter what a party’s race, gender or religion is. It also doesn’t matter if one of the parties is a corporation rather than an individual. Justice is blind, and treats both parties the same under the law.”

**EXAMPLE:** “Everyone stands on equal footing in the courtroom. Did you ever see the movie Rocky? Rocky Balboa, the underdog from Philly, was fighting Apollo Creed, the heavyweight boxing champion of the world. How many of you were rooting for Rocky? (Show of hands). Why? (He was the underdog; Didn’t like Apollo Creed; Apollo Creed was rich and famous, Rocky was poor and unknown; big guy vs. little guy.) Did you find yourself rooting for Rocky because no one expected him to win? Did you find yourself rooting for Rocky because he was the little guy going up against the big guy? He was clearly the underdog. It’s only human nature to pull for the underdog. But ‘justice is blind’ means there is no underdog in the courtroom. All parties – individuals and corporations – stand on equal footing.”

## **VI. FEELINGS ABOUT CORPORATIONS**

- **FOCUS:** Discovering individual jurors’ feelings about corporations in general, looking for any prejudice against corporations. Juror questionnaires, if permitted, are an excellent way to identify individuals who may be predisposed to rule against a corporation.

**BASIS:** “In this case, the defendant is a corporation. The mere fact that one of the parties is a corporation does not mean it is entitled to any lesser consideration by you. All litigants are equal before the law, and corporations, big or small, are entitled to the same fair consideration as you would give any other individual party.” 4-72 Modern Federal Jury Instructions-Civil P 72.01; Fifth Circuit Civil Pattern Jury Instruction 2.13; Ninth Circuit Model Civil Jury Instruction 4.1

“In deciding Plaintiff’s claim, you should not concern yourselves with whether Defendant’s actions were wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proved that Defendant [adverse employment action] him [because of race/sex] [in retaliation for complaining about discrimination].”  
1diam-7 Federal Pattern JI 7th Circuit - Civil 3.07

“You will be asked questions [by the Court and] by the attorneys. Although some of the questions may seem to be personal, they are intended to find out if you have any knowledge of this particular case, if you have any opinion that you cannot put aside or if you have had any experience in life that might cause you to identify yourself with one party or another. Jurors must be as free as humanly possible from bias, prejudice, or sympathy and must not be influenced by preconceived ideas about the facts or the law. The parties are entitled to jurors who approach this case with open minds until a verdict is reached. Each party has a right to request that a certain number of prospective jurors be excused.” 1-1 T.P.I. Civil 1.01

**EXAMPLE:** “I’ve looked over your questionnaires, and I appreciate your candor in your responses. Mr. Juror, I noticed in your responses that you seem to have some pretty negative feelings about corporations. Is that correct? (Allow Mr. Juror to answer.) How long have you had these feelings about corporations? (Allow Mr. Juror to answer.) And are you the kind of person who holds fast to his beliefs and convictions, or are you someone who is easily persuaded by others and can be talked out of his beliefs and convictions? (Make Mr. Juror answer). So is it fair to say that you’re a person who has some strong negative opinions about corporations, that you’ve had these opinions for a long time, and that you are the type of person who stands by their principles and opinions and is not easily swayed by others? Given that, isn’t it likely the Plaintiff would be starting out a little bit ahead of XYZ Corporation, and that XYZ Corporation will have a little steeper hill to climb to prove its case? If this case were a race, Plaintiff would have just a little bit of a head start, right?”

**EXAMPLE:** (If no questionnaires) “Lots of people these days don’t think much of corporations, with things in the news like the Enron scandal, the Wall Street collapse, back dating of stock options, etc. Ms. Juror, how do you feel about corporations? What are your opinions about how they operate? (Allow Ms. Juror to answer). Could you tell me a little more about your feelings toward corporations? (Allow Ms. Juror to answer). How long have you had these feelings about corporations? (Allow Ms. Juror to answer.) And are you the kind of person who holds fast to her beliefs and convictions, or are you someone who is easily persuaded by others and can be talked out of her beliefs and convictions? (Make Ms. Juror answer). Earlier we all agreed that I shouldn’t referee a U of M basketball game because of my strong feelings about the University. Would you agree with me that a lawsuit like this one is a much more serious matter than a basketball game – particularly to the parties involved? (Make Ms. Juror answer.) Do you find yourself in much the same position with this lawsuit that I was with the ball game? (Solicit answer.) Given your opinions, isn’t it likely that XYZ Corporation will be starting out a little bit behind Plaintiff?”

**Practice Pointer:** *If the juror(s) answer yes to the questions in these examples – particularly the last question in each example, be prepared to move to strike the juror(s) for cause outside the hearing of the venire.*

## VII. BUSINESS JUDGMENT RULE

- **FOCUS:** Pointing out that a business can make employment decisions for good reasons, bad reasons or no reason at all, as long as it is not for an illegal or impermissible reason. It is not the jury's job to second guess the corporation's decision; their only job is to determine whether the decision was discriminatory.

**BASIS:** “Under the law, an employer such as [defendant] has the right to hire or not hire an individual such as the plaintiff for a good business reason, a bad business reason, or no reason at all, as long as the reason for the decision was not the candidate's race. If you find that the defendant's decision to [terminate/not hire/suspend] was a result of the defendant's business judgment, you must render a verdict for the defendant, even though you might feel that the defendant's actions were unreasonable, arbitrary, or unfair. You are not to focus on the soundness of the defendant's business judgment or to second guess its business decisions. You must not permit any sympathy for the plaintiff lead you to substitute your own judgment for that of the defendant, even though you personally may not approve of the action taken and would have acted differently under the circumstances.” O'Malley, §172.64; *Nelson v. Christian Brothers University, et al.*, No. 03-2671; *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987).

“[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. . . . In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom.” 1diam-3 Modern Federal Jury Instructions-Civil 5.1

“You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable.” Diamond-8 Modern Federal Jury Instructions-Civil 5.94

**EXAMPLE:** “Ms. Juror, I notice from your questionnaire that you own your own business. Can you tell us about that? (Ms. Juror described business.) Do you have folks that work for you? And you have to make decisions about work distribution, and whether or not to hire more employees. Do you have a certain standard or level of performance that you expect out of your employees, or are they free to do pretty much whatever they want? How to deal with employees that may not be performing up to your standards? Who do you think is in a better

position to make decisions about how you run your business – you, or ten or twelve people in your community who may not know much about your business or how your company works? Why is that?

In the same way, the company is in the best position to make decisions related to its employees. The company has certain standards and expectations of its employees. It is not your job as a juror to second-guess the company's decisions, even if you personally would have reached a different decision or handled the situation differently. The fact that you may wish the situation were handled in a different manner, or that you think the company's decision was harsh or even unreasonable, should not influence your decision. The question you must decide is whether or not the company's decision was the result of illegal discrimination."

**EXAMPLE:** "Mr. Smith. How do you feel about the proposition that a company can make an employment decision [insert]? (Response: I don't think that is right or fair). Why do you feel that way? (Response: I just do.). If that proposition was the law and the judge so instructed you, would you have any problem following that instruction and applying it in this case? (Response: No.)"

#### **VIII. COMPANY'S GOOD FAITH BELIEF IN SUPPORT OF ITS DECISION**

- **FOCUS:** Pointing out that the critical question is not whether the company made the right decision with respect to the plaintiff, but instead whether the company had a good faith basis or belief that the plaintiff engaged in the conduct for which s/he was terminated/disciplined. NOTE: Many jurisdictions may not have specific model jury instructions on this point. It is, however, a concept that is well-developed in case law and adopted in many jurisdictions. Check for controlling or persuasive precedent in your jurisdictions before pursuing this line of questioning.

**BASIS:** "Federal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior.'" *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (citations omitted). "For an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory. . . ." *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1323 n. 4 (11th Cir. 1982) (emphasis in original). See also . . . *Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452-53 (11th Cir. 1987) ("If the employer fired an employee because it honestly believed that the employee had violated a company policy, even if it was mistaken in such belief, the discharge is not 'because of race' and

the employer has not violated § 1981.”).” *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. Fla. 1991).

As we have often times repeated, “it is inappropriate for the judiciary to substitute its judgment for that of management.” *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000); *see Krenik v. County of Le Sueur*, 47 F.3d 953, 960 (8th Cir. 1995)(holding that federal courts do not sit as a “super-personnel department”); *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (same). “Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior.” *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994) (quoting *Elrod*, 939 F.2d at 1470, 939 F.2d at 1470); *see Simms v. Oklahoma ex rel. Dep’t of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999)(“Our role is to prevent unlawful hiring practices, not to act as a ‘super personnel department’ that second guesses employers’ business judgments.”). *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 462 (6th Cir. Ohio 2004)

**EXAMPLE:** “Mr. Juror, I see that you’re a supervisor at your job. Do you supervise other employees? Are you responsible for hiring, disciplining and, if necessary, firing employees? Have you ever had to fire someone? Tell me a little about that; what did the employee do that caused you to terminate him/her? (Allow juror to explain.) So you believed that you had a valid reason to take the action you did, right? (Allow juror to answer.) When you terminated their employment, did the *employee* think it was fair? (Allow juror to answer.) But you had your reasons, correct?”

How do you feel about the proposition that a manager or a supervisor or a business can make a decision that may seem harsh or even unreasonable to the employee, as long as the decision is not made for an improper or illegal reason? Mr. Juror, do you think that’s fair? (Ask several jurors).

In the same way, XYZ Corp and Mr. Manager are in the best position to make decisions related to XYZ’s employees. It is not your job as a juror to second-guess the company’s decisions, even if you personally would have reached a different decision or handled the situation differently. The fact that you may wish the situation were handled in a different manner, or that you think the company’s decision was harsh or even unreasonable, should not influence your decision. The question you must decide is whether or not the company’s decision was the result of illegal discrimination.”

## **IX. LISTEN TO ALL EVIDENCE BEFORE DECIDING**

- **FOCUS:** Pointing out that the Plaintiff gets to present their case first, and that the Defendant will not be presenting its case until the Plaintiff gets finished. Here is the time to explain to the jurors why someone should listen to both sides before

deciding who is right and who is wrong. Remind jurors to wait until they have heard all of the evidence.

**BASIS:** “Finally, please do not discuss the case even among yourselves until all the evidence has been presented and the case has been given to you for your deliberations. The reason for this is that the evidence will be presented one witness and one exhibit at a time, and it is important that you keep an open mind until you have heard all the evidence.” 4-71 Modern Federal Jury Instructions-Civil P 71.02

“[D]o not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.” Diamond-8 Modern Federal Jury Instructions-Civil 1.05

“The trial will proceed in the following manner: First, the plaintiff’s attorney may make an opening statement. Next, the defendant’s attorney may make an opening statement. . . . The plaintiff will then present evidence and counsel for the defendant may cross-examine. Following the plaintiff’s case, the defendant may present evidence and plaintiff’s counsel may cross-examine. After the presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. The court will instruct you further on the law. After that you will retire to deliberate on your verdict.” Diamond-8 Modern Federal Jury Instructions-Civil 1.06

“First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.” 2diam-9 Federal Pattern JI 9th Circuit - Civil 1.12

“Until this case is submitted to you for your deliberations, you should not decide any issue in the case . . . .” 1-2 Virginia Model Jury Instructions - Civil Instruction No. 2.000

“The plaintiff will present evidence first. The defendant then will be given the opportunity to present evidence. Normally, the plaintiff will present all of the plaintiff’s evidence before the other party[ies] presents any evidence. . . . You must keep an open mind until you have heard all the evidence, the attorneys’ closing arguments and my final instructions concerning the law.” 1-1 T.P.I. Civil 1.02

**EXAMPLE:** “It won’t be too long until we will have another election and we’ll get to vote on who will represent us in Washington DC or in the state capital. Let’s imagine that two candidates are running for office, and you will only get to hear them speak one time before you have to vote. How would you feel if, after

the first candidate spoke, you had to vote without ever getting the chance to hear from the other candidate? Would you feel like you could make an informed decision about the candidates if you only got to hear from one of them, and didn't get to hear from the other one at all? Mr. Juror, if Candidate A told you several bad things about Candidate B, but Candidate B didn't get the opportunity to respond, do you think you could make a fully-informed choice between the two candidates? You would want to hear from Candidate B before you decided, right?

**EXAMPLE:** I've got three kids, and they are each about 3 years apart. Whenever something bad happens around the house, they all start the "blame game." For instance, our trampoline broke – one side just collapsed. The youngest child immediately came to me and said the oldest child broke the trampoline. It was all his fault. Based on nothing more than that information, and without talking to the oldest child at all, would it be fair and reasonable to punish the oldest child for breaking the trampoline? (Ask jurors whether they think it would be fair.) Why not? (There might be an explanation; youngest child might not know everything that happened). As it turns out, the oldest child had broken the trampoline, but it was a complete accident. After hearing from the oldest child, I learned that he had not done anything wrong. One of the trampoline's side bars had just failed to work like it was supposed to and had to be replaced. I would not have known this, however, if I hadn't withheld judgment on him until after I heard his side of the story and his explanation of what had happened.

The same holds true in a trial like this one. The plaintiff gets to present all of their evidence first. XYZ Company and Mr. Manager must wait until Plaintiff is finished before we can present our side of the story. In order to make a fully-informed decision, it is important that you, as jurors, listen to ALL the evidence in this case – not just one side's evidence – before you decide the case. So don't make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. That way you have the chance to hear each side's story and decide for yourself who to believe."

**H**

**Transcript of Limited Voir Dire**

U N R E D A C T E D

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

-----  
[REDACTED] )  
 )  
Plaintiff, )  
 )  
VS. ) NO. [REDACTED]  
 )  
FEDEX CORPORATION, )  
 )  
Defendant. )  
-----

VOIR DIRE OF THE JURY BY MR. CLINT SAXTON  
BEFORE THE HONORABLE CHIEF JUDGE [REDACTED]

DECEMBER 15, 2008

BRENDA PARKER  
OFFICIAL REPORTER  
SUITE 942 FEDERAL BUILDING  
167 NORTH MAIN STREET  
MEMPHIS, TENNESSEE 38103

## A P P E A R A N C E S

Appearing on behalf of the Plaintiff:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Appearing on behalf of the Defendant:

SARAH F. HENRY, ESQ.  
RICHARD C. SAXTON, ESQ.  
3620 HACKS CROSS ROAD  
THIRD FLOOR, BUILDING B  
MEMPHIS, TENNESSEE 38125

\* \* \*

1  
2           **MR. SAXTON:** Good afternoon. As you previously  
3 heard, I'm Clint Saxton. I think y'all can probably  
4 figure that this is not the first case that I have ever  
5 tried. But we do appreciate it. It is a privilege to be  
6 here today in front of y'all to represent FedEx Corp. and  
7 Jan Smith. Our team, Sarah Henry and Rhonda Saulsberry  
8 are proud here to be representing both of them, and really  
9 because corporations can only act through their employees,  
10 although Jan Smith is not named as a defendant, she is the  
11 person that is charged with racial discrimination in this  
12 hiring, so we're honored to be representing both of them.

13           Now, y'all are pretty much professional jurors  
14 now by the job that the judge did with y'all in the voir  
15 dire. The -- but I'm going to go a little bit further  
16 than that. The purpose of this is really for me to get up  
17 here and try to find the best jurors to serve on this  
18 case. Some jurors may be better for a criminal case than  
19 they might be for a car wreck case, just by -- based on  
20 life experiences. And I will give you an example of that.  
21 I grew up in Little Rock, went to college at the  
22 University of Alabama, and I met my wife there, the school  
23 was good to me, and I'm a crazy Alabama football fan, and  
24 when I go to the games, you know, I don't see that pass  
25 interference, I don't see the holding in the line and so

1 forth. So I might be a good referee for the University of  
2 Texas playing SMU, but am I going to be a good referee  
3 when the University of Alabama is playing? I don't think  
4 so. I don't think I'm a bad fellow, you know, I just try  
5 to -- but there's certain things we just hold back and we  
6 can't get over, and that's kind of what we're digging down  
7 to here today, and what the judge went through with each  
8 one of y'all is that fact of the -- is there something  
9 down there that really might not make you the best juror  
10 for this case.

11 Now, I read your questionnaires, I appreciate  
12 the candor that was in the answers to those, it is very  
13 valuable, it speeds up our time, and I think it is a very  
14 good process. Some of these questions I may ask -- I'm  
15 going to be as brief as I can. I'm probably talking about  
16 twice as fast as I normally talk, but I do want to try to  
17 cover the material. Some of the things I may be asking  
18 you, I don't want anybody to take personally, I'm not  
19 prying, it is just I'm here doing my job.

20 Now, how many people in here have heard the  
21 saying justice is blind? Okay. I think everybody  
22 probably has.

23 Ms. Foster, what does that mean to you?

24 **MS. FOSTER:** I have never really thought about  
25 it, because I haven't been in a situation where I had to

1 be judging anyone, but I remember seeing a movie at one  
2 time, and it was about a little girl who had been killed.  
3 I think she had been killed by a couple of white men, and  
4 I remember the lawyer asking -- he gave a scenario, he  
5 gave a story, and he asked them -- it was a beautiful  
6 story, he said -- he went through the case and he talked  
7 about it, and he asked them to not color the little girl  
8 white how they're judging, and the whole scene just got  
9 quiet, so as far as justice being blind to me, I think  
10 that I should be able to -- I should be able to -- I  
11 shouldn't see color when I'm looking at it. I should just  
12 base it on things -- on the facts when I am listening to  
13 somebody -- when I'm going to make a decision about  
14 somebody.

15 **MR. SAXTON:** Mr. Bryan, since you're close and  
16 she has got the microphone there.

17 **MR. BRYAN:** Basically, the same thing. If I  
18 were blind, I couldn't tell if you were one color or  
19 another, and all I'm doing is listening to the facts and  
20 what happened or what did not happen.

21 **MR. SAXTON:** Okay. Well, one thing that I'm  
22 driving at and asking this question has to do with this:  
23 Under the law, an individual, black, white, yellow,  
24 whatever color and a corporation under the law are to be  
25 treated on equal footing.

1           **MR. BRYAN:** Right.

2           **MR. SAXTON:** That's what I'm getting at as far  
3 as the equal justice, and I anticipate that Judge McCalla  
4 will give you a jury instruction along those lines that an  
5 individual and a corporation coming in here on equal  
6 footing, and I think that sometimes in our natural  
7 feelings about things -- I'm always that way at ballgames,  
8 I kind of tend to want to pull for the underdog. That's  
9 natural tendency of people to feel that way. If the judge  
10 does so instruct you, and that's what the law is, will you  
11 have any problems in that proposition when it goes to  
12 deliberating and when you're listening to the proof  
13 presented here? Does anybody have a problem with that?  
14 So I can't -- from what I'm understanding and what the  
15 reaction I'm getting here is no one has problems and they  
16 will apply that principle in this case, is that correct?  
17 You won't give Mr. Wilson a leg up here before we start  
18 because he's an individual and we're a corporation? We  
19 talked about corporations can only act through its  
20 employees, and in this case it is Jan Smith.

21           One other proposition I want to ask y'all about  
22 is do you agree or disagree that an employer in making an  
23 employment decision has the right to make that decision  
24 for a good reason, a bad reason, maybe even based on  
25 erroneous facts or no reason at all as long as that reason

1 is not discriminatory? I think the judge touched on that  
2 a little bit, it's not up to us to say who we're to hire,  
3 for the courts to be able to come in and say that's who we  
4 are going to hire. Does anybody disagree with that  
5 proposition, or have problems with that?

6 Ms. Foster, you're staring at me a little bit,  
7 am I not making myself very clear?

8 MS. FOSTER: I don't have any problem.

9 MR. SAXTON: Okay. I think the instruction  
10 will tell you that it is not your job to second-guess  
11 FedEx's decision in this case or to second-guess  
12 Ms. Smith's case, whether you think that was the right  
13 one, whether that's the one that you would have made or  
14 you think it should have been somebody else should have  
15 made, it's only if you feel that it was discriminatory in  
16 nature. Does everybody understand the proposition I'm  
17 telling you -- saying here?

18 And you will, as we talked before, you will  
19 treat FedEx equal on that, and you won't come in and say,  
20 well, you know, I really don't think that was fair. I  
21 mean fair is not the test here. You know, life is tough,  
22 you know, a lot of us get turned down for judges -- not  
23 for judges, but for jobs. I certainly wouldn't make a  
24 very good judge, but anyway, get turned down for jobs, and  
25 we go on about our business. And it's not -- I think the

1 court will talk about sympathy, that sympathy coming in  
2 doesn't come into play in your decision-making.

3 Now, has anybody on the jury panel had to hire  
4 people before?

5 Okay. All right. Mr. Moss, I read your  
6 questionnaire, I read everybody's, and I kind of knew the  
7 answer to that question. I know Mr. Livingston has in his  
8 landscaping business too. If you would, Mr. Moss, when  
9 you have hired people, if you take an application and  
10 reviewed resumes and interviewed, have you done all that  
11 kind of stuff?

12 MR. MOSS: (Nodding head up and down).

13 MR. SAXTON: And what do you expect from the  
14 individuals that you're going to hire as far as the  
15 application process, do you expect them to be honest and  
16 straightforward with you --

17 MR. MOSS: Yes.

18 MR. SAXTON: -- about their situation?

19 MR. MOSS: Yes, sir.

20 MR. SAXTON: Okay. Why do you expect that?

21 MR. MOSS: Well, one of the things is people  
22 that work for me, I expect that there's going to be a  
23 relationship while they work there, and so in the process  
24 of there being a relationship, I don't want to find out  
25 later that you ain't what you say you are.

1           **MR. SAXTON:** Okay. And so what do you do or  
2 have you had that situation happen before?

3           **MR. MOSS:** Well, I have had to fire them.

4           **MR. SAXTON:** Okay. And the -- what about when  
5 you go to hire anyone, is longevity of how long a person  
6 might be there, is that an issue that you consider in your  
7 hiring decision?

8           **MR. MOSS:** Yes, because --

9           **MR. SAXTON:** Why is that important?

10          **MR. MOSS:** I'm a people person, and when I hire  
11 people to work for me, I hire them with the intention of  
12 them being there until they decide that they no longer  
13 want to be there.

14          **MR. SAXTON:** Okay.

15          **MR. MOSS:** But if I have to remove you, I will  
16 do that. But my intention is when you come to work for  
17 me, that you are there, you know. That's just the way I  
18 do.

19          **MR. SAXTON:** Does pay play a factor in your  
20 hiring decisions of what people want to get paid?

21          **MR. MOSS:** Yes, yes.

22          **MR. SAXTON:** Why is that important?

23          **MR. MOSS:** Because I might not be able to pay  
24 what some people want.

25          **MR. SAXTON:** Okay. If you will pass the

1 microphone down to Mr. Livingston. Mr. Livingston, I  
2 noticed in your questionnaire, you said you had had a  
3 little bit of HR training or some HR training because when  
4 you're doing the hiring process, you want to be honest and  
5 fair; is that a fair statement of how you answered that?

6 MR. LIVINGSTON: Yes, sir.

7 MR. SAXTON: Okay. Would you tell us why that  
8 is important, please, sir?

9 MR. LIVINGSTON: The training?

10 MR. SAXTON: Yeah, or being honest and fair in  
11 the training, yes, sir.

12 MR. LIVINGSTON: It's important to be honest  
13 and fair and to want to give a person a chance, be honest  
14 and fair so you can get the best employee or the one that  
15 is most suitable for the job.

16 MR. SAXTON: Okay. And do you expect to get  
17 that in return of that honesty and straightforwardness  
18 from the individual that you're hiring?

19 MR. LIVINGSTON: Yes.

20 MR. SAXTON: Okay. Why is that important?

21 MR. LIVINGSTON: It's important so I know who  
22 I'm dealing with.

23 MR. SAXTON: Okay. And what -- have you had  
24 people that maybe didn't give you the full story and you  
25 found out the full story later?

1           **MR. LIVINGSTON:** Well, you find out on  
2 applications, people put down pretty much sometimes what  
3 they want.

4           **MR. SAXTON:** All right. Do you think that is  
5 right for them to put down something that is not correct?

6           **MR. LIVINGSTON:** No, it's not.

7           **MR. SAXTON:** Okay. I know you also said, I  
8 believe, that you had -- I don't know if it was your  
9 grandfather, he was the head of a company called LDS or  
10 something like that, help me if my memory is wrong.

11           **MR. LIVINGSTON:** It was Livingston Janitorial  
12 Services.

13           **MR. SAXTON:** Okay. All right. And did your  
14 grandfather have to make hiring decisions also?

15           **MR. LIVINGSTON:** Yes.

16           **MR. SAXTON:** Okay. Now, what about how long  
17 somebody might be staying with you, longevity, is that  
18 also something you take into consideration when you're  
19 hiring someone?

20           **MR. LIVINGSTON:** Yes.

21           **MR. SAXTON:** And why is that important to you?

22           **MR. LIVINGSTON:** To hire -- keep hiring and  
23 firing someone, it turns your system upside down.

24           **MR. SAXTON:** Well, does it take more time for  
25 you to train and go back and do it all over again?

1           **MR. LIVINGSTON:** Yes.

2           **MR. SAXTON:** All right. If you would hand the  
3 microphone to Mr. Moore. Mr. Moore, I know that you were  
4 with Sears Roebuck Company for a number of years. Tell me  
5 a little bit about your hiring that you went through.

6           **MR. BRYAN:** Well, I never worked -- excuse me,  
7 I never worked in the personnel department or human  
8 resources, but I did work for a department manager who  
9 hired people, but the personnel department office took the  
10 applications and that sort of thing. I did do some  
11 interviewing occasionally.

12           **MR. SAXTON:** Okay. And did you do any  
13 follow-up of checking references and -- did you ever do  
14 that?

15           **MR. MOORE:** No.

16           **MR. SAXTON:** Did you read applications before  
17 you actually met with the people that came in?

18           **MR. MOORE:** Yes, I think so.

19           **MR. SAXTON:** Okay. And in those experiences,  
20 did you see some people that looked better on paper than  
21 they did when they actually came in?

22           **MR. MOORE:** I would say so, yes, sir.

23           **MR. SAXTON:** And in -- you actually made some  
24 of the hiring decisions, or did you just --

25           **MR. MOORE:** Well, not the final decisions,

1 because there was also the personnel department or human  
2 resource person who that responsibility rested with more  
3 than me.

4 **MR. SAXTON:** Okay. And was the end result of  
5 what you were trying to do was to get the best fit for  
6 your company regardless of what credentials someone might  
7 have?

8 **MR. MOORE:** Yes.\*

9 **MR. SAXTON:** I mean that's the end result, do  
10 you agree with that, Mr. Livingston?

11 **MR. LIVINGSTON:** Yes.

12 **MR. SAXTON:** Mr. Moss, is that fair to say  
13 also?

14 **MR. MOSS:** Yes.

15 **MR. SAXTON:** Okay. Mr. Meeks, I believe maybe  
16 you raised your hand.

17 **MR. BRYAN:** Well, I was self-employed for 22  
18 years farming, and I did some hiring and firing, but I  
19 hadn't -- I hadn't did that for like six or seven years,  
20 and I'm not self-employed anymore.

21 **MR. SAXTON:** Okay. All right. Well, without  
22 trying to take up too much time, do you pretty much agree  
23 with what I have been talking with these other gentlemen  
24 about as far as their hiring and what is important to you?

25 **MR. MEEKS:** Yes.

1           MR. SAXTON: All right. And you felt like, I  
2 presume, that you knew more about what you needed than  
3 some folks that didn't know the operation, is that fair to  
4 say?

5           MR. BRYAN: Sure.

6           MR. SAXTON: Mr. Livingston, do you feel like  
7 you're in the best position to see what fits your needs?

8           MR. LIVINGSTON: Yes.

9           MR. SAXTON: Mr. Moss?

10          MR. BRYAN: Yes.

11          MR. SAXTON: Same for you?

12          MR. BRYAN: Yes.

13          MR. SAXTON: Okay. I think one last thing I  
14 want to bring up with y'all is this, is, you know, we all  
15 watch used to be Perry Mason, I guess back in my day, and  
16 then maybe we worked through LA Law and now we have got  
17 crazy Denny Crane and Boston Legal. I hope that y'all  
18 understand that maybe the legal process isn't like it is  
19 on TV, and that as in football or any other business that  
20 you're in, you have certain rules that are to be followed,  
21 and the same applies here in the courtroom, and what I'm  
22 trying to get to is from time to time, we may --  
23 Mr. Davison may feel that it is time to make an objection  
24 for some rule or some basis of law that we should make an  
25 objection, and I believe Ms. Frazier is familiar with that

1 because of the remarks she made earlier about that, so  
2 will you not hold that against us and understand that  
3 we're just trying to do our job if we're making objections  
4 or approaching the bench with the court?

5 All right. Now, I guess I want to just finish  
6 up with just a couple of you, and again, it is because of  
7 the answers that were in there. Ms. Foster, I know in  
8 your questionnaire that -- and I am not going to say who  
9 your employer is, but you felt that maybe some -- I don't  
10 know if it was you, or you felt like maybe some friends of  
11 yours had maybe not been promoted because they are a  
12 minority or something, is that what your answers were?

13 MS. FOSTER: Yes. It wasn't me, but I heard  
14 someone talking.

15 MR. SAXTON: Okay. So that wasn't you  
16 directly?

17 MR. BRYAN: Not me directly.

18 MR. SAXTON: And the way that question was  
19 phrased, it said you or a friend, and some of y'all didn't  
20 have who it was, it just said yes, so that is why I was  
21 trying to find that out. So that experience with -- that  
22 your friend had at your present employer, were you upset  
23 with your employer because of whatever they had done with  
24 your friend?

25 MS. FOSTER: I can't be upset with the

1 employer, because I didn't know all that happened. You  
2 know, you can say I been discriminated against, but if you  
3 don't give me the facts of what is going on, then I can't  
4 tell you, so I'm not just going to jump on the band wagon  
5 with because you say I have been discriminated against,  
6 tell me more.

7 **MR. SAXTON:** Okay. All right. That's fair  
8 enough. That's why I'm following up on the questions that  
9 you had, really to kind of -- as y'all -- before you  
10 didn't know all the facts, and I'm just trying to dig down  
11 and get a little bit on that too. Thank you. Will you  
12 hand the microphone down to Ms. Frazier, please?

13 Ms. Frazier, in your questionnaire, I believe  
14 that you mentioned that you felt that all three of your  
15 sons may have been discriminated against in some hiring,  
16 is that correct?

17 **MS. FRAZIER:** Yes.

18 **MR. SAXTON:** Okay. And I believe one of your  
19 sons, you listed in there too had worked at FedEx?

20 **MR. BRYAN:** Yes.

21 **MR. SAXTON:** Okay. The -- and the answer --

22 **THE COURT:** All questions regarding the  
23 questionnaires are going to be at side bar. Just come  
24 around to side bar, please. I didn't know that, I didn't  
25 know we were going to ask them there, but we usually come

1 around to side bar. Come around to side bar, that will be  
2 great. We try to do that so that if you put something in  
3 that questionnaire that you don't want to talk about in  
4 front of everybody, you don't have to. So that's what we  
5 will do then. Sure.

6 Yes, ma'am, we will see you at side bar.

7 MS. FRAZIER: I'm sorry, I didn't understand.

8 THE COURT: No, no, that's okay.

9 MS. FRAZIER: I thought you were talking to  
10 them.

11 THE COURT: That's no problem. That's no  
12 problem at all.

13 (The following proceedings had at side-bar  
14 bench.)

23 (The following proceedings were had in open

24 court.)

25 MR. SAXTON: All right. I guess one last

1 question is y'all have been asked from A to Z in this  
2 thing, y'all have pretty much been run through the gaunt  
3 with it, but is there anything else that maybe the judge  
4 hasn't asked, that Mr. Davison hasn't asked or that I  
5 haven't asked that is kind of rumbling around in your head  
6 right now to think, you know, maybe I might not want to be  
7 the referee at that ballgame, is there anything that is  
8 sticking in your crawl? Okay. All right. Thank y'all  
9 very much.

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# I

## Trey Cox's Article: *Taking the Voodoo Out of Voir Dire*

# Taking the Voodoo Out of Voir Dire

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## A Down And Dirty Guide to Voir Dire

Trey Cox<sup>1</sup>

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## **I. Introduction**

Every trial lawyer knows what it is like to debrief a jury after an unfavorable result only to learn that the result might have been different, but for one or two of the jurors. We have all found ourselves saying, "I wish I asked about that during voir dire examination."

The objective of voir dire is not to persuade unfavorable jurors that their beliefs are misguided, but rather to flush out those views and used them as the basis for cause challenges. Once you establish yourself as credible, potential jurors will be more willing to speak openly about their biases. And the more bias you can eliminate, the better your client's chance for a winning trial.

It is no secret that winning or losing a case at trial may depend almost entirely on the jurors hearing the case. When assessing juror qualifications, the court looks for the ability to be impartial; lawyers look for "ringers" who will win or lose the case for them during deliberation.

The ability to influence jury selection is quite limited in many jurisdictions. In many federal courts, the presiding judge will typically pose all or substantially all of the voir dire examination, and counsel has only a very limited number of peremptory strikes from the panel. In some state courts, lawyers are given more information and latitude in the juror selection process than in federal court. Whatever the court, a lawyer is well advised to familiarize him or herself with the court's rules and practices regarding jury selection and meticulously prepare for this critical process.

## **II. The Purpose of Voir Dire**

The stated purpose of the voir dire segment is to provide an opportunity to identify potentially biased jurors in order to empanel a fair and impartial jury for trial. In actual working, the adversary system impels attorneys to choose jurors who are most biased and sympathetic to their side of the case, and the court hopes that through this process the panel results in a balanced group favoring neither side more than the other. The effective attorney uses the voir dire to identify both favorable and unfavorable jurors. Thus, your goal is to learn enough information about prospective jurors to make intelligent use of peremptory challenges. The reason we ask questions is to find the audience that will be most receptive to your case.

### III. Your Demeanor, Style, And Approach Equals Rapport (Or Not)

Lawyers aren't the only participants who learn something during voir dire. While you focus on eliciting information from prospective jurors during voir dire, the jurors study you for clues about you and your case. They are formulating impressions of the merits of your case, credibility, competence and trustworthiness. If your voir dire is haphazard or half-hearted, jurors will undoubtedly draw negative inferences about you and your client's case.

To identify potentially friendly jurors, you must develop a good rapport with the venire. If the potential jurors do not trust you or do not feel comfortable enough to speak frankly, you cannot do your job. You will extract enough information to identify negative jurors, let alone strike them for cause. Most panel members will be experiencing voir dire for the first time. Being interrogated by an attorney in public about their history, values, and beliefs can make jurors anxious. You must take steps to reduce or eliminate juror anxiety early. Here are some suggestions for doing this:

1. **You can make a first impression only once.** Know that the jury is watching your every move – whether you're opening a door for a client, glancing sideways at a witness, or rubbing at that ketchup stain from lunch that would up on your shirt. Be a leader in the courtroom. This also means being upfront and honest – don't try to defend cases that may cast your case in a bad light. Explain how the facts here are not comparable and how this case is important to everyone involved.
2. **Value the jury's time.** Most jurors have, by this point, experienced the usual inefficiencies of the legal process and are sensitive to wasted time. A trial attorney should acknowledge (and if necessary, apologize for) the time. Jurors are taking time out of their busy lives to participate in the legal process. You should be concise and efficient, and move quickly. If opposing counsel is laborious and questioning, you should by your conduct draw the contrast between your opponent's style and you're more efficient and timely way of working.
3. **Addressing Jurors Individually.** If you use the juror's names, you should maintain the appropriate level of formality for the courtroom by addressing them as Mr. or Mrs., and not by their first names. If you cannot use their names, then use their juror numbers so you will have a clear record for appeal.

4. **Avoid monotony.** Try to vary your questions with each juror. Hour after hour of the same questions can become robotic. Be creative. Get personal. This technique helps keep things interesting and doesn't allow others down the road to prepare their answers. You're looking for honesty, and from the way people answer you can detect whether they're being forthright. Also, don't go row by row, seat by seat, systematically asking the same question; mix it up. This not only will keep the process moving, it also will create a more conversational setting, which is a more effective way to communicate to the group as a whole.
5. **Be polite and respectful.** Say "please" and "thank you." This seems obvious, yet often voir dire can transmute into an embarrassing voyeurism. Acknowledge when some questions become personal, and perhaps difficult to answer.
6. **Don't be cute.** Do not be brilliant – be human. A healthy dose of humility goes a very long way. Too many lawyers seek to try their case, ingratiate themselves with the potential jurors or tell the jury how great they are. Stay away from personal exploits. The jurors do not care about your war stories. Instead, focus on developing credibility and trust with the jurors. Once you have your jury in the box, you can turn to trying the case.
7. **Do not talk like a lawyer.** Although lawyers hear it from Day One of trial advocacy, this remains a big problem. Unless you have selected 12 people with legal backgrounds – and I work to keep lawyers out of the box – you must talk (and act) like a real person and explain terms that you may take for granted. In other words, speak English and avoid legalese and other complex language. Put all questions in as plain, simple, everyday language as possible. Speak to the jury as though you are addressing a respected, non-lawyer family member. Never talk down to the jurors or patronize them. Avoid pretension and pomposity.
8. **Be confident.** The jurors will observe your interaction with others in the courtroom. They should notice your knowing rapport with the clerk, bailiff, and the other court personnel.

#### IV. Getting Things Started

1. **Introductions All Around.** At your first chance to speak to the jury, introduce yourself, your client and your team. The jury is watching you and wants to know some basics about you. Who are you? Who is your team? Whether and how you introduce them says a lot about you and how you treat people. Ask open-ended questions ("Please tell me about....") that prompt jurors to tell you who they really are, what they feel, and what their experiences have been. Make it your aim to establish a trusting relationship with the jury.
2. **Show them yours if you want them to show you theirs.** Generally, people are more willing to open up if you have already opened up and trusted them. After you introduce yourself and your client share something more personal about yourself. After a few opening words, tell brief personal story that is tied to the voir dire process. For example, I often explain that I love football, especially LSU football. Both my parents graduated from LSU. My Dad went to law school at LSU. My father-in-law played on the 1958 LSU national championship team and my mother-in-law was an LSU Golden Girl. I have attended nearly every LSU home game since I was two years old. I then add that even though I am a lawyer and know every rule in football, I would not be the best referee for an LSU game. It would be impossible for me to be fair, because I love LSU. And I confess that, I have never seen an LSU player hold or commit pass interference. I then tie that to voir dire process by saying that I am trying to identify anyone who because of past experiences or opinions would not be the best juror for this particular case. Just like I could never referee an LSU football game.
3. **Share a few facts.** Once you've broken the ice with the panel, explain briefly what the case is about. Psychological studies show that many jurors quickly form opinions of what they think happened, and then search for evidence that confirms their beliefs and disregard evidence that is inconsistent with them. Therefore, you should share a few positive case facts with the potential jurors early, while they are at their most impressionable. When you do this, take care not to sacrifice your credibility. People do not trust those who appear to be selling them something. Your description should be relatively balanced. Do not

consciously omit an important fact and give defense counsel the opportunity to reveal it later.

4. **Advise jurors of prying questions.** Warn them in advance that in order to do your job and identify the best jury for this case, questions must be asked that may seem to pry into their personal affairs, and it is not done to be nosey or meddling.
5. **Start with the question that will encourage a response.** Unless the panel members talk, you can't do your job. One way to begin is by asking the entire panel a nonthreatening, simple question to which anyone would have an answer. For example, ask whether anyone knows the attorneys or parties involved. Once you get the group talking, questions posed to those individuals may seem less threatening. Another technique is to ask potential juror what he you are the she thinks about frivolous lawsuits. If addressing a single juror, the question should be open-ended, not necessarily answered with a "yes" or "no," and not asked in a suggestive manner.

## V. Specific Questioning Techniques To Deal With Tough Issues

There are several different ways for you to introduce and discuss a potentially troublesome issue with the denier. Here are a few examples.

1. **Ask a direct question to potentially unfavorable juror.** One way to introduce an issue is to address a question to a juror you have identified as a potentially unsympathetic juror. Ask how he or she feels about a certain topic. Because our time is usually limited, focus your efforts on trying to extract bases for casual strikes against the unfavorable jurors. Target the leaders first; you can try to ascertain whether a potential juror is unfavorable or a leader before trial by looking at juror questionnaires or the juror card themselves.
2. **Ask the entire venire a direct question.** If you decide to start by a question to the entire panel, ask it in a manner that encourages a response. For example, asking, "how many of us feel...?," or "how many agree that...?," while raising your hand and smiling, will be more effective than simply reading from your notes, "does anyone think that...?" "Does anyone have a problem with...?" Or "can everyone on the

panel promised me...?" If several people raise their hands, note the responses for the record, and then ask each juror additional questions individually.

3. **Ask a question posing alternatives.** Another effective method is to introduce an issue by asking the question that suggests alternative responses. For example, "Mr. Jones, let's talk for a minute about chiropractors. Some people really like chiropractors and believe they can cure just about anything. Others believe the chiropractors are quacks. Which of these statements best describes how you feel about them?" Use this technique with a juror you believe is potentially unfavorable and a leader. When you describe the "positive" position that supports your side of the issue using terms that make the alternative less attractive. When you describe the "negative" position, use terms strong enough to set up a causal challenge, but not so extreme that the unfavorable juror would feel uncomfortable adopting such a position. The objective is to get the unfavorable juror to select a negative stance.
4. **Flush out.** Once your target adopts a negative position, bind the juror to it so he or she cannot back away later. You need the juror firmly tied to the position for your casual challenge. Be careful not to push the unfavorable jurors so far that he or she recognizes that the extreme stance is ludicrous. After the juror adopts a negative position, thank him or her. The venire members will probably see that this position is against the plaintiff's interest and expect you to be antagonistic. Instead, explain to the jury system is built on honesty and say that you sincerely appreciate the jurors candor. Do this before moving to any other jurors.
5. **"Loop" to identify other unfavorable jurors.** To expand your inquiry, "loop" the negative jurors' position into a question to the entire venire. For example, "how many of us agree with Mr. Jones that all chiropractors are quacks?" People are more willing to agree with someone else than be the first to express an opinion. Again, be careful not to go too far: you don't want other potentially negative jurors to back down and adopt a less extreme alternate position. Occasionally, when you use the "looping" technique, you discover a juror who takes a more extreme position than the first juror or who has deeper feelings of the top. When that happens, you may want to loop off at the more extreme position rather than that of the original juror. The objective is to get as many unfavorable jurors is possible to agree with the most extreme position possible.

6. **“Lock-in” negative jurors for causal challenge.** While you are flushing out the views of each juror and looping to others, be sure to lock each unfavorable juror into the extreme position. You typically will not want to establish the causal challenge at this point, but rather simply locked the juror into his or her position. The more solidly you lock the juror, the less chance he or she will escape challenge later and the more comfortable other jurors will be joining with his or her views.
7. **Turn to positive jurors.** Next, you may want to open the discussion to jurors who do not agree with a negative position. Take this opportunity to educate the panel about your case themes or the controversial issues. Allowing the “positive group” to respond to the “negative group” gives you a preview of jury liberations.
8. **Inoculate.** After you address the controversial issues with your positive jurors, you must inoculate them against your opponent’s challenges. Use leading questions to get the jurors to assure the court that they will weigh the evidence objectively and follow the court's instructions. For example, if a juror states that he or she suffers from an old back injury and therefore knows it's just a matter of time before surgery is necessary. You may want to inoculate the juror against a subsequent attack. You could ask, “even though you know first hand how painful injuries like these are, can you still follow the court's instructions and require the plaintiff to prove each element of damages, including future medical expenses, by a preponderance of the evidence?”

## VI. What I Want to Know About a Juror

With a few limited exceptions, I set very little store by demographics and bias questions never uncover jurors' secret or unconscious biases. After all, how many people will admit to strangers that they are prejudiced or biased and hold grudges from past experiences? As a result, I have a list of the main things I'm listening for -- the things I'm usually trying to figure out in voir dire. I use it both as a checklist to develop questions, and as a reminder of what I'm looking for as I listen. I keep tinkering with this list, but here's the version I'm using right now:

1. **Preconceptions.** Does this juror have preconceptions about any aspect of this case? Ask directly, yes, and then look for similar experiences and knowledge or expertise in the area.
2. **Math & Science.** Can this juror do math and follow my expert? Unless it is a job requirement or the juror has had significant education in a field that uses numbers, you cannot assume the juror can perform mathematical calculations even on a calculator. A jury with typical math skills can easily return a verdict they did not intend because no one knew how to calculate percentages.
3. **Leadership.** Will this juror lead or follow? Look for:
  - a. Relevant knowledge. Anyone experienced or knowledgeable in relevant subjects will be looked to by other jurors as an expert, whether or not he or she is otherwise a natural leader.
  - b. Employment and experience. Lawyers, others involved in the legal system, and teachers will almost inevitably be strong leaders.
  - c. Age, sex, social class, education, and personality. Here, demographics do have meaning, at least to me. Over and over in mock trials, middle-aged male business managers tend to be jury leaders, while young blue-collar women and elderly women tend to be very quiet, and everyone else falls on the continuum between. Ask questions to seek out leadership roles at work and in personal activities.
4. **Affinity.** Will this juror like me, my client, my important witnesses and the other jurors? Look for:
  - a. Personal chemistry.
  - b. Demographic similarity and similar "life story."
  - c. Behaviors, especially those chosen or avoided because they speak "for" or "against" entities like your client. If you represent a large national chain company, people who avoid

shopping at Wal-Mart or drinking Starbucks coffee may not be your jurors.

5. **Sense of control.** Does this juror tend to believe that others and external forces control life events, or that people control their own destiny? Look for:

- a. Prior complaints. Ask questions to elicit all prior lawsuits, employment complaints, complaints to the Better Business Bureau, even insurance claims. If the judge would let you ask whether the juror sends back food at restaurants, you would want to know. Likewise jurors who have been sued, or have had complaints lodged against them, tend to feel very strongly about those who complain rather than taking responsibility.
- b. Explanation for prior failures. How does the juror explain business failures, firings, and similar events, in her own life and that of friends and relatives? Was the juror's job eliminated by foreign competition or a vindictive boss, or did she simply move on? Obviously these questions need to be asked very respectfully.
- c. Supervisory and decision-making roles at work. Supervisors often need to believe in personal responsibility and control just to perform their function. In addition, they have more opportunities to control their work day, so they experience more personal autonomy and assume others do as well.
- d. Entrepreneurship, business ownership, and "self-made" success.
- e. Future plans and expectations. Jurors with a high sense of responsibility and control may display that in describing their expected future.
- f. Age. Some demographers suggest there is a typical "Generation X" juror who tends to believe each person is responsible for himself and should just move on if things don't work out.

- g. Physical strength or frailty. A physically frail person can feel much more vulnerable to external forces of all kinds than a physically vital person would.
6. **Story vs. process orientation.** Is this juror more oriented to the parties' "stories," or to the elements of legal claims and defenses? Look for:
- a. Style of expression. "Story jurors," as I call them, often answer questions with a story. "Process jurors" usually speak more precisely and answer the question posed more narrowly.
  - b. Profession. People involved in sales, marketing, teaching, and counseling often use stories and narrative as their main professional tool. Accountants, engineers, doctors, and computer programmers use a clear process in their work. (If this is difficult, ask yourself whether you would want to defend a deposition of the juror. If you'd be exhausted at the end of the day, I bet that's a story juror.)
7. **Identification with status quo.** Does this juror feel she is a part of the "system," or estranged from the "system?" Look for:
- a. Work experience. An extreme "system juror" might be one who had spent a long career working successfully within a large organization. An extremely "estranged" juror might avoid long-term employment and have a succession of disconnected jobs.
  - b. Affiliation with institutions. Strong connections to church, marriage, government, and other institutions make us feel more part of established society. The weaker those affiliations, especially if the juror actively works in some way against those institutions, the weaker that connection.

## VII. Jury Selection: Pointers on the Art

Based on my experience in the courtroom, I offer the following general tips to be used in deselecting a jury:

1. **Consider Using a Jury Consultant.** Evaluate whether a jury consultant can assist in identifying favorable jurors or disqualifying potentially harmful jurors based on factors such as education and economics. The expense associated with jury consultants may not be practical in garden variety cases but may make sense in very large cases. An alternative to professional jury consultants is to enlist the help of an experienced local trial lawyer who has tried cases in the locality of the trial.
2. **Be the Master of the Jury Pool.** To the extent possible, the lawyer should attempt to influence the jury pool selection. For plaintiff's counsel, it may be possible to file a lawsuit in multiple districts within a state, each of which may draw a substantially different jury pool. For employer's counsel, there often is the opportunity to remove state court actions to federal court based on federal question or diversity jurisdiction. Federal district courts generally draw jurors from a much different pool than do state courts. The former is generally viewed as more favorable for the defense because the jury pool in federal court is culled from numerous counties in the district. State court is frequently perceived to be more advantageous for plaintiffs, probably because the jury pool is more localized and because urban jurors are regarded as more likely to be generous with a company's money than are rural jurors. Additionally, state court juries are frequently comprised of twelve people instead of the usual six in federal court. With more jurors on the panel, there seems to be a greater tendency to compromise on a verdict, which usually does not inure to the benefit of a company. It is important for the lawyer to consider this "forum" issue at the outset of the litigation.
3. **Know the Local, Local Rules of Jury Selection.** It is critical to determine as much as possible about the particular court and judge's jury selection process. Find out from the judge's law clerk whether or not a jury questionnaire can or will be used and, if so, whether you will be allowed to provide questions, and exactly how to proceed. Prepare specific questions for the questionnaire that elicit the information needed to identify the "ideal" juror for your type of case. Exhibit A and B are two sample jury questionnaires for employment cases. Verify with the court's clerk the exact number of jurors in civil cases in that court, as well as the permitted number of peremptory strikes. Surprises in this area must be avoided. As early as possible, obtain a copy of the venire from which the jury will be chosen. This list typically contains very helpful identification and demographic information on each juror: name,

address, marital status, educational background, occupation, residency, and so on. With this information, together with that gleaned from the juror questionnaires, you should prepare a juror profile sheet that ranks jurors in order of raw demographic desirability. Having immediate access to this information, including through use of a laptop computer in court, can prove invaluable. Once in court, the time between voir dire and jury selection is very short. Thus, whatever you can prepare in advance will be very helpful. In districts that provide only the limited information of juror names in advance of trial, it is important to devise a system in advance to help capture critical information while the jurors are responding to voir dire. It is important to have co-counsel or a skilled paralegal at the table to assist while lead counsel actively conducts the voir dire.

4. **Listen, listen, listen. Always** Most important, though, is the admonition for you to *watch* and *listen*. Pay attention to what the prospective juror is actually saying and to body language and voice inflection, too. Listen to what the prospective jurors say and how they say it. Listen to what they *do not* say. Pick up on any visual or aural cues you can about their predispositions and get a gut feel for them. I try to mimic the individual's tone, rate of speech, gestures, volume and inflection whenever possible. For example, if a juror is closed and holding back, be more reserved – this tends to make a juror feel comfortable and may help that person to open up. When a person is answering, try to observe the reactions of others in the venire when possible.
5. **Know your goal.** Keep the verdict you want in mind. For example, if you have a damages case and liability is admitted, you don't necessarily need an engineer on the jury. What that also means is that you should identify through focus groups, mock juries, or just common sense and experience who your ideal juror is. That means you should be able to identify biases on certain issues early. Remember that all roads lead to closing arguments.
6. **Managing Information during Voir Dire.** It is critical to know exactly how a particular judge will proceed to select jurors, including the number of peremptory strikes and the specific method the judge will employ. Remember also that some jurors can be struck for cause. Therefore, if a juror appears to be improperly predisposed one way or the other, that witness is subject to be stricken for cause. Any discussion regarding the

striking of a juror should be conducted outside the presence and hearing of the jury panel to avoid antagonizing the subject juror or other potential jurors. Prepare in advance a voir dire witness seating chart that can be quickly completed at counsel's table. Handwritten charts also may be helpful, but may waste valuable time. I have attached the chart I am using as Exhibit C.

7. **Establish themes.** You should reinforce the storyline at every opportunity, logically weaving the pointing to jury questions and responses to their answers.
8. **Admit weaknesses in your case.** This gives jurors the impression you are being honest with them, and lessens the impact of the weaknesses during trial.
9. **Be aware of the reluctant and the overeager juror.** A reluctant juror generally is a poor juror. I am no less concerned about an eager-to-serve juror. Does he or she have an agenda? Try to identify jurors who are unhappy; they can taint the case. Ask about the juror's view of the recent changes in civil justice system – the answers could be telling for all sides.
10. **Avoid the "one-person" jury.** Do not select a person to sit on your jury if he or she is particularly experienced in the matters which are the basis of the lawsuit.
11. **Don't embarrass a juror. Ever.** If you cannot formulate a question in a way that is non-offensive, don't ask it. I once saw a lawyer question a prospective juror who admitted to watching a fair number of law-related television shows. The lawyer asked whether that person could separate fiction from reality in the courtroom. The potential juror was offended, and it would be very difficult to gain that person's trust again. It is pointless to try to change people or their attitudes. You will not get a juror to come over to your way of thinking. Instead, the case must be positioned so it is acceptable to the person's beliefs.
12. **Pick sheep.** Don't try to pick a leader because, invariably, it never turns out that way. And if it does, that leader might end up steering everyone against you. I view myself as the leader in the courtroom. So I pick people who will follow me. Identify jurors who are sufficiently smart

and willing to be educated about the issues in the case and will make a commitment to pay attention.

**13. One last question.** Conclude by asking the panel generally if there is any reason already mentioned or not, why any member could not be a totally fair, impartial and unprejudiced juror. This question sums up the whole purpose of a jury trial and the voir dire examination.

**14. When time is limited,** the following suggestions may be helpful:

- a. Use a juror questionnaire.
- b. Request that the court ask "obligatory" questions, such as whether the jurors know any of the parties, attorneys, or witnesses.
- c. Limit introductory comments in case overview to two to four minutes.
- d. Limit the number of topics you discuss to one topic for every five minutes allowed.
- e. Ask each juror no more than five questions on each topic.
- f. Focus on the jurors with in the "strike zone" and explain why you are talking more to those seated upfront if you have a 12 person jury and six peremptory strikes per side, your "strike zone" would consist of the first 24 people on the denier. You want, therefore to concentrate your questioning on jurors one to 24, usually seated towards the front of the venire.
- g. If you encounter talkative jurors, thank them, tell them you appreciate and understand how they feel on the issue, and explain that you need if you're from others.
- h. Introduce new topics by using questions appose alternatives. This can be an efficient way to frame the issue and elicit useful responses quickly.

**15. Think Before You Choose.** Make sure that you have the opportunity to absorb all of the information that you have gathered before making your ultimate selections. If necessary, ask the judge for a few moments to review your notes on the jurors before the actual selection process begins. Any amount of time the court permits can be put to effective use, particularly if your notes are organized. Remember that your primary goal in jury selection is to *deselect*, through the use of peremptory strikes (or for-cause dismissal), those jurors who you believe will be most likely to hurt your case. Jurors are human beings who bring to court all of their predispositions based on their experiences, their exposures, and their

religious, political, economic, and philosophical beliefs. Specifically, the types of jobs jurors hold, their educational backgrounds, and their similarities or empathy with a party in the case or a party's counsel are powerful factors that may result in partiality. These are all important in deciding who to strike. The lawyer should visualize prior to trial what the characteristics are of the jurors he or she does not want and utilize peremptory strikes accordingly.

### **VIII. Sample Challenge Questions**

Every jurisdiction has special rituals or "magic words" that must be used to perfect a challenge for cause, but over the years I have developed the following list to help me nail down a for cause challenge:

**Step 1:** When a juror has expressed a strong opinion that gives rise to a challenge for cause, start by repeating the juror's answer: "Let me make sure I understand what you are saying..."

**Step 2:** Then ask why he/she feels this way. This should be the only time you ask an open-ended question in a challenge for cause.

**Step 3:** When doing your challenge for cause, after the one "why" question, always ask closed-ended questions, and use metaphors which provide a socially acceptable way to admit bias. Ask questions like:

- Would it be fair to say that this is a strong opinion you have about this issue?
- You'd agree with me that you have had this opinion or feeling for quite some time?
- Given what you said before (or based on your questionnaire), would the defendant start with a bit of an edge?
- Would the plaintiff have a little steeper hill to climb to prove its case?
- Would the defendant be starting a little bit behind the plaintiff?
- If this trial was a race, would we be starting one step behind?
- If you were in my shoes, representing John Smith, would you want a person with your views sitting as a juror?

**J.**

**Sample Motion to Strike Juror for Cause,  
Memorandum of Points and Authorities  
in Support Thereof**

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3  
4 Attorney for Defendant  
5 ACME CORPORATION  
6  
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**  
10

11 SAM WILLIAMS,

12 Plaintiff,

13 v.

14 ACME CORPORATION and DOES 1-15,

15 Defendants.  
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18  
19

Case No. BC 488 844

ASSIGNED FOR ALL PURPOSES TO:

~~REDACTED~~  
DEPARTMENT 30

**DEFENDANT ACME CORPORATION'S  
MOTION TO STRIKE JUROR JOHN  
WALTERS FOR CAUSE; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Complaint Filed: August 2, 2012  
Trial Date: March 14, 2013

20 Defendant Acme Corporation ("Acme" or "Defendant") by this Motion moves to  
21 strike for cause Juror John Walters. According to his Juror Questionnaire, Mr. Walters's son was  
22 employed by Acme, and was terminated by Acme on account of his race. The termination of his son  
23 for an unlawful reason has, according to Mr. Walters, caused him to think less of Acme. For these  
24 reasons, Mr. Walters is not qualified to serve as a juror in this case because he is both impliedly and  
25 actually biased. CAL. CODE CIV. PROC. §§ 229 (b) and (f), 225 (b) (1) (C). Because the situation  
26 with Mr. Walters's son is so similar to the facts of this case, wherein plaintiff Sam Williams claims  
27 that he was not hired by Acme on account of his race, this is not the type of bias that Mr. Walters can  
28 reasonably be expected to set aside when considering the evidence in this case.

1  
2 **Memorandum of Points and Authorities**

3 **I. Defendant Has Timely Brought this Challenge for Cause.**

4 A challenge for cause may be made either orally or in writing. CAL. CODE CIV. PROC.  
5 § 226 (b). All challenges for cause must be made prior to any peremptory challenges. No party has  
6 made any peremptory challenges as of the time of this motion. CAL. CODE CIV. PROC. § 226 (c).  
7 Defendant is required to bring its challenges for cause to individual jurors before plaintiff makes his  
8 challenges for cause. CAL. CODE CIV. PROC. § 226 (d). Plaintiff has not yet made any challenges for  
9 cause. A challenge for cause can be based solely upon a juror's responses to their juror  
10 questionnaire. *People v. Avila*, 38 Cal. 4th 491, 529-531 (Cal. 2006).

11 **II. Because Mr. Walters's Son Worked for Acme, He Is Impliedly Biased and Not**  
12 **Qualified to be a Juror in this Case.**

13 The law *presumes* a prospective juror is biased, and thus unqualified to serve if the  
14 juror is the parent of someone who stands in the relationship of employer and employee to a party to  
15 the action. CAL. CODE CIV. PROC. § 229 (b) ("A challenge for implied bias may be taken for one or  
16 more of the following causes, and for no other: . . . (b) Standing in the relation of, or being the parent  
17 . . . of one who stands in the relation of, . . . employer and clerk . . ."). Accordingly, Mr. Walters is  
18 unqualified to serve as a juror in this case solely on the basis of his son being an employee of Acme.

19 **III. Mr. Walters'ss Questionnaire Responses Indicates that He is Actually Biased**  
20 **against Acme Based on Acme's Termination of His Son's Employment.**

21 The Court may excuse for cause a prospective juror whose written response to a juror  
22 questionnaire indicates a bias against one of the parties. *People v. Avila*, 38 Cal. 4th 491, 529-531  
23 (Cal. 2006); *see also* CAL. CODE CIV. PROC. § 229 (f) ("A challenge for implied bias may be taken  
24 for one or more of the following causes, and for no other: . . . (f) The existence of a state of mind in  
25 the juror evincing enmity against, or bias towards, either party.").

26 In his Juror Questionnaire Responses, Mr. Walters indicated that his son was  
27 terminated by Acme for having a knife at work, but that Mr. Walters believes Acme terminated his  
28 son because of his son's race. Mr. Walters further indicated that Acme's treatment of his son has

1 negatively impacted his opinion of Acme.

2 A challenge for cause lies where a prospective juror is shown to have a state of mind  
3 in reference to a party which will prevent the juror from acting with impartiality and without  
4 prejudice to the substantial rights of a party. CAL. CODE CIV. PROC. § 225 (b) (1) (C) (challenge for  
5 cause based upon actual bias, defined as "the existence of a state of mind on the part of the juror in  
6 reference to the case, or to any of the parties, which will prevent the juror from acting with entire  
7 impartiality, and without prejudice to the substantial rights of any party.").

8 **IV. Conclusion**

9 Defendant respectfully requests that the Court grant this Motion to Strike juror John  
10 Walters for cause on the grounds that he is disqualified from serving as a juror in this matter  
11 because: (1) he is impliedly biased because his son was employed by Acme, and (2) he is actually  
12 biased because he believes Acme terminated his son because of his son's race.

13  
14 DATED: March 14, 2013

Respectfully submitted,

15  
16 By: \_\_\_\_\_

17 Attorney for Defendant  
18 ACME CORPORATION  
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# 13<sup>TH</sup> ANNUAL FREE WINTER CLE



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June 14, 2018 Alumni Luncheon at the Annual Arkansas  
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