TRIALS

TRIAL TECHNIQUES

Voir Dire in Low Speed Collision Cases—Plaintiff's View

DANIEL J. CHRISTENSEN

TRIALS

An encyclopedic guide to the modern practices, techniques, and tactics used in preparing the trying cases, with model programs for the handling of all types of litigation.

Volume 96

MODEL TRIALS

2005

THOMSON
WEST

For Customer Assistance Call 1-800-328-4880

40188576

VOIR DIRE IN LOW SPEED COLLISION CASES—PLAINTIFF'S VIEW

*Daniel J. Christensen**

I. INTRODUCTION

II. UNDERSTANDING JUROR BIAS

III. PRE-TRIAL PREPARATION

---

*Mr. Christensen is a shareholder in the firm of Smith and Carlson, P.C. in Austin, Texas and exclusively represents plaintiffs in personal injury lawsuits.

IV. UNCOVERING JUROR BIAS

V. OVERCOMING JUROR BIAS

VI. FORMS

Research References

West's Key Number Digest

Automobiles ⚿146 to 227.5, 228 to 251; Jury ⚿97, 98 to 102, 103, 104 to 108, 131; Torts ⚿23 to 30

Westlaw Databases

Andrews Automotive Litigation Reporter (ANAUTOLR)
ALR—Personal Injury Damages (DMG-ALR)
Causes of Action—Personal Injury Damages (DMG-COA)
AM JUR Proof of Facts—Personal Injury Damages (DMG-POF)
Personal Injury Damages—Statutes (DMG-ST)
Personal Injury Damages Texts and Periodicals (DMG-TP)
AM JUR Trials—Personal Injury Damages (DMG-TRIALS)
Jury Instructions—Combined (JI-ALL)
Model Jury Instructions Combined (JI-MODEL)
Jury Instruction Filings Combined (JIV-ALL)
Jury Selection: The Law, Art and Science of Selecting a Jury (JURYSELLAS)
Jury Verdict and Settlement Summaries (LRP-JV)
Punitive Damages: Law and Practice (PDLP)
Personal Injury Briefs (PI-BRIEF)
Products Liability Briefs (PL-BRIEF)
Punitive Damages: A State-by-State Guide to Law and Practice (PUNITIVE)
Stein on Personal Injury Damages (STEIN)
Stein on Personal Injury Damages—Digest of Awards (STEIN-DIG)
Stein on Personal Injury Damages—Practice Aids (STEIN-FRM)
Stein on Personal Injury Damages—Treatise (STEIN-TREATISE)
Structured Settlements (STRST)

Primary Authority

U.S. Const. Amends. VI, VII

Tex. Gov't Code § 62.105(4) (2004)
Tex. R. Civ. Proc. 223, 228 (2004)

A.L.R. Library

A.L.R. Index, Automobile; Automobile Collision Insurance; Automobiles and Highway Traffic Products Liability Second Collision; Bulls Highway or Street Collision; Proximate Cause Products Liability Second Collision; Rear-End Collision; Second Collision

Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim, 69 A.L.R.5th 625

Propriety of inquiry on voir dire as to juror's attitude toward, or acquaintance with literature dealing with, amount of damage awards, 63 A.L.R.5th 285

Sufficiency of Evidence to Raise Last Clear Chance Doctrine in Cases of Automobile Collision with Pedestrian or Bicyclist—Modern Cases, 9 A.L.R.5th 826

Automobiles: Liability for U-Turn Collisions, 53 A.L.R.4th 849

Liability of Governmental Entity for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision Between Vehicle and Domestic Animal at Large in Street or Highway, 52 A.L.R.4th 1200

Placement, Maintenance, or Design of Standing Utility Pole as Affecting Private Utility's Liability for Personal Injury Resulting from Vehicle's Collision with Pole Within or Beside Highway, 51 A.L.R.4th 602

Liability for Damage to Motor Vehicle or Injury to Person Riding Therein from Collision with Runaway Horse, or Horse Left Unattended or Untied in Street, 49 A.L.R.4th 653

Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway, 29 A.L.R.4th 431

Liability of Owner or Operator of Vehicle for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway, 21 A.L.R.4th 159

Liability of Person, Other than Owner of Animal or Owner or Operator of Motor Vehicle, for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway, 21 A.L.R.4th 132

Products Liability: Sufficiency of Proof of Injuries Resulting from "Second Collision", 9 A.L.R.4th 494

Liability of Automobile Collision Insurer Undertaking to Repair Damaged Vehicle for Negligence or Delay in Making Repairs, 68 A.L.R.3d 1196

Liability or Recovery in Automobile Negligence Action Arising Out of Collision or Upset as Affected by Operation of Vehicle Without, or with Improper, Clearance, Load, or Similar Auxiliary Lights, 62 A.L.R.3d 844

Liability or Recovery in Automobile Negligence Action Arising Out of Collision or Upset as Affected by Operation of Vehicle Without or with Improper Taillights or Rear Reflectors, 62 A.L.R.3d 771
Liability or Recovery in Automobile Negligence Action Arising Out of Collision or Upset as Affected by Operation of Vehicle Without Front Lights, or with Improper Front Lights, 62 A.L.R.3d 560
Failure to Comply with Statute Regulating Travel by Pedestrian Along Highway as Affecting Right to Recovery for Injuries or Death Resulting from Collision with Automobile, 45 A.L.R.3d 658
Automobiles: Liability of Motorist for Collision as Affected by Attempts to Avoid Dog or Other Small Animal in Road, 41 A.L.R.3d 1124
Dog Owner's Liability for Damages from Motor Vehicle Accident Involving Attempt to Avoid Collision with Dog on Highway, 41 A.L.R.3d 888
Liability of Owner or Proprietor for Injury or Death Caused by Collision with Glass Door, Panel, or Wall, 41 A.L.R.3d 176
Applicability of Last Clear Chance Doctrine to Collision Between Moving and Stalled, Parked, or Standing Motor Vehicle, 34 A.L.R.3d 570
Liability for Injury or Damage Caused by Collision with Portion of Load Projecting Beyond Rear or Side of Motor Vehicle or Trailer, 21 A.L.R.3d 371
Applicability of Last Clear Chance Doctrine to Intersectional Collision Between Motor Vehicles Meeting from Opposite Directions, 20 A.L.R.3d 287
Applicability of Last Clear Chance Doctrine to Collisions Between Motor Vehicles Crossing at Intersection, 20 A.L.R.3d 124
Liability for Collision of Automobile with Pedestrian at Intersection as Affected by Reliance Upon or Disregard of Stop-and-Go Signal, 2 A.L.R.3d 155
Liability for Automobile Accident, Other than Direct Collision with Pedestrian, as Affected by Reliance Upon or Disregard of Stop-and-Go Signal, 2 A.L.R.3d 12

Legal Encyclopedias

Am. Jur. 2d, Automobiles and Highway Traffic §§ 446, 861, 1298; Evidence §§ 396, 422; Highways, Streets, and Bridges § 440; Products Liability § 1415
C.J.S., Carriers § 563; Insurance §§ 1021, 1023, 1213, 1231, 1488, 1667; Motor Vehicles §§ 736, 1010, 1040, 1081, 1092, 1156, 1179, 1182, 1183, 1339

Treatises and Practice Aids

ATLA's Litigating Tort Cases (ATLA Press)
Gobert & Jordan, Jury Selection: The Law, Art and Science of Selecting a Jury (2d ed.) (Trial Practice Series)
National Jury Project, Jurywork: Systematic Techniques
Childress, Persuasive Delivery in the Courtroom (Trial Practice Series)

Aron et al., Trial Communication Skills 2d (Trial Practice Series)
Singer & Maloney, Trials and Deliberations Inside the Jury Room (Trial Practice Series)

Trial Strategy

Challenges for Cause in Jury Selection Process, 58 Am. Jur. Proof of Facts 3d 395
Discrimination in Jury Selection—Systematic Exclusion or Underrepresentation of Identifiable Group, 9 Am. Jur. Proof of Facts 2d 407
Sample Settlement Brochure—Head-On Collision, 31 Am. Jur. Trials 527
Litigation of Collision-Caused Automobile Fuel Tank Fire Cases, 23 Am. Jur. Trials 383
Handling a Rear End Collision Case, 19 Am. Jur. Trials 567
Motor Vehicle Collisions—Agency Relationship, 8 Am. Jur. Trials 1
Cause of Action in Negligence for Damages Arising from Collision between Motor Vehicle and Livestock Running-at-Large, 7 Causes of Action 2d 427
Cause of Action for Injury Suffered in Collision Involving Ambulance, 29 Causes of Action 655
Cause of Action Against Utility for Injury or Death Suffered in Collision of Motor Vehicle with Utility Pole, 27 Causes of Action 453
Cause of Action to Establish Coverage Under Motor Vehicle Liability Insurance Policy for Personal Injury or Property Damage not Resulting from Collision with Insured's Vehicle, 22 Causes of Action 111
Cause of Action for Injury or Death Suffered in Collision with Parked or Disabled Vehicle, 21 Causes of Action 693
Cause of Action for Personal Injury or Property Damage Suffered in Motor Vehicle Collision at Intersection, 18 Causes of Action 485

Forms

Am. Jur. Legal Forms 2d, Highways, Streets, and Bridges §§ 134:120, 134:124, 134:125; Insurance § 149:178
Am. Jur. Pleading and Practice Forms, Evidence, Form 37; Trial, Form 136

Law Reviews and Other Periodicals

Wright, Friends and foes in the jury box: Walls v. Kim and the mission to stop improper juror rehabilitation, 53 Mercer L. Rev. 929 (2002)
Cosper, Rehabilitation of the Juror Rehabilitation Doctrine, 37 Ga. L. Rev. 1471 (2003)
Moscovici, Social Influence and Conformity, 6 The Handbook of Social Psychology 347 (Lindzey et. al., 3rd ed. 1985)

Additional References

3 The Writings of Thomas Jefferson 71 (Washington ed. 1861)

Hare, Handbook of Small Group Research (2d ed. 1976)
ABA Standards Relating to Juror Use and Management, (1993)
Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques
Handbook of Social Psychology (Lindsey & Aronson (eds.)
Lerner & Goldbeg, When Do Decent People Blame Victims, Dual-Process Theories in Social Psychology, ch. 31 (Chaiken & Trope eds., 1999)
Paulus, Psychology of Group Influence (2d ed. 1989)
Waites, Courtroom Psychology and Courtroom Advocacy (2003)
Blue & Hirschhorn, Blue's Guide to Jury Selection (ATLA Press)
Courtroom Persuasion-Jury Selection: Principle & Techniques; Demonstration and Analysis (ATLA Press)
Haydock Advocacy-Book 5: Jury Trials (American Casebook Series)
Jury Selection Deskbook
Donner and Gabriel, Jury Selection: Strategy & Science (3d ed.) (Trial Practice Series)
Givens, Advocacy: The Art of Pleading a Cause (3d ed.) (Trial Practice Series)
Carlson, Successful Techniques for Civil Trials 2d
Wells, Successful Trial Techniques of Expert Practitioners (Trial Practice Series)
Bramlet, Plaintiff/Appellant, v. Provident Life & Accident Insurance Co. and Paul Revere Life Insurance Co., Defendants/Appellees, 2004 WL 3252524 (Appellate Brief) (11th Cir., Apr 02, 2004), Brief of Appellant (NO. 03-16244-DD)

INDEX

I. INTRODUCTION

§ 1 In General

The most important and, arguably, the most difficult part of a low-speed collision case is jury selection. For the plaintiff's counsel, this phase of the trial is particularly critical. The strong biases possessed by today's jurors regarding low-speed collisions and "soft-tissue" injuries make selecting an impartial

jury extremely challenging. If plaintiff's counsel is unsuccessful, the plaintiff almost certainly faces defeat. If, however, plaintiff's counsel successfully empanels a jury of fair and impartial members, the plaintiff will have a legitimate chance of winning their case.

§ 2 Scope of article

This article focuses on preparing for and performing jury selection in a low-speed collision case from the plaintiff counsel's view. The article provides sample questions, suggested "sound bites," and example motions that can be used; however, counsel should tailor them to their specific case.

In order to explain the concepts and techniques of effective voir dire, the article discusses legal principles of jury selection to some extent. No attempt, however, is made to set forth all the law regarding jury selection in all the jurisdictions or even to state the law in a technically complete form. Each attorney performing voir dire is responsible for familiarizing himself with the legal principles controlling jury selection in the relevant jurisdiction.

§ 3 History of Voir Dire

It is commonly believed that the jury system as we know it originated with the citizen juries of ancient Greece.[1] Under the Greek system, groups of citizens, sometimes numbering in the hundreds, would sit in judgment of civil and criminal disputes. The system experienced various modifications and spread westward to Great Britain after the Norman conquest of 1066 A.D. As time passed, formal courts were eventually developed with judges and juries of disinterested citizens. Judges were selected by noblemen and the king to sit over the courts, record the proceedings, and administer justice. In 1215 A.D., King John of Great Britain was forced to sign the Magna Charta, Clause 39, which guaranteed the right to trial by jury.

The American jury system is, of course, a direct descendant of the British common law system. The Sixth Amendment to

---

[Section 3]

[1]For a more detailed discussion of the history of the jury system, see, e.g., Valerie Hans & Neil Vidmar, Judging the Jury (1986); Hastie, Penrod & Pennington, Inside the Jury (1983); Simon, The Jury: Its Role in American Society (1980).

the U.S. Constitution mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . ."[2] The Seventh Amendment further preserves this right for suits at common law when the value in controversy exceeds twenty dollars.[3] The system's principle purpose was to serve as protection of the common citizen's rights of freedom and liberty against the threat of corporate or governmental abuse of power.[4]

Since the founders instituted the American jury system, it has continued to undergo change. During the 20th century, jury service was opened to women and minorities. Additionally, some courts and legislatures have reserved certain types of decisions by administrative agencies as nonjury matters. In large part, however, the American jury system has remained in tact and generally of the same appearance as when originally implemented.

Most recently, the jury system has been under attack by "tort reform" activists. These activists organizations, usually affiliated with large corporate or insurance interests, have successfully pushed federal and state legislatures to enact various forms of change to the civil justice system. Usually, these changes have consisted of punitive damage caps, non-economic damage caps, modifications to the collateral source rule, modifications to the law of joint and several liability, and additional procedural requirements in medical negligence cases. Many, if not most, of these changes serve as a universal limit on the jury's discretion, regardless of the facts or circumstances of the case or the evidence presented.

Limitations on juries' discretion is not a new or novel concept. For as long as there have been juries, there have been those who have argued against vesting such power with common people possessing no special legal training or experience. Thomas Jefferson answered jury system opponents by saying, "I know of no safe depository of the ultimate powers of the so-

---

[2]U.S. Const. Amend. VI.

[3]U.S. Const. Amend. VII.

[4]Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 343, 99 S. Ct. 645, 58 L. Ed. 2d 552, Fed. Sec. L. Rep. (CCH) P 96713, 26 Fed. R. Serv. 2d 669 (1979) (Rehnquist, J., dissenting) (quoting 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861)) (Jefferson noted that jury is ". . . the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.").

ciety but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion." Some states' legislatures have taken Jefferson's advice while others have divested civil juries of much of their discretion and authority. It is important for a plaintiff's attorney to be aware of this trend and to recognize not only the potential legal and procedural impact it could have on his case, but also the effect the "tort reform" movement in general has had upon the jury pool.

§ 4 Purpose of Voir Dire

Plaintiff's counsel has many objectives during voir dire. Some of the more important purposes of voir dire are the following:

(1) identify and strike unfavorable jurors;
(2) establish credibility and build rapport;
(3) persuade and educate; and
(4) inoculate favorable jurors.

For plaintiff's counsel, the primary goal of voir dire must be to identify and strike unfavorable jurors. Whether counsel accomplishes this goal, however, is largely dependent upon whether or not they have established their credibility and built a rapport with the panel. If counsel has not done so, the potential jurors will not likely be comfortable enough to admit the existence or strength of their biases in front of the rest of the panel. Because of the extreme time limitations on voir dire typically imposed by many courts today, counsel are often doing well if they accomplish the first two goals listed above.

If time permits, plaintiff's counsel should attempt to familiarize the panel with counsel's theory of the case as well as to inoculate favorable jurors against attack by the defense counsel. One of the best ways to educate the panel about the theory of the case is to find a juror who has favorable opinions and use them as the advocate. Having a juror espouse the virtues of the plaintiff's case is much more persuasive than counsel lecturing the unfavorable jurors about why they should think differently. When counsel has elicited support for the plaintiff's case, they should take care to go back and inoculate those jurors so that they do not fall prey to defense counsel's attempts to strike them for cause.

The mistake many counsel make is believing that voir dire is a time to persuade and "sell" their theory of the case to the venire. Years ago, law schools were instructing their students

to "persuade every time you open your mouth." Professors would teach their students not to "let the skunk in the box" by allowing a potential juror to say something detrimental to the case in front of the venire. While there may have been a time that this advice was useful, it is not helpful when addressing today's potential jurors who have been exposed to 20 years of tort reform propaganda. Like it or not, plaintiff's counsel must recognize that the skunk is already in the box and he has no choice but to locate where it is and to talk about it. Persuasion and inoculation are tasks undertaken only when counsel is sure they have adequate time to accomplish the goals of building rapport and eliminating bias.

II. UNDERSTANDING JUROR BIAS

§ 5 In general

In order to formulate an effective strategy to overcome juror bias in low-speed collision cases, plaintiff's counsel must first understand how jurors listen, think and make decisions. Knowing your audience is the first step in being able to communicate to them and to persuade them.

§ 6 Situational influences on juror candor—Status of interviewer

Studies have shown that the greater the perceived disparity between the status of the interviewer and the subject, the greater is the subject's apprehension.[1] The more anxious the subject feels, the more he will attempt to give answers he believes the interviewer wants to hear, whether or not the answers are sincere. This influence is likely to be more of a factor in cases where the court conducts some or all of the voir dire examination.

§ 7 Situational influences on juror candor—Status of interviewer—Purpose of the interview

Regardless of what the court or counsel may tell them, jurors know that when they are being questioned during voir dire,

---

[Section 6]

[1]See, Handbook of Social Psychology (Lindsey & Aronson eds.).

they are being evaluated and judged. Even though many people would rather not serve on a jury, they still possess an intense desire to present themselves in a socially desirable way.[1] Most people believe themselves to be fair and impartial and want to be viewed that way by their peers. While they may not necessarily want to serve on a jury, they also do not want to be labeled or judged as lacking fairness or impartiality. Therefore, jurors will, intentionally or unintentionally, ascertain what behaviors or responses reflect positively and then they will adopt such behaviors and responses in an effort to be seen in a positive light and to avoid any embarrassment.[2]

§ 8 Situational influences on juror candor—Status of interviewer—Fear of public speaking

It is well known that public speaking ranks as one of people's most feared activities. This fact is especially true when applied in the context of jury selection when potential jurors are questioned about their beliefs, values, and personal experiences. Furthermore, offering jurors the opportunity to request private interviews with the judge and counsel hardly reduces the problem. Most jurors are too embarrassed to ask for such special treatment for fear of drawing attention to themselves.[1] This widely-held fear of speaking can serve as a major impediment to receiving candid and complete responses during voir dire.

§ 9 Situational influences on juror candor—Status of interviewer—Group influence

Group influence is the tendency of people to conform their

[Section 7]

[1]Marlow and Crown, Social Desireability and Response to Perceived Situational Demands, 25 J. Consulting Psychol. 109 (1968); Crown & Marlow, The Approval Motive: Studies in Evaluative Dependence, 13 (1964).

[2]Roth, Snyder & Pace, Dimensions of Favorable Self-Presentation, 51 J. Personality & Soc. Psychol. 867 (1986); Arkin, Social Anxiety, Self Presentation and the Self-Serving Bias in Causal Attribution, 38 J. Personality & Soc. Psychol. 23 (1980).

[Section 8]

[1]V. Hale Starr, Jury Selection: An Attorney's Guide to Jury Law and Methods, (1991) (1985) § 10A.3.2.

responses to the perceived norm of the group. While many people like to think they are independent and not subject to peer pressure, studies show that most people are likely to consider the opinions of others when deciding how they feel about an issue.[1] This is especially true in situations that are unfamiliar to the person, such as undergoing a voir dire examination. For example, a person at home speaking with their family is much more likely to share their true feelings about personal injury lawsuits than if they were in a courtroom being questioned by the court or by the plaintiff's counsel in front of strangers. Jurors will tend to give short, incomplete responses until they are able to identify what attitudes and beliefs are acceptable within the group. Once they have defined the norm for the group, they will often conform their responses to the group's norms in an effort to reduce anxiety and to avoid embarrassment.

The "group influence" theory presents an interesting challenge for the plaintiff's attorney. As discussed above, the primary goal of the plaintiff's attorney's voir dire is to identify and strike unfavorable jurors.[2] To do this, the attorney must discover whether any members of the venire have beliefs, attitudes, or personality traits that are unfavorable to the plaintiff's case. The attorney accomplishes this by asking the members how they feel about specific issues—normally, the worst parts of the plaintiff's case such as tort reform, "soft-tissue" injuries, and low property damage. The attorney wants the jurors to admit to having strong feelings about these issues that are negative to the plaintiff's case so that he can strike the jurors for cause. According to the "group influence" theory, however, the more the unfavorable jurors talk about the plaintiff's case in negative terms, the more likely it is that the other jurors, maybe even favorable jurors, will adopt the negative opinions as their own.

While this appears to be a "no win" situation, the plaintiff's attorney should take comfort in the fact that the attitudes and beliefs jurors possess when they enter the courtroom will

---

[Section 9]

[1]Scheff, Shame and Conformity: The Deference-Emotion System, 53 Am. Soc. Rev. 395 (1988); B. Latane, Psychology of Social Impact, 36 Am. Psychologist 343 (1981); J.M. Levine, Reaction to Opinion Deviance in Small Groups, Psychology of Group Influence (P. Paulus ed., 1980); Asch, Opinions and Social Pressure, 193 Sci. Am. 31 (1955).

[2]See Purpose of Voir Dire, § 4, supra.

normally remain unchanged throughout the trial.[3] Jurors are not inclined to change their core values and beliefs simply because an attorney or other strangers feel differently. While group influence may cause them to modify their response to questions so that their responses conform more with the perceived norm of the group, the jurors' true attitudes and beliefs will likely remain unchanged and will be what controls their decision making.[4]

§ 10 Juror decision making

Counsel must understand the juror decision making process before they can make intelligent choices about how best to present their case. Generally, jurors can employ two different types of reasoning: inductive and deductive. Inductive reasoning is when a juror objectively weighs the facts on one side against the facts on the other side and comes to a conclusion. Deductive reasoning is when a juror forms opinions about the general issue presented and then looks to the specific facts to find support for the opinion. Research has shown that many jurors reason deductively and the opinions they form are largely controlled by the values and beliefs they posses when they enter the courtroom.[1]

Which method of reasoning a juror employs is related, in part, to whether they are affective or cognitive thinkers. Affective jurors make decisions more quickly on an emotional basis (deductive reasoning) and cognitive jurors are more likely to carefully and methodically weigh the evidence before deciding (inductive reasoning). Affective jurors are more likely to be religious or philosophical people. They tend to be more creative and to conduct their lives based upon their feelings or beliefs.

---

[3]See Broeder, Voir Dire Examination: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965).

[4]This phenomenon is the difference between "conversion" and "compliance." In conversion, the juror will actually change their opinion on an issue. In compliance, the juror will state that he or she can be fair and impartial in order to comply with the conformity pressure from the judge, attorney, or other venire members, but will still retain his or her private opinion. Moscovici, Social Influence and Conformity, 6 The Handbook of Social Psychology 347 (Lindzey et. al., 3rd ed. 1985). See also, Broeder, Voir Dire Examination: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965).

[Section 10]

[1]Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 13 (1993).

Cognitive jurors are often described as very structured, detailed, and organized.

Whether jurors are cognitive or affective thinkers or if they employ deductive or inductive reasoning, counsel must also consider common juror attitudes and biases in personal injury cases when determining who to strike.

§ 11 Fundamental attribution error and defensive attribution

Personal injury trials often involve situations where someone's life has been significantly and irreversibly harmed in an instant due to no fault of the person. One moment, the plaintiff is enjoying life with a loving family, a successful career, and a future filled with hope and promise. One moment later, everything is lost and the only thing the plaintiff knows now is that he will have a future filled with excruciating pain every day.

When tragedy like this strikes, it can often seem very random and arbitrary. People do not like such uncertainty in their lives; it makes them uncomfortable. They want to believe that good things happen to good people and bad things only happen to those who deserve it. People want to believe that they have control over their lives. They want to know that if they go to work every day, be a good person, and take care of their family, everything will be fine.

Jurors in personal injury cases are forced to reconcile the plaintiff's story with their notion of a just world. The thought that this tragedy arbitrarily happened to the plaintiff makes jurors uncomfortable. If jurors accepted the notion that this terrible thing just randomly happened to the plaintiff, then they would have to make room for the idea that it could happen to them.

To avoid this anxious feeling, jurors look for a reason why it happened. This tendency to assume that if a person has suffered an injury, there is someone to blame is referred to as "fundamental attribution bias."[1] Psychologists and jury consult-

---

[Section 11]

[1]Fundamental attribution error is defined as "a person's tendancy to explain others' actions in terms of personal rather than situational causes." Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 94 (1993). For example, if a witness stammers on the stand, a juror is likely

ants used to believe that this bias would generally work in favor of plaintiffs by causing jurors to lean toward finding against the defendant. If they blamed the defendant for the plaintiff's harm, then they could reject the notion that awful things randomly befall innocent people for no reason at all.

More recent studies, however, seem to indicate that jurors will more often look to the plaintiff's conduct as a way to separate themselves from the plaintiff's plight and resolve their discomfort.[2] This phenomenon is termed "defensive attribution."[3] Jurors will compare the plaintiff's conduct with what jurors believe they would have done in the same position. When making the comparison, jurors seem not to ask whether they have ever acted the same as the plaintiff did, but rather, whether hypothetically they would have acted the same way under the same circumstances. For example, if the plaintiff was on his cellular telephone at the time of the collision, jurors are less likely to ask themselves whether they have ever driven while talking on the phone; but rather, whether hypothetically they would have been on the telephone in that situation. If the juror can conclude that the plaintiff was irresponsible in some way and brought the harm upon himself, then the juror can maintain their belief that life is fair.

Another example of defensive attribution found in the criminal law context is often observed in rape cases. Studies have shown that often female jurors, even those who have suffered a sexual assault themselves, are extremely critical of a rape victim's conduct. They have the tendency to harshly judge the appearance and actions of the victim and are quick to find ways in which the victim did something that caused or enabled the assault to occur. While not recognizing what they are doing, the female jurors remove their feelings of discomfort by looking for what the victim did or did not do which is different

---

to believe the cause is personal to the witness (i.e., the witness is lying) rather than situational in nature (i.e. the witness is nervous to speak in front of others or in court).

[2]N. Feigenson, et al., Effects of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases, 1(6) Law & Hum. Behav. 597 (1997); Valerie Hans, The Contested Role of the Civil Jury and Business Litigation, 79(5) Judicature 242-48 (Mar.-Apr. 1996).

[3]Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 13 (1993); K. Shaver, Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident, 14 J. Personality & Soc. Psychol. 101-13 (1970).

than what the juror would have done under those circumstances. If the juror can conclude that she would never experience such a horrible assault because she would never wear such revealing clothing or allow herself to be alone with someone she barely knew, then she can continue to believe that the world is just.

Studies have also shown that the strength of jurors' defensive attribution is correlated to the severity of the harm suffered by the plaintiff.[4] In other words, the more severely the plaintiff is injured, the more uncomfortable jurors feel, and hence, the stronger is their urge to relieve their discomfort by attributing blame to the plaintiff.

§ 12 Availability bias

People have the tendency to make decisions in accordance with the availability of information. If one side of an issue or story is presented well, but the other side is presented poorly or not at all, then the jurors will have the tendency to focus on the side that has the most available information.[1] If a trial focuses upon the plaintiff's opportunity to avoid the harm he suffered, then the jury is likely to focus on the same thing.

"Tort reform" propaganda has been so successful, in part, due to this availability bias. A large majority of people believe that there are too many lawsuits today when, in fact, there are fewer lawsuits per capita today than there was in decades past. People believe juries award unreasonably high amounts of money to plaintiffs when, in fact, the average jury verdict in a civil case today is smaller in inflation-indexed dollars than it was in years past. People believe these things because that is what the available information they have leads them to believe.

A good example of this is the case of *Liebeck v. McDonalds*, or what has become known as the "*McDonald's* case." Most people know that this case involved an elderly lady who was burned by coffee and was awarded millions of dollars. Most people use the "McDonald's case" as their example of a run-

---

[4]M. Lerner & H. Goldbeg, When Do Decent People Blame Victims?, Dual-Process Theories in Social Psychology, ch. 31 (S. Chaiken & Y. Trope eds., 1999); Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 98 (1993).

[Section 12]

[1]Daniel Kahneman & Amos Tversky, The Simulation Heuristic, Judgment Under Uncertainty: Heuristics and Biases 201-08 (1982).

away jury or frivolous lawsuit.[2] Their perception is based, of course, on what information has been made available to them through various sources, primarily the media. Unfortunately, much of the press devoted to the "McDonald's case" actually reported incorrect facts.[3] Very little press has been devoted to explaining many of the other facts of the "McDonald's case" that tend to show a fully functioning civil justice system. Few people know that McDonalds had over 700 complaints of burns resulting from hot coffee before Ms. Liebeck's case, that McDonald's knew the temperature of their coffee was higher than industry recommendations and capable of causing severe burns, and yet, they had no intention of changing the temperature of their coffee or of warning their customers about the danger.[4] It is not surprising, therefore, that very few people know the true facts of the case or believe that the final result was explainable.

§ 13 Confirmation bias and belief perseverance bias

The confirmation bias describes people's tendency to search and recall facts that confirm their beliefs and either criticize, reject, or forget facts that do not support their beliefs. This

---

[2]A nationwide poll of jury-eligible adults conducted by The National Law Journal found that only 6.7% of those questioned agreed with the jury's decision.

[3]For example, the media reported: (1) that the plaintiff was driving when she was actually a passenger; (2) that the vehicle was moving when it was actually stopped; (3) that the coffee was not dangerously hot when in fact it was maintained by McDonald's at around 180 degrees which was hotter than deemed safe by the restaurant industry; (4) that the plaintiff's burns were not that severe when actually they were full-thickness burns in many places; (5) that the plaintiff could have mitigated her injuries by disrobing when actually the coffee had already soaked through her sweat pants and had been in contact with her body for some time; (6) that the jury found the plaintiff did nothing wrong when actually they found her 20% at fault; (7) that plaintiff sought maximum damages from the start when in fact she offered to settle early in the process for $20,000 just to pay her medical bills; (8) that McDonald's had to pay the $2.7 million punitive damage award when actually it was reduced to $480,000 or three times the compensatory damages of $160,000; and (9) that the plaintiff collected the award when in fact she entered into a confidential settlement after the trial, some of which was for medical bills. Richard Waites, Courtroom Psychology and Trial Advocacy, 83, n. 2 (2003).

[4]Gerlin, How a Jury Decided That a Coffee Spill Is Worth $2.9 Million, The Wall Street Journal, Sept. 1, 1994 at A1.

bias also causes people to interpret ambiguous or neutral facts in a manner that supports their beliefs.[1] The closely-related belief perseverance bias describes a person's tendency to refuse to abandon their theory of what happened, even in the face of conflicting evidence.[2]

Research has shown that jurors develop a theory of the case early in the trial. The theory chosen is determined, in part, upon the value beliefs that the jurors possess when they come to jury selection. For example, a juror who believes teenage drivers driving sports cars routinely speed and drive recklessly will quickly adopt a theory that is consistent with that belief. If a party's theory is inconsistent with that belief, it will likely not succeed with that juror, regardless of the facts. The juror will filter the evidence that they hear, picking out those facts that support their theory and closely scrutinizing, rejecting, or forgetting those facts that are inconsistent with their own beliefs.

§ 14 Juror attitudes pertaining to Personal Injury Lawsuits

While every case and every venire is different, there are generally five attitude areas that people have pertaining to personal injury lawsuits.[1] They are the following:

[Section 13]

[1]Ditto & Lopez, Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions, 63 J. Personality & Soc. Psychol. 568 (1982); Lord, Bias Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. Personality & Soc. Psychol. 2098 (1979); Ross, et al., Perseverance and Self Perception and Social Perception; Bias Attribution Processes of the Debriefing Paradigm, 32 J. Personality & Soc. Psychol. 880-92 (1975).

[2]Nisbett & Ross, Human Inference: Strategies and Shortcomings of Social Judgment 167, ch. 8 (1980).

[Section 14]

[1]National Jury Project, Jurywork: Systematic Techniques, § 19.01 (West 1999). While a detailed discussion about personality theory and research is beyond the scope of this article, some researchers have identified three general categories of personality traits; aggressive, compliant, or detached. Aggressive people want to control the environment they are in. Compliant people want to do as others do. Detached people want to act differently and avoid a perceived norm. Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 150 (1993). Regardless of how jurors' personality traits are divided or categorized, it is important for counsel to carefully

(1) individual or personal responsibility for hardships in life;
(2) complexity in attributing responsibility and fault;
(3) respect for law and legal system as way of solving problems;
(4) ability to identify and empathize with party;
(5) views about financial compensation as way of solving problems.

§ 15 Individual or personal responsibility for hardships in life

Some people believe that a person should take responsibility for everything that occurs in their life. Such people will be more inclined to hold a plaintiff responsible for taking care of themselves and for overcoming any hardship that may have befallen plaintiff. At the other end of the spectrum, some people believe that a person's life is affected by their environment and various social factors. These people will be more inclined to look to external forces and actions of others as an explanation for the plaintiff's plight. Most people will fit somewhere in between these two extremes. In a low speed collision case where there is any dispute about liability, pre-existing injuries, or whether plaintiff was over-treated, plaintiff's counsel is probably going to want to strike those prospective jurors who closely hold personal responsibility as a value.

§ 16 Complexity in attributing responsibility and fault

People have different amounts of patience and willingness to sift through voluminous facts and complex issues when determining liability in a case. While some folks are less detailed and have a desire to come to a quick conclusion, others are willing and able to meticulously pick through the facts presented and thoroughly evaluate all issues before reaching a conclusion. This attitude is closely related to a person's attitude in regards to personal responsibility as mentioned above. In general, people "who seek simple answers to complex problems or who rush to closure find it difficult to hold named defendants liable when there is involvement by other unnamed

---

consider which traits are favorable and unfavorable when determining who to strike.

defendants or even a tenuous basis to conclude that there was comparative negligence."[1] So, in the case of a low speed collision, if there will be extensive discussion about biomechanical, accident reconstruction, epidemiological, or injury causation issues, plaintiff's counsel will want to make sure that the jurors have a high tolerance for ambiguity and the ability to understand complex matters.

§ 17 Respect for law and legal system as way of solving problems

Attitudes about how or if the legal system should be used to resolve disputes can also affect how a juror will decide a case. Some people believe that people should not bring lawsuits regardless of the reason. Others recognize that it is a tool that society has employed for years to resolve disputes. Similarly, while some people will follow the judge's instructions regardless of their personal beliefs, others will vote according to their value system, whether or not they are complying with the judge's instructions. Counsel will have to evaluate the facts and issues in their case to determine what type of attitude is unfavorable and then strike those jurors from the panel.

§ 18 Ability to identify and empathize with party

As discussed below in sections 20 to 24, many attorneys and consultants used to advise that one method of defining the "juror profile" was to pick those characteristics that were common to the plaintiff. The thought was that if the jury was filled with people having similar demographic facts and experiences to the plaintiff, then they would be more likely to identify with the plaintiff and thus there would exist a better chance that they would vote in his favor. The theory of defensive attribution, however, has shown that often times, jurors with similar experiences as the plaintiff will actually impose a higher standard of conduct upon the plaintiff and thus they would eventually vote against him.

[Section 16]

[1]Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 150 (1993). See also,Vidmar, et. al., Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases, 12 Behavioral Sciences and the Law 151 (1994).

If a juror has had similar experiences as the plaintiff, they may display very different reactions. Firstly, the juror may empathize with the plaintiff because the juror has lived through the same sort of ordeal. Secondly, the juror may impose a higher standard of conduct upon the plaintiff because the juror has had the same experience and he either did not receive any compensation or he is physically okay now. Lastly, the juror may, as a function of defensive attribution, distinguish his experience from the plaintiff's and focus on something that the plaintiff did or did not do that brought the tragedy upon himself. It is important for counsel to discuss the juror's attitudes about any similar experiences to determine how the prospective juror will react.

§ 19 Views about financial compensation as way of solving problems

Jurors are generally concerned with three things regarding damages when they deliberate: (1) how responsible was everyone; (2) the purpose of awarding damages; and (3) the effect awarding damages will have upon the defendant, them, or the public in general.[1] Because these things are concerns during deliberations, counsel should investigate the prospective jurors' attitudes on the issues during voir dire.

Regardless of whether comparative responsibility was an issue in the case, studies have shown that juries will examine plaintiff's conduct both while determining liability and damages.[2] Therefore, the weaker the liability case in a juror's mind, the lower the amount of damages they will support.[3] As explained above, jurors assessments of personal responsibility are largely affected by their attitudes about personal responsibility; therefore, counsel's selection criteria will also be similar.

Because jurors are concerned with the purpose of awarding

[Section 19]

[1]Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 150 (1993).

[2]Vidmar, et. al., Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases, 12 Behavioral Sciences and the Law 151 (1994); Bovbjerg, et. al., Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering,' 83 Northwestern U. L. Rev. 963 (1989); Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio State L. J. 172 (1958).

[3]Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 754 (1959).

damages, plaintiff's counsel needs to demonstrate during trial that the plaintiff and/or the plaintiff's family will benefit from a large damage award. If a juror believes that an award for pain and suffering or for someone's death will not improve the plaintiff or his family's situation, the juror will not be inclined to support a large damage award. The attorney should identify whether the jurors are open to awarding damages even when the harm has already occurred.

Jurors may also be concerned with the effect a large damage award will have upon the defendant or others. Jurors may believe that if they award a large sum of money to this plaintiff, that it will consequently affect the cost of goods and services in their community. Or, their concern may be more of a systematic concern that if they deliver a large verdict, that it will only exacerbate the existing problem of large verdicts and drive up prices of insurance across the country. At the other end of the spectrum, some jurors may assume that higher prices are inevitable anyway, and will concentrate more upon the extent of the defendant's conduct. In any event, it is important for counsel to examine the jurors to find out if they are concerned about the effect of a large verdict and why.

III. PRE-TRIAL PREPARATION

§ 20 Identify "worst" juror

Many attorneys and consultants develop a profile of the "ideal juror" to aid them in determining what issues to focus on and what questions to ask. Some believe that one way of identifying a favorable or desirable juror is to look for someone who has the same background and experiences as the plaintiff. Considering the demonstrated prevalence and strength of defensive attribution bias, this may not be a wise strategy.[1] The person who has fought neck and back problems their whole life and has never been paid any money for their pain may not be the most sympathetic or generous juror when deciding what the plaintiff's neck and back injuries are worth.

An arguably better method to accomplish the goal of identifying and striking unfavorable jurors is to develop a profile of the "worst" juror. Identifying the character traits, demographics,

---

[Section 20]

[1]See, e.g., National Jury Project, Jurywork: Systematic Techniques, 18-7 (West 1999).

and value beliefs that are worst for the case keeps the attorney focused on the mission—to eliminate unfavorable jurors. Considering that the voir dire process is really a de-selection, rather than a selection, of potential jurors, the method of creating a profile for the worst juror is most consistent with that primary objective.

It is important, however, for counsel to recognize that creating a "profile" of the worst juror is simply a tool to: (1) assist in the selection of attitudes and personality traits upon which inquiry will be necessary; and (2) identify those jurors who are most likely to possess those strong attitudes and personality traits that are unfavorable to the plaintiff. It would be a mistake to make decisions about how to exercise peremptory challenges based solely upon the profile created pre-trial from demographic and social data.

The following sections discuss various things the attorney and his team can do to identify the "worst juror."

§ 21 Identify "worst" juror—Investigation

Assuming the attorney is informed of the jurors' names prior to the day of trial, some investigation may be helpful in identifying the "worst juror." While most of the investigation that can be done will be limited to acquiring demographic-type information that is readily accessible to the public, it can still be extremely helpful in identifying both potentially unfavorable jurors as well as jurors who are likely to be leaders. These jurors, of course, will be the first people the attorney will want to speak to during questioning. By questioning these individuals during voir dire, the attorney can confirm or dispel the preliminary opinions he has formed from the demographic data. It is important to note that demographic information should only be used as a preliminary tool for pre-trial planning and not as the sole basis for determining strikes.

Before the attorney can began to investigate, however, he needs to know what to look for and where to look. Some common categories of demographic data that can be gleaned from the court's juror cards are:

(a) gender;
(b) age;
(c) race;
(d) religion;
(e) education;
(f) occupation;

(g) employer;
(h) duration of employment;
(i) marital status;
(j) spouse's age;
(k) spouse's occupation;
(l) spouse's employer;
(m) spouse's duration of employment; and
(n) previous jury service.

Other factors that can also be useful in identifying the worst juror are:

(a) social memberships;
(b) political party;
(c) property valuation;
(d) criminal record;
(e) experience with the judicial system;
(f) collection history;
(g) vehicles owned; and
(h) similar experiences.

Some of this information can be obtained via juror questionnaires, discussed *infra*. Some of the other factors, such as political party, property valuation, criminal record, civil lawsuits, judgments, and vehicle registrations can commonly be acquired via the internet.

Other options available to the attorney are to hire people to conduct "drive bys" or to interview people within the community who may know the prospective jurors. A "drive by" is when a person simply drives by the prospective juror's address and observes as much as he can about the neighborhood, the home, the vehicles, the people, and the activity of those in the area.[1] Counsel can learn a lot from seeing how the juror lives, who the juror lives with and around, what the juror drives, and how the juror maintains his residence as compared to those in the neighborhood.

It is important that the person doing the drive by have no contact with anyone and does not appear to be "staking out" the prospective juror's home. For example, if the juror or his

---

[Section 21]

[1]For a more detailed discussion about pre-trial juror investigation, see Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 9 (West 1993); V. Hale Starr & Mark McCormick, Jury Selection, §§ 4.1 to 4.3 (1993).

family is outside, they should not drive by slowly and stare. They can take photos to show the attorney; however, it should be done in a manner that the juror's privacy is not invaded.

Interviewing key people in the community is another method for investigating prospective jurors. Again, this requires that the attorney know who their prospective jurors are sufficiently ahead of trial. This method works well in small communities where there is likely to be a core group of people who know everyone in town and what is going on in their lives. Attorneys, bartenders, barbers, tax collectors, restaurant owners or mangers, and local politicians may be good sources of information about prospective jurors within their community. The attorney should be careful, however, to select sources who can be trusted to keep the interview confidential.

If counsel is provided with juror cards before the day of trial and time allows, the attorney may want to compile a spreadsheet with much of the above information on the venire members.[2] This will allow an at-a-glance view of the information on the attorney's seating chart. A spreadsheet like that shown in § 70 can also be very handy if there is a shuffle. The new juror numbers can be entered into the spreadsheet program and the jurors data can be re-sorted and printed.

Counsel should also create a seating chart prior to trial.[3] A seating chart is a graphical representation of how the venire is configured looking at it from the attorney's position. It typically has a box for each juror located in the position where they are seated. The attorney or staff will write the juror's information in the box before trial. The juror's responses during voir dire will be added in the box during jury selection. If the attorney uses the spreadsheet discussed above, the data from the spreadsheet can be merged into the seating chart template so that counsel, staff and the client all have access to the all the juror's information on one document, the seating chart. This not only makes conducting voir dire easier, but also makes determining challenges less confusing.

---

[2]See Sample Juror Data Spreadsheet, § 71.

[3]See Sample Seating Chart, § 70.

§ 22 Identify "worst" juror—Focus groups

Probably one of the most effective tools for preparing a case to go to trial is a focus group.[1] Conducting a focus group involves presenting a distilled version of the case or even just individual issues of the case to a sample group of individuals and then observing their deliberations. Questions that may be studied could be: how to address a specific weakness in the case; how will the jury receive an expert witness; will the jury like the plaintiff; or will a certain piece of demonstrative evidence be persuasive. The facts and issues that the group focuses on can be indicative of what a jury may find important. This information can then be used to assist the lawyer in deciding how to present the case.

More specifically, a focus group can also be particularly valuable in preparing for the voir dire portion of the case. From the focus group, the attorney will learn what issues the jury may find important. Experienced trial lawyers often report that a fact or issue that they believed was ancillary ended up being the fact that the jury relied on most in forming their opinions about the case. The issues identified by the focus group as being important will be some of the issues that counsel inquires about during voir dire.

The focus group will also tell the attorney how certain people feel about those issues. Counsel may be able to ascertain certain demographic, social, or ideological similarities or patterns amongst those individuals possessing the same opinion on a specific issue. For example, from observing the focus group deliberations, the attorney may be able to develop a "profile" of the type of juror who believes no one should ever be awarded noneconomic damages, or that no one is ever injured in these low speed collisions. The attorney can apply that profile to the demographic and social data contained on the juror cards to aid in identifying the worst juror.

Having discussed some of the ways focus groups can assist in preparation of voir dire, it is also important to note the limitations of focus groups. Focus groups cannot, for example, predict how a jury will vote on liability or how much it would

---

[Section 22]

[1]For a more detailed discussion of focus groups, see Richard Waites, Courtroom Psychology and Trial Advocacy, § 6.05 (2003); Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 5 (West 1993).

award in damages. Focus groups cannot predict how widely held a specific belief will be held within a particular venire. In order to develop any scientifically reliable conclusions on such issues, counsel would have to test an enormous number of participants. Recognizing these limitations enables counsel to understand the usefulness of focus groups as well as to interpret and employ their results effectively.

Conducting a focus group used to be an extremely expensive and involved process, typically requiring the assistance of juror consultants. Accordingly, focus groups were reserved only for the most valuable cases. Today, however, attorneys are beginning to conduct more informal focus groups on their own with very effective results. This more cost effective approach allows counsel to reap the benefits of focus groups on even low-impact auto cases and other cases that may arguably have moderate to low verdict potential.

It is important to note that focus groups are not mock trials. While many of the same issues and questions can be presented in either format, a focus group is generally a more flexible and less expensive method. A mock trial, discussed infra, is where counsel will present an abbreviated version of the trial to a mock jury. While focus groups are sometimes used to test a specific issue or question in the case, mock trials are typically used to test the entire case. Because they are usually more comprehensive than focus groups, mock trials are normally done later in the trial process when the elements of the case have been fully discovered.

Focus groups can take on many different appearances from a simple one-issue question to something more resembling a mock trial. Regardless of the format, the first thing to do is to determine what is the purpose of the focus group and what questions will it need to answer, then the process of identifying and selecting the focus group can begin.

There are many methods an attorney can employ to recruit people to participate in a focus group. Anonymous newspaper advertisements, random telephone solicitation, lists of persons who have recently served as jurors in the subject jurisdiction, and hired recruiters are all common ways counsel can obtain participants. Unless absolutely necessary, counsel should not resort to other methods such as contacting a temp agency or some social organization in which counsel is involved to get participants. Such selection methods will limit the panel's diversity, compromise its anonymity, and reduce is usefulness.

It is important to get sufficient information on each potential participant so that counsel can select a diverse group of people representative of a cross-section of the jury pool. The attorney will want to attempt to pick a sample that is typical of the average jury in the relevant jurisdiction.

Each panel should be composed of around 10 to 12 participants if at all possible and probably not more than about 15. More than one panel can be conducted at the same time. If more than one panel is tested, counsel should ensure that the facilities chosen for the focus group will allow all the panels to hear the same presentation.

The presentation typically involves an objective, unbiased presentation of the facts of the case by members of the trial team. It is usually not delivered in an adversarial or argumentative manner. The content, length, or delivery of the presentation will depend upon what issues or questions intend to be examined. After the presentation, the panels are escorted to separate deliberation rooms.

Within the deliberation room, the panel members' discussion is lead by a facilitator who obtains the necessary information from the participants to answer the questions presented. The facilitator's primary objective is to fully understand each participant's thoughts and feelings about the issues or questions presented. The facilitator should not attempt to persuade or manipulate the process. Usually, the deliberations are videotaped and/or transcribed.

Every effort should be made to ensure that the participants do not know who the sponsoring lawyers are or what side of the case they represent. For example, the focus group should not be held at the sponsoring attorney's office if at all possible. The interaction between the presenters, the facilitators, and the participants should be very informal and conducive to an open exchange of ideas. Confidentiality is also important. Therefore, the participants should sign a confidentiality agreement as well as a release of information so that their identity and comments can be used for purposes of the study.[2]

Recently, internet focus group services have grown in popularity. In an internet focus group, the participants all log onto a web site and watch or read the presentation. They then discuss the issues or questions presented in a "chat room." Because of the format, probably no more than three issues or

[2]See Sample Focus Group Confidentiality Agreement, § 72.

questions should be presented. The facilitator observes the discussion and interjects when necessary. The data is collected after the study and interpreted the same as it would be with a live focus group.

The primary advantages of an internet focus group are cost, convenience, and speed. Internet focus groups can be set up within hours and a report sent to the attorney within just a few days for 1/3 to ½ of the cost of a live focus group. The principle disadvantage is the lack of visual feedback gathered while watching the participants deliberate. Whether a participant is being sincere or attentive is difficult to ascertain through their written feedback. Also, few attorneys could orchestrate an internet focus group without the assistance of a professional which may prevent its use in some low-speed collision cases.

§ 23 Identify "worst" juror—Mock Trials

As opposed to focus groups, mock trials[1] are typically used for testing an entire case rather than just specific issues or questions. Many of the primary objectives of a mock trial, however, are the same as a focus group. The attorney is typically interested in testing the effectiveness of certain themes, witnesses, demonstrative evidence, or arguments. These sorts of issues and questions are common to both focus groups and mock trials. Mock trials, however, are normally just more comprehensive than focus groups. Either tool can be extremely useful in identifying the traits and beliefs of the worst juror.

Mock trials are conducted a lot like focus groups, with some minor exceptions. First, the deliberations are normally guided by the facilitator through the use of a sample jury charge. This allows the participants to get to the relevant issues quickly rather than taking the time to discover them on their own. Second, usually the interaction between the presenter, the facilitator, and the participants is a little more formal than with a focus group. This is to try to re-create the decision-

---

[Section 23]

[1]For a more detailed discussion about mock trials, see Richard Waites, Courtroom Psychology and Courtroom Advocacy, § 6.07, (2003); National Jury Project, Jurywork; Systematic Techniques, chap. 11, (West 1999); V. Hale Starr & Mark McCormick, Jury Selection, chap. 7 (1993); Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 5, (West 1993).

making process that would be used in the context of a trial. Most of the rules as set out above in regards to the logistics, confidentiality, and setting of focus groups will apply equally to mock trials.

§ 24 Identify "worst" juror—Market research

Another way to identify the characteristics of the worst juror is to conduct market research[1] in the relevant venue. This typically takes the form of a random telephone survey where subjects are called and asked to participate in a survey or questionnaire. In order to obtain useful and reliable data, hundreds of people should be called. The survey results can be significantly influenced by how the questions are written and delivered. Therefore, counsel is usually forced to hire professionals to conduct the research. Because of the obvious expense involved with market research, this is not a method commonly employed in low speed collision cases.

§ 25 Determine question topics

The above methods for identifying the worst juror can also be valuable tools for determining what issues and topics are important to address with the venire. Mock trials and focus groups will often uncover many issues for inquiry that possibly the attorney had not considered. The opinions that make someone the worst juror are the same opinions that counsel will want to elicit from the venire during voir dire.

One of the best exercises for identifying what issues to discuss during voir dire is simply for the attorney to ask themselves, "What scares me?" and "If the jury were to find against my client, what would be the most likely reasons why?" By answering those questions as honestly as possible, counsel will quickly be able to zero in on what issues are important to discuss with the potential jurors. While this seems like a simple enough task, many attorneys will not devote enough consideration to this process or take the effort to be honest about the weaknesses in their case. Thoughtful consideration and

---

[Section 24]

[1]For a more detailed discussion about market research or community surveys, see Richard Waites, Courtroom Psychology and Courtroom Advocacy, § 6.04, (2003); National Jury Project, Jurywork; Systematic Techniques, chap. 10, (West 1999); Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 6, (West 1993).

absolute honesty is required for this exercise to be of benefit in preparing voir dire.

The attorney should focus on designing questions that will elicit the prospective jurors' beliefs and attitudes more than their life experiences. Studies have shown that jurors vote according to the value beliefs that they have carried with them into the courtroom.[1] Therefore, if a juror has been a plaintiff in a personal injury lawsuit before, they may not necessarily be a favorable juror for the plaintiff if their belief is that there are too many lawsuits and that most plaintiffs bring suit in an attempt to get rich. It is likely that this juror will, consciously or unconsciously, not separate himself from his belief system and will vote consistent with his beliefs, rather than with his experience.

It is important that counsel not attempt to address too many issues or subjects during their voir dire. It is best to limit inquiry to only about four to five *substantive* issues per hour of voir dire. This would not include the more administrative questions about knowledge of witnesses, counsel, etc. While there are normally an abundant number of available issues in low speed collision cases, counsel must resist the temptation to cover everything. It is more important to thoroughly address a few major issues with most or all of the potential jurors than it is to just touch on a large number of issues with a few select venire members.

§ 26 Create Juror Questionnaire

Another pre-trial tool for acquiring more information on potential jurors is the Juror Questionnaire[1]. Juror questionnaires are additional questions, beyond the simple qualifica-

---

[Section 25]

[1]"Psychologists have learned that attitudes that are closely tied to core values are the best predictors of behavior, because people are motivated to act in ways that are consistent with their values." Donald Vinson, Jury Persuasion: Psychological Strategies and Trial Techniques, 17 (1993).

[Section 26]

[1]For a more detailed discussion about drafting and employing juror questionnaires, see Richard Waites, Courtroom Psychology and Trial Advocacy, § 10.09[3], (2003); National Jury Project, Jurywork; Systematic Techniques, chap. 3 (West 1999); V. Hale Starr & Mark McCormick, Jury Selection, §§ 11.5 to 11.10 (1993); Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 8 (West 1993).

See § 66 for a sample Juror Questionnaire.

tion questions posed by the court, submitted to the potential jurors before trial. Obviously, the best time to submit these questions is weeks before trial so that the potential jurors can answer the questions, return the questionnaire to the court, and the court can then forward the answers to counsel with enough time left for a meaningful review.[2]

In order to have the questionnaire submitted, counsel normally will have to file a motion with the court and have the questionnaire approved.[3] The odds of the court approving the questionnaire as submitted are, obviously, better if opposing counsel agrees with the questions. In spite of the fact that juror questionnaires have been used for years, courts may not see the need for questionnaires in a seemingly straight-forward car wreck case. While not true, some courts may believe that the more simple the facts of the case are, the less imperative is the need for effective or in-depth voir dire. In reality, low speed collision cases possess more potential for influence due to juror bias than other cases where injury causation and the necessity of medical treatment are not central issues. It is important for counsel to demonstrate to the court the time-saving potential offered by a questionnaire.

It is important that the attorney draft the questionnaire such that it can be answered quickly and the answers have meaning. Therefore, employing methods such as forcing the potential juror to circle an answer, rather than including a blank, should reduce the number of unanswered questions. For qualitative questions, placing a numbered scale and/or requiring the potential juror to explain their answer is an effective method for ensuring that the response is useful.

While the best questionnaire would also probably include some questions directed at potential jurors' value beliefs, as opposed to merely their experiences, such questions will likely be looked at with greater scrutiny by opposing counsel and the court. Therefore, the typical juror questionnaire approved for use in a low speed collision case often has very few, if any, questions regarding potential jurors' value beliefs, but rather, only questions about experiences and general data. In spite of that fact, questionnaires can be very valuable tools for preparing for voir dire and can save counsel significant time by not

---

[2]See Sample Letter from Judge for Supplemental Juror Questionnaire, § 67 for a sample letter from the court to potential jurors.

[3]See Sample Motion for Supplemental Juror Questionnaire, § 68 for a sample motion requesting use of a supplemental juror questionnaire.

having to ask many of the standard or obligatory questions that take up so much valuable voir dire time.

§ 27 Evaluate juror qualifications

At some point before trial, it is important for counsel to evaluate the potential jurors' qualifications to ensure that every juror meets the qualifications necessary to serve in that jurisdiction. Assuming counsel receives the juror cards in advance of trial, it is important to take the time to ensure that all the potential jurors are proper members of the venire. While this is rarely an issue, if counsel elects not to make an objection or fails to do so in a timely manner based upon the jurisdiction's rules, any error may be waived.[1]

§ 28 Consider challenge to array

Another pre-trial administrative task is to ensure that the venire was selected in accordance with the law in the relevant jurisdiction. Again, while this is rarely an issue, if an objection is not brought before the court in a timely manner, any error may be waived.[1]

§ 29 Selecting targets—Identify negative jurors

Armed with the knowledge provided by the above tools, the attorney can now begin to make preliminary decisions about which jurors will likely be negative jurors. The first step in identifying unfavorable potential jurors is to combine the demographic data from the juror cards, the additional information in the juror questionnaires, and any ideological information gleaned from a mock trial or focus group. The second step is to apply that data to the set of attitudes and personality traits describing the "worst juror." If a prospective juror's demographic and social data indicate they may have many of the "worst juror's" attitudes and personality traits, then the juror will be a "target" during voir dire.

Every client and every case is different, therefore, the criteria

---

[Section 27]

[1]Shamburger v. Behrens, 418 N.W.2d 299 (S.D. Jan 13, 1988).

[Section 28]

[1]For a detailed discussion of the law regarding preserving error and making a timely jury challenge, see National Jury Project, "Jurywork; Systematic Techniques, § 5.06 (West 1999).

making up the negative juror will vary. Conventional thought, however, would suggest that teachers, military service members, engineers, CPAs, lawyers, doctors, and managers would probably be negative jurors.[1] Depending upon the parties involved and the facts of the case, however, the above-described jurors might be favorable to the plaintiff's case. The presumptive negative jurors will be those whom counsel will target for causal strikes during voir dire.

As explained above, pre-trial decisions regarding potentially negative jurors are merely presumptive opinions. No firm decisions about whether to strike a potential juror should be made until after voir dire. Voir dire is counsel's opportunity to explore the issues uncovered through the above pre-trial tools.

§ 30 Selecting targets—Identify negative jurors—Identify leaders

It is also very important for the attorney to try to identify potential leaders within the venire. Leaders are important, of course, because they have the ability to influence the opinions of others and/or to influence the process the jury goes through to reach its decision.

The information provided by the above tools will also assist the attorney in identifying potential leaders within the venire. Potential jurors who are likely to be leaders are often the following:

(a) professionals;
(b) managers;
(c) jurors with previous jury experience;
(d) leaders in social organizations;
(e) articulate, thoughtful, and calm communicators; and
(f) decisive, forceful, and confident communicators.

Leaders can be dangerous people to leave on the jury because, if they are against the plaintiff, they have the ability

---

[Section 29]

[1]People who have "authoritarian" personalities are often thought to be unfavorable to the plaintiff's case. They usually value personal responsibility highly, have a low tolerance for ambiguity and complexity, and a high amount of respect for the legal system and authority. National Jury Project, Jurywork: Systematic Techniques, § 18.07 (West 1999). As discussed in §§ 14 to 19, supra; these are some of the attitudes that are predictive of future juror behavior. Counsel must closely examine the facts of his case to determine whether an authoritarian juror would or would not be favorable.

to turn others against the plaintiff as well. Therefore, if counsel elects to keep a leader on the jury, they should be confident that the potential juror is favorable. Having a jury void of any leaders, however, can also be detrimental.[1] Some consultants advise that, while it may seem too risky to leave a leader on the jury about whom counsel is a little unsure, it is better than having a jury with poor leadership and weak people.[2]

If a leader is likely to be unfavorable, then counsel should focus on this individual as soon as possible during voir dire. If a leader is likely to be favorable, then counsel should confirm their presumption and inoculate the person as effectively as possible. In any event, if a potential juror is identified as a leader, the attorney should take the time to speak with the person in detail to verify counsel's preliminary conclusions from reviewing the pre-trial data.

§ 31 Motions

This section discusses some of the potential motions that may be useful in a low speed collision case. By no means does this section serve as a comprehensive listing of all possible pre-trial motions that could be brought regarding the voir dire process. Counsel may, for example, consider bringing a motion to question jurors individually or in small groups rather than to question the entire venire at once. The attorney may also request to shuffle the jurors or to ask for a different procedure when dealing with peremptory strikes. Finally, some motions will become necessary depending upon the rules of procedure in the relevant jurisdiction. For example, if counsel is normally not allowed to participate in voir dire, the attorney may want to bring a motion asking to be allowed to conduct some of the voir dire examination.

§ 32 Motions—To extend time

Low speed collision cases are frequently viewed by the bench as "simple" cases that warrant less time during voir dire. The growing trend is to limit counsel to 30 or 45 minutes of time

---

[Section 30]

[1]Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, § 16.61 (West 1993).

[2]National Jury Project, Jurywork: Systematic Techniques, 18-42 (West 1999).

each to conduct voir dire. Courts that impose such arbitrary and unreasonable time limits operate under the erroneous notion that if the case is factually simple, there must be less to cover during voir dire. Quite the contrary is true.

There are few type of cases where juror bias is stronger than in low speed collision cases. Studies have shown that lay persons have an unrealistic view of how much vehicle property damage is required before a person can be injured in a collision.[1] Most people believe that if the vehicles are not significantly damaged, then no one should be injured.[2] Furthermore, the injuries sustained in such collisions are usually not demonstrable through films or scans. Therefore, potential jurors are often inclined to use the absence of demonstrable injury to confirm their belief that no one could have been injured in such a minor collision. These and other biases covered supra in §§ 5 to 19 all make voir dire in low speed collision cases difficult and vitally important.

The chances of counsel obtaining adequate time from the court to conduct voir dire will be greater if the attorney can articulate why more time is needed. Submitting a written Motion to Extend Time may aid the court by providing some authority and ensuring counsel that their issue is properly preserved for appeal.[3] When arguing the motion, counsel should be prepared to explain to the court the various issues present in the case and why it is important that they be discussed with the venire. Simply informing the court that it would be beneficial to know the juror's thoughts and feelings on certain issues is not sufficient. The attorney must be able to demonstrate that strong feelings on these issues would prevent a juror from being able to follow the court's instructions or to weigh the evidence impartially.

§ 33 Motions—To request court inquiry

Depending upon the issues present in the case, counsel may

[Section 32]

[1]J.B. Aubrey, Laypersons' knowledge about the sequelae of minor head injury and whiplash, J. Neurol. Neurosurg. Psychiatry, July 1989 at 842-6 (study that indicated laypersons believed highly exaggerated speeds were necessary to produce even the most common physical symptoms reported in motor vehicle collisions).

[2]J.B. Aubrey, Laypersons' knowledge about the sequelae of minor head injury and whiplash, J. Neurol. Neurosurg. Psychiatry, July 1989 at 842-6.

[3]See § 69 for a sample Motion to Extend Time.

also want to request that the court present certain questions to the jury. The issues best addressed by the court are those issues where inquiry by a party might prejudice the venire against that party simply because they asked the question. For example, use of alcohol or drugs causing the collision could be an issue better presented by the court. Fortunately, not many issues in low speed collision cases require court inquiry.

It would not be effective to have the court present counsel's substantive issues to the venire. Firstly, counsel loses the ability to control how the issue is presented by having the court pose the question. The court does not want to elicit responses that could support a causal challenge because, if too many people are struck, the court will have to bring in another panel. The court, therefore, will likely pose the question in a manner that discourages widespread response. Secondly, as discussed above, the greater the perceived power differential between the interviewer (the court) and the interviewee (the venire person), the more likely the venire person's response will simply be whatever they sense the court wants to hear.[1] Such responses will be of little use when determining whether a person is truly favorable or not.

§ 34 Motions—To challenge selection process

It was suggested in Consider Challenge to the Array, § 28, *supra*, that counsel review the method employed to select the venire and consider a challenge[1] to the array. If the attorney discovered that the selection was not in compliance with the relevant jurisdiction's law, then a motion should be submitted to the court explaining the problem and requesting another venire. Depending upon the jurisdiction, if counsel elects not to

---

[Section 33]

[1]See sections pertaining to the status of the interviewer, §§ 6 to 9, *supra*.

[Section 34]

[1]For a more detailed discussion of challenging the jury selection process, see National Jury Project, Jurywork; Systematic Techniques, chap. 5 & 6 (West 1999); Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel, 76 A.L.R.2d 678.

bring the matter to the court's attention or does not do so in a timely manner, any error is waived.[2]

§ 35 Motions—To request larger venire

If counsel believes that the number and/or significance of the issues present in the case are extraordinary, they may request that the court sit a larger venire than normal. Again, this is usually not necessary in most low speed collision cases. If, however, the attorney believes the case warrants, they will have to articulate reasons why the case deserves special consideration. Counsel should file a written motion to ensure the court is provided with the relevant authority, all counsel's arguments are in the record, and the issue is properly preserved for appeal.

§ 36 Motions—To transfer venue

Depending upon the issues and parties involved in a case, it may be appropriate to transfer venue.[1] This typically is not a concern for most low speed collision cases. If, however, a case warrants, counsel should file a written motion detailing the reasons why transferring venue is necessary. Some of the tools discussed above for identifying the worst juror, such as focus groups and market research, can be used as a basis for the motion.

§ 37 Motions—To request or exclude inquiry

If counsel desires to question the venire on a subject typically forbidden, or if they want to prevent the other side from doing so, they should file a written motion with the court. The attorney can use a Motion in Limine to seek the same ruling. However, in many jurisdictions, Motions in Limine do not preserve error. Therefore, it is incumbent upon the attorney to make an actual motion to the court specifically detailing what

---

[2]For a detailed discussion of the law regarding preserving error and making a timely jury challenge, see National Jury Project, Jurywork; Systematic Techniques, § 5.06 (West 1999).

[Section 36]

[1]For a more detailed discussion regarding the process of preparing for and making an effective Motion to Transfer Venue, see National Jury Project, Jurywork; Systematic Techniques, chap. 7 (West 1999); Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, 1995 app. 7-65.

they want to ask or what they don't want the other attorney to ask.

§ 38 Motions—To request shuffle

If there are substantially more presumptively favorable jurors located in the rear of the venire, thereby making it less likely they would be on the jury, counsel may consider making a motion to shuffle the panel.[1] Depending upon the law in the relevant jurisdiction, this must be done before the panel is sworn or answers juror questionnaires specific to the case.[2]

IV. UNCOVERING JUROR BIAS

§ 39 Building rapport

While the overarching goal for voir dire in a low speed collision case is to strike unfavorable jurors, that goal cannot be accomplished without first building a rapport with the venire. It is critical for counsel to put the venire members at ease so that they will feel more comfortable speaking and willingly admit to their biases.

Just like there are countless ways to socialize with others at a party, there are just as many ways to build rapport with a venire. The method counsel selects should be consistent with their personality and demeanor. If the venire senses that the attorney is making up something about themselves or their client, they will likely return the favor with their own set of untruths.

Building rapport is not a distinct and separate phase of the voir dire examination. It is simply a goal that must be achieved early on in the process and can be done while introducing the case or the client. For example:

> Good morning ladies and gentlemen. I am proud to stand here with *[client's name]* and have twelve of you decide this very important case. In this part of the trial, we need to find out your feelings, impressions or opinions about the issues in this case. I want you to know that there are no right or wrong answers. We

---

[Section 38]

[1]Tex. R. Civ. Proc. 223 (2004).

[2]Carr v. Smith, 22 S.W.3d 128 (Tex. App. Fort Worth 2000).

> will be honest with you and we ask that you be as honest as you can with us.[1]

The above is a good introduction in that it makes the client the focus, is quick, emphasizes the importance of the matter, and resolves the jurors' concerns that they will say something wrong.

One effective way to build rapport is to begin with a question that is not related to the case but that virtually everyone will be able to answer. For example:

> By a show of hands, and I am going to raise my hand as well, how many of us hate speaking in public? Me too, and I do this for a living. I'm always afraid that I will say something stupid or be wrong about something. But here is the good news about voir dire; there are no wrong answers. . . .
>
> By a show of hands, and I am going to raise my hand as well, how many of us have ever seen those day-time talk shows like Sally Jesse or Springer? Well, that is kind of like what voir dire is supposed to look like. We don't throw chairs at each other or scream, but everyone is supposed to talk and tell us how they feel. So, if you have thoughts or feelings about any of the things we talk about, please raise your hand so that we can hear from you. The only way this process works is if you all speak up and participate. . . .

By starting with a question that virtually everyone can answer, counsel has "broken the ice" and caused most, if not all, of the potential jurors to become involved and raise their hand. After the potential juror has raised their hand and taken the risk of being called upon and seen that nothing bad happens, they will be more likely to participate again later during the substantive voir dire.

The attorney's body language and delivery of the question is just as, if not more, important than the actual question itself. Counsel should smile, use open body language, and present the question in the least threatening manner possible. By responding to their own question, counsel also implicitly demonstrates to the venire that an affirmative answer to the question is acceptable and encouraged. It also has the effect of reducing the power differential discussed above that can inhibit participation.

[Section 39]

[1]These opening comments are suggested by Robert Hirschhorn of Cathy Bennettt & Associates in his presentation entitled, How to Conduct a Meaningful and Effective 30-minute Voir Dire to the Texas Trial Lawyers Association at the 2003 Advanced Personal Injury Course.

§ 40 Establishing credibility

Another important objective during the initial moments of voir dire is to establish credibility with the venire. Establishing credibility is not a separate and distinct phase of voir dire, but rather usually blends in nicely with counsel's efforts to build rapport.[1] Again, there are innumerable ways to establish credibility with the venire and no one way is necessarily superior to another.

It is probably easier to discuss what not to do as opposed to go through all the various effective means of establishing credibility. In a general sense, counsel should simply use good manners. For example, if the attorney briefly explains the voir dire process to the jury, they should not do so in a way that seems condescending. The attorney should not seem conceited, all-knowing, or flamboyant. Possibly most important, the attorney should not seem as though they are selling anything to the venire. People, in general, do not trust those who try to sell them something. Therefore, counsel should resist the temptation to jump in and begin persuading the venire of their case.

One effective method to establish credibility is for counsel to share something about themselves with the venire. This can be done in conjunction with building rapport. For example:

> I don't know if you can tell or not, but I am very nervous. I am no different than most people—I hate to speak in public. But, even more than that, I am particularly nervous today because of the importance of this case. You see, today is *[client's]* only chance to receive justice. He has waited years for this day and I am scared that I might make a mistake. . . .

Or, counsel can establish credibility while explaining the voir dire process. For example:

> Everyone is biased in some way. For example, I hate boiled cabbage—can't stand it. I grew up in a pretty strict household and my mother always made me eat my boiled cabbage. I would sit there at the table after everyone else had already eaten and left, choking it down. I still can't stand the smell of it today. So, if this case were about boiled cabbage, there is no way I could

---

[Section 40]

[1]"Communication psychologists indicate that two critical variables underlying the persuasiveness of a message sender are the credibility and likability of the speaker." Credibility, in turn, has two components to it as well: competence and trustworthiness. Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 36 to 37 (1993).

serve because of my strong feelings about cabbage. I would have the obligation to make sure I did not serve on that jury.

Whatever method counsel chooses, the most important thing is to be honest. If the venire senses that a story or fact the attorney relates about themselves or their client is false, they will closely scrutinize everything else the attorney says for the remainder of trial. Also, do not try to impress, do not try to sell, do not try to be too much of a comedian. The keys to building credibility is to be human, honest, prepared, and humble.

§ 41 Disclosing facts

At some point during the initial part of the voir dire, counsel should also briefly acquaint the venire with some of the more important facts in the case. This task can be accomplished in conjunction with building rapport and establishing credibility. In other words, discussing the facts of the case does not have to seem like an independent phase of the voir dire and should be done in a manner that continues to build rapport and establish credibility.

How many and what facts to include must be determined on a case-by-case basis, however, counsel should be mindful not to bore the jury with a lengthy monolog. The venire will be curious about what the case involves so the attorney should give enough information so that the venire will understand what the case is about. Counsel should keep in mind, however, that today's television saturated jury pool has a very short attention span and is fairly attune as to what voir dire is for from watching attorney actors do it on the television and in movies.

The attorney should also be careful not to present a one-sided version of the case or appear to be selling the case. If the attorney omits significant facts from the disclosure, they can rest assured opposing counsel will take the opportunity to bring such omission to the venire's attention. The discussion about the facts of the case should enhance and build on the rapport and credibility already established. If counsel appears to be selling the case or leaves out important pieces of the story, they may destroy whatever rapport or credibility they may have earned with the venire.

One example of opening remarks in an auto collision case is the following:

Good morning ladies and gentlemen. As the judge told you, my name is *[attorney's name]* and I am proud to be here representing *[client's name]*. I would like to begin by explaining a little bit

about how we all got here. On *[date of collision]*, *[defendant's name]* was driving *[direction]* on *[street]* in *[city]* when he suddenly slammed his car into the rear of *[client's name]*'s car. *[Client's name]*'s neck and back were hurt so she went to the doctor. She had never been in a car wreck before and didn't know how the process worked, so she came to me for help. *[Client's name]* continued to treat for her injuries and I contacted the defendant, *[Defendant's name]* and when things didn't go well, we were forced to file this lawsuit. That's how *[Defense counsel]* became involved. *[Defense counsel]* is an attorney and he represents *[Defendant's name]*. They answered the lawsuit, requested a jury, and that is how you all got here.[1]

The above example is a good way to educate the panel about why they are there, who brought them there (the defense), the fact that the plaintiff has not been involved in a collision before, and why the plaintiff hired a lawyer. It also correctly focuses the description of the collision on the defendant's actions rather than the plaintiff's. Finally, it describes the lawsuit as an unfortunate result of things not "going well," essentially forcing plaintiff to bring suit. This above is a fairly aggressive example of educating the panel during counsel's opening remarks and may not be permissible depending upon the court's local rules or order *in limine*. While this approach does not focus much on building rapport, it is short enough that counsel can begin to build rapport after the remarks and the jury will not be bored.

§ 42 First questioning topic

There are numerous acceptable methods for segueing into the substantive questioning portion of the voir dire. The following are just three suggested ways in which to introduce a topic to the venire:

(1) *Question in the alternative*

A question in the alternative is when counsel presents both sides of the issue to the venire or individual member and asks them with which side they identify. For example:

Let's talk for a moment about chiropractors. Some people believe that chiropractors can cure anything from a pulled back to

---

[Section 41]

[1]This example is based on a presentation by Janice Kim, a practicing attorney in Hawaii, to the Association of Trial Lawyers of America.

cancer. Others believe that chiropractic medicine is really not a legitimate type of medicine at all. Which best describes you?

This method effectively controls the issue and prevents a juror from embarking on a nonresponsive, 10-minute diatribe in response to an open-ended question. For example, if the above question was instead phrased, "How do you feel about chiropractors?" the prospective juror may decide to tell the court about his uncle who was married to a chiropractor and she cheated on him, so they got divorced which caused a major upheaval in the family. While the juror is recounting his story, counsel's precious voir dire minutes are wasting away.

This method of questioning also allows counsel to define the two ends of the spectrum which may make it easier for a juror to adopt a more extreme position. For example, the object of the above question is to identify jurors who believe chiropractors are quacks. Counsel, therefore, will want to phrase the question in such a way that a juror who does not believe in chiropractic medicine will feel comfortable admitting so.

The first alternative should be the opposite bias of what counsel is trying target and should be phrased using extreme and unreasonable terms. This can be counter-intuitive. For example, for years, jury consultants have instructed plaintiffs' lawyers not to use the terms *"give money"* or *"award money"* because that implies the plaintiff should receive something for nothing. Instead, plaintiffs' counsel should talk about the plaintiff being *"reimbursed"* or *"compensated"* for their *"losses."* Similarly, consultants have advised not to use terms like *"pain and suffering"* or *"soft tissue"* because research has shown such terms convey the message that the plaintiff's injuries are minor. Instead, plaintiffs' attorneys have been advised to use words like *"pain," "human damages"* or *"connective tissue injuries."*

When asking a potentially unfavorable juror questions, however, the attorney should use those terms if they will increase the likelihood the target juror will admit to bias. In the examples given above about noneconomic damages, the terms *"give money"* and *"intangible"* are emphasized to illustrate this point. Normally, plaintiffs' counsel would never use such terms in describing the plaintiff's case or losses suffered. But, when delivering the question to the potentially unfavorable juror, counsel should not only use those terms, but should emphasize them. This will increase the chances that the juror will admit no one should be *given money* for something

intangible like pain and suffering or mental anguish. Again, this is not done to trick or trap the juror, but rather, simply to make it easy for them to admit to a bias if they are inclined to lean that way.

The second alternative should describe the targeted bias and should be phrased in terms that are strong, but not too extreme. The attorneys tempo, inflection, and nonverbal cues should subtly draw the jurors' focus on the latter alternative, rather than the former. After the juror adopts the second alternative, counsel can gently nudge the juror more to the extreme in order to establish the basis for a causal challenge. It is important to note that the objective is not to trick an impartial juror into confessing to bias they do not have, but rather, to make it as easy as possible for a biased juror to admit to having such strong feelings about an issue that they would be unable to fairly judge the case.

Questions posed in the alternative like above can be lengthy and potentially confusing, therefore, it is very important for counsel to thoroughly practice their delivery so that it is easy for the target juror to understand the question and admit any bias. Similarly, the attorney must practice delivering the question so that they can ask it from memory rather than reading it. During voir dire, the attorney must be focused on the venire members' verbal and nonverbal cues and not distracted by concerns about the wording or delivery of the questions.

(2) *Show them yours first*

The infamous Gerry Spence has advised attorneys conducting voir dire to "show them yours and they will show you theirs." In other words, if counsel wants the jury to open up with their honest thoughts and feelings, counsel must do the same. For example:

> One of my biggest fears in this case is that *[client's name]* was not able to go to the doctor right away after the collision. I am scared that you will hold that against him and think that he must not have been injured if he did not go to the doctor immediately. What do you think about my fear?
>
> OR
>
> You know, when I first spoke to *[client's name]* he told me about how he was thrown around in his vehicle during this wreck and how he was really banged up afterwards. And then he told me when he took his car to the body shop, they told him the frame was bent and his bumper absorbers were compacted. So, I grabbed my camera and we went out to see his car and, I have to be honest with you, I could hardly see any damage. My first reac-

> tion after seeing his car, and I can tell him this now, was to question what he was telling me. Now that I know more about the case, I know he was telling me the truth, but at first, I questioned him. I am scared folks. I am so scared that you will have that same reaction as I did. What do you think about that?

One of the main advantages of this method is that it builds credibility, humanizes the attorney, and establishes rapport, all while introducing the topic. How the question is worded and delivered will determine how comfortable an unfavorable juror will be in coming forward.

(3) *How many of us agree?*

Another way to introduce a subject is to simply ask about the targeted bias directly. For example, "*How many of us agree* that there are too many lawsuits?" This immediately defines the issue, is not confusing, and does not take up much time. It also is worded in a way that suggests many people feel this way and encourages a positive response. "How many of us agree" is more encouraging than "Does anyone think." Counsel should smile and raise his hand as well while asking the question to further encourage unfavorable jurors to adopt the statement.

Whether asking simple, open ended questions or questions in the alternative, counsel should take care in selecting their words. When deciding how to word questions, the attorney should remain focused on the primary objective: identify and strike unfavorable jurors. The questions, therefore, should be worded in a manner that encourages biased jurors to admit to their lack of impartiality. As explained above, most people have difficulty merely speaking in front of others, let alone admitting they are biased. Recognizing this, the attorney should make it as easy as possible for them to concede that they are better suited for a different case.

(4) *Select the topic*

Now that the attorney has selected a method for introducing the topic to the venire, he must determine which topic to use. What topic counsel chooses to start the questioning with can depend upon a lot of different factors. For example, if the judge has conducted a relatively thorough initial voir dire, counsel may want to quickly tie up some loose ends left from those responses. Or, if the court conducted a very short or no voir dire, counsel may want to warm the venire up a little by beginning with a simple, straight-forward line of questioning such

as whether any of the venire is familiar with the parties or counsel. In any event, the attorney must keep in mind the court's time limitations and not spend too much time on the administrative questions. Hopefully, the attorney will have handled most of those questions in a pre-trial questionnaire anyway.

One of the more effective ways to begin substantive questioning is to start with a topic on which most or all of the venire will have an opinion. As discussed above, where the attorney determined what topics to inquire on, the topic should be one of the attorney's fears in the case. Will the jury think that this is just another frivolous lawsuit like those they read about in the newspapers? Will the jury think that the plaintiff is just another greedy person trying to make an opportunity out of this collision? Will the jury think that because there is not much property damage to the vehicles involved that no one could be injured? These are all issues that appear in most low speed collision cases and, if presented right, would elicit a response from most people.

It is probably more effective to select a topic that inquires about a belief or attitude, rather than an experience. Research shows that jurors vote according to their value beliefs more than their life experiences.[1] Therefore, counsel cannot assume that just because a prospective juror has also been injured in a low speed collision before that they will be more sympathetic or generous toward the plaintiff. If the juror believes there are too many high verdicts or frivolous lawsuits, this belief system will outweigh the juror's previous experience. The attorney would learn more about this juror by simply asking the juror how they feel about awarding damages for pain and suffering or whether they believe "tort reform" measure like damage caps are a good idea. The set of beliefs the juror carries into the room should be what the attorney is attempting to learn as opposed to all of the juror's life experiences.

Counsel can present the question to the group as a whole and then go person to person to examine the basis for the responses. Or, the attorney can present the question to an individual juror, get the response, and then offer the opportunity

---

[Section 42]

[1]Research has shown that attitudes, more than experiences, are the best predictors of future behavior. Donald Vinson, Jury Persuasion: Psychological Strategies and Trial Techniques, 17 (1993).

to others to agree or disagree. If counsel decides to pose the question to an individual, they should pick someone they have identified before trial as an unfavorable juror and a leader. It is probably best, however, to make it appear to the venire as though the attorney just selected the person from the list randomly at that moment.

§ 43 Flushing out

Regardless of whether the attorney began with a question to the entire venire or an individual member, once one or more members admit to having adverse feelings on the issue, the attorney must flush those feelings out, one member at a time.

The best way to do this is to ask open ended questions and then let the juror speak. This is counsel's opportunity to learn more about the venire member and to confirm or dispel the presumptive impressions gathered pre-trial from the demographic and social data in the juror cards or questionnaires. The attorney should not make the mistake of attacking every potentially unfavorable juror, or inoculating every potentially favorable juror, without first learning more about them.

It is in the plaintiff attorney's best interest to begin individual questioning with a juror who will likely be unfavorable and a leader, as determined from counsel's pre-trial research. This juror may be the most likely to adopt an extreme position on the issue. The more extreme the position the juror takes, the easier it will be for counsel to loop to other jurors (see infra) and obtain similar opinions.

If, during questioning, the juror discloses that they have strong thoughts or feelings adverse to the plaintiff's case, the attorney must prepare to establish the basis for a causal challenge. This can still be done with open ended questions. Counsel should attempt to gently nudge the juror further and further toward an extreme position on the issue.

For example, if the juror confessed that they did not think non-economic damages were warranted in most, if not all, cases, the attorney might explore that belief:

Q. Why do you feel that way Mr. Jones?

A. I think people are given way too much money these days in the courts. Even if it is something small, some jury will give them millions. Plus, I don't know how you are supposed to value something like emotional distress anyway. I'd be just *guessing*. What good will it do anyway. If they

have pain, it *ain't going to go away just because they get some money*. We all have some pain in our lives and no one is *giving us any money*. If you can show me a bill from a doctor, fine, but you should not be able to get money for that other stuff.

[The attorney must be careful to stay on task. There are a lot of issues brought up by the juror's response, but counsel should stay focused on the original question posed about noneconomic damages. The attorney should make a note, however, to come back to this juror when, and if, the attorney intends to inquire about lawsuit abuse.]

Q. That's right. You feel like it is just too hard to try to *guess* what something like that is worth?

[If possible, the attorney should try to use the juror's words in the follow up questions.]

A. Yes, Sir. I would have no idea.

Q. Do you think juries should *guess* about things like that?

A. No, Sir. We are supposed to just look at the evidence and a person can say they have pain, but how am I gonna know.

Q. So you would be *guessing* about whether they even had pain and then you'd be *guessing* again about how much it is worth.

A. That's right, and I just don't think that is right in a court of law.

Q. And we all have pain in our lives of some sort, don't we?

A. That's right.

Q. And no one is *giving us any money*.

A. No, Sir.

Q. And even if we were to give them money, it *ain't going to go away just because they get some money*.

A. That's right. That's not going to do anyone any good.

[At this point, counsel may decide to move toward tying the juror down on his opinion that noneconomic damages are never warranted.[1] Or, because the juror hasn't stated such a solid opinion yet, counsel may choose to learn more about what the juror's opinion really is.]

Q. Can you think of any circumstances where we should give

[Section 43]

[1]See § 44.

money to someone for pain and suffering or do you feel like, because it is just too hard to value, you just could never see yourself giving money to someone for something intangible like emotional distress?

[This question will tell counsel how far they will be able nudge the juror on this topic. If the juror replies that no one should ever be awarded any money for pain and suffering no matter what the circumstances are, then the juror has committed to a radical position and counsel can either: (1) lock them in for a causal challenge immediately, or (2) loop to others first, and come back later to lock him in for a challenge. If, however, the juror takes a less radical position, then counsel must continue to explore.]

A. Well, I suppose there might be a case out there where it would be appropriate, but not very often.

[Counsel has a decision to make at this point. If the juror was still an unknown and potentially unbiased, the attorney would continue to pursue open-ended questions to learn more. If, as with this juror, however, it is clear he is unfavorable, counsel will want to try to control the juror a little more and ask more direct questions.]

Q. I think I understand. So, maybe if a person was burned all over their body in a wreck or something like that you might be able to consider pain and suffering, but not if it was just a typical car wreck.

A. Yes, that's right.

At this point, counsel has a pretty good idea of how the juror feels. If, as in this example, the juror discloses a lot of their thoughts in their initial response, then fewer open-ended follow up questions are needed. If, however, the juror was less forthcoming initially, then counsel may need to ask more follow-up questions to learn more about the juror's feelings.

How much time counsel spends on flushing out jurors' feelings not only depends upon the juror's responses, but also on how much time the attorney has for their voir dire. If the attorney does not have much time, they may move more quickly toward asking leading questions to tie the juror down.

There are no magic questions, nor is there one "right" way to extract a juror's true beliefs. Flushing out jurors' thoughts and feelings is not a lot different than making conversation at a party—just ask them about themselves. Some general guidelines, however, are the following:

(1) Always remember the goal: identify and strike unfavor-

able jurors. Therefore, the more the jurors are discussing the worst parts of the plaintiff's case, the better the attorney is doing. It is always tempting to try to persuade. It is always difficult to listen to someone say things harmful to your case in front of those who will eventually be the fact-finders. Counsel must resist these urges, however, and relinquish control of the discussion to the venire.

(2) Always make sure counsel's questions, body language and delivery encourages an open exchange, including opinions that are clearly against the plaintiff's interests. Open-ended questions are best.

(3) Really care what the responses are. Counsel's state of mind must be such that they sincerely and genuinely want to learn more about the people in the venire. If the venire senses that the attorney is not listening or doesn't care what they say, they will not talk. During this phase of the voir dire, the attorney must listen and allow the jurors to talk.

(4) Don't react to juror responses. Counsel should not give any indication to the venire that the attorney is looking for a certain response. The attorney should thank jurors who reveal opinions adverse to plaintiff's interests, but not to the extent that it is obvious counsel is pleased with the fact that he has laid the foundation for a causal challenge.

(5) Be able to justify the question. The attorney should know where they are going with a line of questioning so that if, and when, opposing counsel objects, the attorney can respond quickly with the basis of the question. Counsel should always be mindful that only biases that could potentially affect jurors' impartiality are proper subjects for questioning.

§ 44 Tied Down

Now that the attorney has sufficiently flushed out the target juror's opinion, they should make sure the juror is firmly tied down on the issue. There are two times when this can be accomplished: (1) immediately once the juror's opinion has been fully developed, or (2) after counsel has used the juror's opinion to loop to other members and then has returned to the original juror. Either way, the attorney must firmly lock the juror in on their opinion before moving on to another subject or

approaching the bench to establish the basis for a causal challenge.

Counsel should ask more directed, leading questions when tying a juror down to their opinion. This is very different then when the attorney was attempting to flush out the juror's opinions. At this time in the voir dire, the attorney should take more control and limit the juror's ability to back off of their previously stated position.

It is important for counsel to be familiar with the law in their jurisdiction regarding what is required for a causal challenge based on juror bias. Usually, being biased is not enough. Most jurisdictions require counsel demonstrate that the juror is so biased that they cannot fairly weigh the evidence or follow the court's instructions.

There are a number of sample questions or techniques on how to tie the juror down to his opinion. Some examples are the following:

Q. It sounds like you have felt this way for a long time.

A. Yes, I have.

Q. Today is not the first time you have thought about this.

A. No, definitely not.

Q. It is fair to say that you feel strongly that *[opinion]*.

A. Yes.

Q. You would agree that because of your strong feelings about *[topic]*, I'm starting out a little behind in your mind.

A. That is probably true, yes.

Q. It sounds like *[experience they described]* was a pretty *[major/important/devastating]* event in your life.

A. It was.

Q. It is probably something you think about fairly often.

A. Yes.

Q. It is fair to say that because of that experience, you believe strongly that *[opinion]*.

A. Yes.

Q. You would agree that because of your strong beliefs about *[topic]*, you would make me work a little harder in this case than you would the defense.

A. That is probably true, yes.

Q. It sounds like because of your job, you deal with *[topic]* on

a daily basis.

A. That's correct.

Q. So, if you were not here, you would be at work dealing with *[topic]*.

A. True.

Q. And you have been doing this for *[number]* years.

A. That's right.

Q. And because of your tremendous experience in *[field]*, you believe strongly that *[opinion]*.

A. Yes.

Q. And I or someone else could stand up here and say otherwise all day, but you would not believe it, would you.

A. No.

Q. So, regardless of the facts, law, or instructions, you would not be able to just forget what you have learned over the last *[number]* of years doing *[job]* and believe someone who comes in here and says your wrong.

A. No.

Q. It sounds like because of your *[prior jury experience in a similar case][job]* you have some experience with *[topic]*.

A. That's right.

Q. You know, when I was a boy, my father would tell me to go in the corner and do *not* think about a red-faced monkey. Of course, I would go in the corner and all I could think about was a red-faced money. The harder I would try to think of something else, the more I would think about the red-faced monkey. Isn't it fair to say that because of your experience *[in the other case][on your job]*, even though you may try to forget about it, you will not be able to.

A. That's probably true.

Q. And that, just like me with my Dad, the more I tell you not to think about it, the more you probably will.

A. True.[1]

As noted above, counsel's success or failure in obtaining af-

---

[Section 44]

[1]The above example was an example used by Robert Swafford in a presentation given to the Texas Trial Lawyer's Association at their Trial Advocacy College in the Summer of 2003. The phenomenon he describes has

firmative responses to these questions largely depends on the way the questions are delivered. Counsel must present the questions in the least threatening manner possible. The juror should not feel as though they are being cross-examined or pressured to respond a certain way. Because of the importance of the presentation, the attorney should practice their "tie down" questions so that they are able to deliver them effectively whenever the opportunity presents itself.

If a juror seems extremely cooperative or anxious to get struck and counsel is confident the juror will agree, the following questions may be helpful:

Q. There are plenty of trials going on in this courthouse every day. You would agree with me that, because of your strong feelings about *[topic]*, that you would be better suited to serve on a jury in a different case some other time.

A. I think that is true.

Q. Would you like me to ask the judge to release you from serving on this jury?

A. Yes, that would be fine.

Once counsel gets the juror to agree to the basis for the causal challenge, it is important to thank the juror for their candor. The attorney may even want to take the opportunity to explain how important honesty is to the voir dire process. If counsel can eliminate any perceived stigma the potential jurors have about being struck for bias, it may increase the jurors' willingness to speak and be honest. For example:

> Thank you, Mr. Smith, for your candor. Honest responses like that are what the entire system depends on. We have all heard of our civic duty to serve on the jury. Well, there is an equally important duty that is not talked about as much and that is the duty *not* to serve. So, if a person knows they may not be the best juror for a particular case, it is their *duty* to make sure to speak up and let everyone know.

§ 45 Looping

Once a juror's opinion has been fully developed, counsel should loop to other jurors. Looping is the process of taking one juror's opinion and offering it to other jurors. For example:

Q. So, it is fair to say that regardless of the facts, law or

---

been noted in psychological studies for years. See, Wegner & Erber, The Hyperaccessibility of Suppressed Thoughts, 63 J. Personality & Soc. Psychol. 903 (1992).

instructions, you could not give money to someone for something intangible like pain and suffering or mental anguish.

A. That's correct.

[Counsel has locked the original juror in to their opinion and has established the basis for a causal challenge. Now, the attorney should loop to other jurors.]

Q. Thank you, Mr. Smith. *How many of us agree* with Mr. Smith, that we could not give *money* to someone for something *intangible* like pain and suffering or mental anguish?

In this example, the attorney is opening the question up to the entire venire. Another option is to just present the question to the next juror in line or the next juror who counsel presumptively identified as an unfavorable leader from the demographic and social data on the juror cards or questionnaire. Regardless of the technique used, the key is to present the question in a way that encourages an affirmative response. Therefore, the attorney should say "How many of us agree" while raising his own hand instead of simply reading from his notes asking, "Who else thinks. . . ." Also, as explained in First Questioning Topic, § 42 above, the attorney should use words such as "give money" and "intangible" to increase the odds of getting an affirmative response.

Looping may be done before or after the original juror has been tied down to his opinion. The important thing is that the counsel attempt to get the juror to firmly subscribe to as radical position as possible without backing down. If the original juror adopts a radical position on the issue, it makes it easier for the other jurors to do the same.[1]

§ 46 Opening topic up to positive jurors

Once all the unfavorable jurors are identified, their opinions flushed out, and their position tied down, counsel may want to elicit the opinions of those jurors who either did not respond to the question or responded with an answer that was favorable to the plaintiff's case. This should only be done, however, if counsel is confident that there is enough time to get to all the issues and eliminate all the unfavorable jurors. For example:

[Section 45]

[1]See § 9 *supra*, discussing group influence.

Q. So, it is fair to say that regardless of the facts, law or instructions, you could not give money to someone for something intangible like pain and suffering or mental anguish.

A. That's correct.

[Counsel has locked the last unfavorable juror in to their opinion and has established the basis for a causal challenge. Now, the attorney can loop to potentially favorable jurors.]

Q. Thank you, Mr. Brown. Ms. Jones, I noticed that you did not raise your hand when I asked for folks who agreed with Mr. Smith. Do you believe, Ma'am, that there are circumstances when a person who has suffered pain should be compensated?

OR

Q. Thank you, Mr. Brown. Ms. Jones, you heard Mr. Brown say that he could not compensate someone who has suffered pain. What do you think about that?

OR

Q. Thank you, Mr. Brown. Ms. Jones, I have not heard from you yet. Let me go back to my original question. Some people could reimburse another for lost wages and medical expenses but just could not compensate them for pain and suffering mental anguish. Other people could reimburse another for all their losses, whether it be for lost wages, medical expenses, pain and suffering, or mental anguish. Which best describes you?

There are some benefits to offering the topic to favorable jurors. Firstly, it may offset a little of the group influence effect where the favorable jurors, after hearing from all the unfavorable jurors, begin to perceive that the norm is what the unfavorable jurors believe. Secondly, it gives counsel the chance to conduct jury deliberations during voir dire. This exercise can give the attorney a preview of what issues will be viewed by the jury as important as well as the opportunity to identify the leaders from the followers. Thirdly, it can be a powerful way to educate and persuade the panel on the plaintiff's side of the issues. Having a venire member advocate plaintiff's case is much more effective than the lawyer doing so themselves.

One of the downsides of this strategy is that counsel is spending valuable voir dire time while not progressing toward the primary objective: to identify and strike unfavorable jurors. In today's jury pool, there are usually many potentially unfavor-

able jurors who have been exposed to lawsuit abuse propaganda for years. Counsel does well nowadays if they have enough time to speak to just the unfavorable jurors.

Another risk, of course, of offering the topic to the favorable jurors is that counsel will expose favorable jurors to the opposition. While this is certainly a risk, the attorney should assume their opponent is competent enough to identify most of the plaintiff's favorable jurors anyway. If counsel does uncover a favorable juror during voir dire, it is important that the juror is inoculated before the defense's voir dire.

Inoculating a favorable juror is simply the reverse of tying down an unfavorable juror in preparation for a causal challenge. The attorney should employ the use of direct and leading questions and take more control over the discussion. For example:

Q. Thank you, Mr. Brown. Ms. Jones, you heard Mr. Brown say that he could not compensate someone who has suffered pain. What do you think about that?

A. I disagree. I believe that if someone has been caused pain by another, then that person should be compensated for that pain. If you ever have had horrible pain before, like I have, you know there is nothing worse. And, even though you can't prove you are feeling it, it is there and you'll do anything to have it end. So, I would definitely award money if someone has suffered pain.

[Counsel may spend some time with the juror here flushing out her experience and having her explain to the rest of the venire how debilitating pain can be and that it should be compensated. Once that is done, the attorney should inoculate the juror from a defense causal challenge.]

Q. Before you would award anyone anything, however, you would make them prove their case to you, wouldn't you?

A. Oh, yes.

Q. So, before you could determine whether this plaintiff should be compensated for the pain she has been through, you would require her to prove, first of all, that she experienced pain.

A. That's right.

Q. So you can't say one way or the other right now whether she should be compensated or not because you have not heard any of the evidence, isn't that right?

A. That's true.

Q. You are going to follow the judge's instructions and wait until all the evidence, from both the plaintiff and the defense, has been presented in this case before you are going to make a decision, correct?

A. Correct.

Q. And you will not let your experience cause you to give one side or the other an advantage in this trial, will you.

A. No.

§ 47 Typical topics in low-speed collision cases

Many topics are similar to almost every civil case where the plaintiff alleges negligence. For example:

(1) knowledge of/relationship with attorneys, witnesses, parties;
(2) prior jury service;
(3) experience in/connection with insurance/claims industry;
(4) experience in/connection with medical industry;
(5) experience in/connection with legal industry;
(6) burden of proof;
(7) negligence versus intent;
(8) attitude about bring lawsuits;
(9) negligence versus accident; and
(10) experience as witness or party in lawsuit.

The purpose of this article is not to discuss jury selection in civil cases generally, but rather, to specifically address jury selection in low speed collision cases. Therefore, the above-listed topics will not be covered in further detail.[1] There are

---

[Section 47]

[1]Some of the areas that have been found to be permissible for inquiry include:

(1) Stockholder interests in litigation. Texas Power & Light Co. v. Adams, 404 S.W.2d 930 (Tex. Civ. App. Tyler 1966).
(2) Pecuniary interests in the litigation. Green v. Ligon, 190 S.W.2d 742 (Tex. Civ. App. Fort Worth 1945), writ refused n.r.e.; Carey v. Planters' State Bank, 280 S.W. 251 (Tex. Civ. App. San Antonio 1926), writ dismissed w.o.j., (Mar. 10, 1926).
(3) Carrying insurance with defendant insurer and may be entitled to dividends. Texas Emp. Ins. Ass'n v. Lane, 251 S.W.2d 181 (Tex. Civ. App. Fort Worth 1952), writ refused n.r.e..

many publications available to the practicing attorney which offer sample questions regarding the above topics.[2]

When addressing a topic with the venire, counsel should usually inquire as to the prospective jurors' attitudes, values, beliefs, feelings or thoughts on the issue, rather than focusing solely on their experiences. Attitudes and personality traits are a better predictor of jurors' future decisions than their experiences. This is not to say that prior experiences in a juror's life cannot have an impact on the juror's current beliefs on a subject. Information about previous experiences, however, is sometimes difficult to interpret. For example, a person who has been involved in a low speed collision before may or may not be a favorable juror for the plaintiff. The juror's experience may

---

(4) Employment relationship with party. Stephens v. Smith, 208 S.W.2d 689 (Tex. Civ. App. Waco 1948), writ refused n.r.e..

(5) Acquaintances with opposing counsel. Anderson v. Owen, 269 S.W. 454 (Tex. Civ. App. Galveston 1924).

(6) Membership in secret societies. Burgess v. Singer Mfg. Co., 30 S.W. 1110 (Tex. Civ. App. 1895).

(7) Acquaintances with potential witnesses. Employers Mut. Liability Ins. Co. of Wisconsin v. Butler, 511 S.W.2d 323 (Tex. Civ. App. Texarkana 1974), writ refused n.r.e., (Sept. 24, 1974).

(8) Opinion about use of intoxicants. Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. Amarillo 1965).

(9) Whether would give more weight to experts over lay witnesses. Travelers Ins. Co. v. Beisel, 382 S.W.2d 515 (Tex. Civ. App. Amarillo 1964).

(10) Unwillingness to award large sum in damages regardless of the circumstances. Cavnar v. Quality Control Parking, Inc., 678 S.W.2d 548 (Tex. App. Houston 14th Dist. 1984), writ granted, (Nov. 21, 1984) and judgment rev'd in part, 696 S.W.2d 549 (Tex. 1985) (holding modified by, C & H Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 42 A.L.R.5th 867 (Tex. 1994)) and (abrogated by, Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998)).

(11) Insurance crisis, lawsuit crisis, liability crisis, or tort reform. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989); National County Mut. Fire Ins. Co. v. Howard, 749 S.W.2d 618 (Tex. App. Fort Worth 1988), writ denied, (Nov. 16, 1988).

[2]National Jury Project, Jurywork: Systematic Techniques, §§ 19.02 to 19.05 (West 1999); V. Hale Starr, Jury Selection: Sample Voir Dire Questions, part 1 (1995); V. Hale Starr & Mark McCormick, Jury Selection, app. 6 & 8 (1993); Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 12 (West 1993).

make them more empathetic to the plaintiff's suffering or it may make them judge the plaintiff's conduct more strictly.[3]

There are a number of topics that arise in most low-speed collision cases. The following is a list of 10 of them. Which topics to cover, how many topics to cover, and how to cover them should all be determined on a case-by-case basis. As explained above, there is no "right" way to inquire about these and other topics. How these topics should be presented to the venire should be determined by each attorney themselves. For this reason, this article does not offer an exhaustive list of sample questions for each topic. The sample questions that are included are only to serve as a starting point for counsel to build on using their own creativity. Some of the questions are designed to educate and persuade, and other questions are intended to elicit bias. The questions provided are examples of ways to introduce the topics to the jury, but don't include most of the questions necessary for flushing out the juror's opinion, tying them down, or establishing the basis for a causal challenge. Counsel should follow the guidance set forth in First Questioning Topic, § 42, *supra*, and formulate their own approach to addressing the issues during their voir dire.

§ 48 "Tort reform" subjects

Some counsel chose to bring "tort reform" topics up for the purpose of educating the jury that the lawsuit crisis is simply a fiction created by the media. They inform the venire that there are fewer personal injury lawsuits taking up our courtrooms today than in years past. They inform the prospective jurors about how jury verdicts as a whole are down and that the system has many measures in place to protect against runaway juries and frivolous lawsuits. That is not, however, the approach suggested by this article.

Research has shown that jurors are not likely to abandon their long-standing beliefs about the justice system simply because a lawyer they don't know tells them their perception

[3]For example, plaintiff's lawyers often assume that low income folks who have experienced hardship in their lives are more likely to vote for a large damage award for the plaintiff. Jury consultant experience has show the contrary to be true and that people whose lives have been hard are often hard on others and less likely to grant someone a windfall that they never received themselves. National Jury Project, Jurywork: Systematic Techniques, 18-7 (West 1999).

and what they have read in the newspapers for years is wrong.[1] The better approach is simply to try to separate the plaintiff and his case from the cases they have read about in the press. It is wise for counsel to concede that there are too many lawsuits, frivolous lawsuits, and runaway juries, and then explain how the plaintiff's case is different.

This is easier said than done. It is difficult for a plaintiffs' counsel to introduce a "tort reform" topic and be bombarded with numerous misinformed comments about the system that counsel knows to be untrue. It is tempting to educate and persuade the panel about how the civil justice system really operates, however, counsel must stay focused on the primary objective of identifying and striking unfavorable jurors. No matter how many facts about the "McDonald's case" counsel shares with the venire, if they thought it was a frivolous lawsuit when they came in the door, they are not going to think any different when they are in the jury deliberation room.

Whether, and to what extent, the court will allow counsel to delve into tort reform subjects depends upon the judge and the jurisdiction. More courts are beginning to recognize the prevalence and strength of juror bias regarding tort reform issues and are allowing counsel more latitude during voir dire. Some courts restrict attorneys' inquiry on these subjects because they sometimes result in a discussion about insurance. As long as counsel avoids any implication that the defendant is covered by insurance, they should be allowed to elicit jurors' thoughts about tort reform.[2]

Often times, "tort reform" topics do not result in causal challenges because the jurors will back down and admit they don't know if the case at hand is one of those baseless cases that are clogging up the courts. In spite of that fact, however, juror responses to these questions can offer a lot of insight about the jurors. Research has shown that those people who are in favor

---

[Section 48]

[1]Broeder, Voir Dire Examination: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965).

[2]Propriety of inquiry on voir dire as to juror's attitude toward, or acquaintance with literature dealing with, amount of damage awards, 63 A.L.R.5th 285; Kiernan v. Van Schaik, 347 F.2d 775, 9 Fed. R. Serv. 2d 47A.1, Case 1 (3d Cir. 1965).

of "tort reform" measures are less likely to find for the plaintiff and less likely to give a high damage award.[3]

§ 49 "Tort reform" subjects—Too many lawsuits

Of all the "tort reform" subjects, this is typically the one that draws the largest and most passionate response from the venire. It is easier to introduce than frivolous lawsuits because counsel does not have to get wrapped up in discussing what constitutes "frivolous."

Q. *How many of us agree* (while raising hand) that there are too many lawsuits out there today?

Q. Why do you think that?

Q. What do you think we should do about it?

Q. Who do you think it hurts the most?

Q. Do you think it hurts plaintiffs with outstanding medical bills that need to be paid but they can't get a trial date because there are too many cases?

Q. There has been a lot of publicity over the last decade or so about *[there being too many lawsuits][a lawsuit crisis][an insurance crisis]*; TV shows, newspapers articles, magazine articles, radio. I'm sure you have *[how many of us have]* seen, read, or heard stories about *[there being too many lawsuits][a lawsuit crisis][an insurance crisis]*?

Q. Tell me about them?

Q. What did you think about them?

Q. What do you think the solution is?

Q. Who do you think is responsible for all the publicity about there being too many lawsuits?

Q. Now that "tort reform" has been around for over 10 years, has anyone's premiums gone down?

§ 50 "Tort reform" subjects—Frivolous lawsuits

If counsel is going to address frivolous lawsuits, they should

[3]Greene et al., Jurors' Attitudes about Civil Litigation and the Size of Damage Awards, 40 Am. U. L. Rev. 805-20 (1991); Hans & Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 Law & Society Rev. 85-115 (1992).

first discuss with the venire what constitutes "frivolous". If given the opportunity, the venire will likely come up with a different word such as baseless, silly, stupid, or fraudulent. The attorney can then use the jury's word throughout the rest of the discussion.

This topic can be a good opportunity to educate the panel a little about frivolous defenses as well. Counsel needs to be careful not to get too close to discussing the existence or content of settlement negotiations as such matters are normally inadmissible and prohibited by local rules or motions in limine. It may be helpful, however, if the venire is introduced to the notion that the case may be in trial, not because the plaintiff brought it, but because the defendant has refused to accept responsibility or make a reasonable offer and is forcing it to trial.

Q. How many of us have heard of frivolous lawsuits?

Q. How do you define frivolous?

Q. *How many of us agree* (while raising hand) that there are a lot of frivolous lawsuits out there?

Q. Why do you believe that?

Q. What do you think we should do about it?

Q. Who do you think it hurts the most?

Q. Do you think it hurts plaintiffs who have legitimate cases?

Q. Have you ever heard of frivolous defenses?

Q. If a defendant did something wrong and then said he didn't and tried to get out of it, would that be a frivolous defense?

Q. If a defendant did something wrong and then refused to pay for what the damage he caused, would that be a frivolous defense?

§ 51 "Tort reform" subjects—Runaway juries

This topic can provide a nice segue into a damages discussion. One of the easiest ways to introduce this subject is to discuss the "McDonald's case" if it did not already come up in connection with the other "tort reform" topics. This topic may be a good indicator of how a juror will think on other issues. Jurors

who are in favor of caps are less likely to find for the plaintiff and/or give a large damage award.[1]

Q. How many of us have heard of *[the "McDonald's case][a case where someone was hurt and got too much money]*?"

Q. What did you think about that?

Q. Why do you feel that way?

Q. What do you think we should do about it?

Q. Are you in favor of capping damages?

Q. Why?

Q. What types of damages should be limited?

* * *

Q. *How many us agree* (while raising hand) that these lawsuits drive up our costs?

Q. Why do you believe that?

Q. What should we do to solve the problem?

Q. So, if we just limited the *[number of lawsuits][damages that could be awarded]*, the cost of our insurance, goods, and services would go down?

Q. Now that tort reform has been around now for over 10 years, has anyone's premiums gone down?

* * *

Q. *How many of us agree* (while raising hand) that those sorts of verdicts happen too often?

Q. You have probably heard of, seen, or read that juries frequently give too much money?

Q. How about the rest of us. How many of us have heard of, seen, or read that juries frequently give too much money?

Q. Have you ever known anyone *personally* who got too much money from a jury when they were injured?

Q. Has anyone *personally* known someone who got too much money from a jury when they were injured?

Q. Why do you think almost all of us have heard of, or read about, these cases, but no one knows anyone who got too

---

[Section 51]

[1]Greene et al., Jurors' Attitudes about Civil Litigation and the Size of Damage Awards, 40 Am. U. L. Rev. 805-20 (1991); Hans & Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 Law & Society Rev. 85-115 (1992).

much money?

Q. Who do you believe is responsible for all the publicity about these cases where juries give too much money?

§ 52 "Intangible" damages

"Intangible" damages[1] refers to noneconomic damages like physical disfigurement, permanent impairment, physical pain, and mental anguish. A plaintiff's attorney should never refer to the plaintiff's noneconomic damages as "intangible" damages, except during voir dire when attempting to encourage a response from an unfavorable juror. The reason for using otherwise prohibited terms like this during voir dire is explained above in § 29.

This topic is closely related to "runaway juries." Invariably, when the attorney brings up one of these two subjects, eventually the discussion will likely involve the other as well. An effective technique is to allow the conversation to combine the subjects and build on each other. Sometimes jurors will use their belief that there are runaway juries out there to strengthen their position that they will not consider "intangible" damages in any case.

It is very important for counsel to discuss "intangible" damages with the panel. People who are against compensating others for "intangible" damages will likely be the same type of people who will be more inclined to assess negligence against the plaintiff and sympathize with the defendant. Because people's feelings about this topic are often consistent with their beliefs on many other subjects, this topic can be used as a general barometer for the jurors' beliefs on a number of other issues.

Q. Some people could give money not only for things like lost wages and medical expenses, but also pain and suffering and emotional distress. Other folks might be able to reimburse someone for lost wages and medical expenses, but could not give money for something intangible like pain and suffering and emotional distress. Which one of these

---

[Section 52]

[1]For a detailed discussion about inquiring about damages during jury selection, see Propriety of inquiry on voir dire as to juror's attitude toward, or acquaintance with literature dealing with, amount of damage awards, 63 A.L.R.5th 285.

best describes you?[2]

Q. *How many of us agree* (while raising hand) that while people should get reimbursed their medical expenses and lost wages, they should not be given any money for intangible things like pain and suffering and emotional distress?

Q. Some people could give an injured person millions of dollars if the person showed they were really injured. Other folks could never give millions of dollars to an injured person no matter what the injury was. Which of these best describes you?

Q. In general, do you think injured people should be given money for pain and suffering?

Q. How about mental anxiety or emotional distress?

Q. How do you determine how much to give them?

§ 53 Personal responsibility

As discussed above in § 15, a person's attitude about personal responsibility is one of the five most important attitudes when predicting a juror's future decision making. Therefore, plaintiff's counsel may want to claim "personal responsibility" as their theme of the case before the defense does. This can be done as early as voir dire and can continue throughout the case by structuring the presentation of evidence such that the jury is focused on the defendant's conduct and lack of personal responsibility rather than the plaintiff's actions.

Q. I saw on your juror card that you have _____ children, is that right?

Q. How old are they now?

Q. When you were raising them, did you teach them to take responsibility for their actions?

Q. Why?

Q. Do you think people nowadays are more or less likely to take responsibility for their actions?

Q. Why do you think that is?

Q. How do you think we could change that?

---

[2]This question is based on a presentation given by Mr. Robert Swafford to the Texas Trial Lawyer's Association at their Trial Advocacy College in the Summer of 2003. Mr. Swafford is an attorney and jury consultant practicing in Austin, Texas.

Q. What does it mean to take responsibility for your actions?

Q. Well, let's say I was pulling into a parking space outside on my way to court this morning and I accidentally hit the car next to me. What do you think I should do?

Q. Even if I didn't mean to hit the car—it was an accident?

Q. What if the car was a Lexus or something really expensive and it is going to cost $10,000 to fix. Do I still have to pay for the damage?

Q. Well, what if the owner of the car was in it at the time and now she is claiming I hurt her. Now, what do you think I should do?

Q. Would I be taking responsibility if I just offered to pay for some of her medical bills?

Q. Would I be taking responsibility if I just offered to pay her medical bills but not her lost wages?

Q. Would I be taking responsibility if I just offered to pay her medical bills and lost wages, but nothing for her pain, the trouble I put her through, or the possibility she might need future medical treatment?

§ 54 Lack of property damage

This topic is present in most every low speed collision case and must be addressed. Bias about how much property damage is required in order for an injury to result is possibly the biggest hurdle plaintiff's counsel has in a low speed collision case. Because of how wide-spread the misunderstanding is about low property damage and its ability to result in injury, the attorney will not likely be able to strike all prospective jurors with unfavorable beliefs. The attorney will want to ferret out those jurors who are confident that no injury could occur and are unwilling to listen to evidence to the contrary. Those jurors who are willing to be educated and who are open to the notion that everyone has a different injury threshold may end up being favorable jurors, even if they originally showed bias.

Q. *How many of us agree* (while raising hand) that, in a car wreck, if there is very little damage to the vehicles involved, that the people inside the vehicles will not be hurt?

Q. How many of us have been involved in a little fender bender and we were not injured?

Q. How many of us know others who have been involved in a

little fender bender and they were not injured?

Q. How many of us believe that if someone claims they were injured, but their car just has a minor dent, that the person is probably trying to make a fraudulent claim.

Q. Do you think that happens often?

* * *

Q. You know, when I first spoke to *[client's name]* he told me about how he was thrown around in his vehicle during this wreck and how he was really banged up afterwards. And then he told me when he took his car to the body shop, they told him the frame was bent and his bumper absorbers were compacted. So, I grabbed my camera and we went out to see his car and, I have to be honest with you, I could hardly see any damage. My first reaction after seeing his car, and I can tell him this now, was to question what he was telling me. Now that I know more about the case, I know he was telling me the truth, but at first, I questioned him. I am scared folks. I am so scared that you will have that same reaction as I did. What do you think about that?

* * *

Q. How many of us look inside the egg carton when we buy eggs at the store?

Q. You do that even if the carton is not damaged in any way?

Q. Why?

* * *

Q. How many of us have heard about, seen, or read news stories about plane crashes where almost everyone in the plane dies, except a few people who walk away fine.

Q. How do you think that happens?

* * *

Q. If I told you that one 3000 pound vehicle rearended another 3000 vehicle at 10 m.p.h., who could tell me how much energy was transferred from the rear vehicle to the front vehicle.

Q. Could anyone tell me how much energy was transferred from the front vehicle to the driver of that vehicle?

Q. Could anyone tell me how much energy must be transferred to that driver before the average driver would be injured?

Q. If I were to tell you that, let's say, 100 foot-pounds of pressure was transferred to the driver of the front car in the

car wreck, could anyone tell me whether that is a lot?

* * *

Q. How many of us think that if someone hit us in the back with a 40-pound sack of four, when we weren't expecting it, we would be hurt?

Q. Ma'am, you raised your hand. Why do you think you would be hurt?

Q. Do you think Mr. *[giant male]* would be hurt?

Q. Why not?

Q. What about Ms. *[other lady]*

Q. Why don't you know?

Q. Do you believe that people's bodies are different and even if the same thing happens to them, they have different reactions?

Q. What if I hit *[client]* with the bag of flour, would he be hurt?

§ 55 Lack of objectively demonstrable injury

Often in low speed collision cases, the plaintiff suffers only connective tissue injuries, or injuries to the muscles, ligaments and tendons in the spine. These injuries usually are not very identifiable on a x-ray. Some doctors, chiropractors, or osteopaths, however, can use the x-ray to demonstrate areas showing sublaxation or other signs of connective tissue injury. The fact that the jury will not likely ever see an actual tear of the plaintiff's muscles, ligaments or tendons on a film can be a challenge for the plaintiff's attorney. It is important for the attorney to identify those jurors who will require such visual or objective proof before they will believe the plaintiff is injured.

Q. *How many of us agree* (while raising hand) that if someone is injured in a car wreck, it will show up on an x-ray or some sort of test?

Q. Why do you believe that?

Q. Would you have a hard time believing someone who claims to be injured in a car wreck whose x-rays turned out normal?

* * *

Q. One of my biggest fears in this case is that *[client's name]*'s injures are not the type of injuries that show up on x-rays or other tests. I am scared that you will not believe him

when he says he was hurt because he can't show you a x-ray or blood test or something that proves it. What do you think about my fear?

Q. How will you know if he is telling the truth?

Q. Do you think people can be injured, but it will not show up on a test?

Q. Do you think a trained doctor can examine a patient when they are injured and, by having the patient perform different tests, they can tell whether the patient is injured or not?

* * *

Q. If you hurt your back doing yard work yesterday, how would you prove it?

Q. If it was not fractured, it would not show up on a x-ray, would it?

Q. Who would you want to call as a witness to prove you were injured?

Q. Do you think you could fool a doctor by going in and faking an injury or do you think a trained physician could tell by examining you and having you perform different tests.

* * *

Q. What do you think is more serious, a pulled muscle or a strained ligament or tendon?

Q. Why?

Q. Which do you think heals faster?

Q. Which do you think is more difficult to treat and get better?

Q. Which do you think is likely to continue to be a problem in the future?

Q. Why?

§ 56 Delay in obtaining treatment

If the plaintiff did not take the ambulance from the scene or go to the doctor shortly after the collision, juries will sometimes believe that either the plaintiff is not injured at all or their injuries are very minor and not deserving of much compensation. It is essential, therefore, that the plaintiff's attorney identify those prospective jurors who are likely to have such beliefs.

Q. *How many of us agree* (while raising hand) that if a person

is really injured, they are going to go to the doctor?

Q. *How many of us agree* (while raising hand) that, even if a person does not necessarily have the money to pay for it or have insurance, that they will find a way to get treatment if they are truly injured and in pain?

* * *

Q. One of my biggest fears in this case is that *[client's name]* was not able to go to the doctor right away after the collision. I am scared that you will hold that against him and think that he must not have been injured if he did not go to the doctor immediately. What do you think about my fear?

Q. Why do you feel that way?

* * *

Q. How many of us either ourselves or know someone who hardly ever goes to the doctor when they get sick or are injured?

Q. Why don't they usually go when they get sick?

Q. How many of us have ever been sick or injured, and we didn't go to the doctor, and we just got better?

Q. Isn't that the way it normally happens?

Q. If you were involved in an automobile collision, and you could tell you were feeling a little pain in your neck and back, but there was no blood or obvious broken bones, would you still request an ambulance take you to the ER?

Q. Why?

* * *

Q. How many of us have ever had to get pre-approval for a referral to a doctor from our health insurance company?

Q. How long did it take?

Q. How many of us have had difficulties with getting our health insurance company to respond to us, whether to pay a claim or send us somewhere, or anything else?

Q. What did you do?

* * *

Q. If a person was trying to take advantage of being in a collision and get the most money possible from the other person, do you think they would take the ambulance from the scene?

Q. Do you think they would go the ER?

Q. Do you think they would try to run up a bunch of medical bills as soon as possible after the collision?

Q. Why?

* * *

Q. How many of us, and I have to raise my hand as well because I am guilty of this, have not been physically active for a long time and then gone to the gym and worked out really hard?

Q. Were you as sore as I was afterwards?

Q. But, when did you get sore and start to hurt? Was it right afterwards or a day or two later?

Q. Why do you think that is?

Q. How many of us have had the same experience pulling a muscle doing yard work or something like that—you don't feel bad that day but you can hardly get out of bed the next morning?

Q. What did you do?

Q. Did you go straight to the doctor or did you wait a day or two to see if it would get better?

§ 57 Chiropractic treatment

While certainly more people are aware of the benefits of chiropractic medicine and other natural healing methods, there is still often a widely held belief that such methods are illegitimate. Because of the effectiveness of chiropractic treatment for injuries to the neck and back, chiropractors are often the primary or sole treatment provider in many low speed collision cases. It is very important, therefore, that the plaintiff's attorney elicit the venire's opinion about chiropractors, whether or not one will be testifying.

Q. Let's talk for a moment about chiropractors. Some people swear by them and some people swear at them. Which best describes you?

Q. Why?

* * *

Q. Let's talk for a moment about chiropractors. Some people believe that chiropractors can cure anything from a pulled back to cancer. Others believe that chiropractic medicine is really not a legitimate type of medicine at all. Which best describes you?

Q. Why?

Q. Do you believe most chiropractors are quacks so to speak?

Q. Would you believe anything a chiropractor said when talking about medical issues?

* * *

Q. How many of us have treated or know someone who has treated with a chiropractor before?

Q. When?

Q. For what?

Q. Did you/they get results?

Q. Would you go back?

§ 58 Attorney referral to doctor

Most plaintiff's attorneys, hopefully, will not expressly refer their clients to treatment providers and insert this issue into their case. There are better approaches to assist the client if, in fact, they need guidance about who to seek treatment from that will not result in discovery by the defense of an attorney referral. Attorneys need to also take care to ensure that they are not listed in the treatment records or bills, implying a referral arrangement and disclosing when counsel was retained.[1]

If, however, this issue is present in an attorney's case, they must address it head on. Hiding from this issue simply furthers the implication that counsel has done something wrong and his relationship with the treatment provider is improper.

Q. How many of us have heard of, seen or read about certain doctors and lawyers teaming up to create fraudulent claims?

Q. What did you hear?

Q. Do you think that happens a lot?

Q. Do you think that most lawyers who represent people in car wrecks have some sort of arrangement like that were they send them to a doctor and the doctor says the person is injured whether they are or not?

Q. Why?

[Section 58]

[1]Strategies about how to avoid this issue are outside the scope of this article. Attorneys should consult prominent trial practice manuals for their jurisdiction.

Q. Ma'am: you mentioned earlier that you were in a collision and had a lawyer. Did your lawyer send you to a doctor to say you were injured even if you weren't?

Q. Has anyone else who was involved in the collision experienced this where your lawyer sent you to so doctor who said you were injured when you were not?

Q. Does anyone actually *personally* know of someone, and I won't ask you to say their name, who has gotten with a lawyer and doctor team and faked an injury?

Q. If none of us know anyone who has done this, why do you think we hear about this happening all the time in the media?

Q. Who benefits from those stories?

Q. Who is hurt the most from those stories?

* * *

Q. If you were going to have a very important medical procedure done, how would you pick your doctor?

Q. You wouldn't just pick someone out of the yellow pages?

Q. Why?

Q. What about if you were going to have someone do a major renovation or remodel job on your house, how would you pick the contractor?

Q. You wouldn't just pick someone out of the yellow pages?

Q. Why?

Q. If you had a close friend or family member ask you for advice about what doctor to go see for treatment, would you give them a name if you knew someone who you thought was really good.

Q. If a client asks their lawyer for guidance on what doctor to go see for their injuries, do you think the lawyer should help their client?

Q. Why?

§ 59 Pre-existing medical conditions

The existence of same or similar injuries in the plaintiff's medical history can have a significant impact on a potential verdict. In spite of the fact that the law says that "you take your plaintiff the way you find him," juries still often treat plaintiffs with pre-existing injuries harshly. Pre-existing injuries, however, can help the plaintiff's attorney explain how

the plaintiff could have been injured in a seemingly minor collision or why the plaintiff required substantially more treatment than a "typical" patient with similar connective tissue injuries. It will be critical, therefore, for counsel to discover how the prospective jurors will consider any pre-existing medical conditions of the plaintiff.

Q. *How many of us agree* (while raising hand) that if someone is injured and they just aggravate an old injury that they deserve less compensation than someone who suffers a new injury?

Q. Why?

* * *

Q. How many of you, and I have to raise my hand on this as well, have a bad back or some other part of your body that you hurt over and over again?

Q. What is your injury?

Q. How did you originally hurt it?

Q. Did you treat with a doctor when you hurt it?

Q. Did that make it better?

Q. But, you have re-aggravated it since then?

Q. How many times?

Q. About how often does that happen?

Q. Each time you re-aggravate it, is it more difficult to get over it?

Q. What if I were walking down the hallway outside the courtroom and I wasn't paying attention, and I knocked you down and I knocked down Mr. *[juror]* who has never had a bad back. You both hurt your backs and have exactly the same pain and injuries and both go to the same treatment. Should he get more, less, or the same compensation as you since he has not ever injured his back before?

Q. Why?

§ 60 Non-treating medical or biomechanical experts

Sometimes expert witnesses are employed by both sides in a low speed collision case to discuss injury causation. These experts may be a biomechanical engineer, an epidemiologist, or a medical doctor. Typically, they have not examined the plaintiff, but rather, just inspected his medical records and

other documents regarding the collision. What questions counsel will want to ask will depend on the type of expert and who retained them.

Q. *How many of us agree* (while raising hand) that anyone can find an expert witness to say anything they want?

Q. Why to you believe that?

* * *

Q. Do you think that the nation's premier experts in *[field]* are located right here in *[city or state]* or do you think they are probably elsewhere?

Q. Would you hold it against the plaintiff if he went outside of *[city or state]* to find the best expert in the country in *[field]*?

* * *

Q. If I told you I was injured _____ years ago, who would you talk to to figure out how I was injured?

Q. Why?

Q. What would you ask him?

Q. Do you think that doctor who treated me back then is in a better position to say how I was injured or a different doctor who has never examined me and is just looking at the medical records a couple of years later?

Q. Why?

V. OVERCOMING JUROR BIAS

§ 61 Challenges for cause

A challenge for cause is "an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which, in the opinion of the court, renders him an unfit person to sit on the jury."[1] While there are a number of bases for causal challenges, the basis primarily employed during voir dire is to challenge for bias or prejudice.[2] While the standard is articulated differently depending on the jurisdiction, typically, if a juror can be shown to be

---

[Section 61]

[1]Tex. R. Civ. Proc. 228 (2004). For a detailed discussion of challenges for cause in general, see Challenges for cause in jury selection process, 58 Am. Jur. Proof of Facts 3d 395 (2004).

[2]Tex. Gov't Code § 62.105(4) (2004).

favoring one side of an issue over another and will act with impartiality, they are disqualified.[3]

The first step to successfully eliminating unfavorable jurors through causal challenges is to be familiar with the relevant jurisdiction's standards for disqualification. For example, if the standard in the relevant jurisdiction holds that a juror is disqualified when they "would make one side work harder than the other" or "if one side is starting out behind the other side," counsel would want to incorporate those phrases into his questions when locking in a juror for a causal challenge.[4] The attorney would also want to have the seminal cases that include

---

[3]Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963). The showing sufficient to require disqualification due to bias or prejudice varies per jurisdiction. Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel, 76 A.L.R.2d 678.

[4]A juror is disqualified as a matter of law when he states:

(1) That he does not believe in personal injury lawsuits. Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963).

(2) When he believes that insurance companies get off lightly. Lumbermen's Ins. Corp. v. Goodman, 304 S.W.2d 139 (Tex. Civ. App. Beaumont 1957), writ refused n.r.e..

(3) When he was a client of one of the defendants and admitted that his relationship would bias him toward one side. Gum v. Schaefer, 683 S.W.2d 803 (Tex. App. Corpus Christi 1984).

(4) He believes people sue too quickly. Knop v. McCain, 561 So. 2d 229 (Ala. 1989) (abrogated by, Bethea v. Springhill Memorial Hosp., 833 So. 2d 1 (Ala. 2002)).

(5) The evidence must be overwhelming to award damages. Knop v. McCain, 561 So. 2d 229 (Ala. 1989) (abrogated by, Bethea v. Springhill Memorial Hosp., 833 So. 2d 1 (Ala. 2002)).

(6) He is against drinking of any kind. Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. Amarillo 1965).

(7) He suffered from same ailment as plaintiff. Williams v. Texas City Refining, Inc., 617 S.W.2d 823 (Tex. Civ. App. Houston 14th Dist. 1981), writ refused n.r.e., (Nov. 12, 1981).

(8) He owns stock in the defendant company. Gladhill v. General Motors Corp., 743 F.2d 1049, 16 Fed. R. Evid. Serv. 967 (4th Cir. 1984).

(9) He was an employee of defendant company. Francone v. Southern Pac. Co., 145 F.2d 732 (C.C.A. 5th Cir. 1944).

(10) Was a previous defendant and had strong tort reform opinions. Lewis v. Voss, 770 A.2d 996 (D.C. 2001).

(11) Was a current patient of defendant doctor. McGarry v. Horlacher, 149 Ohio App. 3d 33, 2002-Ohio-3161, 775 N.E.2d 865 (2d Dist. Montgomery County 2002).

(12) He feels that persons bringing claims in minor automobile collisions are dishonest. Goldenberg v. Regional Import and Export

such phrases handy in the trial notebook should it become necessary to remind the court of those authorities.

While there are many different ways that courts handle counsels' causal challenges, one of the more efficient ways is to handle them individually at the bench after each attorney's general voir dire to the entire venire.[5] There are many ways to establish the basis for the challenge, but in general, it should follow the following outline:

(1) introduce the topic again;
(2) lock them in again;
(3) protect them from rehabilitation; and
(4) close them out.

For example:[6]

Q. Mr. *[juror]*, my notes indicate that you said that, regardless of the facts, evidence or instructions, while you could award the plaintiff damages for things like lost wages or medical expenses, you just could not give *money* for something *intangible* like pain and suffering or mental anguish.

Q. Are my notes accurate?

Q. Did you tell us that because it was the truth?

Q. I'm just asking to make sure that I did not intimidate you into saying something that is not the truth.

Q. So, if Judge _____ or *[defense counsel]* were to ask you the same question, you would answer the same way that you did to me?

Q. Mr. *[juror]*, I know you will *try* to follow the judge's instructions on things like not talking to the lawyers during the case or not deliberating until the case is over, but is it fair

---

Trucking Co., Inc., 674 So. 2d 761 (Fla. Dist. Ct. App. 4th Dist. 1996).

(13) Knows defendant doctor and sees him in a social context weekly. Davis v. Powell, 781 So. 2d 912 (Miss. Ct. App. 2000).

(14) Had been represented by attorney, had a family member who had been represented by attorney and considered attorney to be his attorney. Toyota Motor Corp. v. McLaurin, 642 So. 2d 351 (Miss. 1994).

[5]A detailed discussion of the various ways in which courts deal with causal challenges is outside the scope of this article.

[6]This example is based off of a presentation by Robert Swafford, attorney and jury consultant in Austin, Texas to the Texas Trial Lawyers Association at their Trial Advocacy College in the summer of 2003.

to say that you just could not follow an instruction that required you to give *money* for something *intangible* like pain and suffering or mental anguish?

This example illustrates the importance of firmly tying down the juror before you turn questioning over to the judge or opposing counsel. Depending upon the jurisdiction, usually jurors who have demonstrated bias cannot be rehabilitated, however, this often does not stop judges or opposing counsel from trying.[7]

As is true with most other parts of the trial, whether counsel will be successful in establishing the basis for a causal challenge depends a great deal on the delivery. Counsel should be careful not to make jurors feel as though they are being cross-examined, manipulated, or persuaded. The questions should be presented in as non-threatening manner as possible.

§ 62 Peremptory challenges

There are many different ways courts handle peremptory challenges.[1] Whether counsel will conduct causal challenges first, whether they will know what challenges the other side makes, whether challenges will be handled one at a time, or

---

[7]For a more detailed discussion of different jurisdictions' views toward juror rehabilitation, see Cosper, Rehabilitation of the Juror Rehabilitation Doctrine, 37 Ga. L. Rev. 1471 (2003); Wright, Friends and foes in the jury box: Walls v. Kim and the mission to stop improper juror rehabilitation, 53 Mercer L. Rev. 929 (2002). See also, Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963) (statutory disqualification and prohibition against rehabilitation extends not only to bias or prejudice concerning the litigants, but also to the subject matter of the litigation as well); Carpenter v. Wyatt Const. Co., 501 S.W.2d 748 (Tex. Civ. App. Houston 14th Dist. 1973), writ refused n.r.e., (May 1, 1974) (stating that leading questions aimed at rehabilitating a prospective juror who has expressed bias are forbidden); People v. White, 260 A.D.2d 413, 688 N.Y.S.2d 565 (2d Dep't 1999) (stating a potential juror who expresses bias must give an "'unequivocal' promise to set aside his. . .prior state of mind."); State v. Midwest Pride IV, Inc., 131 Ohio App. 3d 1, 721 N.E.2d 458 (12th Dist. Fayette County 1998) (stating a potential juror who demonstrates partiality cannot render himself able to serve simply by stating he can be impartial); McGill v. Com., 10 Va. App. 237, 391 S.E.2d 597 (1990) (stating a juror indicating bias cannot be rehabilitated by "giving 'expected answers to leading questions'").

[Section 62]

[1]For a more detailed discussion of the various systems for exercising peremptory challenges, see Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, chap. 17 (West 1993).

whether the court will allow back striking[2] can all be different depending on the judge. It is, therefore, important for counsel to familiarize themselves with the relevant jurisdiction's rules and law regarding peremptory challenges before trial.

One of the most fair and efficient systems for peremptory strikes is the "Arizona struck system." In this system, the court allows counsel to exercise all their causal challenges and the court rules on the challenges before peremptory challenges are made. Then, a list of jurors who have been passed for cause is circulated to counsel. The list will include the number of jurors and alternates plus the number of peremptory strikes of both parties. For example, if there are 12 jurors, two alternates and each side has six peremptory strikes, the list will consist of the first 26 jurors passed for cause. The list is passed back and forth with counsel making one or more peremptory challenges at a time. The first 12 jurors in order are the jury and the next in order become the alternates.

If the court employs the "Arizona struck system," counsel's strategy will be to strike those jurors last who the opposition will likely strike first. This should force your opponent to strike those jurors and reduce the chance that you strike a juror that the opposition would have struck anyway.

Another commonly used system is a "blind strike" system where counsel go into separate rooms and exercise their peremptory strikes without knowing who their opponent is striking. This, obviously, can result in both parties striking the same juror resulting in a wasted strike.

Whatever system counsel is operating under, it is imperative that they approach the process of peremptory challenges in an organized fashion. For example, the attorney and his staff may want to devise a ranking system so that as voir dire progresses, they can assign a ranking to a juror according to their responses, nonverbal behavior, or other reasons. The ranking system should be an incremental system rather than simply a "+" or "-". This will allow the team member to compare numerous prospective jurors against each other. The ranking then is used by the team member later in making their recommendations for peremptory strikes.

Before deciding on how to exercise peremptory strikes, the

[2]Back striking is when a party elects not to exercise a peremptory strike on a juror, and then when the opponent also fails to strike the juror, the party "back strikes" the juror.

attorney will want to elicit the input of his trial team and client. This meeting between the team members must be efficient and organized. If not organized, this process can degenerate into a chaos with numerous people discussing different jurors at the same time, with no decisions being made. Most courts will limit the amount of time counsel has to make their peremptory challenges, so wasted time can significantly impair the attorney's ability to make intelligent choices about how to exercise his peremptory challenges.

One effective approach when time is limited is the following:

(1) *Identify the six worst jurors for the plaintiff*

Begin by having each person write on a piece of paper the six jurors they want struck the most in order. Each person assigns points to each juror on the list. So, the juror on the list who is most unfavorable will get six points and the juror on this list who is least unfavorable will get one point. This example is assuming each party gets six peremptory strikes. This is done by each member of the team on their own piece of paper without speaking to each other.

(2) *Identify the six jurors the defense will most likely strike*

Then, each member of the team will select the six jurors they believe the opponent is most likely to strike in order. Again, each person will assign points to each juror on the list with the juror who is most likely to be struck getting six points. This example is assuming each party gets six peremptory strikes. Again, this is done by each member of the team on their own piece of paper without speaking to each other.

(3) *Create the list of "sure strikes"*

The names of those jurors who are worst for the plaintiff are collected and compared. Typically, there is a surprising similarity in the names submitted. The lead attorney will then place the names on a list in order. The juror with the most points will be at the top. As each name goes on the list, team members may raise an objection if they disagree and the team can discuss it.

There is usually a large consensus on the worst three or four jurors. The jurors most or all of the team members agree on will be the plaintiff's "sure strikes." It is up to the lead attorney to determine whether enough of a consensus was reached to include a name as a "sure strike" or not.

If the team unanimously agreed on all six strikes, they are done. If, as is normally the case, the team reached a consensus on only three or four jurors, then the process must continue.

(4) *Create the list of the opponent's strikes*

The attorney will then create a list in order of those jurors the team scored as being most likely to be struck by the opponent. The more points a juror has, the higher on the list they will appear. The attorney will set this list aside for the time being and proceed on to the next step.

While it is not common, sometimes a juror's name will appear on both lists. In this case, the team should discuss whether the juror is, in fact, unfavorable to the plaintiff and, if so, whether the team wants to risk betting on the opponent striking the juror.

(5) *Evaluate the remaining jurors*

If the team did not unanimously agree on all their strikes in step three, then they must evaluate the remaining jurors, including those jurors most likely to be struck by the opponent. Assuming there is ample time, the team can discuss each juror in numerical order. They should not, however, make any firm decisions until they have evaluated all the remaining jurors.

Usually, there is not sufficient time for the team to thoroughly evaluate and discuss each and every juror. Therefore, a faster method is to have everyone again go through the jurors on their own and identify the worst two or three remaining jurors (or however many strikes remain). Many times this will result in a short list of unfavorable jurors. The attorney can now direct a discussion about this short list of jurors and decide who to strike.

Because the discussion is limited to just the names on the short list, this is a faster process than going through all the names together with the team. However, it is important that whenever the team discusses a juror, the lead attorney closely controls the conversation and limits it to just the juror in question. This promotes efficiency and reduces confusion, disorganization and wasted time.

(6) *Compare the list of plaintiff's strikes with the list of the opponent's likely strikes*

Now, the attorney should compare the list of his peremptory strikes with the list he compiled in step four. If there are any of the same names, the team will need to discuss whether to use one of their strikes or bet on the opponent using one of theirs. How much of a gamble this is will depend, in part, on the type of peremptory strike system the court uses. If the court is using a "struck system," counsel will be able to see who his opponent is striking and make a judgment call as to whether to strike a particular juror or not.

§ 63 Preserving error

While it may not win the heart of the court-reporter, counsel must request a record for voir dire to preserve any error. Just having a record, however, is not all that is required. During the voir dire examination, counsel must be diligent in identifying the juror's who respond to a question. This can be cumbersome and awkward when asking a question to the venire as a whole and eliciting a large response. The attorney may want to explain to the jury early in the process that he has to go through and identify everyone who responds and to please be patient.

§ 64 Preserving error—When questioning not allowed

If counsel is prevented from asking questions on a specific topic or is severely limited in time such that they cannot conduct an effective voir dire examination, they should:

(a) make specific objection on the record;
(b) explain that more time is needed or that more questions are necessary to determine whether a causal or peremptory challenge is necessary with respect to this juror;
(c) provide a list of questions that counsel could not ask due to inadequate time or the judge cutting counsel off;
(d) make sure the judge rules.[1]

[Section 64]

[1]McCarter v. State, 837 S.W.2d 117 (Tex. Crim. App. 1992); Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989).

§ 65 Preserving error—When causal challenge or peremptory strike denied

If counsel makes a causal challenge and is denied, they should:

(a) state specifically the ground for challenge on the record;
(b) obtain a ruling on the record;
(c) inform the court that denial of the challenge will require you to exhaust your peremptory strikes, and
(d) identify the specific, objectionable panel member who will remain after you exercise all your peremptory strikes;
(e) provide the court the opportunity to remove the objectionable juror;[1]
(f) ask for more peremptory strikes;[2]
(g) if denied, submit your list of peremptory strikes to the judge.[3]

Failure to make the appropriate showing on the record before you submit your peremptory strikes typically waives error.[4]

[Section 65]

[1]This is not a requirement in all jurisdictions. See, Texas General Indem. Co. v. Moreno, 638 S.W.2d 908 (Tex. App. Houston 1st Dist. 1982).

[2]Whether this step is required or not depends on the jurisdiction. There can also be conflicting authority within the same jurisdiction. For example, see Burton v. R.E. Hable Co., 852 S.W.2d 745 (Tex. App. Tyler 1993) (party must request additional strikes before exercising peremptory strikes); Sullemon v. U.S. Fidelity & Guar. Co., 734 S.W.2d 10 (Tex. App. Dallas 1987) (stating Hallett v. Houston Northwest Medical Center, 689 S.W.2d 888 (Tex. 1985) does not require objecting party to request additional challenges). The safest practice would be to request additional strikes.

[3]Hallett v. Houston Northwest Medical Center, 689 S.W.2d 888 (Tex. 1985).

[4]Lopez v. Southern Pacific Transp. Co., 847 S.W.2d 330 (Tex. App. El Paso 1993); Beavers on Behalf of Beavers v. Northrop Worldwide Aircraft Services, Inc., 821 S.W.2d 669 (Tex. App. Amarillo 1991), writ denied, (June 24, 1992).

VI. FORMS

§ 66 Sample Supplemental Juror Questionnaire

Exhibit _____

JUROR QUESTIONNAIRE

The questions asked in this questionnaire could be asked in open court. You are under oath and required to answer these questions truthfully and completely. You must answer the questions yourself without discussing the question or your response with others, unless asked to do so by the Court. If you desire to more fully explain an answer or would like to discuss an answer in private, answer the question briefly and circle the question. YOUR RESPONSES ARE COMPLETELY CONFIDENTIAL AND WILL NOT BE SHARED WITH ANYONE NOT INVOLVED IN THE CASE. PLEASE PRINT CLEARLY.

PERSONAL DATA			
Last Name	First Name		M.I.
Date of Birth	Age	Gender	
Street Address	City	For How Long?	
Type of residence (check one): ☐ House ☐ Apartment ☐ Condo ☐Mobile home ☐ Other			
Do you own or rent you residence? (check one):	☐ Own	☐ Rent	
Marital Status (check one): ☐ Single ☐ Married ☐ Divorced ☐ Separated ☐ Widow(er) Yrs: ___			
Race:	Religious preference:		
Serve in the military? ☐ Yes ☐ No			
If so, list dates, branch, MOS, highest rank and type of discharge.			
FAMILY DATA			
Spouse's Last Name	First Name		M.I.
Date of Birth	Age	Gender	
Street Address *(if different than yours)*	City	For How Long?	
Race:	Religious preference:		
Children and Stepchildren *(continue on back if necessary)*			

Name	Age	Gender	Education	Occupation

EMPLOYMENT & EDUCATIONAL BACKGROUND			
Current occupation:	Current employer's name & address:		
Prior occupations in the last 10 years:			
Are you now, or have you ever been, in a supervisory position at work in charge of other rating, hiring or firing other people? ☐ Yes ☐ No If so, please explain.			
Last grade you completed in school or degree received:			
Spouse's current occupation:	Spouse's current employer's name & address:		
Mother's last occupation:	Mother's most recent employer:		
Father's last occupation:	Father's most recent employer:		
EXPERIENCE WITH JUDICIAL SYSTEM			
Have you, a family member, or loved one ever been arrested or charged with criminal offense (other than minor traffic ticket)? ☐ Yes ☐ No If so, please explain.			
Have you, a family member, or loved one ever filed a lawsuit or been sued? ☐ Yes ☐ No If so, please explain.			
Have you, a family member, or loved one ever worked for a company that has been sued? ☐ Yes ☐ No If so, please explain.			
Have you ever served on a jury before?		☐ Yes	☐ No
If so, how many times? ___	Criminal ___	Civil ___	Grand Jury ___
Were you ever the presiding juror (foreperson)?		☐ Yes	☐ No
Where did you serve?			
When did you serve?			
If civil jury experience, what kind of case?			
What were your verdicts? (check one)		Criminal (☐ guilty or ☐ not guilty	Civil (☐ for Plaintiff or ☐ Defendant)

Have you ever been a victim, witness, plaintiff, or defendant in any civil or criminal lawsuit? ☐ Yes ☐ No If so, please explain.			
What is your opinion about lawyers and whether they are trustworthy or not? Please explain why you feel the way you do.			
Have you, a family member, or loved one ever had to file a claim against an employer or insurance company for a personal injury? ☐ Yes ☐ No If so, please explain.			
Have you, a family member, or loved one ever worked in an insurance related business where the person evaluated, negotiated, approved, or denied claims? ☐ Yes ☐ No If so, please explain.			
Have you, a family member, or loved one ever worked in a medical related business where the person treated or arranged for the medical treatment of others? ☐ Yes ☐ No If so, please explain.			
Have you, a family member, or loved one ever worked in a law or law enforcement related business? ☐ Yes ☐ No If so, please explain.			
What is your opinion about whether there are too many lawsuits? Why do you feel that way?			
Generally speaking, do you feel that jury verdicts or settlements in Austin are:	☐ Too High	☐ About right	☐ Too Low
Please explain:			
If you, a family member, or loved one were injured because of someone else's negligence, would you bring a claim or file a lawsuit against that person? ☐ Yes ☐ No If so, please explain.			
What is your opinion about whether the legislature should limit the ability of juries to award damages for pain and suffering and disfigurement? Why do you feel that way?			

What is your opinion about punitive damages (extra damages to punish a person or entity who has committed negligence?) (check one) ☐ For ☐ Against ☐ They should be limited Please explain.
DRIVING EXPERIENCE
Texas Driver's License #: | How many years licensed in any state?
Identify the Year, Make and Model of any vehicle currently owned by you or a family member living with you?
Have you ever received a traffic ticket? ☐ Yes ☐? No If so, please list date, location, offense, and how disposed.
Have you, a family member, or loved one ever been involved in a motor vehicle collision? ☐ Yes ☐ No If so, please list date, location, whether the person was driving, whose fault it was, and whether anyone was injured.
If a driver accidentally hits another car, do you think the driver should have to pay for any injuries he or she caused in the other car? Please explain why or why not.
If a collision results in very little damage to the vehicles, how likely is it that the occupants are injured? (check one) ☐ Very likely ☐ Likely ☐ Not likely ☐ Impossible Please explain.
MEDICAL BACKGROUND
Have you, a family member, or a loved one ever injured their neck or back? ☐ Yes ☐ No If so, please state who, when, how injured, specific injury, whether they recovered, and whether they still have to seek treatment.
Have you, a family member, or a loved one ever suffered a serious injury? ☐ Yes ☐ No If so, please state who, when, how injured, specific injury, whether they recovered, and whether they still have to seek treatment.
Do you believe a person can seriously injure their neck or back without such injury appearing on a x-ray film? Please explain why or why not?

Have you, a family member, or a loved one ever treated with a chiropractor? ☐ Yes ☐ No If so, please state who it was, who the chiropractor was, when the person treated, for what injury they treated, and whether the treatment was helpful?
What opinion do you have about the legitimacy and effectiveness of chiropractic medicine and why?
Do you believe it is easier or more difficult for a person to injure their neck or back in a motor vehicle collision if they have suffered neck or back injuries before? Please explain why or why not.
SOCIAL BACKGROUND
Please list all organizations, civic clubs, fraternal societies, religious organizations, etc. to which you have belonged or supported financially. State whether you currently belong and identify any offices you hold or have held as a member.
Are you a member of a political party? (check one) ☐ Republican ☐ Democrat ☐ Other
Please list all magazines, periodicals, newsletters to which you currently subscribe or have subscribed to within the last three years.
Please list all television shows you watch regularly, including what your favorite show is and why.
Do you listen to any radio talk shows? If so, identify which ones and why you like them?
Do you currently have, or have you in the last three years had, any bumper stickers on any vehicle you owned or drove? If so, please state what it said and when you had it.
THIS CASE
Please indicate whether and how you know any of the following individuals or entities:

Name	Yes	No	How

1. Judge			
2. Plaintiff's attorney			
3. Defendant's attorney			
4. Plaintiff(s)			
5. Defendant(s)			
6. Witness			
7. Witness			
8. Witness			
9. Witness			
10. Witness			
Is there anything occurring in your personal life or at work that might affect your ability to concentrate if you were selected as a juror on this case? ☐ Yes ☐No If so, please explain.			
Is there anything else that you want the Court or counsel to know that you believe is important regarding whether you can serve as a fair and impartial juror in this case? ☐ Yes ☐No If so, please explain.			

§ 67 Sample letter from Judge for Supplemental Juror Questionnaire

Exhibit _____

Dear Prospective Juror:

You are currently scheduled to appear for jury duty on _____. After the completion of jury selection, you may or may not be asked to serve as a juror on a case. In order to expedite the jury selection process and assist counsel and the Court in picking a jury that is likely to be fair and impartial, certain questions must be answered by you for review by the Court. These questions are not intended to unnecessarily impose on you or pry into your personal affairs, but rather, they are important questions that must be asked in order to ensure a fair and impartial jury.

Your answers to the following questions will be kept strictly confidential and will be used solely for the purpose of jury selection. None of your responses will be disclosed to anyone not involved with the case at hand. The Court instructs you to

answer the questions as completely and honestly as possible. Please make sure your answers are legible. You should not discuss the questions with others or obtain assistance from others in formulating your answers. The Court is seeking your own thoughts and feelings, not those of others.

Please complete the questionnaire and return it by mail to the Court in the enclosed self-addressed, stamped envelope no later than _____. If you fail to return the questionnaire by this deadline, you will be forced to complete the questionnaire on the morning of trial, in the presence of all the other potential jurors, which will significantly delay the proceedings and inconvenience all other potential jurors, the Court, counsel, and litigants. If you have any questions, please do not hesitate to contact the Court Administrator, _____, at (___) ___-_____.

Sincerely,
Judge

§ 68 Sample Motion for Supplemental Juror Questionnaire

CAUSE NO. _____

John Doe,	)	IN THE COUNTY COURT
Plaintiff,	)	
v.	)	AT LAW NUMBER _____
Negligent Tortfeasor,	)	
Defendant.	)	_____ COUNTY, _____
	)	

PLAINTIFF'S MOTION FOR JUROR QUESTIONNAIRE

COMES NOW, Plaintiff, JOHN DOE, and requests this Honorable Court employ a Supplemental Juror Questionnaire in the above-referenced case.

I. FACTS

This case involves a motor vehicle collision wherein Defendant rearended Plaintiff at a stop light causing her personal injuries, to wit, neck and back pain and TMJ.

The physical damage to the vehicles involved in the collision was relatively minor.

Defendant has indicated he intends on introducing evidence

of the magnitude of the impact in an effort to argue Plaintiff's injuries were not caused in the collision.

Trial is currently set for _____, _____ in front of a jury.

II. ARGUMENT

A. *A Supplemental Juror Questionnaire would promote judicial economy*

Much of Plaintiff's voir dire examination is spent asking routine questions about juror backgrounds, experiences, and knowledge of the parties, scene, or events at issue. These are typically straight-forward questions such as whether anyone knows counsel or the witnesses or whether anyone has been involved in an automobile collision. Because these questions are relatively simple, they are appropriate for a juror questionnaire.[1] When asked during voir dire, these questions act to bore the panel, extend the time necessary for voir dire, and prevent counsel from focusing on genuine bias-producing issues in the case.

B. *A Supplemental Juror Questionnaire would allow counsel to more quickly focus their inquiry on the issues present in the case*

If counsel can avoid spending time on asking many of the routine background questions, they will be able to spend the Court's valuable time questioning the potential jurors regarding the real issues in the case. Because this case involved a relatively low speed collision, Plaintiff's counsel will be forced to discuss at length with the venire their assumptions and beliefs concerning whether a person can be injured when the exterior of their vehicle is not very damaged. Most jurors have an unrealistic belief about the property damage required before

---

[Section 68]

[1]ABA Standards Relating to Juror Use and Management, (1993), Standard 7; Voir Dire . . . "a) To reduce the time required for voir dire, basic background information regarding panel members should be made available in writing to counsel for each party" before the voir dire examination. The Report of the Committee on Juries of the Judicial Council of the Second Circuit at 93 (August 1984) ("Much time is presently consumed during the voir dire process by the asking of routine questions . . . Prospective jurors spend considerable periods of time in idleness . . . If some of this idle time were spent completing questionnaires . . . the time spent on routine questioning might be expended more productively.").

occupant injury is likely.[2] Without a supplemental juror questionnaire, counsel would be forced to spend time on background questions rather than discussing more critical issues with the panel.

The efficiency of supplemental juror questionnaires has been recognized by courts all over Texas. Dallas County, for example, has a standing juror questionnaire that it uses in most every case and is what the attached questionnaire is based on.

C. *Jurors are more likely to be truthful and fully disclose their experiences and beliefs in a written questionnaire completed outside the presence of other potential jurors*

The ultimate purpose behind jury selection is to obtain the most fair and impartial jury as possible. The more information counsel and the Court has regarding the potential jurors, the more likely they can intelligently exercise and rule on challenges. Studies have shown that potential jurors are more likely to give truthful responses to questions when allowed to answer in writing outside of the presence of the other jurors, than when asked in person in front of the entire venire.[3] Jurors with strongly held beliefs about lawsuits, lawyers, tort reform, or noneconomic damages will be more likely to disclose their true feelings in private on paper than in person in front of a room full of strangers. The supplemental juror questionnaire, therefore, furthers the goal of selecting a fair and impartial jury.

D. *The Supplemental Juror Questionnaire will not inconvenience the court or staff*

Plaintiff's counsel has provided the court with the attached

---

[2]J.B. Aubrey, Laypersons' Knowledge About the Sequelae of Minor Head Injury and Whiplash, 52(7) J. Neurol. Neurosurg. Psychiatry 842-6 (July 1989) (study that indicated laypersons believed highly exaggerated speeds were necessary to produce even the most common physical symptoms reported in motor vehicle collisions).

[3]Lilley, Techniques for Targeting Juror Bias, Trial 74-79 (Nov, 1994); P.B. Paulus, Psychology of Group Influence (2d ed. 1989); A. Paul Hare, Handbook of Small Group Research, (2d ed. 1976); Haney, Consensus Information and Attitude Change: Modifying Effects of Counter-Attitudinal Behavior with Information About the Behavior of Others, J. Personality & Soc. Psychol. (1984); B. Latane, Psychology of Social Impact, 36 Am. Psychologist 343 (1981); J.M. Levine, "Reaction to Opinion Deviance in Small Groups," Psychology of Group Influence (P. Paulus ed., 1980); Bush, Neal, The Case for Expansive Voir Dire, 2 Law and Psychology Review 9 (1976); Broeder, Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965).

questionnaire and cover letter to be sent to potential jurors. Plaintiff's counsel will also take care of any copying, postage, envelopes, etc. necessary in sending the questionnaire to potential jurors. Plaintiff merely requests the court include the costs associated with the supplemental juror questionnaire as taxable court costs to be paid by the losing party.

III. PRAYER

Plaintiff requests that this Court direct that the written supplemental juror questionnaire attached to this Motion be submitted to prospective jurors in this case. The questionnaires will be mailed by _____, _____ to be returned by _____, _____. Plaintiff's counsel will provide all copies, envelopes, postage, and any administrative support necessary to the court. The completed questionnaires will not be disclosed to anyone other than the court, court personnel, counsel, counsel's staff, and the parties. The completed questionnaires will remain sealed in the court's file, unless the court rules otherwise.

Respectfully submitted,
[FIRM]
[Address]
[City, State ZIP]
[Telephone]
[FAX]

By: _____
[Attorney]
[State Bar No.]

CAUSE NO. _____

John Doe,	)	IN THE COUNTY COURT
Plaintiff,	)	
v.	)	AT LAW NUMBER _____
Negligent Tortfeasor,	)	
Defendant.	)	_____ COUNTY, _____
	)	

ORDER

On this _____ day of _____, _____, Plaintiff's Motion for Supplemental Juror Questionnaire came to be heard. After careful consideration of Plaintiff's Motion, Defendant's Response, evidence presented, and argu-

ment of counsel, if any, the Court GRANTS Plaintiff's Motion. Furthermore, it is hereby ORDERED that:

(1) Copies of the questionnaire and cover letter attached to Plaintiff's Motion will be mailed to each prospective juror by _____, with instructions to be returned by _____;

(2) Plaintiff's counsel will provide all copies, envelopes, postage, and any administrative support necessary to the court;

(3). The completed questionnaires will not be disclosed to anyone other than the court, court personnel, counsel, counsel's staff, and the parties;

(4) After jury selection, the completed questionnaires will remain sealed in the court's file, unless the Court rules otherwise; and

(5) The costs associated with sending the questionnaire and obtaining responses will be considered a taxable court cost to be paid by the losing party in the case.

SIGNED on this _____ day of _____.

PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:
[Attorney]

_____
Attorney for Plaintiff

§ 69 Sample Motion to Extend Time

CAUSE NO. _____

John Doe,	)	IN THE COUNTY COURT
Plaintiff,	)	
v.	)	AT LAW NUMBER _____
Negligent Tortfeasor,	)	
Defendant.	)	_____ COUNTY, _____
	)	

PLAINTIFF'S MOTION FOR ADDITIONAL TIME TO CONDUCT *VOIR DIRE*

COMES NOW, Plaintiff, JOHN DOE, pursuant to the 7th and 14th amendments to the United States Constitution and Article I, Section 9 of the Texas Constitution and files this his Motion for Additional Time to Conduct *Voir Dire*, and shows the following:

I. FACTS

This case involves a motor vehicle collision wherein Defendant rearended Plaintiff at a stop light causing him personal injuries, to wit, neck and back pain and TMJ.

The physical damage to the vehicles involved in the collision was relatively minor.

Defendant has indicated he intends on introducing evidence of the magnitude of the impact in an effort to argue Plaintiff's injuries were not caused in the collision.

Trial is currently set for _____, _____ in front of a jury.

II. LAW

"As a general rule, great latitude should be allowed a party interrogating a venire in order to enable his counsel to determine the desirability of exercising on the members thereof his right of peremptory challenge, and this court does not look with favor on any unreasonable limitation of this right." Smith v. State, 513 S.W.2d 823 (Tex. Crim. App. 1974).

"It is always commendable for a trial court to dispatch business with promptness and expedition, but this salutary result must never be attained at the risk of denying to a party on trial a substantial right." Carter v. State, 100 Tex. Crim. 247, 272 S.W. 477, 478 (1925). A party's right to counsel includes the right to question members of the jury panel in order to intelligently exercise peremptory challenges. De La Rosa v. State, 414 S.W.2d 668 (Tex. Crim. App. 1967).

Imposing time limits for *voir dire* examination is left to the sound discretion of the trial court, however, such discretion must be employed reasonably. Cartmell v. State, 784 S.W.2d 138 (Tex. App. Fort Worth 1990). Appellate courts evaluating whether a trial court abused its discretion in limiting counsel's *voir dire* examination apply a two prong test: (1) whether counsel attempted to indefinitely prolong *voir dire*, and (2) whether counsel was prevented from asking proper questions. McCarter v. State, 837 S.W.2d 117 (Tex. Crim. App. 1992). Some courts also examine a third prong: whether the party was not permitted to examine prospective jurors who actually served on the jury. Morris v. State, 1 S.W.3d 336 (Tex. App. Austin 1999); Wheatfall v. State, 746 S.W.2d 8 (Tex. App. Houston 14th Dist. 1988), petition for discretionary review refused, (June 22, 1988); Ratliff v. State, 690 S.W.2d 597 (Tex. Crim. App. 1985).

"A question is proper if its purpose is to discover a juror's views on an issue applicable to the case." *McCarter*, supra.

It is difficult for a court to impose a rigid time requirement before *voir dire* begins because the court cannot anticipate how many prospective jurors may require significant examination for clarification of their opinions. Thomas v. State, 658 S.W.2d 175 (Tex. Crim. App. 1983) (reversing defendant's conviction because the court unduly and arbitrarily restricted defense counsel's voir dire examination to 35 minutes).

If counsel inquires about issues relevant to the case, the court must allow counsel a reasonable opportunity to examine the venire members. Morris v. State, 1 S.W.3d 336 (Tex. App. Austin 1999) (reversing conviction because court's 45-minute limitation of defense counsel's examination was unreasonable and precluded him from intelligently exercising his peremptory strikes); Tobar v. State, 850 S.W.2d 182 (Tex. Crim. App. 1993) (finding that court's 45-minute limitation of defense counsel's *voir dire* was unreasonable); Wheatfall v. State, 746 S.W.2d 8 (Tex. App. Houston 14th Dist. 1988), petition for discretionary review refused, (June 22, 1988) (reversing conviction because court unreasonably cut off defense counsel's voir dire after 45 minutes); Ratliff v. State, 690 S.W.2d 597 (Tex. Crim. App. 1985) (holding that court's one-hour limitation of defense counsel's *voir dire* examination was not reasonable); Clark v. State, 608 S.W.2d 667 (Tex. Crim. App. 1980) (finding that pretrial limitation of 30 minutes for defense counsel's *voir dire*, then stopping counsel after 40 minutes was not reasonable); De La Rosa v. State, 414 S.W.2d 668 (Tex. Crim. App. 1967) (reversing conviction because court's 30-minute limitation of defense counsel's voir dire was unreasonable and harmful).

If the court disallows proper *voir dire* by unreasonably restricting counsel's time, harm will be *presumed* because the effect of such a restriction would be to deny counsel and his client the ability to intelligently exercise the peremptory strikes. Howard v. State, 941 S.W.2d 102 (Tex. Crim. App. 1996), on reh'g, (Dec. 18, 1996) and (holding modified by, Simpson v. State, 119 S.W.3d 262 (Tex. Crim. App. 2003)); Smith v. State, 513 S.W.2d 823 (Tex. Crim. App. 1974).

III. ARGUMENT

A. *There are numerous issues present in this case that may be the source of bias*

While this case may be factually simple, that does not mean there are not a large number of issues which will need to be discussed with the venire. Many of these issues are controversial subjects that may provoke a lot of response from the

potential jurors. For example, beyond the typical topics like burden of proof, knowledge of the parties, and prior similar experiences, this case also necessitates that counsel inquire about the venire members' thoughts on things like subjective injuries, low property damage, lawsuit abuse, chiropractic treatment, and pre-existing medical conditions. Even assuming plaintiff's counsel only addresses the above eight subjects, limiting counsel to only _____ minutes means he will have approximately _____ minutes with each of the _____ members on the venire. This is not enough time to elicit and evaluate the potential juror's opinions on these very important matters and make intelligent decisions regarding peremptory challenges.

B. *Plaintiff's counsel will have to inquire about administrative matters as well*

Plaintiff's counsel previously requested use of a pre-trial juror questionnaire, however, the Court denied his request. While the juror cards have some demographic data on them, a lot of very important social, demographic, and administrative information is not included on the cards. Since the parties will not have the benefit of a pre-trial juror questionnaire, Plaintiff's counsel will be required to address many of the more administrative manners not included on the juror cards such as whether they know any of the parties or witnesses, whether they are familiar with the collision scene, and whether they have any relatives who are employed in the medical field. Because Plaintiff conducts his *voir dire* examination first, Plaintiff's questioning typically take significantly longer than the defense's. These administrative questions will require a lot of time and, if only _____ minutes is allowed for *voir dire*, Plaintiff's counsel will be prevented from addressing many of the more substantive issues that are critical to the Plaintiff's case.

C. *Plaintiff's counsel has no incentive to unnecessarily prolong voir dire*

Plaintiff's counsel recognizes the risks involved with a lengthy *voir dire*. An unnecessarily long *voir dire* examination will bore the venire. Asking questions that are irrelevant to the case will frustrate the prospective jurors. Plaintiff's counsel has no incentive to bore or frustrate the venire and, in fact, has a strong incentive to do everything possible to make sure the venire's time is used efficiently. Therefore, it is not necessary to establish a _____ minute time limit prior to trial

and before anyone knows what issues may present themselves during the examination.

D. *Plaintiff's counsel will provide the court with a list of questions*

If the court requests, Plaintiff's counsel will provide the court, for *in camera* review, a list of the questions he intends to ask the venire. Plaintiff's counsel will limit his inquiry to simply _____ issues, beyond the administrative questions. These issues are important, substantive issues that must be discussed with the venire if Plaintiff is to be able to intelligently exercise his challenges.

PRAYER

Plaintiff requests this Honorable Court permit _____ hours for Plaintiff's *voir dire* examination or, in the alternative, that the Court impose no time limitation at all before trial, but rather, give counsel guidance during the *voir dire* process depending upon the extent and substance of juror response.

Respectfully submitted,
[FIRM]
[Address]
[City, State ZIP]
[Telephone]
[FAX]
By: _____
[Attorney]
[State Bar Number]
Attorney for Plaintiff

§ 70 Sample Seating Chart

What follows is one example of a Sample Seating Chart that may be useful when questioning prospective jurors:

Juror 31	Juror 32	Juror 33	Juror 34	Juror 35	Juror 36	Juror 37	Juror 38	Juror 39	Juror 40
Juror 21	Juror 22	Juror 23	Juror 24	Juror 25	Juror 26	Juror 27	Juror 28	Juror 29	Juror 30
Juror 11	Juror 12	Juror 13	Juror 14	Juror 15	Juror 16	Juror 17	Juror 18	Juror 19	Juror 20
Juror 1	Juror 2	Juror 3	Juror 4	Juror 5	Juror 6	Juror 7	Juror 8	Juror 9	Juror 10

§ 71 Sample Juror Data Spreadsheet

What follows is one example of a Sample Juror Data Spreadsheet that may prove useful in keeping track of specific information about each prospective juror:

#	Last	First	Sex	Age	Race	Occupation	Employer	Yrs
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								
12								
13								
14								
15								
16								
17								
18								
19								
20								

#	Last	First	Sex	Age	Race	Occupation	Employer	Yrs
21								
22								
23								
24								
25								
26								
27								
28								
29								
30								
31								
32								
33								
34								
35								
36								
37								
38								
39								
40								

#	Marital Status	Spouse Occupation	Spouse Employer	Yrs	Jury Service	Home Value	Crim Record	Civil Law-suit	Pol. Party	Religion	Notes
1											
2											
3											
4											
5											
6											
7											
8											
9											
10											
11											
12											
13											
14											
15											
16											
17											
18											
19											
20											

#	Marital Status	Spouse Occupation	Spouse Employer	Yrs	Jury Service	Home Value	Crim Record	Civil Law-suit	Pol. Party	Religion	Notes
21											
22											
23											
24											
25											
26											
27											
28											
29											
30											
31											
32											
33											
34											
35											
36											
37											
38											
39											
40											

§ 72 Sample Focus Group Confidentiality Agreement

CONFIDENTIALITY AGREEMENT[1]

I, _____, am acting as an agent of [jury consultant firm or law firm] in providing the services I have rendered on this _____ day of _____. In exchange for the monetary compensation I will receive upon the completion of my services today, I agree to the following:

I will not disclose any information, impressions, opinions, or observations I might have learned through this research to any other individual.

I will not repeat any facts, dates, locations, names of any parties, opinions, impressions, observations, or any other information learned from the videotapes and other materials I have seen or heard to any individual.

I will not take any notes, documents, or other materials with me after the research is completed and instead will leave behind all such notes, documents, and other materials.

I also understand that my name will not appear in any written documents that could be published as a part of this research.

SIGNED this _____ day of _____.
Participant

[Section 72]

[1]This agreement is based on an example found in Cathy Bennett & Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics, 5-23, 1995 app.