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# INTRODUCTION

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The voir dire and jury selection process is one of the most challenging aspects of a jury trial. It is at this time that lawyers must identify and remove potential jurors who harbor some bias or hold beliefs that would make them less beneficial than others. Success in jury selection requires lawyers to draw upon a number of basic skills. These skills include the ability to:

- operate effectively within the jury selection system in the trial jurisdiction;
- attain the major goals of voir dire (i.e., information gathering, rapport, education, and persuasion);
- identify critical opinions, biases, and experiences of jurors that can influence their decisions;
- encourage jurors to reveal important information about themselves;
- utilize the information about their opinions and feelings that potential jurors communicate through their nonverbal behavior;
- develop and ask the questions on voir dire necessary to uncover desired information;
- employ methods for handling common situations and problems (e.g., reluctant jurors, difficult jurors, stealth jurors, negative spirals, and pretrial publicity) that arise during voir dire;
- capitalize on the information available through the use of juror questionnaires;
- effectively utilize information available on jurors through Internet sources and minimize potential threats to jury trials posed by the Internet;
- operate effectively in courts-martial member selections; and
- exercise peremptory challenges and challenges for cause in a manner that removes the least desirable potential jurors.

The goal of this book is to promote the skills needed to be successful in the area of voir dire and jury selection. It is through the sharpening of these skills that lawyers take a major step in improving the chances of a favorable verdict at trial.

We begin our consideration of voir dire and jury selection in Chapter 1 by examining the voir dire situation. What are the major goals of voir dire? In what ways do jurisdictions differ in how voir dire and jury selection are conducted? What is the impact of these differences on how lawyers should approach jury selection?

Chapter 2 examines the story model as a model for juror decision making and the importance of what jurors bring with them to court—the opinions, biases, and experiences that shape how they view and relate to the world around them. We consider the pitfalls of stereotypes and how to evaluate jurors' backgrounds and experiences, including a discussion of whether there really is a "CSI Effect." To more fully understand jurors' viewpoints, we explore the importance of global opinions, i.e., authoritarianism and beliefs in equity; case-specific opinions, i.e., opinions and attitudes that relate to the circumstances and issues in the case; and legal opinions, i.e., views regarding legal principles and procedures, and the role they play in jury selection.

Chapter 3 considers the information that is gained through understanding the nonverbal communication of potential jurors. We examine the important visual cues pertaining to the body, e.g., movement, posture, orientation, emblems, shrugs, eye contact, facial expressions, and microexpressions. Valuable information is also communicated through auditory cues. Speech disturbances, vocal hesitancy, rising pitch, amount of speech, speed of speech, tone of voice, tense laughter, and word choice provide insights into what jurors are "really" saying.

Chapter 4 turns to preparing for voir dire. In this chapter, we examine the key elements of the preparation process: case analysis and question development. What are the essential aspects to consider when analyzing a case? How do you consider such factors as the strengths and weaknesses of the case, the case theme, and important opinions and personal experiences of jurors? How should questions be asked to meet the various goals of voir dire?

In Chapter 5 we turn to conducting voir dire. This chapter explores good communication skills and interviewing techniques that facilitate the willingness of jurors to reveal important information about themselves. In addition, we consider key points in structuring the questioning process to maximize juror candor and disclosure. This chapter concludes by addressing the challenges faced in conducting questioning in settings where information is at a premium, i.e., restricted voir dire, group questioning, and judge-conducted voir dire, with discussions of how to improve voir dire conditions, sixteen recommendations for improving group voir dire questioning, and ways to maximize the effectiveness of judge-conducted voir dire.

We next turn our attention to situations and problems commonly encountered in voir dire and how to make the most of them. Chapter 6 considers three types of problematic jurors—reluctant jurors, difficult jurors, and stealth jurors—and ways of meeting the challenges they present. In addition, we examine effective methods of handling (1) controversial issues, (2) "negative spiraling," when jurors as a group become less forthcoming on voir dire, (3) the opportunities that "good" potential jurors present, and (4) the effects of pretrial publicity.

Chapter 7 considers the use of juror questionnaires. These questionnaires gather information on the jurors' backgrounds, experiences, and opinions prior to voir dire questioning and serve to supplement the information available on voir dire. In this chapter we discuss how to construct questionnaires

to get the most out of their use. To illustrate their use, we will consider juror questionnaires from three trials. On the criminal side, we will consider the juror questionnaires used in the highly publicized terrorism trial of *United States v. Zacarias Moussaoui* (the criminal trial arising from events surrounding the attacks on the United States that occurred on September 11, 2001) and the political corruption trial of *United States v. Robert F. McDonnell & Maureen McDonnell* (former governor of Virginia and his wife). On the civil side, we address the juror questionnaire used in *Earl Washington, Jr. v. Kenneth H. Buraker et al.* (a violation of civil rights trial arising out of the fabrication of evidence leading to the wrongful conviction and subsequent near-execution of an innocent man). These questionnaires and examples from other questionnaires will illustrate both good and bad points in questionnaire construction. In addition, we consider how to manage the information available through questionnaires, including the use of checklists and computer-assisted information management for complex questionnaires.

In Chapter 8 we explore the impact of the Internet on jury trials, both in terms of jury selection and the potential threat to jury trials posed by the Internet. Many potential sources of information exist on the Internet, including public records, websites containing records of jurors' involvement in politics (e.g., political contributions and fan/friend activities) and social causes, (e.g., advocacy websites), juror web pages, blogs, participation in social networking websites, and juror postings on media and other websites. By the same token, the Internet poses a threat to jury trials in terms of the jurors' access to outside information, including Google searches, online reference materials, media stories, blogs, and litigation-related advocacy websites, and apparent jurors' willingness to use such sources. The chapter ends with recommendations designed to minimize the threats posed by the Internet.

Chapter 9 examines the special case of military courts-martial. We consider the major differences between the civilian and military systems as they relate to voir dire and the selection process. Recommendations designed to facilitate effective voir dire in this unique setting are made that both highlight and expand upon topics discussed elsewhere in the book.

Chapter 10 examines how to evaluate jurors. We consider how to integrate the information available regarding jurors (both pretrial and trial information). In addition, we examine the group dynamics of jury deliberations, including juror participation, leadership, subgroup formation, cohesion, majority influence, and stages of deliberations. Finally, we consider methods for recording information on jurors and strategies for evaluating jurors and coming to a final decision.

Finally, Chapter 11 explores selecting a jury. We address both challenges for cause and peremptory challenges. In addition, we discuss recent developments in the law regarding the prohibition against the discriminatory exercise of peremptory challenges. An example of a successful *Batson* challenge is presented in detail as it occurred in the *Earl Washington, Jr. v. Kenneth H. Buraker et al.* trial. Finally, we consider strategies for exercising peremptory challenges in the context of the sequential and struck jury methods.

At the end of this book are several appendices for lawyer reference. Appendix I contains the motion for improved voir dire procedures submitted by the defense in a possession of child pornography case with accompanying affidavit and proposed supplemental juror questionnaire. Appendix II contains selected opinion questions for criminal trials from the perspectives of both the prosecution and the defense. Appendix III addresses selected opinion questions for civil trials from both plaintiff and defense perspectives. Appendix IV, appearing at [ambar.org/MasterVoirDire4e](http://ambar.org/MasterVoirDire4e), contains more than 190 juror questionnaires used in numerous civilian criminal and civil trials and in several military courts-martial. The questionnaires from civilian criminal trials include *California v. Scott Peterson* (murder), *California v. O.J. Simpson* (murder), *Colorado v. Kobe Bryant* (sexual assault), *Colorado v. James Eagan Holmes* (Aurora Theater shooting), *Connecticut v. Michael Skakel* (murder), *Florida v. George Zimmerman* (murder—Trayvon Martin), *Nevada v. O.J. Simpson* (armed robbery and kidnapping), *South Carolina v. Michael Slager* (first trial of murder—police shooting of traffic violation suspect), *Texas v. Eddie Ray Routh* (American Sniper murder trial), *United States v. Arthur Andersen* (obstruction of justice—Enron scandal), *United States v. Ammon Bundy et al.* (takeover of Oregon wildlife refuge), *United States v. Richard Causey, Jeffrey Skilling & Kenneth Lay* (Enron securities fraud), *United States v. Robert F. McDonnell & Maureen McDonnell* (public corruption), *United States v. Zacarias Moussaoui* (terrorism), *United States v. Theodore Stevens* (public corruption), and *United States v. Dzhokhar A. Tsarnaev* (Boston Marathon bombing), among others. The civil supplemental juror questionnaires come from trials including *Doe v. Nash* (wrongful termination—AIDS), *David Mueller v. Taylor Swift et al.* (tortious interference with a contract/assault and battery), *In re Enron Corporation Securities Litigation* (securities litigation), *In re Exxon Valdez* (oil spill), *In re Visa Check/Mastermoney Antitrust Litigation* (antitrust), *International Paper Co. v. Affiliate FM Insurance Cos.* (bad faith), *i4i LP v. Microsoft Corporation* (intellectual property), *Romo v. Ford Motor Company* (product liability), *Mildred Valentine v. Dow Corning Corporation et al.* (product liability—breast implant), and *United States v. Holy Land Foundation for Relief & Development* (funding of terrorist organizations), among others. The military member questionnaires are from general courts-martial including *United States v. SGT Joseph Bozicevich* (death penalty—murder of soldiers in Iraq), and *United States v. MAJ Nidal Hasan* (death penalty—Fort Hood shooting), among others. Each juror questionnaire is linked to the table of contents for easy reference and accessibility. Appendix V contains the proposed questionnaires submitted by the United States Attorney’s Office and the Federal Public Defender’s Office in *United States v. Zacarias Moussaoui* so readers can compare what both sides proposed and what Judge Brinkema finally included in the juror questionnaire used at trial. Appendix VI contains the motions, documents, and my affidavit concerning the appointment of a trial consultant in *United States v. MAJ Nidal Hasan*, along with the trial judge’s order granting this request. Finally, Appendix VII contains the plaintiff’s

memorandum in support of the oral *Batson* motion filed in *Earl Washington, Jr. v. Kenneth H. Buraker et al.*

This book goes beyond other books on jury selection in its focus on the skills needed to conduct effective voir dire and jury selection. Having a list of questions to ask is only a starting point. Conducting effective voir dire and jury selection requires developing strategies that secure the necessary information and adapt to the unique circumstances that lawyers face in their trial jurisdictions. Effective jury selection does not result from memorizing questions from a book. It is a dynamic process that places a premium on knowing what is needed and how to get it.