OPERATOR: This is Conference #8966809.

(Mackenzie Copeland): Hi, everyone. And welcome to the ABA Solo, Small Firm and General Practice Division Hot Off the Press Live Podcast. My name is (Mackenzie Copeland), and I’m the Vice Chair of the GPSolo Book Publications Board. Today, we will be speaking with Jeffrey T. Frederick, ABA author and director of the Jury Research Services Division at National Legal Research Group, as he discusses the new edition of his book, Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury, which is currently a bestseller.

I also just wanted to remind everyone who’s tuned in to the podcast that Cyber Monday is coming up. And it will be a 40 percent off sale if you go onto ABA Shop. Or you can also call them at 1-800-285-2221, and the promo code is CYBER18. But you can also just Google the Cyber sale, and it should pop up on the ABA website to get that 40 percent off of all the book.

As we go into this podcast, I just want to say that the presentation will conclude with a question-and-answer session, which the operator will facilitate. This valuable book will help you understand effective voir dire and jury selection strategies and to adapt each strategies to the unique circumstances faced in trial’s jurisdiction. This is a sneak peek of the in-person CLE session scheduled during the ABA 2019 Midyear Meeting in Las Vegas, Nevada on Friday, January 25, 2019. This event in ABA Midyear Meeting is free. So if you go to www.ambar.org/midyear for more information.

Now, I’d like just to give you a little bit of background and information on Dr. Frederick. Dr. Frederick is the Director of the Jury Research Services Division of the National Legal Research Group. Dr. Frederick has been involved in jury selection, in jury research since 1975. He received his MS
and PhD in social psychology from North Carolina State University. He has assisted the Department of Justice Office of Independent Counsel, United States Attorney’s Offices and state prosecutors, and has assisted criminal defense attorneys in both civilian courts and courts-martial. He has assisted attorneys for plaintiff and defendants in a (Silver Area), including (Attorney General) and the Civil Rights Division of the Department of Justice.

In addition, to personally assisting in hundreds of cases, he has written extensively on the topic of jury trials and trial advocacy, including the books that we’ll be discussing today, which is in its fourth edition, Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury. He also has another book that’s Mastering Voir Dire and Jury Selection, which is Supplemental Juror Questionnaires, and the third is The Psychology of the American Jury, as well is he has numerous articles on the jury related topics. And Dr. Frederick is a frequent speaker on juries and jury issues as we will see at the Midyear Conference.

He teaches U.S. tort law as part of the Anglo-American law program at the Law School of the Universidad de Navarra in Pamplona, Spain. And his firm is a recipient of the 2018 and 2017 Virginia Lawyers Weekly Reader’s Choice Award for Best Jury and Trial Consulting Services.

And now, I will turn the call over to Dr. Frederick.

Jeffrey Frederick: Thank you, (Mackenzie), and thanks, everyone, for joining me on this broadcast. I’d like to say that the first edition of Mastering Voir Dire and Jury Selection came out in 1995. And since then, there has been a lot of changes in what we do in voir dire and how we conduct jury selection. And (I’m trying to keep) everybody abreast of that in the subsequent editions.

Now, what I’d like to do today is talk about three, maybe four, major topics today. But I wanted to start off by first highlighting the topics that we won’t be getting to but are included in the fourth edition. These include discussion of various voir dire and jury selection settings; the rule of backgrounds, opinions, and experiences of jurors; conducting case analysis and question development in light of the various goals that you seek to obtain during voir
dire; common situations and problems such as reluctant jurors, difficult jurors, the feared stealth juror among other situations; member selection in courts-martial and how to be most effective in the selection process, group dynamics, (forensic) challenges, challenges for cause, (bats) and issues, striking strategies based on struck versus the sequential systems; and dependencies that I think are particularly noteworthy are appendix that has sample voir dire questions and criminal trials from a prosecution and defense perspective and then the same thing for civil trials’ sample voir dire questions from the plaintiff and the defense perspective. One of the unique aspects of this book is that when you buy the book, you also have access to an online catalogue of over 190 supplemental juror questionnaires from criminal and civil cases. So it’s quite an additional value.

Now, about right now, you’re probably going, OK, well, what’s left to talk about? Well, actually, there’s a lot left. And what I’d like to do is take 45 minutes and look at three to four topics. And these topics include tips for conducting more effective voir dire particularly in a group setting. I’d like to talk about understanding the juror’s nonverbal communication, a very interesting topic, jurors in the internet; and then finally, if we have enough, a time a brief discussion of supplemental juror questionnaires.

Now, I’ll be taking kind of the tip of the iceberg approach in terms of the content of book. Is it no, we’re not going to be able to talk about everything about conducting more effective voir dire? But I’d pull out some things, some highlights that I think you should know. Also, as we go through our discussion today, we need to remember that jurisdictions and judges differ, and their approach is to voir dire and jury selection.

So with that said, I’d like to stress that – as I stress in the book, silence is not golden in voir dire. Our goal is to maximize juror participation and disclosure during voir dire and juror selection process. So let’s turn to a few tips that I believe can make us more effective in group voir dire.

Tip number one, adopt the proper perspective. What we want to do is we want to have a conversation with jurors during voir dire. We don’t want to have a job interview. When you have a job interview, everybody puts on their
best suit and tries to provide the best answers that they can. We don’t want to have interrogation because jurors will get defensive.

What we want to do is having a conversation with them. And the key of a conversation is a good conversationalist is interested in what the other person has to say. And that is a fundamental of good voir dire. So we want to have a conversation. And I don’t care if it’s a conversation with just one juror, 10 jurors, 15 jurors, 20 jurors, 100 jurors. We’ve had those conversations. It’s the key of you having the mindset of I’m having a conversation.

Also, in terms of our orientation, is that what we want to do is we want to reinforce jurors for answering our questions, providing us with thoughtful answers. This applies to not only the ones that are telling us things that we like to hear about, but it particularly applies to those people who are telling us things that we don’t want to hear about, the bad answers, because what we want to do is we want to reinforce them. And you do it in very simple terms. It’s just simply, “I appreciate your candor,” “Thank you very much.” These kind of verbal reinforcers and nodding and looking, showing attention to what they have to say that will encourage them to go further because they’re actually doing us a favor. The bad answer jurors, if you will, are doing us a favor because this is the only time where we can have an opportunity to prevent them from sitting on the jury. And so what we want to do is to reinforce their answers so they can get to the deepest level of their answer in terms of how bad it is for our client.

The second tip is set the stage for jurors. What we want to do in our introduction to the jurors is we want to explain the process. We want to talk about that we’re after truth and candor. There’s no right or wrong answers. There, really, the correct answer is only the truthful one. We also want to take advantage of the opportunity to convert the negative connotation to the word bias to something that’s a little bit more acceptable because we’re going to want to have jurors tell us what their biases are.

But if we’re talking about biases all the time, jurors are really reluctant to admit that they have these biases. But they’re more likely to admit that they have something called a filter. That is, we’re going to say that what we’re
going to be talking about today are going to be exploring some areas that some people refer to as biases that I’m going to refer to as filters because that’s really what they are. And basically, what we’re going to do is convert bias into filter by pairing it. And then we – once we paired it, we then talk about filters. Filters are a fact of life. We all have them. It’s simply part of being human. As we grow up, as we have certain experiences, we develop certain filters or ways of viewing things. And that’s all we’re talking about here. And so, if we convert it, bias to filters, we’re going to be more effective in getting jurors to reveal what filters they have.

Tip three is get them talking. The goal of us in voir dire, in jury selection, is that jurors talk, we listen. If you’re doing most of the talking during voir dire, then something is wrong. What we want to do is use techniques to get jurors involved early. And what we can do depending on the jurisdiction and particularly if you have a box of jurors, if you will, we can simply go down the role of jurors and have each of them answer maybe four to five questions, their name, if that’s appropriate and what they do inside the home or outside the home, their marital status, do they have any kids and maybe throw in what are your favorite spare time activities or hobbies. As a psychologist, I like that part of the information that we’re getting. But the major point here is that while that information, it may be helpful, if they may not be all that helpful, but what it does is that each juror gets an opportunity to say something in open court. And it will reduce the awkwardness, reduce their anxiety, or nervousness with saying something in open court. And they’ve now broken the ice.

Since most voir dire in a lot of jurisdictions conducted in a group format, we also want them to participate by raising their hands. That’s generally how you initiate an answer in group voir dire. So what we want to do is to get them to engage in, what I call, initial hand raising. We want them to raise their hand at the very beginning of voir dire. And we can do this a couple ways. If you’re more relaxed like I am, you can basically tell them, “You know, over the years, jurors have told me that probably one of the kind of the most uncomfortable time they had was the first time they raised their hand. And then they found out nothing really happens to them and everything was fine.
Well, let’s do your fellow jurors a favor and have everybody just raise your hand.” And of course, you raise your hand too.

If you are not the kind of person that can do that, what you can do is simply ask them a question where everybody should raise their hands. What are the qualification for jury service in your jurisdiction? Maybe, is that they’ve lived in the community for six months. Or maybe it’s a year or something like that. Well, just simply ask them, “How many of you have lived in this community for over the past six months?” Now, everybody should raise their hands. And you can ask them, “How many of you are U.S. citizens?” And everybody should raise their hands. Although I have been in a case before where somebody wasn’t a U.S. citizen.

Tip four is capitalize on open-ended questions. Now, this is a distinction between open-ended and closed-ended question. Open-ended questions are those questions where the jurors have to provide the answer. You’re not telling them what the answer is in the question, the phrasing of the question. Closed-ended questions are the do you agree or disagree or are yes/no questions. This is where the answer that they have to choose from is within the question itself.

Now, the value of open-ended questions and examples of the questions are what are your views on this whatever the topic is, what would you expect to see in an arson case, tell me a little bit about your views on lawsuits or just simply the question why. You’ll notice that there’s no answer being given in the question. And the juror must then come up with their own answer. And they must use their own words in telling you their answer. So what you do is you learn more information about them in what they provide. And also you get a chance to assess to some degree their cognitive complexity, their inability to articulate their thoughts.

Tip five, avoid the socially responsible – socially desirable response bias. Now, what we want to do here is that we want to avoid words and phrases that trigger the looking good answer. Such phrases is any bias or prejudiced or fair and impartial or do you understand that. I mean very rarely the jurors will they raise their hand and say, “I don’t know about the other jurors here. But I
must be particularly dumb because I have no idea what you’re talking about. I don’t understand it.” And what we want to do is recognize that when we use these phrases, it triggers impression management, it triggers a response to “I want to look good.” And quite frankly, jurors, when they wake up the morning, rarely does it happen the juror wakes up in the morning, stretches and says, “Whoa, I’m feeling kind of really biased and prejudiced right now. I think I’m going to go onto the court and the trial and do me some justice.” That generally doesn’t happen. So what we want to do is avoid those phrases that trigger attempt at impression management.

Now, tip six, focus on difficulty versus ability. What the research shows is that we are more willing to recognize that we might have a problem with something or it might be difficult for us to do something as compared to admitting that we will not be able to do something. So asking questions, that would you have any difficulties, problems or reservations or concerns, choosing whichever word you want, or what difficulties would you have; as compared to, are you able to do this, can you do this. What you’ll find is if you focus on the difficulties that they might have, they’re more likely to admit them.

Tip number seven, focus on undesirable or prohibitive behavior versus bias. Now, here, what I’m referring to is that we want to look at the manifestations of the bias because as we’ve talked about earlier, people do not want to admit that they are biased. So what we can do is ask them questions that focus on their need for more evidence because of their viewpoints that they may lean in favor of one side or the other. They may give more weight or maybe they give less weight to some type of witness or some type of evidence. Would they start out a little – would one side start out a little ahead of the other as compared to talking about do you have a bias against one party or bias in favor of one party.

Tip number eight is develop questions based on known bad answers. Now, basically, as you prepare voir dire, you want to think about what answers would, could jurors give you that would be a definite red flag. Or if they answered and gave that answer, you would either excuse them for peremptory challenge or exercise a challenge for cost. We want to think about what those
answers are and then generate questions that address that so – because what you find in voir dire is oftentimes you can go through voir dire on a certain topic. And you haven’t heard that red flag answer.

Now, if you believe that that answer is somewhere in your jury pool, you then need to ask it so that you can then follow up. For example, you could ask somebody, ask the jurors about, would not they have – what their feelings are or have any feelings about punitive damages, and a juror might say that to his or herself, “You know, I think they do more harm (than) good.” But they’re more likely (to respond), “Well, not really.”

But if you then asked the question, do you feel the punitive damages do more harm than good, you then hit the critical answer with that potential juror, and that juror is more likely to say, “Well, yes, I agree with that.” And so we want to go ahead and think about the bad answers in advance and make sure that we can make sure that we ask that so that those people still don’t remain in the jury pool.

And tip number nine is contrast competing positions. And this is a nice way of getting information from jurors because basically what you’re doing is you’re saying some people believe this whatever this is and other people believe that, believe something else, which is closer to your view. And what this type of questioning does is that it forces jurors to choose one side or the other. First, it normalizes and say, “Hey, some people believe this. And some people believe that.” And so they – if they raise their hand, they’re going to be expecting other people because there’s always some people.

But also what it does, it allows you to see that if they had to choose, would they choose the bad or the good side because that’s important. For example, you could ask the question in terms of the outcome of a jury verdict, some people believe that it’s worse if the verdict does too – provides too much to the injured persons. Other people believe that it is worse if the verdict provides too little money to the injured person. Which is closer to your view? And then whichever is a good answer for you or a bad answer for you, you get a chance to see which would they choose.
And tip number 10 is harness the power of reflective versus non-reflective questions. Reflective questions are questions that basically ask them, “Tell me about the problems you would have in doing this,” or “What difficulties would you have in terms of this issue?” or something like that.

Non-reflective phrasing is would you have any problems, would you find it difficult to do X, Y or Z. And for example in reflective questions, what difficulties would you have in convicting a police officer of using excessive force making arrest? Or tell me about the problems you might have in awarding money for pain and suffering. The non-reflective would be, for example, would you have any problems in awarding money for pain and suffering. By having jurors reflect on what problems they would have, they’re more likely – at least according to the research, they’re more likely to admit they would have problems as compared to – and tell you what those problems are as compared to just do they have them in general.

Now, I’d like to go ahead and switch to a second topic. And that topic is understanding the verbal, the nonverbal communication of jurors. But before I turn at that or in turning that, I’d like to make a couple initial points. First of all, in looking at juror’s nonverbal communication, we’re looking for signs of anxiety and positive and negative (asset). And we have to recognize that there’s no Pinocchio effect. That is there’s not one cue that if exhibited means 100 percent this particular thing. In the instance of Pinocchio that his nose grew longer every time he told a lie, well, that doesn’t happen with jurors. It doesn’t happen with jurors.

Also, what we’re going to do is we’re going to look for deviations in the pattern of the juror’s behavior as a function of who asked the questions and what questions are being asked. Well, how does her behavior change? And finally, we have to recognize that the same behavior can be exhibited for several reasons. For example, a juror may fold his or her arms during the questioning process. And you may go, well, maybe, the juror is becoming less receptive to what I have to say. Well, that could be true. And it also may be true that the air conditioning just went on in the courtroom and the juror’s cold, and they’re folding their arms to conserve body heat.
Now, there are two types of cues in terms of nonverbal communication. You have the visual cues and the auditory cues. Visual’s what we see. Auditory is what we hear. Now I’d like to do talk about just a few within each cue set, if you will. And there’s obviously more talk about in the book.

In terms of visual cues, one cue is body movement. The greater the movement, the greater the anxiety. Here, we’re looking at movements that dissipate nervous energy. It can be the wringing of the hands, tapping of toes. It can be self-adaptive movements like your kind of grooming gestures or picking lint off of clothes. And of course, it can be pretty outrageous at times. And some of you may have heard about potential juror in the Aurora theater shooting case who was actually pulling out her hair. She was so distressed with the possibility of sitting on that jury.

Next, we have body orientation. Body orientation, if you can visualize standing up and holding your arms out in 90-degree angle, facing the person who is talking to you or asking questions, that is the most open orientation you can get because you’re basically unprotected. Now, what happens when we get anxious that we will tend to close off certain parts of our body, we’re going to protect above the knee and below the neck. And so you might see the arms coming together and folding. You might see the legs crossing. You would see the potential for a juror turning their shoulder into you or turning away from the person that is asking the questions. And in fact, the more extreme case -- and I’ve seen this before -- is where not only have all those aspects but you have the juror then leaning back away from the questioner; very bad nonverbal communication.

Another cue – and we can’t talk about all of them. Another cue is eye contact. Eye contact establishes a relationship between the two people involved. And if there is anxiety in this relationship, as the eye contact increases, their anxiety also increases. And it gets to a point where the person experiencing anxiety feels uncomfortable enough that they want to break the eye contact. And it may be looking away. It may be blinking of the eyes, but something that breaks the constant eye contact. And now, I should also mention that eye contact is also susceptible to cultural and subcultural norms. But for our purposes here, it is a valuable cue as long as we recognize that.
And so what we want to do is pay attention to when does the – is the contact broken. And so it may be when the question is asked, would you have a problem, or that the person responds, “I wouldn’t have a problem,” and then glances down with circumstantial evidence or something like that. So you take a note of when did this break occur.

Now, there’s an exception to this. And that exception is hostility, is that if the juror’s hostile to you, they can deal with the uncomfortable nature of this relationship and they will continue to look at you. So you have to make sure that you look at not only the eye contact and the ability to keep eye contact but some of the other cues associated with the face that might indicate that – or the body that might indicate that, well, that’s really not a lack of anxiety. That really is a hostility.

And finally, we have facial expressions. And just a brief mentioned here is that – is that facial expressions are under our greatest control. And so we need to keep that in the back of our minds. However, having said that, there still is valuable information that we get from jurors looking over with a questioning expression or a look of concern or a look of sympathy or look of contempt. These are all on facial expressions that can mean a lot. So we need to pay attention to that.

And then what we want to do is to match the facial expression with the rest of the body and see whether or not there is inconsistencies. For example, with things like smiles, smiles are used as kind of a social lubricant, as a way of kind of making it through without causing any problems. But it also masks, as a result, it masks what their true feelings are. And they may be exhibited in other aspects of the body.

The second type of cue is auditory cues. We have speech disturbances, the uhs, errs, disruptions in the pattern of speech that can indicate anxiety. We have word repetition. I don’t have a problem with giving money for pain and suffering. The fact that they’ve repeated the words can indicate a level of anxiety. You also have amount of speech. And the greater amount of speech, usually the less anxiety. They feel more comfortable with you. And so you
pay attention to do they provide a lot of verbiage for you or for your opponent. And then it’s differential to when it comes back to you or goes to the opponent to see what happens with that.

There’s an exception to this. And that is irrelevant speech. And I’ll give you an example of this from the trial of Lieutenant Colonel Oliver North. I worked with the Office of Independent Counsel, the prosecutions of North and Poindexter. And here’s an example of irrelevant speech. The prosecutor says, “Is there any other reason that it be difficult for you to serve as a juror?” The juror says, “No, prosecutor.” “Sometimes, people have religious beliefs that make it hard for them to be a juror. Do you have any beliefs that come from your religious ideas or philosophical ideas that make it hard?” Juror, “Well, I’m a Christian. But you know I believe in the truth because the truth is God’s friend.”

Now, there, you start going now what – did that really answer the question? Well, let’s see. Prosecutor, “And if the truth as you understood it and the laws as you heard it from the judge led to a decision that required you to vote Colonel North guilty, you could do that if that’s the way you honestly believed it.” Juror, “No, I couldn’t do that because, you know, I wasn’t there. And then I don’t know if he did it. Say if I vote guilty, you know, people’s life is precious. And I would be taking his life in a sense. And I couldn’t vote guilty.” Prosecutor, “No matter what you heard in the courtroom?” “Right.” “You’re still going to vote guilty.” “No.” “I appreciate your candor.” And the juror was dismissed.

Now, those are some of the examples of visual and auditory cues. And in terms of – and I’ll probably make one more comment about those cues. And that is a cue of word choice. Obviously, it’s important what words, jurors use to provide and they provide in answer. But there’s a couple of things that also are important. One is something called psychological distancing. That is the psychological distance that the person puts between them and the object about what’s your speaking. So you can talk about a defendant. And that pushes that object away from you. But you can also talk about (John Jones) who was the defendant. And that’s a little bit closer. Or you could call him (Johnny). And that’s pretty close to you.
So pay attention to how they’re referring to the defendant and the victim or the plaintiff and the defendant. Also pay attention to negation conjunction, but. I can be fair but I’ve been stopped for no reason, or I can be fair but I saw on the paper that the defendant confessed. These kind of things, whenever you hear but as a cognitive exercise, just strike what they’ve told you and pay attention to what they’re now telling you.

Now, in terms of nonverbal communication, what we want to do is, in terms of value adding, we will now do couple things, is first we want to establish a baseline that is scientist talk for what is happening at the very beginning of something. And so we wanted to notice their behavior at the beginning of voir dire to see how nervous they are if you will. We’re going to look for changes in their behavior as a function of who asked the questions and what question’s being asked. And we’re also going to be looking at jurors in the spectator section. When, particularly, at the very beginning, when they may be questioned by the judge or being told about the case and that kind of stuff, this is a time where jurors don’t have the guard up. And so they’re likely to reveal their opinions about something more readily than once they’re put into the jury box. I have seen jurors cry in the spectator section and not shed a tear when they then came into the jury box.

Well, let’s go onto our third topic. And that is jurors in the internet. And quite frankly, the internet has transformed jury selection in recent years. Not only do jurors – do we have jurors using the internet in inappropriate way and a variety of the inappropriate ways. But the internet has become a valuable resource for helping us evaluate potential jurors. Now, in the book, I make a distinction between the threats posed by the internet and the opportunities presented by the internet in terms of jury selection. And then I briefly go through some sources on the internet that some of them serve that dual purpose.

Now, the first source on is the search engines and reference sites that are available on the internet. You know here you have Google searches you can – the other search engines like Bing and maybe Yahoo! where you can search
out information. The jurors can search out information on the case. And you can search out information on jurors.

You also have Wikipedia and online dictionaries that they can go to. I mean I’ve been in cases before where some of the parties had their own Wikipedia pages. And jurors could have gone to that. With an online dictionary, jurors can type in the word or phrase. And they’ll get an answer. It more than likely not going to be the answer that’s relevant to the definition in your jurisdiction.

And what jurors do and more often than we would think is that they do turn to some of the sources to find out information that they think is relevant to them making their decision in the case. I should also say that in terms of Google searches, you also have the mapping searching capabilities. And there have been cases where jurors have used these mapping capabilities to look at line of sight and these kind of issues that could arise in a case. And what we want to do as attorneys and trial consultants like myself want to do is to identify the juror’s internet footprint. You know that is when you go to the internet and I’m speaking in a very lay way, you go to the internet, what – where do you find bits and pieces, if you will, of the juror’s presence on the internet?

And the second source is the media, the news media. And here, we have websites and social networking websites. They’re associated with primarily news media. And these are very important as we go through trial. You know, yes, jurors can get information from these media sources. And also we can find out that information on potential jurors potentially.

That is these media sources are posting articles that have an opportunity for jurors to go ahead and post an emotional reaction, a like, a sad, wow, mad, laughing, these kind of things that they can post for the article itself. And also they can do the same for comments and replies, and they can actually give comments and replies. And I’m starting to find in a lot of my cases that jurors are appearing there. And we’re seeing them either in terms of providing an emotional reaction or actually a comment. I recently had a case where a potential juror had left a comment on article related to the case that basically was give her the needle meaning give her the death penalty. And obviously, that is important to know.
Next, you have the juror – another source is the juror’s social networking websites and webpages. Here you have Facebook, LinkedIn, Twitter, and Instagram and a variety other potential social media sites. Here, we’re looking at timelines of jurors in terms of their Facebook page and the likes that they may have to other organizations or to entities or to reading material and what have you, and the potential for their listing a group membership. LinkedIn, you’re looking at primarily professional kind of job related or academic related kind of information. Twitter, you have the content itself. What are the tweets? But you also have likes. And you also have who are the people – who are these people following.

Now, one thing that you have to keep in mind is you can’t have contact with potential jurors. So that means you do not friend. You do not follow because that can – that establishes a contact with the person who owns that Facebook page or that Twitter page. And that you should only be using public information.

Another source is likes or following for relevant entity sites. And I know that sounds kind of – potentially sounds confusing. But when you have sites like political figures or organizations and maybe environmental groups, that kind of stuff is that they have – people who have liked this page. You can go in and you can see people who’ve liked that page or people who are following this page. And sometimes there’s a discrepancy between what the page lists as people who follow, who have liked and what individual juror post on their own Facebook page. And so you just need to be aware of that. Also nowadays, there are litigation-related sites. You can have a GoFundMe the site. You can have defense fund sites where people go in and they register and they donate money. You have victim memorials that people can visit, that kind of thing.

And finally, that last source is databases. And this is primarily for jury selection. You have access to political contributions both on a federal level and on a state and local level. You have online petitions and causes that they can sign up for. And then you also can have access to civilian and criminal records.
And so without delving any further into internet kind of activities, it is something I do want to reinforce of that. That when you’re looking for information on jurors, you need to keep yourself in a – you need to keep on dealing with public information. You don’t want to have any contact with potential jurors. And that includes when you have assistance doing this kind of stuff, making sure they know the rules of that and also knowing that if you’re looking at LinkedIn accounts and that you have LinkedIn account that allows you to do so, you need to set your own settings for anonymous so that it doesn’t come up. That the label of your LinkedIn page doesn’t come up for them. And then they know that you’ve looked at their page.

Now, the final topic I’d like to deal with and very briefly is supplemental juror questionnaires. And basically I want to mention, just reinforce (Mackenzie’s) mentioning of my companion book, Supplemental Juror Questionnaires, that came out this year. That’s available. But last marketing (ploy), the – what are juror questionnaires? These supplemental juror questionnaires are questionnaires that are completed by jurors before voir dire begins that contained questions about the juror’s backgrounds or experiences or opinions and case relevant knowledge among other areas of interest.

The reason I wanted kind of briefly talk about supplemental juror questionnaires is that – is to get one thing. Supplemental juror questionnaires, a questionnaire like a supplemental juror questionnaire is the standard for honesty and candor. That is the research shows that they’re more likely to be honest in a written questionnaire as compared to an interview conducted over the phone, as compared to an interview conducted in person. And quite frankly, voir dire is an interview conducted in person. So we need to recognize that it is the gold standard for juror honesty and candor.

The other values of questionnaires is that they provide information, it allows you to more effectively follow up in your voir dire questioning. And it potentially – it has a potential for maybe decreasing the amount of time spent during the voir dire stage.
Now, basically, there are two forms of – two methods or options for administering juror questionnaires. One is a mail method by sending it out by the mail and having it returned, completed and returned in postage paid envelopes. You have the onsite method where jurors who brought in traditionally in the courthouse, they fill out the questionnaires and they give it to the clerks.

There’s a third option that is infrequently used but will be used more in the (future). And that’s going to be the online option where people can take of – complete this from their home online. And it’s important that when you use juror questionnaires that you consider how you’re going to distribute the completed questionnaires to the parties and also how you – and how much time you will be allowed to have to review those questionnaires. Given the amount of information that’s potentially available, you definitely need to give yourself the fair amount of time for you to appreciate what the answers are and to process all that information.

Now, basically, you have a number of components of a juror questionnaire. You have an introduction where they’re basically told what they’re going to be doing, why they’re doing it, and their answers are under oath. You have a lot of background information of demographics, their general experiences like military service and prior jury service, their involvement in various groups, case-specific information potentially having unsatisfactory experience with law enforcement or being falsely accused, these kind of things. Oftentimes, the questions might be, please list the organizations to which you and your spouse belong to or have participated in the past and what are your sources of news, listening to various sources, please list your hobbies or spare time activities. And this is an interesting question because in Oklahoma, I had a potential juror say that their hobby was cockfighting. In Michigan, I had a potential juror said that his hobby was smoking weed. I mean these are fairly candid responses and again showing you the value of a questionnaire.

But you can then look at the types of reading material and who they admire most or least. And nowadays, you want to include what websites do they visit, have they liked or placed comments on various website, this kind of things and then list the ones that are relevant to your case. You then include
questions dealing with background knowledge of the case, the opinions that they have formed about the parties in the case, the impact of the publicity that they may have seen, the impressions of the advocate’s roles like criminal defense attorneys or U.S. attorneys, and nowadays, particularly, U.S. attorneys, and opposing parties in civil cases. You’ll be amazed at the kind of diversity of answers that you’ll get about people’s perceptions of that. Obviously, there’s going to be case relevant opinions, their views on strictness and leniency of laws, and views on compensation.

And what’s important to keep in mind as you’ve crafted this questionnaire, you have it ready, you then have a – you have the questionnaires being completed and they come in, how are you going to process and handle that information. Sometimes it can be handled with just note taking to the side of a questionnaire or post-its. But that usually can – that can lead some problems. We oftentimes will use summary forms where you take this information from the questionnaire and put it on a single sheet that has all the important information that you want to know in a format that you can easily see in essence the juror at a glance. And then you also have the possibility of inputting the information electronically so that you can then put it in there. You have the ability analyze that in terms of how many people believe X, Y, and Z. You also have the ability to produce it on customized forms that have highlighted the crucial information for you.

And so, I think that at this point in time, it’s about time to turn it back over to (Mackenzie) and have some questions because we reached our 45-minute block.

(Mackenzie Copeland): Yes. And thank you so much, Dr. Frederick, for that amazing insight into the jury selection process even though that’s just the tip of the iceberg of all of the information that you have and that’s in your book that we all look forward to purchasing and reading. But now, we’re going to have some time for some questions. And so I’ll ask for our operator to explain that process.

Operator: Thank you. At this time, I would like to remind everyone that in order to ask a question, press star then the number one on your telephone keypad. That is
star one on your telephone keypad. We’ll pause for just a moment to compile the Q&A roster.

(Mackenzie Copeland): OK. So as we’re – she will let us know if any questions come in. So in the meantime …

Jeffrey Frederick: Yes.

(Mackenzie Copeland): … I actually have a question for you, Dr. Frederick, while we’re waiting.

Jeffrey Frederick: Sure.

(Mackenzie Copeland): And she can let us know when anybody has a question come in (like this). How important do you think that it is to read up on the strategies and things into jury selection so that you know the deeper process and what’s going on in each juror’s mind before going into a jury trial?

Jeffrey Frederick: Well, it’s obviously very important and for a couple of reasons. One is kind of a practical reason, is that when you go – the jury selection, is kind of a pressure cooker situation. And we have to recognize that we sometimes don’t make our best decisions under that kind of pressure. And that we want to think about, OK, who are the red flag jurors, who are the jurors on a deep level, who do I want to prevent from getting on to the jury, these kind of things. That all has to be thought up in advance. You then combine that with the answers that they give you and the nonverbal communication and that kind of thing. But you have to establish what it is you’re looking for, who are you looking to prevent from getting on to the jury. And so that is – that’s obviously a primary concern.

The other thing in terms of looking at different strategies of questioning in this kind of thing is that by being familiar with various alternative approaches. Like for example, we talked about contrasting positions in the form of a question or talking about reflective questioning is that it then allows you to respond, “Here’s an opportunity where I can use this,” and be able to – if you think about in advance, it allows you to be able to respond on your feet in spontaneous manner. And it makes you more effective.
(Mackenzie Copeland): Great. Thank you. Do we have any questions at this time?

Operator: Again, if you would like to ask a question, please press star then the number one on your telephone keypad.

Jeffrey Frederick: And while we’re waiting for our questions and we know you’re all sitting at the back of the room pretending that you’re not going to ask any question, but while we’re waiting for these questions, let me talk about maybe one or two situations that can happen in voir dire and how we might be – it might effectively handle it.

One situation is something I call negative spiraling. And negative spiraling is basically maybe that the questioning has gone fine initially. And then all of sudden, you’re getting less and less responses from jurors. And in fact, part of that can happen via the way we ask our questions, by always asking questions where only a few people answer -- and that’s great for notetaking but is lousy for voir dire -- and so that they (inaudible) (and not responded). Or it may come from the jurors basically saying, “Oh, yes, I agree with what number one said,” or they hear a kind of a particularly good phrase that they think is good like I have no preconceived opinions. And also everybody starts answering that same thing.

What we want to do in that kind of situation with this negative spiral, first, we want to try to prevent it by have – by asking questions as we go through voir dire where the majority of people should raise their hands. So it keeps them engaged in the process. The second thing that we can do is to treat someone who’s giving you very little information, not answering much, is to encourage them to be more thoughtful. Show some empathy. I know this is a situation we don’t oftentimes deal with at talking about this issue in public. But it’s really important that we do so. And then empower them to be able to answer the question that maybe they’re concerned about being able to make a decision. And talk about what tough decisions they’ve made in their lives maybe at work or something like that to get them in touch with, yes, they’ve made decisions that disappoint somebody. And that’s all that they’re going to be asked to do here, is to – they may be – they will be making decision that
will disappoint somebody. And that’s OK. That’s just what their job’s going to be. You have to control the process. When someone says, “Well, I agree with number one,” you say, “OK. Well, how is that? In what way? Tell me a little bit about that.” And you don’t let them get off by saying, “Yes, I agree with that one over there.” And so this way, it encouraged them to participate again.

And you also can capitalize. And if you have a longer voir dire, you can capitalize on breaks and breaks to where you can kind of – and I hate to say it – you kind of tread water till you get to the break. Break happens, a lunch break or something. They feel more refreshed. And then you come back in and you start questioning on the more meaningful questions. You don’t want to waste those if people have gone silent and it’s right before lunch time.

And you can also use -- and we did this before -- is to use untainted jurors. And I was in the case one time where the jury got into this, the questioning process got into the, “Oh, I have no preconceived notions. And everybody goes, “Oh, that’s really legal founding.” And so they started using it. And we had a situation where a juror had come in late to trial, and the judge was basically upset that this juror did not come in on time. And so the first open seat in the box that became available, he had that juror come up and replace in the empty seat. And so instead of proceeding with our questioning to the remaining jurors, we went to that juror, (inaudible) went to that juror and started our questioning (anew) with this person. The good thing about it is that untainted juror had not seen everybody answering no preconceived notions and was a little bit self-conscious about, gee, I got – the judge was mad at me. I better act right here. And so he was very – he gave us a lot of information. And it was interesting to watch the rest of the jury because we did not hear the phrase, “I have no preconceived notions” throughout the remainder of the voir dire. We use that in order to break that negative spiral there.

And then because I can appear to be able to talk forever, someone can alert me if there is a question. Otherwise, I’ll go on to another topic, which I think is particularly interesting. And that is stealth jurors. And I talked about it in the book. Stealth jurors are those jurors that – they’re a special case of biased
jurors because stealth jurors are aware of their bias and they seek to get on the jury to forward an agenda. A lot of biased jurors just simply aren’t aware that they’re biased. But stealth jurors are. And the way they try to get on is they’d try to say very little. They refrain from extreme positions or statements. They qualify or restrict the scope of their answers. And they obviously maintain, well, (steadfastly) that I can be fair.

First, we want to identify stealth jurors. And we got to recognize that there’s kind of two types of stealth jurors. You have jurors who are stealth through omission. That is that they have an opinion or they have this kind of bias. They won’t fess up to it unless they’re pinned down. And then they will not lie. They’ll just – they’ll give it to you. And then you have those that are stealth through commission. That is that they actually will deny bias. And they will actually lie. And what we want to do is we want to first of all identify stealth jurors looking at maybe the inconsistency between their supplemental juror question or answers or the information you’ve gathered from the internet or some of the other information you have on them comparing that with their answers they give in court, unfavorable nonverbal communication, unduly precise or restrictive answers. And that’s a real one to pay attention to, where someone says, “Do you know the defendant or defense attorney?” “Well, I don’t know him really,” or “I’m not a friend of his.” All these are defining things that you follow up with them and you find out, well, wait a minute, the defense attorney goes through their church. But I don’t really know him but he goes to my church. Well, yes, you do know him in a relative way that you do.

And what we want to do is listen for phrases that can indicate red flag issues like the laws are too harsh or the law enforcement is focusing on too much at neighborhoods of color. You want to listen to the qualifications that I’ve talked about. Example of a stealth juror that I’ve – I mention in my book is that there is a public defender who was a – was a juror in the criminal trial. And she gave her occupation as an attorney. She didn’t volunteer information about her employment. And she was newly assigned to the court. So she said, no, that she didn’t know any of the court personnel, attorneys, or the witnesses at trial. And she also didn’t volunteer that she came (inaudible) contact with law enforcer part of her job.
Now, the little (abstracts) besides that is that we all have to do our own job in voir dire. And this voir dire was not as well as it should have been. But what was interesting is that here, you had a public defender who really at some point in time knew what these questions were getting at and decided I’m not going to tell you that I’m a public defender because I actually want to get on this jury. The result in this particular case was a hung jury with this juror is being the only (hold out) for a lesser offense. And so it provides us illustration of what a stealth juror and agenda juror might do, how might they try to get around the process. Their preferred method is through omission so they don’t have to actually lie about something. But in some situations, they actually may lie.

(Mackenzie Copeland): All right. Thank you again so much, Dr. Frederick and to all of you guys, for joining us. If we don’t have any last minute question, then I’m going to go ahead and wrap up.

Operator: There are no further questions at this time. You may continue.

(Mackenzie Copeland): Thank you so much. Thank you, Dr. Frederick. We truly value you and your presentation today. And everyone on here, you will be receiving an email in a few days with the direct link to the recording of this podcast and a discount code for his book, the bestseller, Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury. And don’t forget that still the ABA has their Cyber Monday sale, which is 40 percent off, which you can get online or you can call in. And you can use the code CYBER18 to get 40 percent off. So don’t forget to tell all of your friends and family or to get them a good gift for the holidays. And just a reminder that you can also meet Dr. Frederick and learn more about this topic at his free CLE session scheduled during the ABA 2019 Midyear Meeting in Las Vegas, Nevada on Friday, January 25th. And this event and the ABA Midyear Meeting is free. So go online for more information. And, again, we want to thank everyone for joining us today on this episode of Hot Off the Press. And we hope you tune in next time. Thank you so much.
Operator: This conclude today’s …

Jeffrey Frederick: Thank you.

Operator: … conference call. Thank you all for participating. You may now disconnect.

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