TOP 10 RULES FOR AN EFFECTIVE VOIR DIRE

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INTRODUCTION

Most litigators agree that voir dire is the most significant aspect of any trial. Of course, the stated purpose of voir dire is to obtain a fair and impartial jury, but the ultimate objective is to pinpoint the prejudice and bias that hides in the subconscious of every juror. Although we call it jury selection, maybe it is more accurately referred to as juror “elimination”. Be aware, though, that jury selection is a matter of personal judgment and will obviously be colored by the experiences, prejudices and biases of the trial lawyer. Recognizing this ahead of voir dire will assist in a more accurate identification of the type of jurors to be selected or eliminated for a particular trial.

This paper is intended to cover the aspects of voir dire that we believe to be the most important. We have tried to provide both practical tips and legal authority. So, here are our top ten rules for an effective voir dire............

RULE 1: ALWAYS REMEMBER THE PURPOSES OF VOIR DIRE.

Studies have shown that most cases are won between voir dire and opening statement. By the end of the opening statement, most jurors have formulated strong opinions about the case that remain constant through the end of trial. Thus, voir dire becomes all the more important.

Dr. Robert Gordon of The Wilmington Institute advises that there are six basic purposes for any voir dire examination:

SIX PURPOSES OF VOIR DIRE

- Uncover the bias of the panelist
- Teach the jurors about the law
- Condition jurors to your theme
- Commit jurors to your view
- Establish a rapport with jurors
- Select the jurors best suited for your side of the case

1. Uncover Bias

In order to find which potential jurors might be helpful or hurtful to your side of the case, you must identify the juror’s bias or prejudice. This includes their conscious, preconscious, and subconscious bias. Conscious bias includes those biases that the juror is consciously aware of and knows he has. Preconscious bias is bias that the juror is not aware of but can be brought to their conscious mind through examination. Subconscious bias remains underneath the surface of the juror’s awareness despite questioning.

To identify the conscious and preconscious bias, you must get the juror’s talking – get them to tell you about themselves. Ask open-ended questions to encourage them to express their opinions on issues that are important to your case.
It is important to listen to the juror’s responses and follow-up on their answers. Many attorneys shy away from this free exchange out of fear that a juror may express an opinion that will taint the remainder of the panel. However, it is important to remember that these same opinions will undoubtedly be expressed in the jury room with a far more devastating effect. Wouldn’t you rather get it out at the beginning when you can do something about it, than when it is too late in the jury room?

Equally important is to encourage through positive feedback the openness and honesty of the panel. This is not the time to be judgmental. Do not put a prospective juror in a defensive posture. Questions that ask a juror whether he could be fair, impartial, or whether he is prejudiced are not open-ended and encourage only yes or no responses and discourage jurors from revealing their true position on an issue. An average person will not look you in the eye and admit to a prejudice.

Remember, one of the purposes of voir dire is to learn the potential jurors’ attitudes toward the issues involved in your case so that you may eliminate those jurors. Encourage them to tell you how they feel about the hot issues.

2. Teach about law

Another purpose of voir dire is to teach the juror about the law as it relates to your case. Most jurors will be unfamiliar with the exact legal concepts involved, and it is your job to facilitate their learning process. In this role, you are the teacher – the professor – and they are the students. Be careful not to talk over them or complicate the issues. Simplify the concepts so they are readily understandable. In some cases, what may appear to be a bias may instead only be ignorance that can be cured through education. But, if these misconceptions are not cleared up, jurors will filter the factual information inaccurately and reach erroneous conclusions.

3. Condition to your theme

Voir dire is the first opportunity to introduce the themes of your case. This is where the art of persuasion is particularly beneficial. The words used to describe events affects how jurors view the events. Capitalize on this by consistently using desirable words or phrases throughout the questioning, and carry over those same words or phrases to the opening statement, witness questions, and through the closing argument. Legal standards can also be influenced by the choice of wording, making something as straight-forward as the burden of proof seem like a moveable, fluid concept.

4. Commit to your view

Obviously, the ultimate goal of voir dire and your entire trial is to commit the individual jurors to your view so they will vote favorably for your side of the case. You should structure your voir dire so as to get the panelists’ heads nodding in your favor. Ask a general question first with which all should be able to agree. Then, begin to narrow your focus gradually to your specific issue. Get them saying yes so it is more difficult for them to say no later.

5. Establish a rapport

It is absolutely essential to take advantage of voir dire to establish a rapport
with the jurors. Not only does this begin to establish a bond of trust between you and the jurors, it also involves them in the process and captures their interest. All of this is essential to aid in the communication of your message. To get the juror’s participation, they must understand that you and they are engaging in an interactive exchange of information, free-flowing in both directions. You must act in a courteous, professional manner throughout the process to all persons involved, especially when discussing personal issues.

6. Select jurors

Of course, the ultimate purpose of voir dire is to select (or eliminate) the jurors to serve during the trial. In order to make an educated guess about which panelists to leave on the jury and which to strike, you must talk to each juror, even briefly. Then, challenge for cause the jurors who have bias. Exercise peremptory strikes on those remaining panelists who could hurt you the most.

RULE 2: KEEP IN MIND THE PERMISSIBLE SCOPE OF VOIR DIRE.

The Scope of Voir Dire Examination.

A main use of voir dire is to elicit information for use in determining which jurors may be challenged for cause and in exercising peremptory challenges. Lubbock Bus Co. v. Pearson, 277 S.W.2d 186, 190 (Tex.Civ.App.--Amarillo 1955, writ ref’d n.r.e.).

The test for the scope of voir dire is materiality – is the voir dire question relevant to the parties or issues in the particular kind of case on trial? Johnson v. Reed, 464 S.W.2d 689, 691 (Tex.Civ.App.--Dallas 1971, writ ref’d n.r.e.) cert. denied, 405 U.S. 981 (1972). Counsel should be allowed a broad latitude as to subject matter in voir dire so that peremptory challenges may be intelligently exercised, but the extent of examination is within the discretion of the trial judge whose decision will not be reversed unless it clearly appears that he abused his discretion. Texas Employers’ Ins. Assn v. Loesch, 538 S.W.2d 435, 440 (Tex.Civ.App.--Waco 1976, writ ref’d n.r.e.); Flores v. Tex. Employers’ Ins. Ass’n, 515 S.W.2d 938, 939 (Tex.Civ.App.--El Paso 1974, no writ).

Permissible Voir Dire Inquiries.

Permissible voir dire inquiries have been found to include the following:


Comment by defendant that in civil cases there is no one to screen the cases that go to trial. *Flores v. Tex. Employers’ Ins. Ass’n*, 515 S.W.2d 938, 939 (Tex.Civ.App.--El Paso 1974, no writ).

Whether the jury will consider in a will contest based on undue influence that the witnesses to the will are employed and controlled by the other party and the expressions of the testatrix. *Rothermel v. Duncan*, 365 S.W.2d 398, 401-2 (Tex.Civ.App.--Beaumont), rev’d on other grounds, 369 S.W.2d 917 (Tex.1963).


Counsel is permitted to make statements made to advise the panel of what is expected to be proven during the trial. *American Motorist Ins. Co. v. Sells*, 747 S.W.2d 27,29 (Tex.App.--Texarkana 1988, writ denied).

Counsel’s right to voir dire examination extends to his or her making statements to the panel as to the issues to be tried in the case. *Robinson v. Lovell*, 238 S.W.2d 294, 297 (Tex.Civ.App.--Galveston 1951, writ ref’d n.r.e.).

Counsel’s remarks which inform the panel of what each party contends is different than informing the jury the effect of their answers. *Fort Worth & D.C. Ry. Co. v. Keel*, 195 S.W.2d 405,409 (Tex.Civ.App.--Fort Worth 1946, writ ref’d n.r.e.). As such, the court in this case stated, “Naturally, the members of the panel would have to know the nature of the case and the contentions of the respective parties to answer many questions essential to their fitness as jurors.” Id. at 410. “It is a
matter of common knowledge to the bench and bar that counsel may argue long and loud to the jury that a certain issue should be answered in a particular way. It would tax one’s credulity to say that a competent juror would not know from such argument that an answer as suggested by counsel would be favorable to his client and would be what counsel wanted as a basis for a judgment. Yet the advocate may not tell the jury the effect such answers would have on the judgment.” Id. At 409.

- A panelist’s dealings with the parties, in any material respect. See Lillie Sales, Inc. v. Rieger, 437 S.W.2d 872,876 (Tex.Civ.App.-Texarkana 1969, writ ref’d n.r.e.).
- Whether the panelist would consider the fact that witnesses that testify were employed by the other party, as well as whose control such witnesses were under. Rothermel v. Duncan, 365 S.W.2d 398,401-2 (Tex.Civ.App.-Beaumont), rev’d on other grounds, 369 S.W. 2d 917 (Tex.1963).

Impermissible Voir Dire Inquiries.

The following are areas of questioning which the courts or Rules of Civil Procedure specifically prohibit, and are errors per se, although comment on these forbidden topics may not cause an automatic reversal due to application of the harmless error analysis.

- Questions concerning pending legal accusations against the prospective juror of theft, or any felony or prior conviction of the prospective juror for a disqualifying offense are not permitted to be asked by counsel. TRCP 230.
- Advising jury of effect of their answers.

- Whether the panelist would consider the fact that witnesses that testify were employed by the other party, as well as whose control such witnesses were under. Rothermel v. Duncan, 365 S.W.2d 398,401-2 (Tex.Civ.App.-Beaumont), rev’d on other grounds, 369 S.W. 2d 917 (Tex.1963).

Robinson v. Lovell, 238 S.W.2d 294, 297-298 (Tex. Civ. App.--Galveston 1951, writ ref’d n.r.e.). The jury in a worker’s compensation case was informed that a total and permanent injury meant 401 weeks at $35.00 per week. In this case, however, the error was waived for lack of proper objection. Texas Employers’ Ins. Ass’n v. Loesch, 538 S.W.2d 435, 440 (Tex. Civ. App.--Waco 1976, writ ref’d n.r.e.).


- Questions designed to instill in the jury prejudice against the parties are improper. Texas Employers’ Ins. Ass’n v. Loesch, 538 S.W.2d 435, 440-41 (Tex. Civ. App.--Waco 1976, writ ref’d n.r.e.). (Plaintiff’s counsel stated to jurors that the opponent company had engaged in sinister and malicious conspiracies and was attempting to avoid liability by evasion, confusion and deception. The court held comments to be error but harmless due to failure to properly object.)

- Calling attention to the difference in financial ability of the contending parties. Texas & New Orleans R.R. Co. v. Lids, 117 S.W.2d 479, 480 (Tex. Civ. App.--Waco
Generally, it is improper to advise the jury that a party is or is not protected by insurance. A.J. Miller Trucking Co. v. Wood, 474 S.W.2d 763, 766 (Tex. Civ. App.--Tyler 1971, writ ref'd n.r.e.)

While parties are permitted considerable latitude on their examination, they are not permitted to extract a commitment from the jurors prior to any evidence being introduced. Lassiter v. Bouche, 41 S.W.2d 88, 90 (Tex. Civ. App.--Dallas 1931, writ ref'd).

It has been held improper to comment on settlement negotiations that have occurred in the case. See McGuire v. Commercial Union Ins. Co., 431 S.W.2d 347, 352 (Tex. 1968).

The trial court may restrict inquiry into the personal habits of jurors, including their dating habits, as opposed to inquiry into personal prejudices or moral beliefs. De La Garza v. State, 650 S.W.2d 870, 877 (Tex. Civ. App.--San Antonio 1983, writ ref'd).

If counsel is restricted in voir dire by the trial court, objection to such restriction is waived unless counsel timely complains to the trial court regarding such restrictions and makes a bill of exceptions showing any questions that counsel was unable to ask because of the restrictions. Kendall v. Whataburger, Inc., 759 S.W.2d 751, 756 (Tex. Civ. App.--Houston [1st Dist.] 1988, no writ).

**Form of Questions.**

Counsel is charged with the duty of making sure that a question addressed generally to the entire panel is heard and understood by everyone. Missouri Pacific R.R. Co. v. Cunningham, 515 S.W.2d 678, 683 (Tex. Civ. App.--San Antonio 1974, no writ); O’Day v. Sakowitz Brothers, 462 S.W.2d 119, 123-24 (Tex. Civ. App.--Houston [1st Dist.] 1970, writ ref’d n.r.e.).

Problems can arise when a question is propounded to the entire panel that asks for a nonverbal answer, such as the raising of hands. See Southern Truck Leasing Co. v. Manieri, 325 S.W.2d 912, 914 (Tex. Civ. App.--Houston 1959, writ ref’d n.r.e.). Counsel should state on the record that a visible response has been made by specific jurors. When a voir dire question is ambiguous, the interpretation placed on the question by the juror, if reasonable, will be accepted. Missouri Pacific R.R. Co. v. Cunningham, 515 S.W.2d 678, 683-684 (Tex. Civ. App.--San Antonio 1974, no writ); O’Day v. Sakowitz Brothers, 462 S.W.2d 119, 123-24 (Tex. Civ. App.--Houston [1st Dist.] 1970, writ ref’d n.r.e.).

Counsel should follow up answers to general questions with additional questions to develop sufficient information to establish the juror’s qualifications. Ramirez v. Wood, 577 S.W.2d 278, 285 (Tex. Civ. App.--Corpus Christi 1978, no writ). “One who fails to conduct a complete voir dire waives his right to complain of any resulting prejudice.” Bailey v. Rains, 485 S.W.2d 837, 842 (Tex. Civ. App.--Waco 1972, writ ref’d n.r.e.).

The better approach to voir dire examination is to direct specific questions to the panel members individually. If no direct and specific questions are directed with reference to the desired information, there is no showing of error if the trial court refuses to grant a new trial because of alleged jury misconduct, absent a showing of a concealment of facts. Coulson v. Clark, 319 S.W.2d 183, 193 (Tex. Civ. App.--Austin 1958, writ ref’d n.r.e.). General questions to the panel are usually a poor predicate for a later claim of this form of misconduct. Thompson v. Quarles, 297 S.W.2d 735, 737 (Tex. Civ. App.--Waco 1955, writ ref’d n.r.e.).
Voir Dire and Jury Selection
By A. Michelle May and Bobby D. Barina (December 1999)


The trial court has discretion to refuse to allow individual questioning of jurors out of the hearing of the others impaneled, Levermann v. Cartall, 393 S.W.2d 931, 937 (Tex. Civ. App.--San Antonio 1965, writ ref’d n.r.e.), but most judges allow it where the juror has indicated he may be subject to a challenge for cause and the matter needs to be further explored out of the other jurors’ hearing to avoid tainting them.

Obviously, it is error to conduct any further voir dire of the jury after they are selected and sworn in as the jury in the case, Sunbelt Insurance Co. v. Childress, 640 S.W.2d 356, 357 (Tex. Civ. App.--Tyler 1982, no writ).

RULE 3: ANALYZE ALL ASPECTS OF YOUR CASE.

What are the issues in your case?

From the moment the case comes in your door, you should begin preparing for trial. Identify all of the issues in your case and begin thinking about how to present each of them.

Develop your theme.

It is absolutely necessary that counsel should develop a theme during voir dire examination, carry it through opening statement, expound upon it in the evidence, and use the fully developed theme as a cornerstone of summation.

The utilization of one or more themes is an effective method of organizing and presenting the closing argument. Themes should be selected at the initial stages of case preparation. The theme gives the jury a title, a goal and a purpose within a vital framework for deliberations.

There are numerous case standard themes which have been developed over the past few decades of litigation. These standard themes include, for example, corporate greed v. consumer safety; child safety; product safety; workplace safety.

Harold Nations in his article Art of Persuasion, Jury Persuasion Institute 1997, outlines the corporate greed theme as follows:

A corporation has no heart, it has no soul, it has no nerve center, it has only bank accounts. Corporations exist solely to produce profits and converse only in the language of accounting. But this corporation must receive the message that the citizens of Texas will not tolerate corporate greed over consumer safety. As jurors in this case, you have the opportunity to send that crucial message to the corporation in this case.

A case theme which explains both the plaintiff’s position and reverses the defendant’s position is the perfect case theme. The case theme should be short and perhaps use various literary techniques to make it more memorable.

The most memorable example of this comes from the infamous trial of O.J. Simpson: “If the glove don’t fit, you must acquit.” This theme was short and it rhymed. It was easy to remember and made a big impact.

Here are some other examples of case themes:

- In a rear-end collision where a young man
suffered severe brain damage, the collision was caused by the driver of a truck changing lanes quickly in heavy traffic who didn’t see the young man stopping in front of him. The theme was, “An erratic lane change lead to a catastrophic life change.”

- In an oil refinery explosion, the defendant contractor had installed some valves backwards which allowed volatile hydrocarbons to bleed into the atmosphere. The theme was, “They contracted to build an extension to the oil refinery, instead they built a bomb!”

- In an anesthesiology medical negligence case, an anesthesiologist failed to properly treat a child’s spasm of the larynx by giving a drug to reverse the spasm. Instead, he tried to force a breathing tool into the child’s mouth, but when it would not go, the anesthesiologist flung the tool across the room. The theme was, “A professional panicked. Professionals must not panic.”

Tell about the evidence.

Voir dire is the first opportunity to give the jurors a sneak peek at the evidence you intend to present in support of your case. Tell them about that evidence. But, I usually like to save something for later. Don’t put every favorable fact out there in voir dire. Save something powerful for opening statement. But, do tell them about all of your weaknesses, so there is no surprise in that area.

Tell a story.

Children love stories. Adults love stories. We remember, understand and create through storytelling and listening. Jurors decide on the basis of stories heard, related, and understood.

Gerry Spence explained the role of storytelling in an article appearing in the American Bar Association Journal in April 1986:

Of course, it is all storytelling – nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening, the shivers racing up your back to the place where the scalp is made, and then the breathless climax, and the sadness and the tears with the dying of the embers, and the silences.... The problems is that we, as lawyers, have forgotten how to speak to ordinary folks... lawyers long ago abandoned ordinary English. Worse, their minds have been smashed and serialized and their brain cells restacked so that they no longer can explode in every direction – with joy, love and rage. They cannot see in the many colors of feeling. The passion is gone, replaced with the deadly droning of the intellect. And the sounds we made are all alike, like machines mumbling and grinding away, because what was once free – the stuff of storytelling – has become rigid flanges and gears that convey nothing....

The importance of the story in human remembrance and understanding is easier to grasp if we picture the individual in today’s high intensity world of communication. The storytelling trial lawyer must fathom the stories story in each juror’s mind, so, as an effective communicator, he or she can activate the scripts that will lead to an understanding by the listener. It is a concept of reaching into the jurors’ minds and pulling out those stories that match our clients’ favorable story. If we do not carefully structure our stories, unfavorable scripts will be scanned by the listener and applied to the situation at hand.

Every case has a story to tell. It is the job of the trial lawyer to find the story in each case and flesh it out.
Work backwards.

No attorney should select a jury until he knows his jury argument. Prior to voir dire, know the evidence and the issues which will be submitted to the jury. In preparing voir dire, work backwards from the charge and your closing argument. In other words, you’ve got to know where you’re going to know how to get there.

Organization.

Voir dire should be carefully organized. Typical organization might include:

a. Statement of facts and contentions

Always introduce your client and have him or her stand and face the jury as you discuss his background. You should call him by his first name after this introduction and throughout the trial. On the other hand, you should strive to depersonalize the opposing client. Call him or her by their formal name (“Ms. Smith”) or by a title (“the defendant”, “the ex-wife”, or “the corporation”).

Close Strongly!

The rule of primacy and recency – that we better remember what we hear first and last – would have you make a strong closing statement right before you sit down summing up your case and what you want from the jury.

b. General comments of progress of trial
c. General questions of panel
d. Individual questions of panel

Fully discuss unfavorable facts.

The trial attorney should always bring out the facts most unfavorable to his side of the case and not allow opposing counsel to do so. If opposing counsel is allowed to point out the unfavorable facts, trial counsel’s credibility will be severely damaged in the jurors’ eyes.

Always personalize the client.

Clients should be instructed to appear attentive and considerate of one another, as well as the members of the jury. Tell them not to make faces or react in any way to the negative evidence. They should not be overly jovial and should appear serious about the matter at hand.

The client should be dressed appropriately, and the trial attorney should consider in advance what is appropriate for the particular case. For example, a trial between corporate clients in Dallas County would require one manner of dress. Whereas, a custody suit between a father and mother in Cameron County might require another.

RULE 4: KNOW THE PLAYERS.

• What will the jury think of your client?

Control the appearance and body language of your client. The client should be aware of the effect of his/her body language on the jury.

• What will the jury think of your witnesses?

Consider what impression your witnesses will make on the jury. Although this is more difficult to control, you should at least think about it and analyze whether you should talk about it in voir dire. What if you have a fact witness that has good things to say about your case, but who has a DWI conviction? I would think you might want to address the issue of that
witness’ credibility in voir dire.

- What will the jury think of your opposing counsel?

You should fully analyze and consider the effect your opposing counsel will have on the jury. You should also think about how to compensate for that impression. Will the opposing counsel make a lot of objections? Will the opposing counsel seem like a jerk or a good-ole-boy? Will the opposing counsel seem credible or not?

Further, knowledge of opposing counsel’s tactics and strategy will greatly aid you in voir dire examination. For example, does opposing counsel like to “memorize” the jury panel list or does he or she utilize such auxiliary tools as a shadow jury or a psychologist in jury selection?

- What will the jury think of you?

Be cognizant of your appearance. Jury selection is the point of first impact. Like so many other aspects of our lives, the first impression is the lingering impression. The trial lawyer impacts on the jurors’ senses before they receive the law, before the evidence is presented, and even before a client is introduced. When the potential jurors are brought into the courtroom, the lawyer should not be shuffling through papers or looking over exhibits, as this presents an unprofessional and unprepared appearance. Always appear organized and in control.

excuses and ask whether you can attend. Find out whether the Court will limit your time or give you free reign.

- Know the panel.

  a. What are the attitudes of the community?

Spend some time researching the attitudes of the community the panelists come from. A panel from Collin County will tend to be white, republican, conservative, educated and upper middle class. They will have greatly differing views than a panel of mostly minority, lesser educated, oil worker, liberal, democrats from Nueces County. You would defend a rear-end collision differently in Nueces County than you would in Collin County.

You should also consider reading the newspaper from the area for a few weeks before the trial. If you are trying a child custody case for a mother where the mother has been diagnosed with depression and takes Prozac, you would need to know that there was a recent murder by a mother of her young daughter and the mother was depressed and on Prozac. That
type of current event might have a slight effect on your voir dire, and you would be blind-sided if you didn’t know this information ahead of time.

b. Obtain jury list

Different counties operate differently, but always request and try to obtain a copy of the list of jurors ahead of time. If you are in a firm, pass the list around and ask if anyone knows about any of the prospective jurors. Give your client a copy of the list for review and input. If the case can bear the expense, you may even want to consider hiring a consultant or investigator to find out as much as possible about the prospective jurors. Also, consider doing some research on the Internet about the panelists.

Until very recently in history, juries were predominantly made up of affluent Anglo-Saxon men. Jury selection in America was originally done by the sheriff picking citizens to serve on the panel. Then, courts went to a “keyman” system, where prominent citizens’ names were placed in a pool then drawn out. Next, the jury pool moved to property owner’s roles, then voter registration roles. Now, we use voter registration and drivers’ license roles to select panelists for jury duty. This change has made for a more diverse group of jurors than ever before, which makes jury selection an even more imprecise effort.

**Generation Gaps**

It is important to have an understanding of the general trends and attitudes common among the different generations in order to best present your voir dire and challenge panelists’ bias and prejudice.

- **Generation X**

  Generation Xer’s are those persons born between 1961 and 1981. This group is widely discussed in legal and business circles since they present cohesively differing attitudes than previous generations. Further, because they are typically more technologically literate than the older generations, it takes a more specialized presentation to capture their attention.

  Generation Xers are typically perceived as cynical, selfish and pessimistic about the future. They tend to question authority figures, such as police officers, school teachers or expert witnesses, and have little faith in the government or politicians.

  Most Gen Xers are saving for their future (probably due to a lack of confidence in the social security system) and more than half have at least one year of college. They typically marry later, have kids later, and value personal time, especially with their family, over working longer hours. This may explain why Gen Xers are depicted by older generations as being lazy and unmotivated.

  This is the first generation since World War I to be more conservative than their parents. Gen Xers typically identify more with corporations than the workers, and more with institutions than with victims. Therefore, monetary verdicts by
this generation tend to be less than other generations.

Gen Xers tend to be more socially tolerant than older generations, and view fathers versus mothers in custody suits more equally. They tend to be accepting of interracial marriages, varying sexual preferences, and religious differences. To Gen Xers, a “family” could be a group of friends living together, a single mother raising a child, or a traditional mother-father household with 2.7 kids. The Census Bureau projects that 85% of this generation will have married at least once by the year 2010 -- meaning that 15% will not have married. Gen Xers are more likely than any generation in the past to award custody of a child to a homosexual parent, for example.

The attitudes of men versus women among Generation X tend to be blurred. With the older generations, men and women had distinctive and predictable viewpoints. However, the male and female viewpoints of Gen Xers are more similar to each other, so you should look to other factors than gender in predicting attitudes.

Baby Boomers are more likely than their parents to accept a father as a custodian of children, but usually they first look at the mother to analyze why she should not have custody. They may theoretically accept that a homosexual person can be a custodial parent, but will rarely go against the traditional roles.

• Silent Generation

The Silent Generation includes that generation born between 1942 and 1928. They are now retired, but were very hard working during their younger days. The men of this generation worked very hard in their careers, typically placing work over family. The women were more likely to be homemakers and less likely to work outside of the home. Therefore, women of the Silent Generation will have greatly differing views than the men.

Gen Xers tend to prefer immediate results and become impatient with longwinded oratory. They have been raised with remote controls, email, and microwaves. They perceive themselves as “consumers” wherever they go. Therefore, it is a good idea to use visual aids which include graphics, videos, animation, etc. to keep a Gen X juror’s attention.

• Baby-Boomers

Baby Boomers include that generation born between 1943 and 1960. Baby Boomers typically have a strong set of ideals and traditions and usually have a strong set of moral obligations. They are family oriented but fearful of the future. Baby Boomers tend to be politically active and conservative.

Baby Boomers tend to be sympathetic to victims and workers. They are more inclined to give large monetary verdicts compared to their parents or children.

The Silent Generation is trusting of the government and tends to be optimistic about the future. However, they remember the depression and therefore tend to be fiscally conservative. Their damage awards tend to be more in line with those of Generation X, much more conservative than Baby Boomers.

The Silent Generation holds a strong set of moral obligations and are religious. They do not tolerate perceived immoral behavior.

In family law cases, they tend to be “mommy” jurors. They only consider a father for custody when there is something terribly wrong with the mother. They will not even consider non-mainstream issues, such as homosexuality or interracial marriages.
• Depression Generation

The Depression Generation was born before 1930. They are the most conservative fiscally and socially of all of the generations. They lived through the depression and tend to be very frugal. They are absolutely intolerant of alternative lifestyles and almost always award custody to mothers, regardless of circumstances.

• Millennial Generation

The Millennial Generation, sometimes called Generation Y or Echo Boomers, are those kids born after 1981. Although their values and generational tendencies are not set in stone yet, some generalities can be drawn predicting their behavior. This generation will outnumber Gen Xers in size. The majority of the Millennial Generation group will have played computer games, surfed the Internet, exchanged email, read the newspaper, and visited a museum or art gallery. They will be very, very informed.

This generation is more materialistic, selfish and disrespectful of authority than Generation Xers. They are very aware of the world and are

• Authoritarians. Generally unfavorable for plaintiffs, authoritarians value obedience and identify with symbols of strength. They are often politically conservative, punitive, rigid, and acquiescent to authority. They may be identified with questions designed to determine how they value obedience, or by an air of certainty in answering questions with “yes, ma’am” or “No, sir”.

• Perfectionists. Perfectionists, also generally unfavorable to plaintiffs, are judgmental of others and intolerant of less than optimal behavior. They may be identified by fastidious dress, professional occupations requiring compulsive attention to detail, and rigid value systems. They will usually only travel with a structured itinerary and do not like surprise visits from unexpected guests.

They budget money fastidiously.

• Ego-maniacs (narcissistic personalities). Generally unsympathetic to plaintiffs, they may be identified, by excessive use of “I” in their speech, expensive clothes and other symbols. They are very self-centered.

• Sympathetic indulgers. Generally favorable to plaintiffs, sympathetic indulgers are generous, softhearted and empathetic individuals. They tend to smile readily, are polite and inoffensive when answering pointed questions, tend to have large families and a good number of pets, and are most likely employed in people-oriented occupations.
RULE 6: BEWARE OF STEREOTYPES.

In jury selection, stereotyping assumes that a certain group of attributes will be associated with a given personal characteristic, such as age, relative wealth, marital status, religion, etc. The value of stereotyping in jury selection is that it provides a working hypothesis about an individual to which further information may be compared. BEWARE: As with any generalization, do not be tied to stereotypes--use experience and common sense.

- Socio-economic status. Socio-economic status may be relatively easily identified by occupation, types of recreation, dress, housing (neighborhood area), types of automobiles owned, etc. Studies have shown that jurors with smaller incomes are more likely to be sympathetic to the poorer party, whereas higher socio-economic status correlates with higher participation in jury deliberation.

- Wealthy Jurors. Although they tend to identify with the more wealthy party, if a wealthy juror identifies with a plaintiff, such jurors should be distinguished between those who have inherited old money. Those who have had to work hard for their wealth may well identify with the plaintiff.

- Moderate and low income jurors. Such jurors are generally not accustomed to dealing in large amounts of money.

- Educational level. Higher educated people tend to exert greater leadership and be more conservative than less educated jurors. It is important to determine whether higher educated people have a particular expertise in the particular case. Less educated jurors tend to put more emphasis on witness testimony, personal experience and opinions concerning trial proceedings. More educated jurors tend to place more emphasis on the trial procedure and the judge’s instructions to the jurors. More educated jurors are also thought to be more receptive to more technical legal arguments.

- Nationality/ethnic background. More important than nationality or ethnic background is the strength of a panelist’s ties with his/her cultural background. The stronger one’s association with traditional ethnic culture, the more likely a stereotypical conclusion will provide useful insight into the juror’s psychological makeup.

- Age. It is thought that jurors get more conservative with age. Younger jurors are found to be more questioning of authority figures and traditional values and more impulsive in their decision-making. They may be less sympathetic to an injured party’s plight unless they have personally experienced a similar injury. Older people are less likely to empathize with a younger party in a lawsuit.

- Gender. Pleasant-appearing witnesses seem to draw quick initial empathy from jurors of the opposite sex.

- Religion. Generally, the more traditional and moralistic a person’s religious beliefs, the more conservative and defense-minded he/she will be.

- Marital status. Happily-married jurors with children are thought to be more plaintiff-oriented. It is thought that experiences of marriage and family expose the individual to situations that require sensitivity to other’s
shortcomings and frailties.

- Prior military service. Volunteer enlistment suggests conservatism and authoritarian tendency; however, one who has been drafted may well not conform to the stereotype.

- Reading material. People who read technical and work journals are thought to be very serious and highly competitive, and are more likely to be oriented toward logical and factual presentation. Fiction readers are thought to be more attuned to emotional issues. Jurors should be asked about newspapers or magazines that they have read.

- Political orientation. Democrats tend to award higher damages than Republicans.

- Prior jury duty. Jurors who have previously served in similar cases will consciously or subconsciously consider evidence and arguments presented in the prior case. Therefore, it is important to inquire into the type of case and the outcome of the case before accepting a juror.

- Prior involvement with the judicial process. Anyone who has previously been involved in

RULE 7: OBSERVE PROSPECTIVE JURORS REACTION TO THE COURTROOM SETTING.

Jurors quickly mold their behavior to conform with what is perceived as “proper” for their role in the courtroom. Once seated in the courtroom, their demeanor becomes similar. The important instant to observe is just prior to that moment as the jurors enter the courtroom.

Look for physical problems such as limps, crutches, artificial limbs that could make jury service uncomfortable, and therefore affect the juror’s views.

Observe individual juror reactions to courtroom setting:

- Irritation at being in the courtroom.

- Familiarity of juror with the courtroom.

- Gender differences: Women maintain more eye contact than men, express more emotion, especially in their faces, and tend to smile
more often and more easily. Men tend to use more personal space than women (spread out their arms and legs), interrupt more during conversations, and use more fill pauses (“as”, “well”, etc.) in their speech.

- Leadership qualities: A display of high self-esteem and verbal dexterity are indications of leadership qualities. Other indications of leadership which should be inquired about in voir dire are offices held in professional social, political or religious organizations, letters to the editor, etc.

- Eye contact: Eye contact may be one of the most important factors in determining the desirability of a prospective juror. Increased eye contact may be indicative of a positive personal reaction. It may also demonstrate a need for approval and be indicative of a willingness to help in a given situation. Lack of eye contact may signal discomfort, lack of genuineness, deception, anxiety, and lack of self-esteem.

- Speech: People talk more with those they like, so if a prospective juror speaks more with opposing counsel, this should be considered significant. Prospective jurors who “rattle on” may disrupt deliberations and either prevent a verdict or create a strong negative emotional reaction by other jurors. If such a juror appears to be favorable, caution must be exercised.

  - Fingers tugging at the collar and hand to the back of the neck indicate uneasiness or uncomfortableness.
  - Pinching bridge of nose indicates deepness of thought.
  - Locked arms is an indication of defensiveness.
  - Clenched fists is a gesture showing defensiveness, hostility, as well as a desire to have control of the situation.

  - Rate, latencies, and pauses: Latency refers to the amount of time that passes between a question and a response. Rate of speech, latencies and pauses in between words may sometimes be signals that the prospective juror may have doubts about the answer and may simply be attempting to provide a “socially-acceptable” answer.

- Juror involvement: Strong juror involvement in what the lawyer is saying may be a positive factor, particularly if displayed more toward one lawyer than the other. Evidence of juror involvement is forward lean, increased gaze, more direct body orientation, greater facial expressiveness, longer speech duration, increased postural openness, more frequent head nods, and more intense paralinguistic cues.

- Hand movements: Generally, the following hand movements are indicative of the reactions described:
  - Steepling (placing the fingers together in the shape of a steeple) – shows confidence of the juror.
  - Touching or rubbing the nose tends to reflect a negative reaction.
  - Hand to mouth gesture tends to suggest self-doubt or that the person is not telling the truth.

- Facial cues: Common facial cues and their meanings are as follows:
  - Frown – displeasure or confusion
  - Raised eyebrow – envy or disbelief
  - Eye winked – intimacy or private matter
  - Tightened jaw muscles – antagonism
  - Squinting eyes – antagonism
  - Rolling eyes upward – disbelief, exasperation
  - Both eyebrows raised – doubt or questioning
- Smiling, if appropriate, may reflect a pleasant open attitude; where inappropriate, may show a juror is hiding his/her feelings, and/or may be a follower.

- Juror dress: Clothing is a way we project an image of the way we wish to be viewed by others. Wearing out-dated clothing, hair styles, etc. may signal an identification with the past. Comparing a juror’s clothing worn in the courtroom with what he/she might wear in the course of performing his/her occupation may provide clues to the juror’s conformity or regard for the jury system.

- Detect deception: The following are recognized as signs of deception: tightened facial expressions, rapid foot or leg movement, averted eye contact, dilated pupils, heightened self-manipulation (fidgeting with jewelry, hair, lapels, coat buttons), shifting posture, raised voice pitch, lengthy drawn-out answers to questions, and a nervous appearing eye-lid flutter. Asking open-ended questions which permit more of an opportunity to compare paralinguistic aspects of the speech with facial expressions and body movements allow you to detect deception. Also, asking questions in a way that prevents panelists from anticipating the questions will permit deceptive signs to show.

- Recognize and handle anxious or depressed jurors. Anxious people tend to appear jittery and should simply be handled in a special way to soothe their anxiety. It may be appropriate to ask if they would like to approach the bench to speak more privately. People who are depressed show a lack of eye contact, may droop their head, mouths, shoulders, and typically show a lack of hand movement. They are frequently followers, but so enthralled with their own psychological pain that they cannot empathize with the suffering of others. Thus, they are more likely to be defense-oriented jurors.

- Note jurors who stick together (striking one may alienate the other).

- Observe juror’s reading material (Wall Street Journal versus National Enquirer).

### RULE 8: KNOW HOW TO CHALLENGE JURORS.

It is important as a trial lawyer that you very intimately familiar with the rules for challenging jurors. After all, what good is all of your brilliant oratory and questioning if you can’t get the unfavorable panelists off the jury?

#### Challenges for Cause.

A challenge for cause is used to eliminate those jurors from the panel who are biased or prejudiced or otherwise disqualified from service.

- is of sound mind and good moral character;
- is able to read and write;
- has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;
- has not been convicted of a felony; and
Voir Dire and Jury Selection
By A. Michelle May and Bobby D. Barina (December 1999)

- is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.

A person is disqualified to serve as a juror in a particular case if he:

- is a witness in the case;
- is interested, directly or indirectly, in the subject matter of the case;
- is related by consanguinity or affinity within the third degree to a party in the case;
- has a bias or prejudice in favor of or against a party in the case; or
- has served as petit juror in a former trial of the same case or in another case involving the same questions of fact.


Rule 227 of the Texas Rules of Civil Procedure sets forth the general rules regarding challenging a juror:

A challenge to a particular juror is either a challenge for cause or a peremptory challenge. The court shall decide without delay any such challenge, and if sustained, the juror shall be discharged from the particular case. Either such challenge may be made orally on the formation of a jury to try the case.

Challenges for cause are defined by Rule 228 of the Texas Rules of Civil Procedure:
Bullard v. Universal Underwriters Insurance Co., 609 S.W.2d 621, 623-24 (Tex.App. - Amarillo 1980, no writ). Later cases have carried these basic principles forward. Of particular clarity on these issues is the case of Sullemoon. Sullemoon v. United States Fidelity & Guaranty Co., 734 S.W.2d 10, 14 (Tex.App. - Dallas, 1987, no writ). This case held that once prejudice is

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. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.

Bias and prejudice are the most common of all the permissible challenges for cause.
Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963). Compton sets forth the procedure and standards for challenging a juror for cause. To disqualify a juror for bias, it must appear that the state of the juror’s mind leads to a natural inference that he will not act with impartiality. Prejudice means prejudgment and embraces bias. The establishment of prejudice disqualifies a person from serving on a jury as a matter of law.

Once bias or prejudice is established, there can be no rehabilitation. The Amarillo Court of Appeals, spoke to the issue as follows:

Bias or prejudice, which is to some extent common to all persons operates as a statutory disqualification when the bias or prejudice reaches that degree which produces a state of mind in favor of or against one of the litigants or the type of suit so that the panelist would not, or the juror did not, act with impartiality or had prejudged the cause.

established, the prospective juror is automatically disqualified from serving on the jury. The removal of the juror is outside the court’s discretion – it is automatic. Accord, Gum v. Shaffer, 683 S.W.2d 803, 807-8 (Tex.App. - Corpus Christi 1984, no writ).

When the issue of rehabilitation is discussed,
it appears that the key issue to review is how firmly the prospective juror is committed to his view. Carpenter v. Wyatt Construction Co., 501 S.W.2d 748, 750 (Tex.Civ.App. - Houston [14th Dist.] 1973, writ ref’d n.r.e.). Further, when a juror is biased or prejudiced, his affirmation that he can set his opinion aside and try the case fairly upon the law and evidence’ should be disregarded.

If the evidence conclusively establishes that a venire member has a state of mind in favor of or against a litigant or type of suit so that he or she would not act with impartiality in the case, an appellate court must hold that the venire member was disqualified as a matter of law; however, when the evidence does not conclusively establish the venire member’s disqualification as a matter of law, the appellate court must consider the evidence in a light most favorable to upholding the trial court’s ruling. Gum v. Shaffer, 683 S.W.2d 803, 807 (Tex.App. - Corpus Christi 1985, now rit).

Other areas of inquiry in challenging a juror for cause include a prospective juror’s relationship to a party or one of the lawyers. While this is a popular area of inquiry, many relationships are considered too tenuous to justify a challenge for cause.

Another reason for challenging a juror for cause often used is that of persons interested in the outcome of the suit at bar. While this interest can actually be an interest in any variety of issues, the most common issue is financial. Each juror must be able to read and write in order to be qualified for jury service. Over the years, several cases have discussed this issue as a challenge for cause as well. It has been held, however, that it is not reversible error for a juror to be unable to read and write the English language, especially when the juror can speak and understand English. Mercy Hospital of Laredo v. Rios, 776 S.W.2d 626, 628 (Tex.App. - San Antonio 1989, writ denied); Jenkins v.

interest. One type of financial interest in the suit, either directly or indirectly, is when a prospective juror is a stockholder of a corporation that is a party to the current suit. Texas Power & Light Co. v. Adams, 404 S.W.2d 930, 943 (Tex.Civ.App. – Tyler, 1966, no writ); see also, Texas Employers Ins. Ass’n v. Lane, 251 S.W.2d 181, 182 (Tex.Civ.App. – Fort Worth 1953, writ ref’d n.r.e.) (two prospective jurors who carried insurance with defendant and who might be subject to assessment or who might be entitled to dividends depending on the company’s financial statement at the end of the year were interested persons within the meaning of the statute).

It has generally been held that any interest a taxpayer has in a lawsuit, without any further immediate, real or substantial connection, is too remote to disqualify him as a juror. City of Hawking v. E.B. Germany & Sons, 425 S.W.2d 23, 26 (Tex.Civ.App. – Tyler 1968, writ ref’d n.r.e.).

It is within the trial court’s discretion to determine if a prospective juror should be struck for cause for reasons other than as set forth in the statutes. See Williams v. Texas City Refining, Inc., 617 S.W.2d 823, 826 (Tex.Civ.App. – Houston [14th Dist.] 1981, writ ref’d n.r.e.). In Williams, the trial court did not abuse its discretion in excusing a juror challenged for cause when it was learned that the juror suffered from the same ailment as the worker in the lawsuit.

In exercising challenges for cause, it must be remembered that the refusal of a trial court to excuse an unqualified juror for cause does not necessarily constitute harmful error. The harm occurs only if the party uses all of his peremptory challenges and is thus prevented from striking other objectionable jurors from the
list because he has no additional peremptory challenges. It is then incumbent on the complaining party to make the court aware that objectionable jurors will be chosen. Once informed, the court is able to determine if the party was in fact forced to take objectionable jurors. It is at this point that any harmful error occurs.

Therefore, it is the duty of the complaining party, before exercising its peremptory challenges, to advise the trial court of two things: (1) that the party would exhaust its peremptory challenges; and (2) that after exercising its peremptory challenges, specific objectionable jurors would remain on the jury list. Failure to advise the trial court of these two things constitutes a waiver of any error committed by the trial court in its refusal to discharge those jurors challenged for cause. Hallett v. Houston Northwest Medical Center, 689 S.W.2d 888, 889-90 (Tex. 1985); White v. Dennison, 752 S.W.2d 714, 718 (Tex.App. - Dallas 1988, no writ).

**Peremptory Challenges.**

The purpose of allowing peremptory challenges is not to allow a party to select a jury, but to permit a party to reject certain jurors based upon a subjective perception that those particular jurors might be unsympathetic to its position. Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979). Such challenges attempt to grapple with the fact that the prospective juror’s personality, prejudices, feelings, passions, and biases follow him right into the jury box and invariably affect his deliberations and their outcome. Roth, Henry B., How to Profile a Jury, 7 Trial Diplomacy Journal 16 Spr. 1984.

Texas Rule of Civil Procedure 232 provides that a peremptory challenge is made to a juror without assigning any reason for it.

In a civil case, each party is entitled to six peremptory challenges in a case tried in the district court, and three in the county court. Tex. R. Civ. P. 233. However, in multiple party cases, the trial judge must decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury, before the exercise of the peremptory challenges. The term side as used in this rule is not synonymous with “party,” “litigant,” or “person.” Rather, “side” means one or more litigants who have common interests on the matters with which the jury is concerned.

The Supreme Court has held that the presence or absence of cross claims is not dispositive as to the allocation of peremptory strikes. The real factor is whether or not the defendants are antagonistic with regard to each other. Tamburello v. Welch, 392 S.W.2d 114, 116 (Tex. 1965).

**Batson Challenges.**

It is well established that peremptory strikes may not be made on the basis of race or gender. Jury selection procedures that are racially based undermine public confidence in the fairness of our judicial system. As such, a party’s right to equal protection is violated when jury members
are purposely excluded on the basis of their race. Batson v. Kentucky, 476 U.S. 79, 84-86, 106 S.Ct. at 1712, 90 L.Ed.2d 69, 79-80 (1986). The United States Supreme Court explained that although a defendant has no right to a petit jury composed in whole or in part of persons of his own race, the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. Batson, 476 U.S. at 85-86, 106 S.Ct. 1712, 90 L.Ed.2d at 80.

The Court has recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to a jury selection procedure that are free from state sponsored group stereotypes and reflective of historical prejudice, including discrimination on the basis of gender. J.E.B. v. Alabama ex rel T.B., 511 U.S.127, 114 S.Ct. 1419, 120 L.Ed.2d 89, 105,107 (1994).

A Batson objection must be made after peremptory challenges have been exercised but before the voir dire panel has been discharged and the jury sworn. Pierson v. Noon, 814 S.W.2d 506, 508 (Tex. App.–Houston [14th Dist.] 1991, writ denied).

• A female juror stated she would have difficulty finding the defendant guilty if only one witness testified against him. Hawking v. State, 793 S.W.2d 291, 294 (Tex. App.–Dallas 1990, writ ref’d).

• A black juror was struck because he kept dozing off during voir dire. Ivatury v. State, 792 S.W.2d 845, 847 (Tex. App.–Dallas 1990, writ ref’d).

Once a Batson objection is made, the complaining party must make a prima facie showing of purposeful discrimination at a “Batson hearing.” Batson, 476 U.S. 79, 93, 106 S.Ct. 1712, 90 L.Ed.2d 69,85 (1986). See also Ivatury v. State, 792 S.W.2d 845, 847-48 (Tex. App.–Dallas 1990, writ ref’d).

Once a prima facie case is established, the burden shifts to the challenged attorney to come forward with a neutral explanation why peremptory strikes were exercised on the jurors who were struck. Batson, 476 U.S. at 97.

Several cases have addressed “neutral objections” to jurors:


• A female juror rolled her eyes, shrugged her shoulders, crossed her arms, and sighed out loud. Hawking v. State, 793 S.W.2d 291, 294 (Tex. App.–Dallas 1990, writ ref’d).

• Juror muttered under his breath that the trial judge talked too much and the prosecutor showed disrespect for the court. The appellate court found, however, that the prosecutor’s expressed reason for striking the juror--the juror’s membership in the NAACP--was race-specific and therefore prohibited. Sommerville v. State, 792 S.W.2d 265, 267-69 (Tex. App.–Dallas 1990, writ ref’d).

“Counsel’s use of his peremptory challenges violates the due process and equal protection clauses of the Constitution and were made solely on the basis of race or gender.”

Sample Batson Objection:

"Counsel’s use of his peremptory challenges violates the due process and equal protection clauses of the Constitution and were made solely on the basis of race or gender.”
RULE 9: GET THE MOST FROM JURY SELECTION TOOLS.

Prepare a Jury Chart.

The more you know about what to expect during voir dire, the more comfortable you will be. Call the bailiff of the court sometime the week before, and ask him or her how the jury panel is arranged in the courtroom; i.e., how many people on a row, and how many rows, whether there is a podium available for you, what the courtroom setup will be, etc.

Prepare a chart or grid which will match up with how the jury panel is actually seated, to use during your voir dire examination. In other words, make a square for each person, so that you can take short notes about that person as you talk to the panel. A very simple but effective way to create a jury chart is to use a blank file folder, and draw the chart on the inside front of the file. You can even pre-number the squares, which will correspond with the jury forms you are given. This is a handy way to keep your jury list, forms, notes, and everything relating to the jury together in one file.

Jury Questionnaire

Relevant background information can be obtained about potential jurors through a juror questionnaire to aid in determining which jurors are closest and furthest from the ideal juror profile. The questionnaire requests potential jurors to answer questions that will reveal attitudes and feelings about issues as well as background information. The questionnaire allows the attorney to gather more information in a shorter time frame than from traditional voir dire alone. In voir dire, the attorney is often limited in time which makes it difficult to ask very many questions to the individual panel members.

Juror questionnaires are useful because they allow jurors to truthfully answer questions on paper without the pressure they may feel from having to answer orally before a live audience. While this information can be considered very reliable, the attorney must make every effort to flesh out the facts underlying the answers during oral questioning of the jury members.

Dr. Robert Gordon of the Wilmington Institute suggests that the attorney provide multiple choice questions that can be filled in on a scantron form which can then be evaluated more quickly than a handwritten response. This also allows the attorney to limit possible answer choices to those that will be relevant to the case at hand.

From this information the attorney will know which jurors will fit into his ideal juror profile. Answers to these direct questions will also allow the attorney to know on which jurors to focus during voir dire. The attorney will be able to ask follow-up questions that will determine which biases that juror has, based upon the initial information from the survey.

Witness Training

But witness training is more than just practice answering questions. It is to help the witness understand and utilize techniques of persuasion and conveying credibility. It is also to assist the witness with body language, dress, manner of
speech, facial expressions, and other nonverbal cues that the jurors will pick up on. Witness training is most effective if the cross-examiner uses some of the tactics that the opposing counsel might use. If the opposing counsel is sarcastic or badgering, then the cross-examiner in the witness training session should utilize those tactics as well.

Mock Trials

One creative way to enhance voir dire and assist with the development of the ideal juror profile is to conduct a mock trial. This technique is invaluable because it allows the attorney to see how arguments and methods of presentation impact real people. The attorney also has the opportunity to try his case in many different ways to see which presentation is the most effective. Arrangements may also be made to see how people will react when discussing the issues among themselves. Sometimes an argument or fact that the attorney believes is completely in his client’s favor could be seen in a completely different light by jurors based on their own perspective during the course of the trial.

A mock trial should replicate the actual trial as much as possible. The jurors for the mock trial should be a relative sampling of the community where the case will be tried. A wide range of local jurors will allow the attorney to assess how people from that actual community will view the issues in the case.

The jurors should be placed in a real courtroom situation where they will hear live testimony by witnesses and argument by counsel. It is mostly through this method that the mock trial will be effective. Following the presentation of testimony, jury deliberations should then be observed by the attorney using closed circuit cameras. From this viewing, the attorney will see not only how the issues were viewed by the jurors, but also how he was viewed in his presentation. This can suggest possible tactical changes that the attorney will need to make before trial.

The presentation of the issues of the case to real people enables the attorney to see how various people view the issues. From this information, an attorney can determine which types of jurors have biases for or against the client and his client’s case. This information can be factored in to voir dire as well as preparation of a jury questionnaire for the best possible voir dire at trial.

Community Surveys

Community surveys are random samples of attitudes in the community from which a jury will be selected. Such surveys typically attempt to correlate demographic information about the individuals in the community with attitudes which the lawyer expects to be major premises involved in the persuasion of the jury. A community survey, used with a pretrial juror questionnaire, offers significant advantages. The community survey may be used to get a demographic profile of jurors who are least likely to accept the major premises of one’s own case and most likely to accept the major premises of the opposition’s positions. The pretrial juror questionnaire may then focus only on demographic characteristics, and thus give the lawyer who has the benefit of the community survey exclusive knowledge about the attitudes which are most likely to be held by jurors with given demographic characteristics. Because only a correlation is obtained, however, it is still important to use other information gained during voir dire (verbal and nonverbal cues, etc.) in order to obtain an overall picture.

If you are trying a case in a county where you or your client do not know anyone, you probably ought to consider hiring local counsel, if only to help you know more about the jury panel and pick the jury.
It may be very helpful to hire professionals to help you choose a jury. The professional can come in many forms, but the most widely known is the jury selection consultant. This consultant is usually trained in psychology or communications and marketing. They may aid in providing ideal juror profiles, investigating the jury list, observing jurors in court, conducting community surveys, conducting a mock jury trial, conducting a shadow jury, preparing the jury questionnaire, assessing the effect of pretrial publicity, critiquing the attorneys in nonverbal communications, aiding witnesses in preparing testimony, aiding attorneys in settlement negotiations by predicting jury response to the case, and by conducting post-trial juror interviews. These professionals are trained to watch body language and analyze all of the facts about the juror, as well as their answers to voir dire questions, to help you pick the best jurors for your case. They can also be utilized to sit in the courtroom and aid the lawyer by giving feedback as to how things are doing. It is important to handle the presence of such a person in voir dire examination by introducing the person and acknowledging that he or she is there to tell the lawyer how he/she is doing each day, what he/she is doing right and what he/she is doing wrong as to afford the client the best possible representation.

The Wilmington Institute has developed a new program called The Virtual Jury. This is a new method of conducting a focus group through an online, private chat room. The jurors are still selected scientifically, as with traditional focus groups, but the online focus group may be conducted at a fraction of the cost. You can learn more about the virtual jury at www.virtualjury.com or more about The

RULE 10: UTILIZE THE ART OF PERSUASION.

Persuasion is composed of three essential elements: attention, comprehension, and acceptance. A lawyer must immediately gain the panel’s attention. Failure to do so will render voir dire examination totally useless. After gaining their attention, the lawyer must make the panel members comprehend or understand his position in the case. This can be accomplished both verbally and visually. Upon understanding your position, the panel must then accept it. Acceptance will be aided by utilizing the three C’s: Charisma, Competency, and Credibility. The jury must perceive you as credible and competent or they will not place stock in what you tell them. In order to maximize the juror’s listening skills, you must present your message in a charismatic way.

One of the best uses of persuasion is to employ rhetorical devices. Rhetorical devices are language techniques which are used to arrange words in distinctive and persuasive phrases, sentences, and paragraphs in order to forge greater force and fluency. Here are some examples of rhetorical devices that can be used to enhance persuasion:

- Triad.

language: words, phrases, clauses, sentences, paragraphs, or the development of the entire argument. A rule for the advocate is to convey three major messages to your jury in such
manner that the messages can be remembered. One example of the use of a triad is as follows:

*We shall fight them on the beaches; we shall fight them in the streets; we shall fight them in our homes.* We shall *never, never, never* surrender. (Winston Churchill)

- **Parallel Structure.**

  Parallel structure is an extremely effective technique in persuasion. This device is basically a technique of compare and contrast.

  For example, in a catastrophic injury case, you could say:

  We have seen two John Smith’s in this case. One is an energetic and active father – the other is a bedridden paralytic. One a helpful and loving husband – the other a helpless patient. One a hard working provider – the other a financial burden. One a healthy happy John Smith before this defendant’s tragic mistake – the other John Smith for the next forty years.

- **Antithesis.**

  The rhetorical device of antithesis is used to balance contrasted ideas so as to highlight both ideas through the parallel arrangement of key phrases. Antithesis is used in conjunction with parallel structure to effectively counterpoise and contrast the past and future, life and death, healthy and crippled, words and deeds, one and many, light and dark, mortal and immortal, age and youth, male and female, choice and determination, or any other counterpoising principles.

  John F. Kennedy’s speeches were replete with antithesis. This repetition at the beginning of a sentence creates a refrain. Again, Martin Luther King

We observe today not a victory of party, but a celebration of freedom, symbolizing an end as well as a beginning, signifying renewal as well as change.

Let us never negotiate out of fear, but let us never fear to negotiate.

And so my fellow Americans, ask not what your country can do for you, ask what you can do for your country.

If a free society cannot help the many who are poor, it cannot save the few who are rich.

Howard Nations gives an example of how this technique can be applied to a case involving the death of a child:

In determining the damages in this case, don’t look at the death of this child, but look at the life that will never be.

- **Repetition.**

  You should refresh the memory of your audience frequently.

  Eloquent and rhythmic effects can be achieved by repeating a word or phrase at the beginning of consecutive clauses or sentences in order to form a rhythmic pattern which will capture the jury’s attention, stir their emotions, and persuasively deliver the message.

  Consider Martin Luther King’s Lincoln Memorial speech in 1963, wherein he uses the repetitive phrase “one hundred years later” in referring back to the signing of the Emancipation Proclamation.
used the refrain throughout his “I Have a Dream” speech, repeating the phrase “I have a dream...” which sequels into the refrain of “let freedom ring” which culminates in the climax of “free at last, free at last, thank God Almighty, we are free at last!”

Applying the triad/refrain technique may be illustrated as follows:

They gambled with our public safety.
They gambled with our judicial system.
They gambled with young David’s life.
We know that David lost their gamble.
We know that his parents lost their gamble.
We know that they must never, never, never be allowed to win their treacherous gamble.

The echo effect of repetition is achieved through the repetition at the beginning of successive sentences of one word or phrase which repeats the speaker’s theme. It could be the repetitive use of the phrase “I have a dream...” which was used 8 times consecutively by Martin Luther King or it may be in the form of a rhetorical question which reminds the jurors of their power, such as, “what is this child’s life worth in our community?”

Augmentative repetition is used in order to identify and encourage the use of either the same word or a form of the same word for cumulative effect in conveying a message. This technique goes against what our English teachers taught us – the standard rule in English to never use the same word in a sentence of within 20 lines. Consider the use of augmentative repetition by John F. Kennedy: “We will neglect our cities to our peril, for in neglecting them, we neglect the nation.”

In addition to the repetition of a word or phrase, the most effective means for conveying a message to the jury is through the repetition of a central theme throughout the case. After voir dire is complete, the theme should be clear to the jury.

- **Thematic reversal**

  You can use theme development to persuade the jury to well-receive your side of the case, but you can also use the reverse of your theme to turn the jury against your enemy. Accomplish this from carefully reviewing your opponent’s theme and a simple rebuttal of their theme, then reverse it and use it against them.

- **Rhetorical Questions.**

  A rhetorical question is that device which a speaker can use to prompt the listener to ponder the answer of a question where both speaker and listener realize an answer is not expected. Rhetorical questions are frequently used to empower the jurors by having them answer a question in their own minds which makes them better understand that they have the power to resolve the issue raised in the question. Consider the following example where 3 rhetorical questions were used by a plaintiff’s attorney:

  Who will render full justice for this brave young man with a courageous heart beating in his useless body? If not you, who? If not now, when?

- **Understatement.**

  Another verbal technique, similar in nature to the rhetorical question, is the application of understatement. The principle of understatement simply means that it is far better, in terms of impact, that the obvious not be belabored.

  Properly applied understatement lets the jury use its imagination, and often the horrors that can be unleashed by the imagination are worse than what the actual evidence could show.
Consider the following example of a closing argument by the late Moe Levine of New York. He was trying a case for a man who had lost both arms. Of course, everyone expected a long summation, but Mr. Levine surprised them. It was a masterpiece of understatement and resulted in one of the largest verdicts in the history of the State of New York at the time it was given:

Your Honor, eminent counsel for defense, ladies and gentlemen of the jury: as you know, about an hour ago, we broke for lunch. And I saw the bailiff came and took you all as a group to have lunch in the juryroom. An then I saw the defense attorney, Mr. Horowitz and his client decided to go to lunch together. And the judge and the court clerk wen to lunch. So, I turned to my client, Harold, and said why don’t you and I go to lunch together, and we went across the street to that little restaurant and had lunch. [significant pause]

Ladies and gentlemen, I just had lunch with my client. He has no arms. He eats like a dog! Thank you very much.

Sweet, short, simple, and to the point.

• Grammatical Inversion.

Grammatical inversion involves displaying words more prominently by inverting the normal quarter of sentences. For example, in Lincoln’s Second Inaugural, instead of the standard “we fondly hope and fervently pray”, Lincoln inverted the grammar so as to place more emphasis on the adverbs: “fondly do we hope, fervently do we pray.”

• Rhythm.

Rhythm in speech refers to the flow or movement of the language through patterns. From the cradle to the grave, humans respond to rhythm. The rhythm of our breathing, pulse and heartbeat instill patterns into our most essential existence. Rhythmic speech can be used just as effectively as rhythmic music to move an audience emotionally and to capture and hold their attention.

CONCLUSION

I hope that this paper has offered you not only legal authority, but practical information which you can put to use immediately in your practice and in your next trial.