

THE GEORGE MASON AMERICAN INN OF COURT PRESENTS

**ANATOMY OF A TRIAL:
VOIR DIRE**

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Introduction

The right to an impartial jury is guaranteed by the United States Constitution (U.S. Const. amends. VI, VII, and XIV), and the Virginia Constitution (Va. Const. Art. I §§ 8, 11). As a way of ensuring these rights, the process of Voir Dire allows for prospective jurors to be questioned as to their interests, biases, and prejudices regarding the case at bar. In the state of Virginia, this right is further enforced by statutory and case law.

Prior to 1981, §8-01-358 of the Virginia Code provided that “the Court and counsel . . . *may* examine under oath any person who is called as a juror.” Code of Virginia (1950). In conjunction with this statute, courts interpreted the Supreme Court’s former Rule 3A:20 as giving the court the right to deny counsel the opportunity to conduct his own voir dire, and the right to refuse to propound specific questions to a juror. Turner v. Commonwealth, 221 Va. 513 (1980).

In 1981, however, §8.01-358 was amended to provide that “the Court and counsel *shall have the right to* examine under oath any person who is called as a juror . . .” (emphasis added). In addition, Supreme Court Rule 3A:20, now Rule 3A:14, was also amended, eliminating the requirement for court permission for counsel to question prospective jurors. In light of these changes, Virginia Case Law has grown rapidly to determine the boundaries to which attorneys may go with their questions.

If a prospective juror is biased, a challenge for cause may be made, and, if granted by the judge, the juror may be struck from the panel and a new juror added in his place. Parties are entitled to any number of challenges for cause until an impartial panel has been formed. A party need not exercise a peremptory challenge to eliminate a juror who is biased. Martin v.

Commonwealth, 221 Va. 436 (1980). The importance of an impartial jury resounds in the ancient rule that any reasonable doubt as to a juror's impartiality must be resolved by excluding the juror. Breedon v. Commonwealth, 217 Va. 297 (1976).

With the above introduction in mind, the following will explore current boundaries in the law of Voir Dire.

I. Overview

A. Voir Dire in the Federal System

1. In federal courts, judges conduct voir dire. Counsel may submit proposed questions to the judge, and the judge will decide which questions to ask the panel.
2. Although subject to local rules, the typical time frame is that counsel must submit questions five business days prior to trial, followed by any objections from opposing counsel two days prior to trial.
3. The court is under no obligation to accept any proposed submissions

B. Is Voir Dire a guaranteed right?

1. The purpose of voir dire is to ensure that each juror selected stands indifferent to the cause.
2. Va. Code §8.01-358 permits counsel and the court to examine under oath any person who is called as a juror in a civil matter and to ask whether the person is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein.

3. A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum. If an answer to a question would lead to the disclosure of a juror's relationship, interest, opinion or prejudice about the case, then the question must be permitted. Otherwise, the court has discretion to prohibit questioning. LeVasseur v. Commonwealth, 225 Va. 564 (1984).
4. Rule 3A:14 provides the court must ask of the potential jurors:
 - a) Is the juror related by blood or marriage to either the accused or the victim?
 - b) Is the juror an officer, director, agent, or employee of the accused?
 - c) Does the juror have any interest in the trial or the outcome of the case?
 - d) Has the juror acquired any information about the alleged offense or the accused from any sources, and, if so, would the information affect the jurors impartiality in the case?
 - e) Has the juror expressed or formed any opinion as to the guilt or innocence of the accused?
 - f) Does the juror have a bias or prejudice against the Commonwealth of the accused?
 - g) Does the juror have any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused solely on the law and the evidence?
5. Selected Cases Involving Voir Dire Rulings

- a) Barrette v. Commonwealth, 11 Va. App. 357 (1990) - Excluded the voir dire question as to whether there was “anyone on the jury who believes that eyewitness identification of a stranger is always accurate and correct,” as the question was not relevant to the scope of voir dire and was not phrased in terms of the law in assessing the credibility of witnesses.
- b) Chichester v. Commonwealth, 248 Va. 311 (1994) - The court has discretion to determine the relevancy of voir dire questions and to decide whether the questions go beyond the statutory requirements as to what should be asked.
- c) Brooks v. Commonwealth, 24 Va. App. 523 (1997) – When the trial judge informed a prospective juror that the defendant wanted the juror removed from the panel because of bias, this was prejudicial to the defendant. This prejudice was compounded when the judge allowed the prosecution to state in open court that he felt the juror was fair and impartial.
- d) Charity v. Commonwealth, 24 Va. App. 258 (1997) - §8.01-358 specifically grants counsel the statutory right to conduct voir dire; however, failure to permit this was non-constitutional and harmless error because it didn’t deprive the defendant of a fair trial or affect the jury verdict.
- e) Jackson v. Commonwealth, 255 Va. 625 (1998) - Illiteracy does not automatically disqualify a person from serving as a juror if the

trial court takes steps to make sure that the illiterate juror has essentially the same opportunity to review the written material in the case as the other jurors. Here, virtually all of the documentary evidence was read to the jury.

- f) Green v. Commonwealth, 26 Va. App. 394 (1998) - Note provided by a juror during deliberations that one of the other jurors had “relatives involved in a drive-by shooting” failed to demonstrate juror misconduct or bias, even though the jurors were asked during voir dire, “have you or any member of your immediate family been the victim of a crime involving a firearm, homicide, or violence”?
- g) Hope Windows, Inc. v. Snyder, 208 Va. 489 (1968) - Jurors may not be questioned in a civil liability case concerning whether they are stockholders, directors, employees, or policy holders of an insurance company. Such a question is a deliberate injection of the presence of insurance in cases and is grounds for a mistrial.

II. Voir Dire

A. Judicial Discretion

1. The trial court maintains discretion to determine what type of questioning fulfills the “fully and fairly” questioned criteria. Lilly v. Commonwealth, 255 Va. 558 (1998). (Reversed on other grounds, Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999)).

2. Where a question is vague, ambiguous, or invites the jury to speculate, the trial court may properly deny counsel the right to ask it. Poyner v. Commonwealth, 229 Va. 401 (1985).
3. The trial court may properly refuse a criminal defendant's request that a questionnaire be sent to and returned by prospective jurors because the opportunity to see and hear the veniremen, when questioned during voir dire, was crucial to the effective discharge of the trial judge's responsibility. Strickler v. Commonwealth, 241 Va. 482 (1991).
4. A prospective juror in a criminal case is not disqualified solely because he has a familial, attorney-client, or social relationship with the Commonwealth's Attorney. A social relationship, standing alone, is no cause for disqualification. Wise v. Commonwealth, 230 Va. 322 (1985).
5. When an accused is to be retried on the same offense, a prospective juror who knows of the accused's prior conviction must be excluded for cause. Barker v. Commonwealth, 230 Va. 370 (1985).
6. A juror who had recently been the victim of a crime similar to that charged is not subject to challenge for cause for that reason alone. If the trial court concludes that the juror can render a fair and impartial decision, the juror may be permitted to remain. Webb v. Commonwealth, 11 Va. App. 220 (1990).
7. The fact that a prospective juror is employed by the same company as the victim of a robbery does not render him per se disqualified. The trial court or counsel may inquire as to the juror's possible partiality, but the trial

court may, in its discretion, determine that the juror possible partiality, but the trial court may, in its discretion, determine that the juror not be stricken for cause. Scott v. Commonwealth, 233 Va. 5 (1987), affg. 1 Va. App. 447 (1986).

B. Voir Dire Subject Matter

1. Counsel has a statutory right to directly question potential jurors. Charity v. Commonwealth, 24 Va. App. 258 (1997).
2. Counsel does have boundaries within which their proposed questions must remain.
 - a) The proposed questions must remain within the relevancy requirement within the statute. Skipper v. Commonwealth, 23 Va. App. 420 (1996).
 - b) Again, the trial court maintains discretion to allow the counsel to go beyond the relevancy requirement of the statute. Goins v. Commonwealth, 251 Va. 442 (1996).
3. Upon Appellate review of an alleged violation of the constitutional right to impartial jury, the party raising the objection must pass a two-part test. Skipper v. Commonwealth, 23 Va. App. 442 (1996).
 - a) The court abused its discretion by limiting voir dire.
 - b) The seated jury was not impartial or the selection process was prejudicial.
4. There are several categories to explore in order to determine the impartiality of a potential juror.

- a) Being excused from a jury based on the existence of any relation between the potential juror and the parties to the proceeding is narrowly interpreted in Virginia. Gray v. Commonwealth, 226 Va. 591 (1984).
- b) Counsel must determine if a juror believes in “innocent until proven guilty” or guilty until he can prove himself innocent at trial. David v. Commonwealth, 26 Va. App. 77 (1997).
- c) The fact that a victim is white and the accused is black does not automatically entitle defense counsel to inquire concerning racial prejudice on voir dire. However, where there are other factors which will bring race into play during trial, the trial court should, on proper request, allow pertinent questions in the subject. The defense bears the burden of any risk that such questioning may create animosity where none existed; the trial court should be sure the defense understands it is assuming this risk. Reynolds v. Commonwealth, 6 Va. App. 157 (1988).
- d) Counsel is at liberty to explore the potential conclusion that some witnesses are more credible simply based on their profession than other witnesses in a different profession. Gosling v. Commonwealth, 7 Va. App. 642 (1989).
- e) Counsel is entitled to ask questions of jurors which clearly relate to possible prejudice or bias. Accordingly, in a DWI case counsel is entitled to inquire whether prospective jurors believe that any

driving after drinking is wrong. Failure to allow such a question is an abuse of discretion. Henshaw v. Commonwealth, 3 Va. App. 213 (1986).

f) Counsel in a criminal case is not entitled as a matter of right to pose “content” questions during voir dire. Accordingly, while counsel is entitled to know whether that information would sway a juror, there is no right to know just what information they have learned. Mu’ Min v. Commonwealth, 239 Va. 433 (1990).

g) Counsel may question potential jurors more in-depth, in some areas, and not at all in other areas, where the defendant has been accused of a capital crime.

(1) A juror’s belief about the death penalty may be asked. Satcher v. Commonwealth, 244 Va. 220 (1992).

(2) Counsel may not address the issue of parole. Lilly v. Commonwealth, 255 Va. 558 (1998).

5. Rehabilitating biased jurors.

a) General Rule: any juror who holds a preconceived notion that is inconsistent with an ability to give the accused a fair and impartial trial, or who persists in a misapprehension of law that will render the juror incapable of abiding by the court’s instructions and applying the law must be excluded for cause.

b) The test for seating a prospective juror who has a preconceived viewpoint which would otherwise be disqualifying is: Can the

juror abuse his or her mind of the preconceived opinion or misconception and decide the case on the evidence submitted and the law as propounded in the court's instructions.

c) The clarification or absence of disqualification must emanate from the juror in order to establish that the juror is impartial and is free from bias.

(1) Using or permitting the use of leading questions in the voir dire to rehabilitate a prospective juror may taint the reliability of the juror's response.

(2) Suggestive questions when asked by the court produces an even more unreliable response as the juror may desire to "say the right thing" to please the authoritative figure of the judge.

(3) Court must consider the context of the entire voir dire to determine whether a challenged juror has demonstrated impartiality.

d) Some recent cases

(1) Griffin v. Commonwealth, 19 Va. App. 619 (1995) - Neither counsel nor the court may rehabilitate a potential juror through a series of leading questions once the potential juror expresses an opinion of guilt or bias. Giving expected answers to questions that suggest the desired

answer does not rebut “positive, unequivocal testimony of bias.”

- (2) McGill v. Commonwealth, 10 Va. App. 237 (1990) – “The proper role for a trial judge is to remain detached from the issue of the juror's impartiality. The trial judge should rule on the propriety of counsel's questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation. If a trial judge adheres to this role, an appellate court may not set aside the trial judge's determination of a juror's impartiality if the juror's responses, even though conflicting, support that determination.”
- (3) Sizemore v. Commonwealth, 11 Va. App. 208 (1990 - The rehabilitation of a juror was ineffective because the Commonwealth failed to propound questions that addressed the basis of the juror’s bias regarding the misconception that the defendant had to produce evidence of his innocence.
- (4) Foley v. Commonwealth, 8 Va. App. 149 (1989) - The proof of a juror’s impartiality should come from the juror himself, not from responses to questions from counsel or the court which tell the juror what he or she ought to say.

(5) Williams v. Commonwealth, 14 Va. App. 208 (1992) -

Where the trial court allows four jurors to sit in on a murder case who, for various reasons, appear to come with a bias against the accused, each should be excluded for cause, even though leading questions appear to rehabilitate them.

6. Media Exposure

a) If the case has been exposed in the media, counsel may question potential jurors on the influence the media's coverage has had upon them. DeHart v. Commonwealth, 19 Va. App. 139 (1994).

b) A juror is not to be excluded for cause just because he has read or heard an account of the case, or even if an opinion has been formed. Rather, the test is whether the juror is capable of laying aside any preconceived opinion and rendering a verdict solely on the evidence. Wilmoth v. Commonwealth, 10 Va. App. 169 (1990).

c) The press and the public are entitled to be present at all stages of trial, including voir dire, unless there is some overriding reason to exclude them. Closure orders must be narrowly tailored based upon a finding, on the record, that exclusion is necessary for some overriding purpose, which may be the request of a juror for closure due to the sensitive nature of the answer to a particular question. In general, motions for closure by the parties should be made in writing, with notice to the public, so that there can be a hearing on

the question at which the public can be heard. Re Times-World Corp., 7 Va. App. 317 (1988).

d) The fact that jurors have read or heard accounts of a case does not automatically render them subject to being struck for cause. If, in the judgment of the trial court, they have not formed an opinion concerning the case, and can perform impartially, the court need not strike them. Similarly, if jurors have heard of a prior trial, but do not know the outcome, they need not be automatically stricken. Foster v. Commonwealth, 6 Va. App. 313 (1988).

e) Impartiality does not compel complete juror ignorance of issues and events. A juror need only be able to put aside impressions gained from publicity and decide the case on evidence presented. Where juror exposure to pretrial publicity can be shown, the defendant must also demonstrate that actual prejudice resulted. United States v. Reynolds, 821 F2d 427 (7th Cir.1987).

7. Appellate Review

a) Counsel may preserve any voir dire objections for appeal or else face the consequence of waiving the matter for appeal. Spencer v. Commonwealth, 238 Va. 295 (1989).

b) The trial court is given a great deal of discretion by the appellate courts in reviewing appeals based on voir dire. Lilly v. Commonwealth, 255 Va. 558 (1998).

III. Ethical Considerations

A. Model Code of Professional Responsibility

Balancing the zealousness of the adversary role and the fairness of the officer of the court role can be especially difficult in the voir dire process.

1. EC 7-33 states that “a goal of our legal system is that each party shall have his case . . . adjudicated by an impartial tribunal.
2. Model Rule 3.5(a) prohibits a lawyer from seeking “to influence a judge, juror, prospective juror or other official by means prohibited by law.”
3. EC 9-1 states that “an attorney is an officer of the court and must maintain the dignity of the court.”
4. Model Code of Professional Responsibility Canon 7 requires attorneys to represent their clients with zealousness.

B. When Race and Gender are a Factor in Voir Dire

1. Batson v. Kennedy, 476 U.S. 79 (1986) - Established a three-step process for evaluating claims that the prosecution used peremptory challenges in a discriminatory manner, thus violating the Equal Protection Clause of the U.S. Constitution.
 - a) The defendant must make a prima facie case showing the prosecutor exercised peremptory challenges on the base of race.
Turner v. Commonwealth, Record No. 1642-97-2 (Va. Ct. Appeals Unpublished, August 11, 1998).

- b) The burden shifts to the prosecutor to give a race-neutral explanation for the strike in question. Cudjoe v. Commonwealth, 23 Va. App. 193 (1996).
 - c) The court must determine whether the defendant has carried the burden of proving purposeful discrimination. Hill v. Berry, 247 Va. 271 (1994).
2. A court's finding pursuant to a Batson challenge will be reversed only if it is found to be clearly erroneous.
 3. Here are three questions to ask yourself when striking a potential juror that will help you avoid a Batson challenge.
 - a) Would I allow this person to sit as a juror if she were white?
 - b) Is this explanation inextricably linked to race or racial stereotypes?
 - c) Am I in doubt? . . . then don't do it. "Batson Ethics for Prosecutors and Trial Court Judges," 73 Chicago-Kent Law Review 475 (1998).
 4. J.E.B. v. Alabama, 511 U.S. 127 (1994) - Extended Batson to enforce gender neutral voir dire questions. Goodson v. Commonwealth, 22 Va. App. 61 (1996).
 5. Peremptory strikes based on religious beliefs have been upheld in Virginia. James v. Commonwealth, 247 Va. 459 (1994).

FOR FURTHER READING

Mark Hansen, "Reaching Out to Jurors," ABA Journal (February, 2003)

William C. Smith, "Challenges of Jury Selection," ABA Journal (April 2002)

John C. Childs, "Cats, Dogs, and Hammer Handles: The Predictive Value of Jury Research,"
Litigation: The Journal of the Section of Litigation, ABA

Sample Questions: Available at <http://www.voirdirebase.com> and at <http://www.westlaw.com>