

**GEORGE MASON AMERICAN INN OF COURT**

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**Focus Groups and Voir Dire**

**Additional Information and Resources**

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## FOCUS GROUPS

*“Focus groups and simulations function like a Rorschach test, illuminating people's cognitive and emotional processes. These tools are excellent for showing how jurors, as a group, will deliberate about specific issues and facts. [F]ocus groups and simulations provide information concerning how jurors will relate to certain facts and issues emotionally and intellectually.”<sup>1</sup>*

### WHAT ARE THEY?

Focus Groups are a tool that some lawyers use to test their case theories, issues, and facts prior to the actual trial. In general, the purpose of a focus group is to determine how your client's argument stands up against the best interpretation of the opposition's case. At the conclusion of the focus group, the attorney should have a better understanding of how the jurors will act based on understanding:

1. How individuals perceive the case issues;
2. How individual jurors receive and filter case information cognitively;
3. How individuals, and particularly sub-populations in the venue, differ in their reactions to the case.<sup>2</sup>

If you decide to conduct a focus group, you should consider addressing the following issues:

1. What is the message?
2. How should we communicate it?
3. How is responsibility perceived?
4. How is causation defined?
5. How can we create empathy for the plaintiff?
6. Is our visual information persuasive?
7. Can we limit the influence of the other side's arguments?<sup>3</sup>

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<sup>1</sup> Amy Singer, *How to Prove Jurors will be on Your Side; Surveys of Potential Jurors can Help Prepare Attorneys for Trial and can Serve as Effective Catalysts for Settlement*, TRIAL MAG., June 1997.

<sup>2</sup> Robert D. Minick, *Pre-trial Audience Research: an Essential Element of Strategic Trial Preparations*, 497 PLI/LIT 281, 285 (1994). For a focus group to be successful, the following elements are important:

- 1) “Selection of a proper research site.
- 2) Careful recruitment of the mock jurors (select only those who would be qualified to serve as jurors in the real trial);
- 3) Proper presentation of the case (limit to major issues);
- 4) Videotaping the mock jury's deliberations and doing an in-depth analysis later;
- 5) Having a skilled jury psychologist leading the juror discussion during their deliberations.”

## FORMING A FOCUS GROUP

A focus group can be a “series of small groups, chosen from last year’s jury lists.”<sup>4</sup> It usually consists of a group of eight to twelve jury-eligible community residents recruited for a small group discussion of the issues of the case.<sup>5</sup> An employment agency can be an excellent resource for finding people to serve as “jurors.”<sup>6</sup>

A focus group can be formed at any time in your pre-trial preparation. Some suggest using a focus group as soon as possible after you begin preparing the case because the participants may suggest issues and pinpoint problems that will direct your future efforts for your client.<sup>7</sup> Others recommend conducting a focus group prior to discovery.<sup>8</sup>

You may run one panel or have several different focus groups listen to your presentation of the case and deliberate separately. The focus group can also help you determine what your most appealing arguments are as well as identify evidentiary problems.<sup>9</sup>

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75 AM. JUR. 2D TRIAL § 42 (1991).

<sup>3</sup> David A. Wenner, *Preparing for Trial: an Uncommon Approach; the Trial Lawyer can use Focus Groups to Flag Potential Juror Reactions and Prepare Effective Arguments for Trial*, TRIAL MAG., Jan. 1998.

<sup>4</sup> Martin L. Dean and Anne Kemp, *Managing Litigation*, 51 AM. JUR. TRIALS 1 § 268 (1994).

<sup>5</sup> Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 16 (1994).

<sup>6</sup> John Howie, *Bringing Case Issues into Focus: Mock Trials and Focus Groups can Sharpen Your Presentation*, TRIAL MAG., Jan. 1995. If you choose to use an employment agency, be sure to ask for more jurors than you need and specify age, race, sex, education and occupation. Your “jury” pool should reflect the demographics of the community from which the actual jury will come.

<sup>7</sup> *Id.*

<sup>8</sup> Amy Singer, *How to Prove Jurors will be on Your Side; Surveys of Potential Jurors can Help Prepare Attorneys for Trial and can Serve as Effective Catalysts for Settlement*, TRIAL MAG., June 1997. Dr. Singer recommends using the following format:

"Attorneys should plan on initiating litigation research at the earliest possible opportunity during case preparation--certainly before conducting expensive discovery. Early findings can help identify the most productive avenues for further research.

"It is generally best to schedule focus groups before conducting an intelligence survey. The first focus groups could be scheduled during early case planning. The insights provided can be used to develop effective survey questions. This approach to survey design is far superior to developing questions from an ivory tower--an approach likely to produce information of limited practical value.

"The litigation intelligence survey is then conducted. The type and format of this survey will depend on the specific research goals.

"After survey results have been analyzed, a second series of focus groups is normally conducted, using information developed from the survey. These are followed by jury simulations, in which the attorney can test arguments and the most effective timing for presentation of evidence or testimony during the actual trial." *Id.*

<sup>9</sup> John Howie, *Bringing Case Issues into Focus: Mock Trials and Focus Groups can Sharpen Your Presentation*, TRIAL MAG., Jan. 1995.

## FORMAT AND PROCEDURES FOR FOCUS GROUPS

Participants in the focus groups are provided with a summary of the trial issues in a step-by-step fashion.<sup>10</sup> “Their points of view, opinions, and reactions are solicited by the ... trial consultant, at each level of discussion. The goal is to allow the attorneys to understand the jurors’ thinking and to learn to view the case as jurors perceive it.”<sup>11</sup> Throughout the presentation of the case, the jurors will hear a balanced presentation of the plaintiff and defendant’s cases. “After eliciting reactions to the strengths and weaknesses of each side’s case, the focus groups monitor will redirect the discussion exclusively toward one side and probe for specific suggestions on how the attorney can strengthen the case.”<sup>12</sup>

During a focus group, attorneys familiar with the case will present unbiased facts and issues of the case for discussion by the group.<sup>13</sup> The attorneys or a consultant lead the focus group through the case and ask questions that should help the attorneys determine how the jury will react to their arguments, exhibits, and facts.

The focus group should account for the following items in its selection of “jurors” and presentation of the case:

1. Venue Representation: juror attitudes and preconceptions are represented in the surrogate jurors
2. Case Stimulus Representation: presenting the key issues on both sides of the case.<sup>14</sup>

Focus Group presentations should be brief and should lay out both the strengths and weaknesses of the case.<sup>15</sup> One tip: Have the lawyer most familiar with the case represent the opposing party.<sup>16</sup>

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<sup>10</sup> Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 18 (1994).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Jonathon M. Purver, *Damages for Wrongful Death of, or Injury to, Child*, 65 AM. JUR. TRIALS 261 § 116 (1997).

<sup>14</sup> Robert D. Minick, *Pre-trial Audience Research: an Essential Element of Strategic Trial Preparations*, 497 PLI/LIT 281, 285 (1994)..

<sup>15</sup> John Howie, *Bringing Case Issues into Focus: Mock Trials and Focus Groups can Sharpen Your Presentation*, TRIAL MAG., Jan. 1995.

<sup>16</sup> *Id.*

## WHAT CAN YOU USE THEM FOR IN YOUR CASES ?

A focus group allows an attorney to test key components of their client's case prior to the actual trial.

1. It allows an attorney to test sensitive issues and obtain reactions to case themes.<sup>17</sup>
2. The attorney can circulate exhibit prototypes to test the reactions jurors may have to those exhibits. A focus group can also be used to determine what “aspects of a document or exhibit confuse jurors.”<sup>18</sup>
3. The focus group allows attorneys to present their case in the worst light to this group to determine which facts make their client's case more effective and why.
4. The discussions of focus group participants may reveal common community mindsets, which filter everything the jury will see and hear.<sup>19</sup>
5. Focus groups are a helpful exercise because the group allows the attorneys to determine how real jurors may act in a similar group.<sup>20</sup>
6. The focus group helps to “validate themes which have been preliminarily identified, to identify themes which may have been missed but are important to the average juror, and to gauge reactions to the key issues in the case.”<sup>21</sup>
7. The focus group should sharpen the client's understanding of their case.<sup>22</sup>

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<sup>17</sup> Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 16 (1994).

<sup>18</sup> *Id.*

<sup>19</sup> See Eric Oliver, *Jury See, Jury Decide: Courtroom Behavior and Juror Judgments*, 19 TRIAL DIPL. J. 288 (1996); see 601 PLI/LIT 391, 430.

<sup>20</sup> Robert D. Minick, *Pre-trial Audience Research: an Essential Element of Strategic Trial Preparations*, 497 PLI/LIT 281, 288 (1994). See also John Howie, *Bringing Case Issues into Focus: Mock Trials and Focus Groups can Sharpen Your Presentation*, TRIAL MAG., Jan. 1995. In this article, Mr. Howie outlines the following benefits of a focus group:

- 1) The trial team has an opportunity to explore the alternatives.
- 2) The focus group is a vehicle for preparing and practicing.
- 3) It is a tool for evaluation and way to gain some objectivity about your client's case. Everyone involved can see your client's case with fresh eyes and recognize its strengths and weaknesses. *Id.*

<sup>21</sup> Jeffrey R. Parson, *Managing the Jury: A Trial Lawyer's Perspective on the Art of Jury Persuasion*, 497 PLI/LIT 301, 317 (1994).

<sup>22</sup> John Howie, *Bringing Case Issues into Focus: Mock Trials and Focus Groups can Sharpen Your Presentation*, TRIAL MAG., Jan. 1995.

## HOW TO USE WHAT YOU LEARN FROM THE FOCUS GROUP

If used properly, the focus group may provide feedback that will enable the attorney to focus on the key weaknesses of the case that potential jurors may have as well. The attorney should analyze the feedback carefully. The following questions may be helpful:

- What specific facts concerned them in the damaging documents?
- Did they appear to respond well or negatively to the attempted explanation or amplification of the damaging facts?
- Did they look convinced by the explanation, or did they pay more attention to the document than to the testimony explaining it?<sup>23</sup>

## COSTS ASSOCIATED WITH A FOCUS GROUP:

The costs of a focus group will vary with how you choose to conduct them. There are firms and consultants who can be hired to moderate and run the focus groups. Their fees vary by individual firm and consultant. Items that you can expect to be included in the costs include the following:

- advertising for participants,
- time spent pre-screening and selecting potential applicants,
- rental of conference rooms,
- fees to the participants,
- expenses related to videotaping the procedure, and
- Consultant's fees.<sup>24</sup>

Fees can run from \$5,000 to \$10,000<sup>25</sup> per session up to \$12,000 to \$50,000.<sup>26</sup>

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<sup>23</sup> Gregory J. Ford, *How to Talk to a Jury in a Complex Business Case*, 66 AM. JUR. TRIALS 435 § 33 (1998).

<sup>24</sup> Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 19 (1994).

<sup>25</sup> *Id.*

<sup>26</sup> Robert D. Minick, *Pre-trial Audience Research: an Essential Element of Strategic Trial Preparations*, 497 PLI/LIT 281, 285 (1994).

## FOCUS GROUP EXAMPLE

The following is an example on the results of one focus group:

“In a medical malpractice case against a nationally recognized and respected health clinic, the plaintiff’s attorney who retained the consultant was concerned that because of the prominent reputation of the clinic, it would be difficult to prove medical malpractice against its physicians. The focus groups bore out these concerns in that jurors were initially not willing to accept that this facility had employed physicians who would make the kinds of mistakes claimed by the plaintiff.

“It was learned that community residents were very familiar with the research that was conducted at this facility and the high caliber of physicians who were employed there. However, one very crucial piece of information was discovered. When jurors learned that the plaintiff was utilizing the clinic through an HMO plan, their attitudes changed dramatically. Jurors were very familiar with the necessity to cut costs and minimize services through HMO plans, and strongly accepted the argument that a patient who was being provided care through an HMO plan would not receive the same quality of care as a patient who was a private user of the clinic. The information regarding the plaintiff’s utilization through an HMO plan was, therefore, identified as a critical issue that must be brought into evidence in order for the plaintiff to have a strong likelihood of prevailing. This knowledge hardened the attorney’s stance during settlement negotiations, and ultimately the case settled for a very high figure.”<sup>27</sup>

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<sup>27</sup> Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 20 (1994).

## DIFFERENCE BETWEEN MOCK TRIALS AND FOCUS GROUPS

A mock or mini trial is different from a focus group in that it is conducted as if it were the actual trial. Usually there are opening statements, witnesses, evidence, closing arguments, jury deliberation, and a verdict.<sup>28</sup> Mock trials are usually more expensive than a focus group costing at least \$10,000 to \$15,000 per day.<sup>29</sup> For an example of a mock trial and its results see this footnote.<sup>30</sup>

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<sup>28</sup> Jonathon M. Purver, *Damages for Wrongful Death of, or Injury to, Child*, 65 AM. JUR. TRIALS 261 § 116 (1997). In general, a mock trial can cost at least \$10,000 to \$15,000 per day.

<sup>29</sup> Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 14 (1994).

<sup>30</sup> This example is taken from Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 15 (1994). This mock trial tested the liability issues of a case and assessed potential damages.

“The Plaintiff, a thirty-five-year-old female in a medical malpractice case, sued her obstetrician, claiming that the defendant doctor was negligent in monitoring her progress during labor. The patient had requested to give birth in the Alternative Birth Center (ABC), if possible. In order to utilize the ABC, the patient must not be receiving drugs during labor or using a fetal monitoring device. After several hours of fetal monitoring in the general obstetrics ward, the patient’s doctor, at her request, moved the patient to the ABC. After approximately fifty minutes in the ABC, the nurse in charge of vital signs was unable to locate a fetal heartbeat and initiated the procedure for an emergency caesarian section. The child was delivered but had suffered severe brain damage due to anoxia that occurred as a result of a collapsed umbilical cord.

“In the mock trial, the plaintiff played herself, and an actor was used for the role of obstetrician. The plaintiff alleged that the doctor failed to notice subtle heart decelerations on the fetal monitor strip, which suggested fetal distress. Removing the fetal monitor and transferring the patient to the ABC were actions that fell below the standard of care. A significant portion of the trial was to be focused on opposing experts who would render opinions about the significance of the fetal monitor strips.

“The mock jury deliberations in this case were eye-opening. It had been anticipated that the main focus of the jury deliberations would be on the opposing experts, as their testimony was seen by the attorneys as the deciding factor. The jury thought otherwise. Very little attention was paid to the experts. The jurors spent over one hour discussing the fact that the parents had prepared for natural childbirth. They noted that the mother, after admission to the hospital, repeatedly wanted to know if she was going to be transferred to the ABC. The jurors decided that the parents should accept some responsibility for selecting a birth process that had inherent risks. While the jurors criticized the doctor for, “caving in” to the mother’s request, they were not convinced that there was sufficient evidence to indicate malpractice. In a striking turn of events, the mock trial jury returned a defense verdict.

“The jury was questioned during a post-trial discussion. In order to double-check the validity of the mock trial methodology, jurors were polled to determine if they were biased toward one party or another because they thought the defendant doctor had sponsored the research. Jurors unanimously reported that they had assumed that the witnesses in the mock trial were the real parties. They were under the impression that the mock trial was an alternative dispute process, and that the doctor and mother were the actual parties to the suit. The results of the mock trial, and subsequent research that validated these findings, prompted the plaintiff attorneys to reassess their settlement posture, and they accepted a seven figure settlement offer in lieu of risking a defense verdict on liability.”

Susan E. Jones, *Use of Jury Consultant in Civil Cases*, 49 AM. JUR. TRIALS 407 § 15 (1994).

# VOIR DIRE IN THE FEDERAL COURTS<sup>31</sup>

## QUESTIONING JURORS – METHOD OF EXAMINATION - DISCRETION

In the federal courts wide discretion is vested in the trial judge as to the method of examination of jurors. Rule 47 of the Federal Rules of Civil Procedure and Rule 24 of the Federal Rules of Criminal Procedure<sup>32</sup> are practically the same in authorizing the court (a) to conduct the examination of prospective jurors, or (b) to permit the parties or their attorneys to supplement it by such further inquiry as it deems proper, or submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.<sup>33</sup>

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<sup>31</sup> Much of the information in this section comes from DEVITT, BLACKMAR, WOLFF & O'MALLEY, FEDERAL JURY PRACTICE AND INSTRUCTION, West, 1987, § 3.01ff. This treatise was the major source for Federal Jury instructions for years. More recently, another treatise has gained prominence with much the same information: KEVIN F. O'MALLEY, JAY E. GRENIG, HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Fifth Edition, West, 2000, § 4.07ff. The sections cited to in these treatises cite many cases. For the purposes of this outline, the footnotes will be brief, and I will cite only to 4<sup>th</sup> Circuit Cases where possible.

<sup>32</sup> Fed.R.Civ.P. 47, 28 U.S.C.A.:

(a) **Examination of Jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

Fed.R.Crim.P. 24, 18 U.S.C.A.:

(a) **Examination.** The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

<sup>33</sup> Courts consistently hold that the trial judge may conduct the entire voir dire examination, and that the judge may put questions to the jury requested by counsel instead of letting counsel ask the questions. *United States v. Corey*, 625 F.2d 704 (5th Cir.1980). After listening to eloquent requests for reconsideration, the courts in *United States v. Bryant*, 153 U.S.App.D.C. 72, 471 F.2d 1040 (1972), and *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), refused to hold that the court must permit counsel to conduct voir dire.

"Although the trial judge may refuse to allow counsel to address the panel directly, the panel must be examined and the questioning of the panel by the trial judge must be sufficient.... Indeed, a trial judge who chooses to conduct all the examination personally has a 'serious duty' to ferret out actual bias." *United States v. Rowe*, 106 F.3d 1226, 1227 (5th Cir.1997)(*quoting*, *Dennis v. United States*, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 (1950)).

*See G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES*, (Federal Judicial Center, 1977). A committee of the Judicial Conference of the United States considered recommendations of the American Bar Association, by which counsel would be afforded the right to conduct voir dire examination, and recommended that no change be made in the rules.

## WHO CONDUCTS THE EXAMINATION?

Traditionally, in federal courts the judge conducts most or all of the voir dire examination. Where the judge conducts the entire examination, counsel may be permitted an opportunity to submit specific questions to be propounded by the court to the prospective jurors. As a middle ground, a substantial number of courts allow counsel to address supplemental questions directly to the prospective jurors after the court has done most of the questioning. The practice of turning over at least a portion of the voir dire examination to counsel may be the result of the increasing complexity of cases being tried in the federal courts and the feeling that the lawyers are better prepared to ask the questions to elicit the information that is needed.<sup>34</sup>

## SCOPE OF VOIR DIRE - WHAT TYPES OF QUESTIONS SHOULD BE ASKED?

Most federal judges confine questioning, with some exceptions, to general questions directed to the entire venire.<sup>35</sup> Regardless of how the voir dire examination is conducted, the purpose of such examination is not to make an advance favorable portrayal of the case of one side or the other, but rather to ensure the parties a trial by an impartial jury--that is, by qualified jurors who have no bias or prejudice that would prevent them from returning a verdict according to the law and the evidence.<sup>36</sup> The scope of the voir dire examination is largely within the discretion of the

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<sup>34</sup> Sometimes, the practice is dictated by local rule. For example, Rule 15 (c) of the United States District Court for the District of Rhode Island provides that "(t)he court may, if it so chooses, conduct the examination of prospective jurors. At the close of such examination, the court shall afford counsel an opportunity to further interrogate the jurors."

These practices are also influenced by the customs observed in the state courts, reflecting the experience of judges who had substantial practices in the state courts prior to becoming federal judges.

A recent survey of 450 federal judges revealed that in almost all federal district courts, judges conduct all or most of the voir dire. Indeed, 67% of those surveyed indicated that they alone ask questions of the potential jurors; 25% indicated that they begin asking questions but then turn the voir dire over to counsel and allow them between ten and thirty minutes of additional questioning. Only in approximately 4% of the courtrooms does the judge give counsel the primary role in questioning. Even where that practice prevails this is often limited only to civil cases. Harkening to state court practice, in the Western District of Pennsylvania, the deputy clerk, by local court rule, asks the questions in civil actions and if there are challenges, the deputy clerk consults with the judge in chambers and receives a ruling which is then announced in open court by the deputy clerk. J. Stratton Shartel, *Federal Judges Employ Wide Variety of Jury Procedures*, 8 No. 8 INSIDE LITIG. 1, 15- 17 (Sept. 1994).

<sup>35</sup> It is settled that the trial judge may question jurors collectively instead of individually. *See*, *United States v. Bailey*, 112 F.3d 758, 769 (4th Cir.1997); *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir.1991).

<sup>36</sup> It was not error for a judge to refuse to submit requested questionnaires to potential juror where the questionnaires were more concerned with ensuring a jury inclined to acquit rather than one that was impartial--the questionnaire included such questions as "do you believe in miracles?" and "would you be offended by someone blaming it on the devil?" *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir.1991). "The quality of voir dire cannot be measured by the length of time it takes to conduct it because the only issue is whether the voir dire was sufficient to impanel an impartial jury." *Id. quoting* *United States v. LaRouche*, 896 F.2d 815, 830 (4th Cir.1990).

trial judge.<sup>37</sup> But the trial judge should conduct an examination that is sufficiently extensive to permit the court and counsel to determine if a cause for challenge exists, and to advise counsel as to the best exercise of their peremptory challenges.<sup>38</sup>

## **CHALLENGE TO QUESTIONS OR PROCEDURE – WHAT IS PREJUDICE?**

While ordinarily the failure to ask a particular question will not necessarily be considered a denial of the opportunity to exercise the right of peremptory challenge,<sup>39</sup> the undue restriction of the scope of voir dire, or the inclusion of prejudicial questions may be reversible error.<sup>40</sup>

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Where allegedly improper remarks are made by one potential juror and overheard by others, proper test for juror impartiality is whether juror can lay aside his or her impression or opinion and render a verdict based upon the evidence presented. Trial court is in best position to judge the effect of improper statements on a jury and the jurors' pledges to abide by the law, and such assessments are entitled to great weight. *United States v. Wacker*, 72 F.3d 1453 (10th Cir.1995).

<sup>37</sup> "The Constitution, after all, does not dictate a catechism for voir dire, but only that defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992).

In *Mu'Min v. Virginia*, 500 U.S. 415, 424, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493 (1991), the Supreme Court indicated that "the trial court retains great latitude in deciding what question should be asked on voir dire" and observed:

Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. In *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) we held the subject of potential racial bias must be 'covered' by the questioning of the trial court in the course of its examination of potential jurors, but we were careful not to specify the particulars by which this could be done. We did not, for instance, require questioning of individual jurors about facts or experiences that might have lead to racial bias.

"Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981).

In a case involving extensive publicity, while questions which conflated the issue of whether jurors had heard about the case and the issue of whether they could remain impartial was "hardly commend(able)," the method of questioning was within the limits of discretion. However, trial judges must attempt to avoid asking compound questions. *United States v. Edmond*, 52 F.3d 1080, 1096-1099 (D.C.Cir.1995), cert. denied, *Sutton v. United States*, 516 U.S. 998, 116 S.Ct. 539, 133 L.Ed.2d 443 (1995).

<sup>38</sup> "(T)he burden is on the party challenging the trial court's conduct of voir dire to establish that the voir dire questioning did not permit intelligent challenges of the juror and therefore constituted an abuse of the court's discretion." *Sasaki v. Class*, 92 F.3d 232, 239 (4th Cir.1996).

<sup>39</sup> *See, United States v. Bakker*, 925 F.2d 728, 733 (4th Cir.1991). The district court is not required to ask each question posed by the defendant. To so require would be to defeat the notion that the handling of voir dire is to be left to the sound discretion of the trial judge. *United States v. Heater*, 63 F.3d 311, 326 (4th Cir.) cert. denied, 516 U.S. 1083, 116 S.Ct. 796, 133 L.Ed.2d 744 (1996).

The court should be solicitous of the reasonable requests of counsel for questions to the jurors. The failure to ask a question cannot serve as a basis for claim of error in the absence of a request,<sup>41</sup> but there have been numerous reversals when the court refused to ask questions which had been properly requested. It has been held that questions about racial prejudice,<sup>42</sup> and attitude

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In a routine money laundering case, it was proper for the district court to refuse defense counsels' request to question the jury as to whether they would prejudice the defendants because they were partners in an interracial marriage. *United States v. Barber*, 80 F.3d 964, 967 (4th Cir.1996).

In a sexual harassment case, it was not abuse of discretion for the court not to ask whether the prospective jurors or any of their immediate family members had experienced or witnessed sexual harassment where other questions concerning lawsuits generally, sexual harassment claims, and assault and battery, would have led jurors to disclose experience with sexual harassment. *Sasaki v. Class*, 92 F.3d 232, 239 (4th Cir.1996).

<sup>40</sup> In a civil rights action where the prisoner brought excessive force action against guard and credibility determinations between that of guard and prisoner would be important, it was reversible error not to ask prospective panel "simply because of their status would any members of the jury be predisposed to believe the word of a law enforcement officer or prison guard against that of a prisoner?" *Rainey v. Conerly*, 973 F.2d 321, 325 (4th Cir.1992); accord, *United States v. Evans*, 917 F.2d 800, 809 (4th Cir.1990).

<sup>41</sup> Where defendants propose voir dire questions, defendants must raise a specific objection or request during voir dire to preserve the matter for appeal "otherwise a long list of questions would become a trap for an unwary judge by failing to give the judge a chance to avoid error by calling attention to the questions that must be asked." *United States v. LaRouche*, 896 F.2d 815, 829 (4th Cir.1990).

New trial was required when jurors were asked clear question as to whether any of them had relatives who had been charged with or convicted of a crime, and one juror's brother was convicted bank robber. *United States v. Bynum*, 634 F.2d 768 (4th Cir.1980).

<sup>42</sup> In *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), the Supreme Court substantially relaxed the apparent effect of the decision in *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), by holding that inquiry as to racial prejudice is not necessarily required even though requested, and pointing out that *Ham* was a case involving a civil rights activist. *See also*, *United States v. Johnson*, 527 F.2d 1104 (4th Cir.1975) (court held that the *Ham* decision was not an absolute, but that it would be an unusual case in which the prosecutor could demonstrate that the error in failing to ask about racial prejudice was harmless).

Noting several cases, the Supreme Court in *Mu'Min v. Virginia*, 500 U.S. 415, 424, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493 (1991), stated that "two parallel themes emerge from these cases: First, the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice; second, the trial court retains great latitude in deciding which question should be asked on voir dire."

Where race itself was not an issue and none of the offenses charged were interracial in nature, there was no abuse of discretion in court asking prospective jurors "do you harbor any bias or prejudice, racial or otherwise, that would prevent you from being fair to the defendants in this case?" and then permitting counsel limited follow-up questions. *United States v. Tipton*, 90 F.3d 861, 877 (4th Cir.) cert. denied, 520 U.S. 1253, 117 S.Ct. 2414, 138 L.Ed.2d 179 (1997).

The fact that defendants in money laundering case were partners in interracial marriage did not require court to ask prospective jurors their view on such unions. While "(r)acial prejudice is a persisting malady with deep and complicated historical roots ...every criminal trial cannot be conducted as though race is an issue simply because the trial participants are of different races.... Moreover, to seek out generalized prejudices during voir dire would greatly divert the trial's focus from the guilt or innocence of the defendants to peripheral factors, such as defendants' race or religious beliefs which are usually irrelevant to the merits of the case." *United States v. Barber*, 80 F.3d 964, 967 (4th Cir.) cert. denied, 519 U.S. 876, 117 S.Ct. 198, 136 L.Ed.2d 134 (1996).

toward the presumption of innocence,<sup>43</sup> should be asked if circumstances warrant and a proper request is made, so that reversal might ensue if the request is refused.

Yet questions, which might be prejudicial, should be rejected, and the court has substantial discretion in rejecting inquiries, which appear to be insubstantial or prolix, or which have been adequately covered by other questions.<sup>44</sup>

## MISCELLANEOUS

In addition, in criminal cases the defendant must be present at "every stage of the trial"<sup>45</sup> including the voir dire examination of the jurors and it is advisable for the record to affirmatively show the presence of the defendant.<sup>46</sup>

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Trial court was not obliged to question jurors individually about racial prejudices when question was asked generally and there was no response. *United States v. Kibler*, 667 F.2d 452 (4th Cir.), cert. denied, 456 U.S. 961, 102 S.Ct. 2037, 72 L.Ed.2d 485 (1982).

*See also United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970), involving prejudice against Indians.

<sup>43</sup> There is no per se rule that court must, on pain of reversal, ask prospective jurors whether they would be biased in favor of testimony of law enforcement officers even when government's case depends wholly on testimony of law enforcement officers. *United States v. Lancaster*, 96 F.3d 734, 741 (4th Cir. 1996) cert. denied, 519 U.S. 1120, 117 S.Ct. 967, 136 L.Ed.2d 852 (1997) (overruling per se rule of *United States v. Evans*, 917 F.2d 800 (4th Cir. 1990)).

<sup>44</sup> A laundry list of questions without showing of need may be rejected. *United States v. LaRouche*, 896 F.2d 815, 829 (4th Cir. 1990). No error in refusing to question about attitude toward insanity defense. *United States v. Cockerham*, 155 U.S.App.D.C. 97, 476 F.2d 542 (1973). Court did not err in limiting inquiry with regard to defendant's religious beliefs and traditions. *United States v. Washington*, 227 U.S.App.D.C. 184, 705 F.2d 489 (1983).

<sup>45</sup> Fed.R.Crim.P. 43, 18 U.S.C.A.

<sup>46</sup> Defendant must show actual prejudice resulting from their absence during portions of voir dire because such absences do not constitute error "affecting substantial rights independent of prejudicial impact" nor "presumed error affecting substantial rights." *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996).

However, the defendant's right to an impartial jury is not violated per se by the pre-voir dire excusal of jurors. *United States v. North*, 910 F.2d 843, 909-910 (D.C. Cir. 1990), superseded in part on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

A three prong test has been developed to determine whether a pretrial proceeding, including voir dire may be closed to the public: (1) there is a substantial probability that the defendant's right to a fair trial will be compromised by publicity; (2) there is a substantial probability that closure would prevent that prejudice; and (3) that reasonable alternatives do not exist to closure. *In re State-Record Co., Inc.*, 917 F.2d 124 (4th Cir. 1990).

Representatives of the press and public must be given an opportunity to be heard on the question of exclusion and hence the court cannot sua sponte order closure of voir dire without notice and providing an opportunity for objection. *In re South Carolina Press Association*, 946 F.2d 1037 (4th Cir. 1991). There, the Fourth Circuit upheld a closure order "under the very unusual circumstances of these cases" involving state legislators charged with extortion since no reasonable alternatives to closure would adequately protect the rights of the accused.

# VOIR DIRE IN VIRGINIA, MARYLAND AND THE DISTRICT OF COLUMBIA

## I. VIRGINIA

Title 8.01 of the Virginia Code, Civil Remedies and Procedure, provides the general framework for counsel conducting Voire Dire in the Virginia Court Systems. It should be noted that a party maintains no constitutional right to counsel-conducted voire dire. The right is purely statutory in nature.<sup>47</sup>

Additionally, the rules of the Supreme Court of Virginia provide that the court shall take an active role in the voire dire process.

### Examining Jurors<sup>48</sup>

The court and counsel each have the right to examine any person who is called as a juror. The court must allow “a full and fair opportunity to determine whether the factors which would disqualify a juror are present.”<sup>49</sup> However, this does not mean that questions can be asked *ad infinitum*. The court may refuse to allow trial attorneys to ask additional questions after they have had a “fair opportunity” to ask “relevant questions.”<sup>50</sup>

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<sup>47</sup> See Title VIII, Virginia Code, Civil Remedies and Procedure. **8.01 – 357. Selection of jury panel.**

On the day on which jurors have been notified to appear, jurors not excused by the court shall be called in such manner as the judge may direct to be sworn on their voire dire until a panel free from exceptions shall be obtained. Upon motion of any party the jurors shall be selected by lot. The remaining jurors may be discharged or excused subject to such orders as the court shall make.

<sup>48</sup> **8.01-358 Voire examination of persons called as jurors.**

The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of the case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

Title VIII, Virginia Code, Civil Remedies and Procedure.

<sup>49</sup> Craig D. Johnston, TRIAL HANDBOOK FOR VIRGINIA LAWYERS, SECOND EDITION, § 6.11 (1998).

<sup>50</sup> Id. at § 6.10. See also *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d 114 (1996).

## Types of Questions Allowed

The questions during *voire dire* must be relevant.<sup>51</sup>

Usually, the court will advise the jury of “the names of the parties and counsel, give a brief synopsis of the issues in the case, and then ask general questions of the jurors.”<sup>52</sup> In criminal cases, the judge must ask the questions outlined in Rule 3A:14 of the Supreme Court Rules<sup>53</sup>:

1. Is the juror related by blood or marriage to the accused or to the a person against whom the alleged offense was committed;
2. Is the juror an officer, director, agent or employee of the accused;
3. Does the juror have any interest in the trial or the outcome of the case;
4. Has the juror acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;

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<sup>51</sup> *Id.* at § 6.11. This book is an excellent resource for attorneys who have questions about how various aspects of a trial will be conducted. It contains references to the applicable rules and to relevant case law.

<sup>52</sup> *Id.* at § 6.13.

<sup>53</sup> **Rule 3A:14. Trial Jurors** states in full:

(a) **Examination.** After the prospective jurors are sworn on the *voire dire*, the court shall question them individually or collectively to determine whether anyone:

1. Is related by blood or marriage to the accused or to the a person against whom the alleged offense was committed;
2. Is an officer, director, agent or employee of the accused;
3. Has any interest in the trial or the outcome of the case;
4. Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;
5. Has expressed or formed any opinion as to the guilt or innocence of the accused;
6. Has a bias or prejudice against the Commonwealth or the accused; or
7. Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, the court, and counsel as of right, may examine on oath any prospective juror and ask any question relevant to his qualification as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

(b) **Challenge for Cause.** The court, on its own motion or following a challenge for cause, may excuse a prospective juror if it appears he is not qualified, and another shall be drawn or called and placed in his stead for the trial of the case.

5. Has the juror expressed or formed any opinion as to the guilt or innocence of the accused;
6. Has the juror a bias or prejudice against the Commonwealth or the accused; or
7. Has the juror any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

If a juror is obviously biased, the trial judge may not attempt to rehabilitate him through leading questions. If the trial judge attempts that, a conviction that the juror participates in must be set aside.<sup>54</sup>

Evidence of a juror's impartiality should come from him, not from answers to leading questions asked by counsel.<sup>55</sup> In general, hypothetical questions "are not competent when their evident purpose is to have the jurors indicate in advance what their decision will be under a certain state of the evidence, or upon a certain state or facts..."<sup>56</sup>

After the court has asked the required questions, counsel is entitled to pose questions to the prospective jurors.

Counsel has the right as articulated in § 8.01-358<sup>57</sup> to examine jurors directly about:

- 1) Their relationship to a party,
- 2) Their interest in the cause,
- 3) Their expression or formation of an opinion, and
- 4) Whether they are sensible of any bias or prejudice.<sup>58</sup>

While counsel has the right to determine what potential jurors know about the case, there is no right to know exactly what they have learned.<sup>59</sup> The counsel must ask questions

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<sup>54</sup> Craig D. Johnston, TRIAL HANDBOOK FOR VIRGINIA LAWYERS, SECOND EDITION, § 6.14 (1998). *See also* Griffin v. Commonwealth of Virginia, 19 Va. App. 619, 454 S.E.2d 363 (1995); Diehl v. Com., 9 Va. App. 28, 384 S.E.2d 801 (1989), opinion withdrawn and vacated on other grounds, 10 Va. App. 139, 390 S.E.2d 550 (1990). When a judge has attempted to rehabilitate jurors who have a bias against the accused, they should be excluded for cause. Williams v. Com., 14 Va. App. 208, 415 S.E.2d 856 (1992).

<sup>55</sup> *Id.* at § 6.11. *See also* Foley v. Com., 8 Va. App. 149, 379 S.E. 2d 915 (1989).

<sup>56</sup> *Id.* at § 6.12. *See also* 47 Am. Jur. 2d, Jury § 208.

<sup>57</sup> *See supra* note 47.

<sup>58</sup> Craig D. Johnston, TRIAL HANDBOOK FOR VIRGINIA LAWYERS, SECOND EDITION, § 6.13 (1998). "While it is an abuse of discretion to fail to ask questions reasonably sufficient to test jurors for bias or partiality, the trial court may refuse questions which are tied only speculatively to prejudice." *Id.* *See also* US v. Toomey, 764 F.2d 678 (9<sup>th</sup> Cir. 1985).

<sup>59</sup> *Id.* at § 6.13. *See also* Mu'Min v. Com., 238 Va. 433, 389 S.E.2d 886 (1990); 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991).

that “bear upon the possible opinion or prejudice, and not be open-ended and invite rambling discourse.”<sup>60</sup> For example, questions that ask a juror to express his opinion of a case “based upon news stories, or ask him whether he could imagine reason why the defendant would not testify, are impermissible fishing expeditions of the juror’s general feelings.”<sup>61</sup>

A defendant has the right to be heard on the question of a juror’s partiality prior to the exercise of peremptory challenges and the jury is sworn.<sup>62</sup> The defendant also has the right to have a trial judge not “advise a juror, in the presence of the jury, that he is being challenged for cause by the defendant. A defendant is entitled to make argument on this point outside the jury’s presence.”<sup>63</sup>

However, it is important to keep in mind that the trial court controls the counsel’s right to question jurors. “Where a question is vague, ambiguous, or invites the jury to speculate, the trial court may properly deny counsel the right to ask it.”<sup>64</sup>

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<sup>60</sup> Craig D. Johnston, TRIAL HANDBOOK FOR VIRGINIA LAWYERS, SECOND EDITION, § 6.13 (1998).

<sup>61</sup> *Id.* See also *Skipper v. Com.*, 23 Va. App. 420, 477 S.E.2d 754 (1996).

<sup>62</sup> *Id.* at § 6.11. See also *Brooks v. Com.*, 24 Va. App. 523, 484 S.E.2d 127 (1997).

<sup>63</sup> *Id.* at § 6.11. See also *Brooks v. Com.*, 24 Va. App. 523, 484 S.E.2d 127 (1997).

<sup>64</sup> *Poyner v. Com.*, 229 Va. 401, 329 S.E.2d 815 (1985).

## **II. MARYLAND**

**Title 2** and **Title 4** of **Maryland's Code** identify the procedures to be followed when impaneling a jury at the trial court level in Maryland. In contrast to Virginia, the Maryland trial court judge plays a more active role in the *voire dire* process. The court also maintains greater discretion over counsel-conducted *voire dire* in the Maryland system.

### **Rule 2-512. Jury Selection (Civil Procedure – Circuit Court)**

- (a) **Jury List.** Before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, occupation of spouse of each juror and any other information required by the county jury plan. When the county jury plan requires the address of a juror, the address need not include the house or box number.
- (b) **Examination of Jurors.** The court may permit the parties to conduct an examination of the jurors or may itself conduct the examination after considering questions proposed by the parties. If the court conducts the examination, it may permit the parties to supplement the examination by further inquiry or may itself submit to the jurors additional questions proposed by the parties. The jurors' responses to any examination shall be under oath. Upon request of any party the court shall direct the clerk to call the roll of the panel and to request each juror to stand and be identified when called by name.

### **Rule 4-312. Jury Selection (Criminal Procedure - - Circuit Court)**

- (c) **Jury List** – same text as 2-512
- (c) **Examination of Jurors** – same text as 2-512.

### **III. DISTRICT OF COLUMBIA**

In the District of Colombia, the Supreme Court Rules provide the legal framework for the voir dire process.

#### **Rule 24. Trial Jurors**

- (a) Examination. The court may permit the defendant or the defendant's attorney and the prosecutor to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the prosecutor to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

## FOCUS GROUP RESOURCES

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John Howie, *Bringing Case Issues into Focus: Mock Trials and Focus Groups can Sharpen Your Presentation*, TRIAL MAG., Jan. 1995.

Ronald J. Matlon, et al., *Factors Affecting Jury Decision-Making*, 12 SOC. ACTION & L. 41, 41 (1985).

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Jim M. Perdue, Sr. & Jim M. Perdue, Jr., *Trial Themes: Winning Jurors' Minds and Heart.(Trial Without Error)*, TRIAL MAG., Apr. 1998.

Bettina B. Plevan, *Jury Trial Issues*, Current Developments in Federal Civil Practice 1999, 601 PLI/Lit 391 (April 1999).

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Samuel H. Solomon, *Generation X in the Jury Box: Thinking Visually in Today's Society*, N.Y.L.J., May 5, 1997, at S2.

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David A. Wenner, *Preparing for Trial: an Uncommon Approach; the Trial Lawyer can use Focus Groups to Flag Potential Juror Reactions and Prepare Effective Arguments for Trial*, TRIAL MAG., Jan. 1998.

Charlotte A. Wortz, *Using Focus Groups Research in Medical Negligence Cases*, TRIAL MAG., May 1999.

## **ADDITIONAL JURY AND VOIR DIRE RESOURCES**

CATHY E. BENNETT, **BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS**, (1994).

LISA BLUE, **JURY SELECTION: STRATEGY AND SCIENCE**, (1986).

ANNE FAGAN GINGER, **JURY SELECTION IN CIVIL AND CRIMINAL TRIALS**, (1984).

JAMES J. GOBERT, **JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY**, (1990).

CRAIG D. JOHNSTON, **TRIAL HANDBOOK FOR VIRGINIA LAWYERS, SECOND EDITION**, (1998).