

Table of Contents

Volume 1

CHAPTER 1. OVERVIEW OF CONTENT

- § 1:1 Introduction
- § 1:2 Voir dire and peremptory challenges
- § 1:3 Jury composition
- § 1:4 Pretrial publicity and juror internet access
- § 1:5 Social science research approaches to understanding jurors' perspectives
- § 1:6 Voir dire and jury selection
- § 1:7 Sample materials for specific types of cases

CHAPTER 2. IMPROVING VOIR DIRE PROCEDURES

- § 2:1 Introduction: Why improvements are necessary

I. FACTORS AFFECTING JUROR CANDOR

- § 2:2 Psycho-social dynamics of the courtroom
- § 2:3 The voir dire interview
- § 2:4 Jurors' opinions and attitudes
- § 2:5 —Prejudgment
- § 2:6 —Prejudicial attitudes
- § 2:7 ——Bias against criminal defendants
- § 2:8 ——Bias against plaintiffs in tort actions
- § 2:9 ——Implicit racial bias
- § 2:10 ——Fingerprint infallibility
- § 2:11 Instructions about legal rules cannot cure bias

II. REMEDIES

- § 2:12 Restructuring the voir dire
- § 2:13 —The role of the judge
- § 2:14 —Precedent for alternative procedures
- § 2:15 ——Individual examinations of jurors
- § 2:16 ——Questioning conducted by the attorney
- § 2:17 ——Intelligent exercise of peremptory challenges
- § 2:18 ——Jurors' self-assessment not adequate
- § 2:19 ——Questions tailored to the case

- § 2:20 Authorities for specific areas of questioning
- § 2:21 —General attitudes
- § 2:22 —Case-specific issues
- § 2:23 —Jurors' experiences and acquaintances
- § 2:24 —The "crisis" in tort litigation
- § 2:25 Removing "set aside" and "rehabilitation" from the voir dire tool box
- § 2:26 Additional peremptory challenges
- § 2:27 Procedures for exercising peremptory challenges

III. STRATEGIES FOR OBTAINING IMPROVEMENTS

- § 2:28 Form and content of motions and arguments
- § 2:29 Sample voir dire motion: Criminal case—Drug conspiracy
- § 2:30 Sample voir dire motion: Civil case—Contract dispute
- § 2:31 Arguments for improved voir dire procedures
- § 2:32 Recommendations from the Federal Judicial Center

IV. MAKING THE BEST OF LIMITATIONS ON VOIR DIRE

- § 2:33 Special considerations when only the judge asks questions
- § 2:34 The 15-minute voir dire
- § 2:35 Treat voir dire as a chance to learn about the jurors
- § 2:36 Successful cause challenges require open-ended and closed-ended questioning
- § 2:37 Enlist help from the judge
- § 2:38 Keep track of time
- § 2:39 Assess individual jurors and the group as a whole
- § 2:40 Reserving jury selection issues for appeal

V. AND THEN THERE WERE NONE. . . : ASTC POSITION PAPER ON THE ELIMINATION OF PEREMPTORY CHALLENGES

- § 2:41 Editor's introduction
- § 2:42 Background
- § 2:43 A Brief History of Peremptory Challenges
- § 2:44 The Use of Voir Dire to Detect Bias
- § 2:45 When Jury Selection Has Gone Wrong: The Discriminatory Use of Peremptory Challenges
- § 2:46 The Case Against Eliminating Peremptory Challenges

TABLE OF CONTENTS

- § 2:47 Jury Diversity
- § 2:48 Inadequacies in Current Voir Dire Procedures Used to Uncover Bias
- § 2:49 Peremptory Challenges Are Still An Important Tool
- § 2:50 Recommendations for Peremptory Challenges
- § 2:51 Section V. References

Appendix 2A. National Jury Project Survey Results: Bias Against Criminal Defendants

Appendix 2B. The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: A Case Study of the Minimization Effect

CHAPTER 3. QUESTIONNAIRES TO IMPROVE VOIR DIRE

- § 3:1 Introduction
- § 3:2 Online juror questionnaires
- § 3:3 When to use voir dire questionnaires
- § 3:4 Requesting use of a voir dire questionnaire
- § 3:5 Supporting the motion for use of a questionnaire
- § 3:6 USDC Northern District of California recommends juror questionnaires in criminal cases
- § 3:7 USDC Eastern District of Texas, Chief Judge recommends juror questionnaires in patent cases assigned to him
- § 3:8 Methods for using voir dire questionnaires
- § 3:9 Designing effective questionnaires
- § 3:10 Sample questionnaire for a civil case
- § 3:11 Sample questionnaire for a criminal case

Appendix 3A. Federal courts where questionnaires have been used

Appendix 3B. State courts where questionnaires have been used

Appendix 3C. Selected federal civil trials where questionnaires were used

Appendix 3D. Selected federal criminal trials where questionnaires were used

Appendix 3E. Selected state civil trials where questionnaires were used

Appendix 3F. Selected state criminal trials where questionnaires were used

CHAPTER 4. BATSON AND THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES IN THE 21ST CENTURY

- § 4:1 Author's note 2024
- § 4:2 Introduction
- § 4:3 Pre-*Batson* opinions
- § 4:4 The *Batson* decision
- § 4:5 *Batson*'s legacy
- § 4:6 Appellate and post-conviction review
- § 4:7 The three steps to a successful *Batson* motion
- § 4:8 Step 1: Establishing a *prima facie* case
- § 4:9 The struck juror must be a member of a cognizable group
 - Race, ethnicity and gender
 - national origin
 - “Color,” racial or ethnic sub-groups, or a combination of groups
 - Religion
 - Sexual orientation
 - Expanding cognizable groups
 - Making a clear record of the juror’s group membership
- § 4:17 The strike must give rise to an inference of discrimination
- § 4:18 Speculation by the trial court is prohibited
- § 4:19 Factors courts consider
 - The “pattern of strikes”
 - The history of discriminatory conduct
 - A single strike
 - The group membership of trial participants
 - The number of seated members of the cognizable group
 - Other evidence establishing a *prima facie* showing
- § 4:26 Comparative juror analysis at Step 1
- § 4:27 Waiver of a strike
- § 4:28 When is Step 1 moot?
- § 4:29 Step 2: The strike proponent explains the strike
- § 4:30 The strike opponent must object on all grounds before the Step 2 ruling
- § 4:31 Explanations that may be inadequate as a matter of law
 - Refusal to state or inability to recall a reason
 - General denial of discriminatory motive

TABLE OF CONTENTS

| | |
|---|--|
| § 4:34 | —Inherently discriminatory explanations |
| § 4:35 | —Disproportionate impact on the cognizable group |
| § 4:36 | Step 3: The court’s ultimate determination |
| § 4:37 | The legal standard |
| § 4:38 | Explanations going to credibility |
| § 4:39 | —Explanations unrelated to the case to be tried |
| § 4:40 | —Explanations based on the juror’s demeanor |
| § 4:41 | —Cognizable group members seated or still in the venire |
| § 4:42 | —The strike opponent’s peremptory challenges |
| § 4:43 | —False, pretextual, unsupported, or post-hoc explanations |
| § 4:44 | —Mistake as a non-pretextual reason |
| § 4:45 | Courts’ indulgent attitude toward inherently racial reasons |
| § 4:46 | Comparative juror analysis for assessing credibility |
| § 4:47 | —The method |
| § 4:48 | —Judicial willingness to tolerate a “laundry list” or shotgun approach undermines the analysis |
| § 4:49 | —The split of authority |
| § 4:50 | Analyzing mixed motives at Step 3 |
| § 4:51 | —The three approaches |
| § 4:52 | —Encouraging courts to adopt the racially tainted approach |
| § 4:53 | Remedies |
| § 4:54 | Anticipate discriminatory peremptory challenges before jury selection begins |
| Appendix 4A. Whitewashing the Jury Box | |
| Appendix 4B. Washington and California Adopt More Stringent Rules | |
| Appendix 4C. Pocket Guide for Winning a <i>Batson</i> Objection at Trial | |
| Appendix 4D. Sample Scenario for Making an Effective <i>Batson</i> Objection at Trial | |

CHAPTER 5. JURY COMPOSITION CHALLENGES: LAW AND PRACTICE

| | |
|-------|--|
| § 5:1 | Introduction |
| § 5:2 | Stages of the jury selection process |
| § 5:3 | Legal bases for challenges |
| § 5:4 | —Federal constitutional claims |
| § 5:5 | — —Sixth Amendment Fair Cross-Section |
| § 5:6 | — —Fourteenth Amendment Equal Protection |

- § 5:7 ——Distinctions between Fair Cross-Section and Equal Protection
- § 5:8 —The Federal Jury Selection and Service Act of 1968
- § 5:9 —State statutes and constitutions
- § 5:10 Proof of a *prima facie* fair cross-section violation
- § 5:11 —*Duren* Prong 1: Distinctive Group
- § 5:12 ——Definition of “distinctive group”
- § 5:13 ——Undisputed distinctive groups
- § 5:14 ——Judicial reluctance to identify other groups as distinctive
- § 5:15 —*Duren* Prong 2: Representation not Fair and Reasonable
 - § 5:16 ——Composition of the community
 - § 5:17 ——Composition of the jury pool
 - § 5:18 ——Standards for measurement and evaluation of disparities
 - § 5:19 ——Absolute disparity
 - § 5:20 ——Comparative disparity
 - § 5:21 ——Standard deviation and statistical significance
 - § 5:22 ——Other tools for measuring disparity
 - § 5:23 ——How much disparity violates *Duren*?
 - § 5:24 ——How much absolute disparity?
 - § 5:25 ——How much comparative disparity?
 - § 5:26 ——How much disparity: other measurement tools?
 - § 5:27 —*Duren* Prong 3: Systematic Exclusion
 - § 5:28 ——Definition of systematic exclusion
 - § 5:29 ——Erroneous interpretations
 - § 5:30 ——Requiring defendant to pinpoint cause of disparity
 - § 5:31 ——Requiring evidence of discrimination
 - § 5:32 ——Ignoring interactions between court policies and private decisions
 - § 5:33 Practice and procedure
 - § 5:34 —Basis for the challenge
 - § 5:35 —Timing of the challenge
 - § 5:36 —Standing
 - § 5:37 —Remedies
 - § 5:38 How courts and jury administrators can avoid challenges
 - § 5:39 —Challenger’s entitlement to discovery
 - § 5:40 —Disclosure obligations of courts and jury systems
 - § 5:41 —The burden of information production
 - § 5:42 —Jury system transparency
 - § 5:43 —Jury system transparency—Data collection

TABLE OF CONTENTS

- § 5:44 —Jury system transparency—Data reporting
- Appendix 5A. Form AO12: Report on Operation of the Jury Selection Plan
- Appendix 5B. Using the Odds Ratio to Explain Disparity

CHAPTER 6. PREPARING AND CONDUCTING A JURY CHALLENGE

- § 6:1 The five steps for a jury challenge
- § 6:2 Step 1: Review publicly available information
- § 6:3 Step 2: Move for discovery
- § 6:4 —The right to discovery
- § 6:5 —Materials to request
- § 6:6 —Protecting juror confidentiality
- § 6:7 —If discovery is denied
- § 6:8 Step 3: Analyze the jury system
- § 6:9 —Composition study
- § 6:10 —Jury system processing
- § 6:11 Step 4: Move to challenge the jury system
- § 6:12 —Timing of the motion
- § 6:13 —Standing to challenge
- § 6:14 —Content of the motion
- § 6:15 Step 5: The hearing on the motion

Appendix 6A. Sample jury challenge materials: *Azania v. State of Indiana* (2002)

Appendix 6B. Sample materials from federal petit challenge (W.D. Texas, 1978)

Appendix 6C. Statement of facts and exhibits from a federal grand jury challenge (N.D. Georgia, 1980)

CHAPTER 7. CHANGE OF VENUE

- § 7:1 Introduction
- § 7:2 The decision to move for venue change
- § 7:3 Federal constitutional standard
- § 7:4 The Impact of *Skilling*
- § 7:5 Federal Rules of Criminal Procedure Rule 21(a): A More Flexible Standard
- § 7:6 Grounds of prejudice
- § 7:7 —Publicity
- § 7:8 —Community attitudes
- § 7:9 Remedies and the right to choice of venue
- § 7:10 Timing of the motion
- § 7:11 Realistic goals of the motion to change venue

- § 7:12 The hearing on a motion to change venue
- § 7:13 When the judge wants to “try to pick a jury”
- § 7:14 If the motion is denied seek alternative relief
- § 7:15 Venue and voir dire
- § 7:16 Creating a record of actual juror bias
- § 7:17 Interlocutory appeals
- § 7:18 Civil actions
- § 7:19 A successful intradistrict transfer
- § 7:20 United States v. Marilyn Mosby
- § 7:21 —Renewed motion
- § 7:22 —Procedural background
- § 7:23 —Media survey
- § 7:24 —Community attitude survey
- § 7:25 —Argument
- § 7:26 —Discussion
- § 7:27 —Conclusion
- § 7:28 Expert opinion
- § 7:29 —The influence of attitudes on cognition
- § 7:30 —The prejudicial impact of pretrial publicity
- § 7:31 —Ability to select a fair and impartial jury in venues saturated with media coverage
- § 7:32 Sample declaration in support of motion to change venue
- § 7:33 Sample declaration—Qualifications
- § 7:34 —Introduction
- § 7:35 —Media analysis
- § 7:36 —Survey results
- § 7:37 —Remedies
- § 7:38 —Conclusion

Volume 2

CHAPTER 8. GATHERING DATA FOR PRETRIAL MOTIONS ON JUROR BIAS

- § 8:1 Introduction
- § 8:2 ASTC Professional Code: Venue Surveys
- § 8:3 —Professional Standards
- § 8:4 —Practice Guidelines
- § 8:5 —Bibliography
- § 8:6 Sample questions for a survey to measure community prejudice
- § 8:7 Content analysis of media coverage

TABLE OF CONTENTS

- § 8:8 —Presentation
- § 8:9 —Procedures
- § 8:10 Community witnesses
- § 8:11 —Presentation
- § 8:12 —Collecting community witness statements
- § 8:13 —Sample affidavit
- § 8:14 Analysis of litigants' economic role in the trial jurisdiction

CHAPTER 9. TOOLS FOR DISCOURAGING JUROR INTERNET USE

- § 9:1 Juror Internet use: an increasing problem
- § 9:2 Judicial response
- § 9:3 Sources of the problem
- § 9:4 Best practices to reduce juror Internet misconduct
- § 9:5 Voir dire questions to reveal and reduce juror Internet use
- § 9:6 Expand judge's instructions on Internet use
- § 9:7 Use a juror responsibilities pledge
- § 9:8 Recommended instructions on electronic media
- § 9:9 Sample judicial instructions
- § 9:10 —New Jersey
- § 9:11 —Arizona
- § 9:12 —Multnomah County, Oregon

CHAPTER 10. COMMUNITY OPINION SURVEYS: A POWERFUL RESEARCH TOOL FOR LITIGATORS

- § 10:1 Community surveys: A major tool of social research
- § 10:2 Using opinion surveys to assess venue or support a change of venue motion
- § 10:3 Using opinion surveys in planning for voir dire and jury selection
- § 10:4 Using opinion surveys to improve case presentation
- § 10:5 Logistical issues in designing and conducting a community opinion survey
- § 10:6 Data analysis and presentation

CHAPTER 11. PRETRIAL MOCK JURY RESEARCH: MOCK TRIALS AND FOCUS GROUPS

PART I. USES OF PRETRIAL MOCK JURY RESEARCH

- § 11:1 Online research in the era of COVID-19
- § 11:2 Highlight non-lawyers' responses to the case
- § 11:3 Create the narrative story of the case
- § 11:4 Uncover moral, psychological, and emotional issues
- § 11:5 Identify areas and approaches for discovery
- § 11:6 Inform jury selection strategies
- § 11:7 Prepare for settlement conferences
- § 11:8 Limitations of mock jury research
- § 11:9 Sample case: How mock trial research changed trial approach in a contract dispute

PART II. MOCK JURY RESEARCH METHODOLOGY

- § 11:10 Assure demographic balance and confidentiality
- § 11:11 Define the research goals
- § 11:12 Choose the research format
- § 11:13 The presentations must be balanced
- § 11:14 Focus on content, not form
- § 11:15 Emphasize clarity
- § 11:16 Effective presentation of testimony
- § 11:17 Conducting mock jury research without consultants:
There are drawbacks
- § 11:18 Moderator's opening remarks set the tone

PART III. MOCK JURY RESEARCH MATERIALS

- § 11:19 Research materials
- § 11:20 Mock juror recruitment questionnaire and specifications
- § 11:21 Mock juror confidentiality agreement
- § 11:22 Re-screen jurors at the beginning of the research
- § 11:23 Questionnaires exploring mock jurors' backgrounds and attitudes
- § 11:24 Moderator's introduction and overview
- § 11:25 Case specific reaction questionnaires
- § 11:26 Jury instructions and verdict form

TABLE OF CONTENTS

- Appendix 11A. Sample mock juror recruitment questionnaire
- Appendix 11B. Sample re-screening questionnaire
- Appendix 11C. Sample questionnaire exploring baseline attitudes
- Appendix 11D. Sample questionnaire exploring mock jurors' background
- Appendix 11E. Sample questionnaire exploring reaction to plaintiff's case
- Appendix 11F. Sample questionnaire exploring reaction to defense case
- Appendix 11G. Sample final reaction questionnaire
- Appendix 11H. Sample jury instructions
- Appendix 11I. Sample verdict form

CHAPTER 12. THE SUMMARY JURY TRIAL

- § 12:1 What is a summary jury trial?
- § 12:2 Summary jury trial procedures
- § 12:3 Where are summary jury trials in use?
- § 12:4 Appropriate cases for summary jury trials
- § 12:5 Pros and cons of summary jury trials—Settlement rates
 - Objections to jurors' role in summary jury trials
 - Is the summary jury trial verdict a good predictor of trial outcome?
 - Are summary jury trial decisions based on “theatrics?”
 - How do summary jury trials impact subsequent proceedings?
- § 12:10 Case example: Summary jury trial in a toxic tort case
- § 12:11 —Preparing for the summary jury trial
- § 12:12 —Conducting the summary jury trial
- § 12:13 —Jury deliberations
- § 12:14 —Interviews with the jurors
- § 12:15 —Settlement

CHAPTER 13. POST-TRIAL INTERVIEWS WITH JURORS

- § 13:1 Why conduct post-trial interviews?
- § 13:2 —Evaluate key witnesses
- § 13:3 —Test effectiveness of case themes
- § 13:4 —Understand trends in similar cases

- § 13:5 —Challenge a verdict
- § 13:6 —Protect a verdict
- § 13:7 ——Sample interview protocol
- § 13:8 ——Sample juror declaration
- § 13:9 When and how to conduct post-trial interviews
- § 13:10 —Jurors' willingness to participate
- § 13:11 —Assistance from the judge
- § 13:12 —Making an appointment
- § 13:13 —Format of the interview
- § 13:14 Who should conduct a post-trial interview?
- § 13:15 Structure of the interview
- § 13:16 Legal restrictions on post-trial interviewing
- § 13:17 —Searching for juror misconduct vs. focusing on attorney education
- § 13:18 —Federal district court rules restricting or prohibiting post-trial juror interviews
- § 13:19 —The Catch-22 of rules prohibiting post-trial contact with jurors
- § 13:20 —Jurors' right to freedom of speech

CHAPTER 14. *[Reserved]*

CHAPTER 15. WITNESS PREPARATION

- § 15:1 Why preparation is necessary
- § 15:2 First impressions in the courtroom
- § 15:3 —Stereotypes
- § 15:4 —Physical appearance and clothing
- § 15:5 —Behavior and credibility
- § 15:6 —Posture and defensiveness
- § 15:7 —Visual dominance
- § 15:8 —Powerful and powerless speech
- § 15:9 —Competence
- § 15:10 Preparing to prepare
- § 15:11 —Begin by interviewing the witness
- § 15:12 —An interview guide
- § 15:13 Preparation techniques
- § 15:14 —Role play
- § 15:15 —Empower the witness
- § 15:16 Preparing for direct examination
- § 15:17 Preparing for cross-examination
- § 15:18 Final words for the witness
- § 15:19 Child witnesses
- § 15:20 —Preparing for court

TABLE OF CONTENTS

- § 15:21 —Preparing for direct examination
- § 15:22 —Preparing for cross-examination
- § 15:23 —Reducing potential for harm to the child
- § 15:24 —Final words on child witnesses
- § 15:25 Witnesses who do not speak English
- § 15:26 Working with a trial consultant

CHAPTER 16. MODERN JURY TRIAL PRACTICES

- § 16:1 From innovations to best practices
- § 16:2 —The need for improved jury trial practices
- § 16:3 ——How jurors learn
- § 16:4 —Trial participants' views of trial complexity
- § 16:5 —Juror comprehension aids have been adopted across the nation
- § 16:6 —National Program to Increase Citizen Participation in Jury Service
- § 16:7 Evaluation research in the courts
- § 16:8 —Massachusetts tests 16 innovations
- § 16:9 —Los Angeles County tests six innovations
- § 16:10 —Tennessee tests 13 innovations
- § 16:11 —Ohio tests 13 jury innovations
- § 16:12 —New York tests 10 jury practices
- § 16:13 —Seventh Federal circuit tests seven concepts
- § 16:14 —Court research on specific practices
- § 16:15 ——Wyoming looks at juror comprehension of instructions
- § 16:16 ——New Jersey and Colorado examine allowing jurors to submit questions for witnesses
- § 16:17 ——Juror questions in civil cases in New Jersey
- § 16:18 ——Juror questions in criminal trials in Colorado
- § 16:19 Mini-openings—Research findings
- § 16:20 —Implementation and authority
- § 16:21 Juror note-taking—Research findings addressing practitioners' concerns
- § 16:22 —Implementation and authority
- § 16:23 Notebooks for jurors—Implementation and authority
- § 16:24 Allowing jurors to submit questions to witnesses— Research findings addressing practitioners' concerns
- § 16:25 —Implementation and authority
- § 16:26 —Frequently asked questions
- § 16:27 Aiding juror comprehension of the law
- § 16:28 —Substantive preliminary instructions

- § 16:29 —Oral instructions both before and after closing arguments
- § 16:30 —Providing deliberating jury with final instructions in writing

Appendix 16A. Civil trial juries: the effects of jury size and nonunanimous verdict rules

CHAPTER 17. CONDUCTING VOIR DIRE

- § 17:1 Voir dire techniques
- § 17:2 —Eliciting bias
- § 17:3 —Structuring the questions
- § 17:4 —Encouraging juror candor
- § 17:5 Avoid giving mixed messages to jurors
- § 17:6 Clarify what it means to be “fair” in voir dire
- § 17:7 Steps to navigating the truth vs. duty trap
- § 17:8 Jurors learn what is expected from what they see and hear in voir dire
- § 17:9 Laying the groundwork for successful cause challenges
- § 17:10 —A general approach
- § 17:11 —Controlling the atmosphere
- § 17:12 —Developing a cause challenge requires both open-ended and closed-ended questioning
- § 17:13 —Arguing for cause
- § 17:14 Areas of questioning
- § 17:15 —Setting the stage
- § 17:16 —Juror background questions
- § 17:17 —Occupation
- § 17:18 —Children
- § 17:19 —Neighborhood
- § 17:20 —Education
- § 17:21 —Military experience or connections
- § 17:22 —Religion
- § 17:23 —Spare time activities
- § 17:24 —Previous jury experience
- § 17:25 —Questions about exposure to pretrial media coverage
- § 17:26 —Questions about racial attitudes
- § 17:27 —Questions about racial prejudice—Racism and racial prejudice
- § 17:28 —Interracial contacts and social distance
- § 17:29 —Language and cultural differences
- § 17:30 —Anti-Arab and Anti-Muslim sentiment

TABLE OF CONTENTS

- § 17:31 — —Components of Anti-Arab/Anti-Muslim prejudice
- § 17:32 — —Tools to help Identify Prejudice
- § 17:33 — — —Types of prejudice
- § 17:34 — — —Punitiveness
- § 17:35 — — —Immigration
- § 17:36 — — —Social distance
- § 17:37 — — —Questions about prejudice
- § 17:38 — — —The Anti-Muslim prejudice scale
- § 17:39 — —Trial preparation note
- § 17:40 — —Questions about sexual orientation
- § 17:41 — —AIDS/HIV

CHAPTER 18. SELECTING A JURY

- § 18:1 Introduction
- § 18:2 Plan a jury selection strategy
- § 18:3 —Analyze case presentations
- § 18:4 —Identify potential juror biases
- § 18:5 — —Use “juror profiles” with caution
- § 18:6 — —Consider the impact of jurors’ attitudes, beliefs, and values
- § 18:7 — —Consider jurors’ personality traits
- § 18:8 — —Include jurors’ formative prior experiences
- § 18:9 —Available data about jury panelists
- § 18:10 — —Public records search
- § 18:11 — —Internet and social media research
- § 18:12 — — —Practical Considerations
- § 18:13 — — —Ethical Considerations
- § 18:14 — —Responses to voir dire questionnaires
- § 18:15 — —Responses to voir dire questions
- § 18:16 — —Observations of panelists’ behavior
- § 18:17 — —Voir dire procedures
- § 18:18 — —Clarify the judge’s voir dire practices
- § 18:19 — —Motions to improve voir dire procedures
- § 18:20 — —Voir dire procedures checklist
- § 18:21 — —Organizing the jury selection process
- § 18:22 — —Use a team approach
- § 18:23 — —Allocate responsibilities within the team
- § 18:24 — —Practice voir dire
- § 18:25 Use in-court time and effort efficiently
- § 18:26 — —Use voir dire to get information, not give speeches
- § 18:27 — —Observe jurors’ dress and demeanor
- § 18:28 — —Process and evaluate the juror questionnaire responses

- § 18:29 Evaluating jurors' biases
- § 18:30 —Use the data gathered by your team
- § 18:31 —Consider alternative juries, and jury-room dynamics
- § 18:32 Exercise challenges strategically
- § 18:33 Use rating systems to compare individual jurors to the group
- § 18:34 The authoritarian personality: A helpful concept for juror evaluation
- § 18:35 —Authoritarianism and criminal trials
- § 18:36 —Authoritarianism and civil trials
- § 18:37 —Identifying authoritarian attitudes in the courtroom
- § 18:38 Nonverbal behavior can reveal personality characteristics or attitudes
- § 18:39 —Interpreting nonverbal behavior
- § 18:40 —Observing nonverbal behavior
- § 18:41 Take group dynamics into account in evaluating jurors
 - § 18:42 —Leaders
 - § 18:43 —Followers
 - § 18:44 —Fillers
 - § 18:45 —Negotiators
 - § 18:46 —Holdouts
 - § 18:47 —Subgroups
 - § 18:48 A sample juror evaluation
 - § 18:49 A sample jury selection in a criminal case
 - § 18:50 —Jury selection strategy
 - § 18:51 —The prospective jurors: Day 1
 - § 18:52 —The prospective jurors: Day 2
 - § 18:53 —The outcome

CHAPTER 19. PERSONAL INJURY LITIGATION

- § 19:1 Juror attitudes affecting personal injury trials
- § 19:2 —Attributing responsibility
- § 19:3 ——The importance of personal and social factors
- § 19:4 ——Tolerance for ambiguity and complexity
- § 19:5 ——Identification with one of the parties
- § 19:6 ——Similarity and empathy
- § 19:7 ——Similarity and rejection
- § 19:8 ——Similarity and denial
- § 19:9 Issues affecting jurors' damage awards

TABLE OF CONTENTS

- § 19:10 —Relative responsibility of the parties
- § 19:11 —The purpose of an award: Questions jurors ask
- § 19:12 —Who benefits from the award?
- § 19:13 ——What will the money accomplish?
- § 19:14 ——Special damages
- § 19:15 —Punitive damages
- § 19:16 —Concern about the effect of an award
- § 19:17 —Case example: Municipality as defendant
- § 19:18 —Special issues in proving damages in wrongful death cases
- § 19:19 Comprehension of legal standards and jury instructions
- § 19:20 The impact of tort reform campaigns and the “insurance crisis”
- § 19:21 The need for improved voir dire procedures
- § 19:22 —Expanded scope of questioning
- § 19:23 —Authorities for improvement
- § 19:24 —Efforts to improve voir dire can effect settlement
- § 19:25 Areas for voir dire in all personal injury suits
- § 19:26 —General impressions of civil suits
- § 19:27 ——Experience with lawsuits
- § 19:28 ——Preponderance of the evidence
- § 19:29 ——Responsibility for negligence
- § 19:30 ——Individuals vs. corporations
- § 19:31 —Damages
- § 19:32 ——The lawsuit crisis
- § 19:33 ——Excessive damage awards
- § 19:34 ——Compensatory and punitive damages
- § 19:35 ——Sample voir dire on damages
- § 19:36 Voir dire in products liability cases
- § 19:37 —Products and the right to sue
- § 19:38 —Consumer rights
- § 19:39 —Duty to warn
- § 19:40 —Strict liability
- § 19:41 —Contact with defendants or product
- § 19:42 ——Carcinogenic substances
- § 19:43 ——Hazardous substances in the workplace
- § 19:44 —Workplace safety
- § 19:45 ——Health and safety programs
- § 19:46 ——Injury on the job
- § 19:47 ——Occupational disease and disability
- § 19:48 ——Government regulation
- § 19:49 —Case example: Defective lawnmower causes loss of eye

- § 19:50 — —Pretrial simulation research
- § 19:51 — —Voir dire and jury selection strategy
- § 19:52 — —A complete voir dire: Defective lawnmower
- § 19:53 — — —Demographics (juror background)
- § 19:54 — — —Juror's contact with courts
- § 19:55 — — —Juror's business experience
- § 19:56 — — —Case specific contacts
- § 19:57 — — —Experience with lawnmowers
- § 19:58 — — —Juror's work situation
- § 19:59 — — —Product safety
- § 19:60 — — —Injuries and disabilities
- § 19:61 — — —General attitudes toward products liability litigation
- § 19:62 — — —Damages/right to sue
- § 19:63 — — —Concluding questions
- § 19:64 Areas for voir dire in medical negligence cases
- § 19:65 —Contact with the medical profession
- § 19:66 —Duties of patients and health care providers
- § 19:67 —Medical malpractice
- § 19:68 —Misdiagnosis
- § 19:69 —Hospital liability
- § 19:70 —Sample voir dire questionnaire for a medical negligence case
- § 19:71 —Complete voir dire: Misdiagnoses leads to hysterectomy
- § 19:72 — —Voir dire questions addressed to a group of jurors
- § 19:73 — —Voir dire questions addressed to individual jurors
- § 19:74 —Pretrial simulation research improves settlement
- § 19:75 Areas for voir dire in motor vehicle collision cases
- § 19:76 Complete voir dire: Collision and wrongful death
- § 19:77 —Juror background
- § 19:78 —Case specific knowledge/contact
- § 19:79 —Juror's work situation
- § 19:80 —Juror's experience with motor vehicles
- § 19:81 —Juror's experience with collisions
- § 19:82 —Negligence
- § 19:83 —Juror's experience with death of a loved one
- § 19:84 —Damages/right to sue
- § 19:85 —Concluding questions

TABLE OF CONTENTS

Volume 3

CHAPTER 20. COMMERCIAL LITIGATION

- § 20:1 Introduction
- § 20:2 Public attitudes about business ethics
- § 20:3 —Beliefs about executives' honesty and trustworthiness
- § 20:4 —Jurors ask: What was reasonable under the circumstances?
- § 20:5 —Negative views of some business occupations
- § 20:6 —Divergent views about big business
- § 20:7 —Ambivalence toward small businesses
- § 20:8 Typical juror responses to business cases
- § 20:9 —Less emotional involvement with the parties
- § 20:10 —Strong reactions to wrongdoing
- § 20:11 —Reasoning from business experience
- § 20:12 —Simplifying facts and drawing analogies
- § 20:13 —Constructing plausible "stories" from the evidence
- § 20:14 —Filling in the gaps
- § 20:15 —Searching out motives
- § 20:16 —Balancing faults
- § 20:17 Special problems of complex/multi-party disputes
- § 20:18 —Remembering the jury in a jury trial
- § 20:19 ——Preparing early for the "jury issues"
- § 20:20 ——Integrating jury issues into discovery and settlement
- § 20:21 ——Practicing voir dire skills
- § 20:22 ——Obtaining improved voir dire procedures
- § 20:23 ——Who serves on long trials?
- § 20:24 ——Over-emphasis on the "smart-dumb" dimension
- § 20:25 ——Business executives as jurors
- § 20:26 Expert witnesses and technical jargon
- § 20:27 —Choosing experts for more than expertise
- § 20:28 —Getting beyond professional jargon
- § 20:29 —Choosing the right starting place for expert testimony
- § 20:30 Avoid redundant, irrelevant case presentations by helping jurors to build "stories"
- § 20:31 Improving jury instructions and verdict forms
- § 20:32 —Uses of preinstruction
- § 20:33 —Uses and abuses of verdict forms
- § 20:34 Juror responses to patent cases
- § 20:35 —Why patent cases are difficult for jurors

- § 20:36 ——Complexity
- § 20:37 ——Abstract and unfamiliar legal concepts
- § 20:38 ——Technical evidence
- § 20:39 ——Expert witnesses
- § 20:40 —How jurors reason in patent cases
- § 20:41 ——Trying hard
- § 20:42 ——Feeling good when they understand
- § 20:43 ——Wrestling with meanings
- § 20:44 ——Searching for the context
- § 20:45 ——Simplifying the issues
- § 20:46 ——Filling in gaps
- § 20:47 ——Using their life-experiences
- § 20:48 ——Following what is clear
- § 20:49 ——Using analogies
- § 20:50 ——Invoking their own senses of justice
- § 20:51 ——Focusing on “human” issues
- § 20:52 Simplify your case to its basics
- § 20:53 —Tell a narrative story
- § 20:54 —Give the jurors arguments they can repeat
- § 20:55 —Use graphics to clarify, not overwhelm
- § 20:56 —Choose expert witnesses who can explain clearly
- § 20:57 —Tell a complete story
- § 20:58 —Pay attention to the “human” issues
- § 20:59 —Use pretrial research to understand jurors’ responses
- § 20:60 Sample voir dire questions for commercial litigation
- § 20:61 —Jurors’ experience with business
- § 20:62 —Jurors’ views about contracts
- § 20:63 —Ideas about business ethics
- § 20:64 —Experiences with real estate and property ownership
- § 20:65 —Contact with and views of financial institutions
- § 20:66 Sample jury questionnaire questions for a patent case

CHAPTER 21. CIVIL RIGHTS, DISCRIMINATION, AND EMPLOYMENT LITIGATION

- § 21:1 Juror biases and stereotypes in civil rights and discrimination cases
- § 21:2 —Improving voir dire procedures - particularly important in civil rights and discrimination cases
- § 21:3 —A practical approach to voir dire in discrimination cases

TABLE OF CONTENTS

- § 21:4 — —A “less is more” approach to questioning
- § 21:5 — —What is discrimination?
- § 21:6 — —Negative answers to voir dire questions present an opportunity
- § 21:7 — —Preparation makes a difference
- § 21:8 — —Jurors who say “I don’t really know the details”
- § 21:9 — —Explore the impact of jurors’ experiences
- § 21:10 — —Avoid stereotyping jurors
- § 21:11 Race issues in jury trials
- § 21:12 —The impact of racial attitudes
- § 21:13 —Benefits of using juror questionnaires
- § 21:14 —Voir dire about race issues
- § 21:15 —Voir dire about race discrimination
- § 21:16 Voir dire in employment discrimination cases
- § 21:17 —Answering jurors’ questions
- § 21:18 —Attitudes toward supervisors and managers
- § 21:19 —Discrimination in employment and hiring
- § 21:20 —Damages for employment discrimination
- § 21:21 Sex discrimination
- § 21:22 —Sexual harassment
- § 21:23 — —Voir dire questions
- § 21:24 — —Written juror questionnaire
- § 21:25 — —Sample plaintiff’s motion to improve voir dire in a sexual harassment case
- § 21:26 Disability discrimination: Juror attitudes and voir dire questions
- § 21:27 Age discrimination: Juror attitudes and voir dire questions
- § 21:28 Improved voir dire procedures in an employment discrimination class action
- § 21:29 —Voir dire questionnaire for screening jurors in an employment discrimination class action
- § 21:30 Sample voir dire: Age discrimination and anti-Semitism
- § 21:31 —Background questions
- § 21:32 —Voir dire questions to explore attitudes and experiences
- § 21:33 Police misconduct
- § 21:34 Police misconduct voir dire questions: Associations, contacts, ideas about police
- § 21:35 Police misconduct—Sample voir dire: Wrongful death
- § 21:36 — —Juror background
- § 21:37 —Police brutality and policy accountability
- § 21:38 —Sample voir dire: Wrongful death—Racial bias

- § 21:39 — —Civil lawsuits, injury, and damages
- § 21:40 — —Ability to apply and follow the law

CHAPTER 22. CRIMINAL DEFENSE: PRACTICE TOOLS

- § 22:1 Introduction
- § 22:2 Voir dire checklist
- § 22:3 Juror attitudes toward crime and criminal justice:
 - Voir dire questions
 - Personal experience with crime
 - § 22:5 —The crime problem generally
 - § 22:6 —The criminal justice system and crime
 - § 22:7 —Views about defendant's legal protections
 - § 22:8 Sample voir dire questionnaires
 - § 22:9 —Sample questionnaire: Savings and loan fraud
 - § 22:10 —Sample questionnaire: Self-defense case
 - § 22:11 Sample papers: Improving voir dire procedures in a child sex abuse case
 - § 22:12 —Motion and memorandum in support of motion for written juror questionnaire
 - § 22:13 —Sample juror questionnaire: Child sex abuse case
 - § 22:14 Sample questions for criminal case questionnaires or voir dire
 - Contact with courts and crime
 - § 22:16 —Attitudes about crime and violence
 - § 22:17 —Involvement with children
 - § 22:18 —Teenagers
 - § 22:19 —Religion
 - § 22:20 Special issues in gun cases
 - § 22:21 —Voir dire questionnaire for a gun case
 - § 22:22 —Voir dire questions for a gun case
 - § 22:23 Jurors' experiences with drugs
 - § 22:24 Juror views about informants and undercover agents
 - § 22:25 —Voir dire questionnaire covering informants
 - § 22:26 —Voir dire questions on informants
 - § 22:27 Cultural differences
 - § 22:28 Insanity defense and exposure to mental health professionals
 - § 22:29 Domestic violence cases
 - § 22:30 —Analysis of issues in a sample domestic violence case
 - § 22:31 —Juror attitudes: Voir dire areas for domestic violence cases

TABLE OF CONTENTS

- § 22:32 —Personal experience with domestic violence
- § 22:33 —Media or other exposure to domestic violence
- § 22:34 —Attitudes toward domestic violence victims
- § 22:35 —Assumptions about self-defense
- § 22:36 —Ability to follow the law of self-defense
- § 22:37 —Lifestyle issues
- § 22:38 —Psychological complexity and personal responsibility
- § 22:39 DUI cases: Driving under the influence
- § 22:40 —Juror background characteristics relevant to DUI cases
 - § 22:41 —Related training or education
 - § 22:42 —Spare time activities
 - § 22:43 —Military experience
 - § 22:44 —Law enforcement associations
 - § 22:45 —DUI: A general voir dire
 - § 22:46 —Exploring jurors' driving experiences in a group voir dire
 - § 22:47 —Contact with law enforcement while driving
 - § 22:48 —Law enforcement credibility
 - § 22:49 —Traffic accidents
 - § 22:50 —Alcohol and DUIs
 - § 22:51 —Alcohol cause challenge questions
 - § 22:52 —Intoxilyzers, blood alcohol tests, and field coordination tests

CHAPTER 23. DEATH-QUALIFYING VOIR DIRE: UNDERSTANDING IT, CHALLENGING IT, IMPROVING IT

PART I. DEATH PENALTY VOIR DIRE IS UNIQUE

- § 23:1 Overview
- § 23:2 The death qualifying voir dire
- § 23:3 Pretrial motions

PART II. PRETRIAL MOTIONS AND TACTICS

- § 23:4 Motions to limit death-qualification
- § 23:5 Racial impact of death qualification
- § 23:6 Challenging use of peremptory challenges to exclude death-scrupled jurors
- § 23:7 Improving voir dire procedures
- § 23:8 Other voir dire issues to address in pretrial motions

PART III. VOIR DIRE STRATEGIES

- § 23:9 Conducting voir dire in death penalty cases
- § 23:10 —Death-qualification and death penalty attitudes
- § 23:11 —Questioning death penalty supporters
- § 23:12 —Preserving the record
- § 23:13 —Questioning death penalty opponents
- § 23:14 —Questions for a voir dire questionnaire in a death penalty case
- § 23:15 —Questioning designed to understand the death penalty attitudes of death qualified jurors
- § 23:16 —Challenging for cause strong death penalty supporters
- § 23:17 The Colorado method
- § 23:18 —Start by rating jurors' death penalty attitudes
- § 23:19 —Assuring that jurors treat each other with respect
- § 23:20 —Questions about the charges and the defense
- § 23:21 —Ask the judge to explain there is no presumption of guilt
- § 23:22 —“Strip Away” extraneous assumptions and irrelevant facts
- § 23:23 —Questioning strategy
- § 23:24 —Re-stripping the prospective juror
- § 23:25 —Questioning to challenge
- § 23:26 —Questioning to defend against government challenge
- § 23:27 —Teaching jurors how to leave jury room with a life verdict

PART IV. BACKGROUND: LEGAL HISTORY AND SOCIAL SCIENCE RESEARCH

- § 23:28 *Witherspoon v. Illinois* and *Wainwright v. Witt*
- § 23:29 Marshaling evidence to challenge death-qualification: Background
- § 23:30 Early studies demonstrating conviction-proneness
- § 23:31 Empirical studies of death-qualified subjects
- § 23:32 *Hovey v. Superior Court*: A state supreme court confronts the problem of bias
- § 23:33 —The studies: Endorsement of their validity
- § 23:34 —The *Hovey* remedy: Sequestered voir dire during death-qualification
- § 23:35 *Lockhart v. McCree*
- § 23:36 —Critique of the court's evaluation of social science data

TABLE OF CONTENTS

CHAPTER 24. SEVERANCE AND JOINDER ISSUES IN CRIMINAL CASES

- § 24:1 Severance and joinder: introduction
- § 24:2 Initial preparation—The legal test
- § 24:3 Relevant social science research on joinder
- § 24:4 Social science research on joinder of charges
- § 24:5 —Relevance of joinder of charges to joinder of defendants
- § 24:6 Social science research on severance of defendants
- § 24:7 —Results
- § 24:8 ——Non-individualized decision making or “the lumping effect”
- § 24:9 ——Respondents’ comments: a partial explanation of why joined penalty trials are prejudicial
- § 24:10 ——The use of social history in the severed format vs. its use in the composite format
- § 24:11 ——Is consideration of social history helpful to defendants?
- § 24:12 ——Summary of respondents’ written comments
- § 24:13 ——Conclusions from Fresno County severance study
- § 24:14 ——Conclusions on the Fresno, Butte, and San Diego County severance studies
- § 24:15 ——Other empirical evidence on severance
- § 24:16 Data on the impact of joinder on the issue of guilt in a noncapital trial
- § 24:17 Severance in capital cases—Death as a factor in severance
- § 24:18 Severance in capital cases where co-defendants are related
- § 24:19 —Attorney testimony to support the motion
- § 24:20 —Research results and expert testimony
- § 24:21 —The prosecution’s response
- § 24:22 —Elements of a successful severance motion
- § 24:23 Joining capital and noncapital defendants
- § 24:24 Problems of voir dire and peremptory challenges when not all defendants are capitally charged
- § 24:25 Penalty phase prejudicial issues in joined capital cases—Dilution of mitigation
- § 24:26 ——Social history
- § 24:27 ——Age
- § 24:28 ——Lingering doubt
- § 24:29 ——Fingerpointing
- § 24:30 ——Competing theories of mitigation
- § 24:31 ——When defendants are closely related

- § 24:32 —Joinder removes the ability of related codefendants to fingerpoint
- § 24:33 Severance in noncapital cases—Confessions, admissions, and other non-cross—Admissible evidence
- § 24:34 —Guilt by association, negative halo effect, spillover effects
- § 24:35 Joinder of a weaker case to a stronger one
- § 24:36 Order of trials
- § 24:37 Race, ethnicity, and other stereotypes
- § 24:38 Antagonistic defenses
- § 24:39 Defendant testifying
- § 24:40 Juror memory and confusion
- § 24:41 Practical problems in joined trials
- § 24:42 Courtroom security and case logistics
- § 24:43 Cumulative prejudice
- § 24:44 Federal trial court practice in joined capital trials
- § 24:45 Remedies
- § 24:46 Instructions as curative
- § 24:47 Dual juries
- § 24:48 Plan for severance

Table of Cases

Index