

Table of Contents

PART I. THE HISTORY, FUNCTIONS, AND FEATURES OF THE JURY

CHAPTER 1. THE RIGHT TO JURY TRIAL

- § 1:1 Introduction
- § 1:2 The jury at common law
- § 1:3 American developments
- § 1:4 Constitutional protection for the right to a jury trial: overview
- § 1:5 The Sixth Amendment right to a jury trial in a federal criminal case
- § 1:6 —Petty offenses
- § 1:7 —Offenses punishable by fines and sanctions other than imprisonment
- § 1:8 —Contempt and quasi-criminal offenses
- § 1:9 The Fourteenth Amendment right to a jury trial in a state criminal case
- § 1:10 Jury trial under the doctrine of selective incorporation
- § 1:11 The Seventh Amendment right to a jury trial in a federal civil case
- § 1:12 —Mixed law and equity actions
- § 1:13 —The requirement of a written demand
- § 1:14 State constitutions and statutes
- § 1:15 Waiver
- § 1:16 —Indirect waiver
- § 1:17 Waiver of jury trial—Criminal cases
- § 1:18 —Civil cases
- § 1:19 Waiver of a jury—Strategic considerations

CHAPTER 2. CHARACTERISTICS AND FEATURES OF THE JURY

- § 2:1 Introduction
- § 2:2 Venue and vicinage: introduction
- § 2:3 Motions for a change in venue or venire
- § 2:4 Venue and vicinage in criminal cases—The legal standards
- § 2:5 Strategic considerations in moving for a change in venue
- § 2:6 Venue and vicinage in civil cases
- § 2:7 A jury of one's peers
- § 2:8 Peers and jury selection
- § 2:9 Impartiality
- § 2:10 —Supreme Court development
- § 2:11 The impartial juror—Fact or fiction
- § 2:12 Size of the jury—Criminal trials
- § 2:13 —Civil trials
- § 2:14 —Federal statutes, state statutes, and state constitutions
- § 2:15 Jury selection as a function of the size of the jury: strategic considerations
- § 2:16 Verdict unanimity

- § 2:17 Jury selection as a function of verdict unanimity—Strategic considerations
- § 2:18 Jury nullification
- § 2:19 Jury selection as a function of nullification—Strategic considerations
- § 2:20 Antinomies and realities

PART II. LAYING THE GROUNDWORK

CHAPTER 3. COMMUNITY ANALYSES: GOALS AND METHODOLOGIES

- § 3:1 Introduction
- § 3:2 Jury consultants
- § 3:3 Community surveys: an overview
- § 3:4 —Designing the questionnaire
- § 3:5 —Choosing a sample
- § 3:6 —Administering the questionnaire
- § 3:7 —Analyzing the results
- § 3:8 —Utilizing the results
- § 3:9 Focus groups
- § 3:10 Juror profiles and their uses
- § 3:11 Applying the profiles to prospective jurors
- § 3:12 State-provided jury consultants—Constitutional arguments
- § 3:13 State provided jury consultants—Statutory arguments
- § 3:14 When funds are limited
- § 3:15 Post-trial interviews of jurors
- § 3:16 Post-trial interviews of jurors as a basis for impeaching the verdict
- § 3:17 Professional responsibility and restrictions on post-trial interviews of jurors

CHAPTER 4. MOCK AND SHADOW JURIES

- § 4:1 Introduction
- § 4:2 Mock trials—Selecting the jurors
- § 4:3 —Conducting the mock trial
- § 4:4 —Observing the deliberations of the mock jury
- § 4:5 —On the internet
- § 4:6 —An evaluation
- § 4:7 Shadow juries
- § 4:8 —An evaluation

CHAPTER 5. INVESTIGATION OF THE VENIRE

- § 5:1 Introduction and importance of juror investigation
- § 5:2 Pre-Trial investigation
- § 5:3 Mid- and Post-Trial Investigation
- § 5:4 Ethics and boundaries
- § 5:5 Discovery of juror investigations
- § 5:6 —Civil cases
- § 5:7 —Criminal cases
- § 5:8 —The work product doctrine

TABLE OF CONTENTS

- § 5:9 Federal law on juror investigation
- § 5:10 Anonymous juries
- § 5:11 —The federal standard
- § 5:12 —Media interests and juror privacy
- § 5:13 —Appeals in federal court
- § 5:14 —Appeals in state courts
- § 5:15 Motion regarding state access to arrest records of venirepersons
- § 5:16 Conclusion to Part II: Laying the groundwork

PART III. THE LAW RELATING TO CHALLENGES

CHAPTER 6. CHALLENGES TO THE ARRAY

- § 6:1 Introduction
- § 6:2 The Federal Jury Selection and Service Act of 1968—Goals and policies
- § 6:3 —Jury plans under the Federal Act
- § 6:4 Disqualifications under the Federal Act
- § 6:5 Exemptions under the Federal Act
- § 6:6 Excuses under the Federal Act
- § 6:7 Random selection of jurors
- § 6:8 Selection of a jury pool—Voter registration
- § 6:9 —“Key man” systems
- § 6:10 The qualification process
- § 6:11 Procedural issues relating to a statutory challenge to the array
- § 6:12 Challenges to the array based on equal protection
- § 6:13 Challenges to the array based on the fair cross-section requirement
- § 6:14 Establishing a constitutional violation—Introduction
- § 6:15 —Standing
- § 6:16 —Cognizability
- § 6:17 —Disparity
- § 6:18 —Discriminatory intent and systematic exclusion
- § 6:19 Rebutting a *prima facie* case of a constitutional violation

CHAPTER 7. CHALLENGES FOR CAUSE

- § 7:1 Introduction
- § 7:2 Challenges at common law
- § 7:3 American developments
- § 7:4 Actual, Implied, and Inferred Bias
- § 7:5 The role of the court
- § 7:6 Preconceived opinions
- § 7:7 —Relevance and amenability to change by proof
- § 7:8 —Opinion of the law
- § 7:9 Pre-trial publicity
- § 7:10 —Supreme Court development
- § 7:11 —Examination of juror
- § 7:12 Prior personal experiences
- § 7:13 —Prior experiences of family members

- § 7:14 —Personal injuries
- § 7:15 —Litigation
- § 7:16 Prior knowledge of facts
- § 7:17 Prior jury service—Statutes
- § 7:18 —Basis for challenge for cause
- § 7:19 —Criminal cases
- § 7:20 —Civil cases
- § 7:21 Acquaintance with parties, lawyers, witnesses
- § 7:22 Acquaintance with parties, attorneys, or witnesses—Personal or social relationships generally
- § 7:23 —Relationship with a witness
- § 7:24 —Membership in same organization as a party
- § 7:25 —Business or professional relationship with party
- § 7:26 —Business or professional relationship with attorney where regulated by a statute
- § 7:27 —Business or professional relationship with attorney in the absence of a statute
- § 7:28 —Business or professional relationship with witness
- § 7:29 —Family relationship to a party
- § 7:30 —Family relationship to an attorney or witness
- § 7:31 —Family relationship to an interested or biased person
- § 7:32 Pecuniary interest
- § 7:33 Connection with an insurance company
- § 7:34 Insurance company advertising
- § 7:35 Sympathy
- § 7:36 —Eliciting admissions
- § 7:37 —Avoiding disqualification
- § 7:38 Prejudice—Labor unions
- § 7:39 —Intoxicants and gambling
- § 7:40 —Religion
- § 7:41 —Race generally
- § 7:42 —Supreme Court development on race prejudice
- § 7:43 —Prosecution questions on race prejudice
- § 7:44 —Membership in racially biased organizations
- § 7:45 —Politics
- § 7:46 —Certain witnesses
- § 7:47 —Certain types of litigation and defenses
- § 7:48 Attitudes on compensatory and punitive damages
- § 7:49 Physical condition and intellectual functioning
- § 7:50 Nervous or emotional condition
- § 7:51 Connection with law enforcement
- § 7:52 Qualification in a death penalty case
- § 7:53 Motion to limit the State's asking for commitment by jurors as to death penalty
- § 7:54 Jury nullifiers

CHAPTER 8. PEREMPTORY CHALLENGES

- § 8:1 Introduction

TABLE OF CONTENTS

§ 8:2	Number of peremptory challenges
§ 8:3	Procedures
§ 8:4	Discriminatory use of peremptory challenges: Pre- <i>Batson</i> Law
§ 8:5	<i>Batson v. Kentucky</i>
§ 8:6	<i>Batson v. Kentucky</i> : The Three-Step Process
§ 8:7	Post- <i>Batson</i> —Establishing a <i>prima facie</i> case
§ 8:8	Post- <i>Batson</i> Evaluation of race-neutral reasons
§ 8:9	Applicability of <i>Batson</i> to groups other than African Americans
§ 8:10	Applicability of <i>Batson</i> to peremptory challenges used by defense counsel
§ 8:11	Applicability of <i>Batson</i> in civil cases
§ 8:12	The seeming demise of <i>Batson</i>
§ 8:13	The Resurrection of <i>Batson</i>
§ 8:14	Litigating a <i>Batson</i> claim
§ 8:15	Remedies
§ 8:16	State and legislative responses to <i>Batson</i> and the use of peremptory challenges
§ 8:17	Final reflections: <i>Batson</i> revisited

PART IV. VOIR DIRE

CHAPTER 9. JUROR QUESTIONNAIRES

§ 9:1	Introduction—What is a juror questionnaire?
§ 9:2	Benefits of a supplemental juror questionnaire (SJQ)
§ 9:3	The American Bar Association’s position on questionnaires
§ 9:4	Formulating questions for an SJQ
§ 9:5	Organizing the SJQ
§ 9:6	Sample motion and order for a SJQ—Criminal case
§ 9:7	Sample motion for a SJQ—Noncapital case involving race, domestic violence, and expert testimony
§ 9:8	Sample motion to submit questionnaire to prospective jurors—Capital case
§ 9:9	Sample letter and/or instructions to accompany a SJQ
§ 9:10	Utilizing the results of a SJQ
§ 9:11	General questions
§ 9:12	Questions about previous jury experience
§ 9:13	Questions about a juror’s sources of information and views
§ 9:14	Questions on pre-trial publicity
§ 9:15	Questions about a juror’s ability to evaluate evidence and testimony
§ 9:16	Questions about jury deliberations
§ 9:17	Questions to get insights into a juror’s “personality”
§ 9:18	Questions on racial attitudes and affirmative action
§ 9:19	Questions on cultural and ethnic issues
§ 9:20	Questions on religion
§ 9:21	Questions on disability discrimination
§ 9:22	Questions on translation and interpreters
§ 9:23	Questions on drugs and alcohol
§ 9:24	Questions on law enforcement
§ 9:25	Questions on terrorism cases

- § 9:26 Questions on federal price fixing
- § 9:27 Medical malpractice cases
- § 9:28 Questions for anonymous juries
- § 9:29 Questions for juries subject to pandemic precautions

CHAPTER 10. *VOIR DIRE*

- § 10:1 Introduction
- § 10:2 The purposes and goals of *voir dire*
- § 10:3 The importance of preparation
- § 10:4 Eliciting information
- § 10:5 *Voir dire* procedures
- § 10:6 Initial conditioning of the panel
- § 10:7 *Voir dire* strategies in the courtroom
- § 10:8 Dealing with hostile jurors
- § 10:9 Beyond a juror's verbal responses
- § 10:10 Judge v. attorney conducted *voir dire*
- § 10:11 Group, individual, and *in camera* questioning
- § 10:12 Attitudes and demeanor of counsel
- § 10:13 The juror's duty of full disclosure
- § 10:14 Court's duty and discretion
- § 10:15 Scope of *voir dire*
- § 10:16 Open-ended versus closed-ended questions
- § 10:17 Hypothetical questions
- § 10:18 Addressing jurors by name
- § 10:19 Cultivating an image of fairness
- § 10:20 Formulating questions so as not to bore the jury
- § 10:21 Admitting the weaknesses in one's case
- § 10:22 On the record
- § 10:23 General topics for introductory questioning
- § 10:24 One last question

CHAPTER 11. *VOIR DIRE* IN CIVIL CASES

- § 11:1 Introduction to civil *voir dire*
- § 11:2 Ranking prospective jurors
- § 11:3 Commitments
- § 11:4 Form of questions
- § 11:5 Automobile collisions
- § 11:6 Child-pedestrian accidents
- § 11:7 Legal malpractice actions
- § 11:8 Medical malpractice actions
- § 11:9 Slip and fall cases
- § 11:10 Products liability suits
- § 11:11 Commercial and consumer protection cases
- § 11:12 Patent infringement cases

CHAPTER 12. *VOIR DIRE* IN CRIMINAL CASES

- § 12:1 Introduction to criminal *voir dire*

TABLE OF CONTENTS

§ 12:2	Making a good impression
§ 12:3	Putting jurors at ease
§ 12:4	Explanations
§ 12:5	Juror silence
§ 12:6	Educative questions
§ 12:7	General questions
§ 12:8	Use of the term “prejudice”
§ 12:9	Relationship with the court
§ 12:10	Protecting favorable jurors
§ 12:11	Applicable legal principles
§ 12:12	—Reasonable doubt
§ 12:13	—Right not to testify
§ 12:14	Areas of <i>voir dire</i> requiring tact and delicacy
§ 12:15	—Religion
§ 12:16	—Pre-trial publicity
§ 12:17	—Graphic evidence
§ 12:18	—Insanity defense
§ 12:19	—Identification
§ 12:20	—Police procedures
§ 12:21	—Lesser included offenses
§ 12:22	—Empathy and emotion
§ 12:23	Illustrative <i>voir dire</i> —In a rape case
§ 12:24	—In a case of white-collar crime
§ 12:25	—In a case of child sexual assault
§ 12:26	—In a case involving the use of a gun
§ 12:27	—In a crime involving alcohol
§ 12:28	Driving under the influence (DUI)
§ 12:29	Illustrative <i>voir dire</i> —In a case of domestic violence
§ 12:30	—When the charge is prostitution

CHAPTER 13. *VOIR DIRE* IN CAPITAL CASES

§ 13:1	Introduction to capital <i>voir dire</i>
§ 13:2	Developing a strategy and theory of the case
§ 13:3	Litigating the conditions of <i>voir dire</i>
§ 13:4	Sample motion for a full constitutional <i>voir dire</i>
§ 13:5	Sample wording for motion seeking individual <i>voir dire</i>
§ 13:6	Motion for jury selection conditions
§ 13:7	Special precautions in conduct of oral <i>voir dire</i> —Death qualification
§ 13:8	Using a jury consultant or expert
§ 13:9	Motion—Funding for jury consultant—Excerpt
§ 13:10	—Seeking <i>voir dire</i> on change of venue and publicity—Excerpt
§ 13:11	—Individual <i>voir dire</i> of prospective jurors
§ 13:12	Explaining to jurors why death penalty questions are being asked
§ 13:13	Automatic death penalty jurors
§ 13:14	The hypothetical used to address the <i>Morgan</i> question
§ 13:15	Mitigation-impaired jurors
§ 13:16	Fact-specific aggravation

- § 13:17 Checklist of question topics for prospective jurors in capital trial (New)
- § 13:18 Sample *voir dire* questions
- § 13:19 Sample *voir dire* in a solicitation of capital murder case (*voir dire* by Richard “Racehorse” Haynes in the trial of Thomas Cullen Davis)
- § 13:20 Jury deliberations
- § 13:21 Nature of the evidence: Victim impact evidence
- § 13:22 Questions relating to punishment
- § 13:23 Jury selection worksheet

PART V. CHOOSING THE JURY

CHAPTER 14. CHOOSING THE JURY

- § 14:1 Introduction
- § 14:2 Choosing a jury or choosing jurors
- § 14:3 When jurors are allowed to question witnesses
- § 14:4 When jurors are allowed to question witnesses: The Advantages
- § 14:5 Objections to the practice of allowing jurors to ask questions
- § 14:6 When jurors are allowed to question witnesses—Procedures
- § 14:7 —Juror questions in practice
- § 14:8 —Strategic considerations
- § 14:9 —Removal of jurors for bias revealed in questions to witnesses
- § 14:10 *Voir dire* limitations and jury selection based on juror profiles and investigations
- § 14:11 Experience as a teacher
- § 14:12 The value of social science research
- § 14:13 Free will v. determinism
- § 14:14 The importance of identification
- § 14:15 Verbal and non-verbal responses to *voir dire* questions
- § 14:16 Verbal and non-verbal responses to *voir dire* questions—Eye contact
- § 14:17 Verbal and non-verbal responses to *voir dire* questions—Facial gestures and body language
- § 14:18 —Paralinguistic cues
- § 14:19 A team approach
- § 14:20 Putting it all together—Jury selection: Start to finish

Table of Laws and Rules

Table of Cases

Index