

Table of Contents

CHAPTER 1. SELECTING JURIES RATHER THAN JURORS

- § 1:1 Goals and objectives
- § 1:2 Scope and purpose of voir dire
- § 1:3 Juror deselection
- § 1:4 Importance of jury selection

CHAPTER 2. CONSTITUTIONAL RIGHTS

- § 2:1 Introduction
- § 2:2 Right to voir dire
- § 2:3 Right to participate in voir dire
- § 2:4 Criminal defendant's right to appear without prison garb
- § 2:5 Right to jury drawn from fair cross-section of community
- § 2:6 Right to 12-member jury
- § 2:7 Right to unanimous verdict
- § 2:8 Right to impartial jury
- § 2:9 Right to public trial

CHAPTER 3. ETHICS

- § 3:1 Applicable ethics rules
- § 3:2 Intentional discrimination in jury selection
- § 3:3 Implicit or unconscious bias in jury selection
- § 3:4 Juror privacy
- § 3:5 Trial publicity
- § 3:6 Misrepresentations
- § 3:7 Client consultation and privilege
- § 3:8 Communications with jurors
- § 3:9 Roundtable discussion
- § 3:10 —Contact with jurors
- § 3:11 —Investigating prospective jurors
- § 3:12 —Using juror information during trial

CHAPTER 4. OBJECTIONS TO ARRAY

- § 4:1 Reasons for challenging array
- § 4:2 Fair cross-section challenges
- § 4:3 Timing and procedural considerations
- § 4:4 Sample hearing on motion contesting array
- § 4:5 Exclusion of previously convicted felons from jury service
- § 4:6 Motions for change of venue
- § 4:7 Motion to close or delay proceedings
- § 4:8 Sample motion for change of venue: *Florida v. Casey Anthony*

CHAPTER 5. HARDSHIP

- § 5:1 Whether hardship decisions should be more regulated

- § 5:2 Challenges to the Array
- § 5:3 The fair-cross section requirement and peremptory challenges
- § 5:4 Hardship Decisions: The Loophole Hiding in Plain Sight
- § 5:5 Case study: *Walker v. Mississippi*

CHAPTER 6. JUROR DISHONESTY

- § 6:1 Introduction
- § 6:2 When juror dishonesty is evidence of bias
- § 6:3 Importance of follow-up questions
- § 6:4 Timing considerations

CHAPTER 7. GROUP DYNAMICS

- § 7:1 Importance of group dynamics
- § 7:2 Historical importance of group dynamics
- § 7:3 Social combinations
- § 7:4 Leaders
- § 7:5 Followers
- § 7:6 Fillers
- § 7:7 Hold-outs
- § 7:8 Organizational dynamics in task-oriented groups
- § 7:9 Forepersons
- § 7:10 Alternate jurors
- § 7:11 Stages in group development
- § 7:12 Anticipating group dynamics during trial
- § 7:13 Stereotyping
- § 7:14 Anticipating group dynamics during deliberations
- § 7:15 Open and closed juror polls
- § 7:16 Decision rules
- § 7:17 Deliberations as group negotiations

CHAPTER 8. JUROR PRIVACY

- § 8:1 Introduction
- § 8:2 Protecting jurors from each other
- § 8:3 Protecting jurors from the parties and their counsel
- § 8:4 Questioning jurors under HIPAA
- § 8:5 Criminal background checks
- § 8:6 Protecting jurors from the public
- § 8:7 Numbers juries
- § 8:8 Anonymous juries
- § 8:9 Cameras in the courtroom
- § 8:10 Motion for limited closure of voir dire
- § 8:11 Thoughts on privacy from *Florida v. Casey Anthony*

CHAPTER 9. PREPARATION AND INVESTIGATION

- § 9:1 Introduction
- § 9:2 Client participation in pretrial investigation and preparation

TABLE OF CONTENTS

- § 9:3 Community surveys and demographics
- § 9:4 Sample community attitude survey
- § 9:5 Focus groups and mock trials
- § 9:6 Reviewing juror rolls in preparation for voir dire
- § 9:7 Avoiding communications with prospective jurors
- § 9:8 Developing trial themes

CHAPTER 10. WORKING WITH TRIAL CONSULTANTS

- § 10:1 Role of trial consultants
- § 10:2 Different backgrounds of trial consultants
- § 10:3 Scientific jury selection
- § 10:4 Using trial consultants to develop case themes
- § 10:5 Limitations on confidentiality
- § 10:6 Former jurors as trial consultants
- § 10:7 Local counsel

CHAPTER 11. STRATEGIES FOR PRE-TRIAL CONFERENCES

- § 11:1 Introduction
- § 11:2 Preparing for the pre-trial conference
- § 11:3 Questioning of witnesses by jurors
- § 11:4 Juror notebooks
- § 11:5 Timing and simplification of jury instructions
- § 11:6 Online courtroom proceedings since COVID-19

CHAPTER 12. PRETRIAL MOTIONS

- § 12:1 Introduction
- § 12:2 To reserve time for voir dire
- § 12:3 To register challenges outside juror presence
- § 12:4 To allow jurors to take notes during trial
- § 12:5 To make an opening or key statement
- § 12:6 To use demonstrative aides during voir dire
- § 12:7 To set ground rules for voir dire
- § 12:8 To allow particular areas of inquiry
- § 12:9 Other pretrial motions

CHAPTER 13. SUPPLEMENTAL JUROR QUESTIONNAIRES

- § 13:1 Importance of juror questionnaires
- § 13:2 Court approval of juror questionnaires
- § 13:3 Procedural concerns
- § 13:4 Crafting juror questionnaires
- § 13:5 Court review of questionnaire responses
- § 13:6 Importance of sworn answers to questionnaires
- § 13:7 Use of questionnaires to protect juror privacy
- § 13:8 Use of questionnaires to limit courthouse traffic

CHAPTER 14. QUESTIONING BY COURT OR COUNSEL

- § 14:1 Judge conducted voir dire

- § 14:2 Judge's participation in voir dire
- § 14:3 Magistrate's role in federal cases
- § 14:4 Sample questions for use in judge-conducted voir dire
- § 14:5 Judge conducted voir dire in *United States v. Manafort*
- § 14:6 Common use of judge-conducted voir dire
- § 14:7 The reciprocity effect on jurors during judge conducted voir dire
- § 14:8 Effect of judge as authority figure
- § 14:9 Time is necessary for attorney-conducted voir dire
- § 14:10 Importance to the parties of attorney-conducted voir dire
- § 14:11 Attorney-conducted voir dire encourages juror candor
- § 14:12 Institutional support for attorney-conducted voir dire
- § 14:13 Controversy surrounding attorney-conducted voir dire
- § 14:14 Importance of self-restraint in attorney-conducted voir dire
- § 14:15 Preserving right to appeal denial of attorney-conducted voir dire

CHAPTER 15. GROUP AND INDIVIDUALIZED VOIR DIRE

- § 15:1 Anticipating jurors' roles as members of a task-oriented group
- § 15:2 Case sample: Court's examination of prospective juror
- § 15:3 Case sample: Prosecution's examination of prospective juror
- § 15:4 Case sample: Defense counsel's examination of prospective juror
- § 15:5 Case sample: Analysis
- § 15:6 Seeking leave to conduct individualized voir dire

CHAPTER 16. THE RULES OF EVIDENCE IN VOIR DIRE

- § 16:1 Introduction
- § 16:2 Relevance standards in jury selection
- § 16:3 Indoctrination
- § 16:4 Hypothetical questions
- § 16:5 Distinguishing case-specific from hypothetical questions

CHAPTER 17. NON-VERBAL COMMUNICATION

- § 17:1 General principles
- § 17:2 Role of non-verbal communication in voir dire
- § 17:3 Non-verbal communication as justification for peremptory challenges
- § 17:4 Evaluating significance of non-verbal communication
- § 17:5 Comparing verbal and non-verbal behavior
- § 17:6 Juror attentiveness

CHAPTER 18. DISCOVERY QUESTIONS

- § 18:1 Introduction
- § 18:2 Open-ended questions
- § 18:3 Follow-up questions
- § 18:4 Case Study: *Michigan v. Tyburski*
- § 18:5 Roundtable Discussion: *Michigan v. Tyburski*
- § 18:6 Crafting appropriate discovery questions
- § 18:7 Revealing generic and idiosyncratic biases

TABLE OF CONTENTS

- § 18:8 Distinguishing situational from normative conduct
- § 18:9 Importance of memory and participation
- § 18:10 Questioning down correlated lines

CHAPTER 19. DESELECTION AND REHABILITATION

- § 19:1 Introduction
- § 19:2 Rehabilitation of prospective jurors
- § 19:3 Relationship between rehabilitation and deselection questioning
- § 19:4 Use of leading questions in rehabilitation and deselection
- § 19:5 Case study: *Ray v. Gream*
- § 19:6 Roundtable Discussion: *Ray v. Gream*
- § 19:7 Case study: *Louisiana v. Holmes*
- § 19:8 Roundtable Discussion: *Louisiana v. Holmes*

CHAPTER 20. BIAS

- § 20:1 Traditional definition of bias
- § 20:2 Actual bias
- § 20:3 Implied bias
- § 20:4 Inferable bias
- § 20:5 Rethinking the importance of bias
- § 20:6 Explicit and implicit bias
- § 20:7 Implicit bias in the Courts
- § 20:8 Implicit bias among the attorneys
- § 20:9 Stereotypes and implicit bias
- § 20:10 Washington state's approach to implicit bias in the courts
- § 20:11 Confirmation and "Myside" bias

CHAPTER 21. CHALLENGES FOR CAUSE

- § 21:1 Introduction
- § 21:2 Actual and implied bias standard
- § 21:3 Burden of proving bias
- § 21:4 Standards for determining "actual bias"
- § 21:5 Determining when a juror can "set aside" a particular bias

CHAPTER 22. PEREMPTORY CHALLENGES

- § 22:1 Importance of peremptory challenges
- § 22:2 Discriminatory use of peremptory challenges
- § 22:3 Excluding Jurors on Account of Race
- § 22:4 Excluding Jurors on Account of Gender
- § 22:5 Excluding Jurors on Account of Disability
- § 22:6 Excluding Jurors on Account of Religion
- § 22:7 Backstriking and Group Dynamics
- § 22:8 Burden of proof in Batson hearings
- § 22:9 Timing of Batson challenges
- § 22:10 Number of peremptory challenges
- § 22:11 Implicit bias and attorney-conducted voir dire

CHAPTER 23. QUALIFYING PROSPECTIVE JURORS

- § 23:1 Criticism of peremptory challenges
- § 23:2 Justice Stevens' rule for peremptory challenges
- § 23:3 Continued debate on propriety of peremptory challenges
- § 23:4 Importance of counsel's motive in Batson hearings
- § 23:5 Implicit bias under Batson
- § 23:6 Washington State's approach to implicit bias in voir dire
- § 23:7 Arizona State's elimination of peremptory challenges
- § 23:8 Identifying when prospective jurors should be excused

CHAPTER 24. ABILITY TO FOLLOW THE LAW

- § 24:1 Importance of jurors' ability to follow the law
- § 24:2 Distinguishing case-specific from hypothetical questions
- § 24:3 Case Study: *North Carolina v. Hightower*
- § 24:4 Roundtable Discussion: *North Carolina v. Hightower*

CHAPTER 25. ABILITY TO FAIRLY WEIGH THE EVIDENCE

- § 25:1 Weighing the evidence
- § 25:2 Personal bias or prejudice
- § 25:3 Political or societal bias
- § 25:4 Professional bias
- § 25:5 Financial or personal interests in the outcome
- § 25:6 Considering extrinsic evidence
- § 25:7 Effect of social media and outside press coverage as extrinsic evidence
- § 25:8 Effect of juror expertise as extrinsic evidence

CHAPTER 26. ABILITY TO FAIRLY DELIBERATE WITH OTHER JURORS

- § 26:1 Whether one juror on the panel can affect another's ability to be fair and impartial
- § 26:2 Deliberating with a legal expert on the jury
- § 26:3 Task-oriented groups
- § 26:4 Effect of juror expertise on deliberations
- § 26:5 Refusing to deliberate

CHAPTER 27. AREAS OF INQUIRY

- § 27:1 Limits on court discretion
- § 27:2 Questioning necessary to the intelligent use of challenges
- § 27:3 Balancing privacy and relevance
- § 27:4 Subject matter likely to prejudice prospective jurors
- § 27:5 Attitudes and life experience

CHAPTER 28. PERSONAL RELATIONSHIPS AND INTEREST IN THE OUTCOME

- § 28:1 Implied bias and personal relationships

TABLE OF CONTENTS

- § 28:2 Significance of questions concerning relationships
- § 28:3 Personal relationships with parties or witnesses
- § 28:4 Relationships with attorneys, judge or other jurors
- § 28:5 Financial interests
- § 28:6 Business or professional relationships
- § 28:7 Use of Supplemental Jury Questionnaires

CHAPTER 29. OCCUPATION AND EDUCATION

- § 29:1 Questions regarding juror occupation
- § 29:2 Questions regarding educational background
- § 29:3 Significance of questions concerning government service
- § 29:4 Limitations on questions regarding occupation and education
- § 29:5 Case study: Questions regarding educational background
- § 29:6 Roundtable discussion: Questions regarding educational background
- § 29:7 Sample voir dire: Experience as a Police Officer
- § 29:8 Roundtable discussion: Experience as a Police Officer

CHAPTER 30. PROFESSIONAL EXPERTISE

- § 30:1 Expert Jurors
- § 30:2 Effect on deliberations
- § 30:3 Asking about juror expertise during voir dire
- § 30:4 Legal bases for excluding “expert” jurors

CHAPTER 31. LEGAL EXPERIENCE

- § 31:1 Personal Experience with the Legal System
- § 31:2 Prior jury service
- § 31:3 Lawyers as jurors
- § 31:4 Case study: Lawyers as jurors
- § 31:5 Roundtable discussion: Lawyers as jurors
- § 31:6 Sample voir dire: Victims of crimes
- § 31:7 Roundtable discussion: Victims of crimes

CHAPTER 32. RACE AND GENDER BIAS AMONG THE JURORS

- § 32:1 Significance of questions concerning racial bias
- § 32:2 Prejudice as a factor in deliberations
- § 32:3 Questioning about Gender Bias
- § 32:4 When voir dire should and should not focus on racial or gender bias
- § 32:5 Instructing the jury on implicit bias

CHAPTER 33. RELIGIOUS AND POLITICAL BELIEFS

- § 33:1 Distinguishing experience from belief
- § 33:2 Religious beliefs and affiliation
- § 33:3 Questions about political affiliation
- § 33:4 Sample voir dire: Religious beliefs
- § 33:5 Roundtable discussion: Religious beliefs

CHAPTER 34. EFFECT OF CURRENT EVENTS AND MEDIA

- § 34:1 Introduction
- § 34:2 The “CSI Effect”: Questioning About Media Habits
- § 34:3 The Inconclusive State of Empirical Evidence
- § 34:4 Relevance of questioning on CSI effect
- § 34:5 Balancing the Equities
- § 34:6 High Profile Cases
- § 34:7 Effect of pretrial publicity on prospective jurors’ self-perception
- § 34:8 Effect of pretrial publicity on jurors’ ability to decide a case on the merits
- § 34:9 Controlling publicity during voir dire and trial
- § 34:10 Celebrity jurors

CHAPTER 35. CONCERNS UNIQUE TO CIVIL TRIALS

- § 35:1 Introduction
- § 35:2 Right to trial by jury in civil cases
- § 35:3 Cases involving claims for equitable relief
- § 35:4 Cases involving claims for punitive damages
- § 35:5 Cases involving arbitration agreements

CHAPTER 36. CONCERNS UNIQUE TO CRIMINAL TRIALS

- § 36:1 General considerations
- § 36:2 Right to trial by jury in criminal actions
- § 36:3 Habeas review of state criminal cases
- § 36:4 Double jeopardy
- § 36:5 Ineffective Assistance
- § 36:6 Case study: Bias against defendants in criminal cases
- § 36:7 Roundtable discussion: Bias against defendants in criminal cases
- § 36:8 Sample voir dire: Burden of proof
- § 36:9 Roundtable discussion: Burden of proof

CHAPTER 37. DEATH PENALTY CASES

- § 37:1 Death qualification of prospective jurors
- § 37:2 Supreme Court cases regarding death qualification of prospective jurors
- § 37:3 Problems from use of questionnaires in examinations regarding death penalty
- § 37:4 Limitations on habeas review in death penalty cases

CHAPTER 38. GRAND JURY PROCEEDINGS

- § 38:1 Introduction
- § 38:2 Bias Among Grand Jurors
- § 38:3 Fair Cross Section Requirements

CHAPTER 39. MILITARY TRIBUNALS

- § 39:1 Courts-Martial Jurisdiction
- § 39:2 Who may serve on courts-martial
- § 39:3 Fair cross-section requirements in military juries
- § 39:4 Jury Selection for Military Panels

TABLE OF CONTENTS

- § 39:5 Use of Volunteer Jurists
- § 39:6 The liberal grant mandate

CHAPTER 40. MISCONDUCT IN DELIBERATIONS

- § 40:1 Introduction
- § 40:2 Juror's duty to participate
- § 40:3 Discussing the case before deliberations
- § 40:4 Independent investigations by jurors
- § 40:5 Communications with outsiders regarding the case
- § 40:6 Jury nullification
- § 40:7 Considering excluded evidence
- § 40:8 Participation of alternate jurors
- § 40:9 Standard for exclusion of jurors
- § 40:10 Racism in deliberations

CHAPTER 41. ANTICIPATING APPEAL

- § 41:1 Preserving objections for appeal
- § 41:2 Need to exhaust peremptory challenges
- § 41:3 Swearing in panel
- § 41:4 Transcribing voir dire
- § 41:5 Post-trial motions
- § 41:6 Post-trial interviews

APPENDIX

- Appendix A. State Laws on Hardship
- Appendix B. State Laws on Attorney Conducted Voir Dire
- Appendix C. Sample Motions in Limine
- Appendix D. Sample Jury Questionnaires
- Appendix E. Sampling of Laws for Challenges for Cause

Table of Laws and Rules

Table of Cases

Index