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Jury Selection Procedures in United States District Courts



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JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS

by Gordon Bermant

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This publication is based on a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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INTRODUCTION

Federal voir dire and juror challenge practices can be described in seven steps beginning with the oath given to the venire in the courtroom and concluding with the oath given to the finally impanelled jury. Each step performs an important function in achieving the goal of the examination and challenges, which is to seat a jury that is accepted as fair and impartial by all parties. Some of the steps are taken by the judge or the courtroom staff, some are taken by counsel, and some are taken by the panelists themselves. To one degree or another, each step allows variation in the details of its accomplishment.

This report describes the seven steps and some of the variations with which each is accomplished. These variations represent the individual practices of six highly experienced federal district judges. Although they do not cover the gamut of federal practice,¹ let alone the range of state court voir dire and juror challenge methods, the variations do demonstrate the considerable opportunity the district court has to tailor these practices to its individual preferences or traditions. Differences in practice among the courts do not necessarily alter the final outcome of the steps, which is the selection of an impartial jury, but they can affect the interactions among court, counsel, and panelists in notable ways.

The following six judges provided the narratives and recommendations on which the present report is based:

Honorable C. Clyde Atkins, Chief Judge, Southern District of Florida

Honorable T. Emmet Clarie, Chief Judge, District of Connecticut

Honorable William B. Enright, Judge, Southern District of California

Honorable John Feikens, Chief Judge, Eastern District of Michigan

1. For an account of the range of federal voir dire practice, see G. Bermant, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges* (Federal Judicial Center 1977).

Introduction

Honorable William S. Sessions, Chief Judge, Western District
of Texas

Honorable Donald S. Voorhees, Judge, Western District of
Washington

As might be expected, the judges' practices converge in some of the steps and diverge in others. To minimize redundancy and still preserve the richness of variation in detail that the judges provided, the material that follows is organized under general headings for each of the seven steps, with the practices of each judge, or group of judges, described as variations on the substance of a particular step.²

Overview of the Seven Steps

Consider as an example the felony trial of a single defendant.³ The jury will contain twelve voting members (Fed. R. Crim. P. 23(b)). The number of alternates will be decided by the court, but is limited to no more than six (Fed. R. Crim. P. 23(c)). The prosecution will be permitted six peremptory challenges, the defense, ten (Fed. R. Crim. P. 24(b)). When there are several defendants in a criminal trial, the number of peremptory challenges may be increased by the court.

After the venire enters the courtroom and is seated for the first time, the clerk administers the *oath to veniremen*. A portion of the venire then moves forward to seats in and around the jury box to commence the examination. This panel is typically selected with a random draw of names by the clerk (step 1). When the panel has been seated, the judge addresses the members about the voir dire, the challenge practice, and the nature of the case at trial (step 2). The principal part of the examination then ensues, during which time the jurors, en masse and individually, respond to questions posed by the judge and, in some courts, by counsel (step 3). When the examination has been completed, counsel may exercise challenges for cause. The judge rules on the challenges and may also excuse jurors on his or her own motion. Jurors who are challenged

2. The judges' original narratives, on file at the Federal Judicial Center's Research Division, are available to judges who wish to read them in their entirety.

3. Appropriate modifications for civil trials include the size of the venire requested from the jury pool, the size of the voting jury, the number of alternate jurors, and the maximum number of peremptory challenges. See Fed. R. Civ. P. 47(a), 47(b), and 48; 28 U.S.C. § 1870. Modifications to accommodate multiple voir dire practice, as used in the Western District of Texas, are described in subsequent comments by Judge Sessions.

for cause or excused are replaced when the clerk draws new names from the remaining venire. The replacements are questioned as necessary (step 4), and when a sufficient number of panelists have been examined and neither challenged for cause nor excused, counsel exercise their peremptory challenges. Challenged jurors then step down (step 5). (It is during this step, in the Western District of Texas, that the multiple voir dire process begins its second cycle.) Alternate jurors are chosen according to one or another modification of steps 2 through 5 (step 6). Finally, the judge asks counsel if the jury is acceptable as constituted, and the clerk administers the *oath to jurors* (step 7).

STEP 1(A): THE CLERK ADMINISTERS THE OATH TO THE VENIRE

For a single-defendant, single-count felony trial, the six judges typically request between thirty and thirty-five panelists to be sent to the courtroom for jury selection. This number is based on the final jury size of twelve, the allowed number of peremptory challenges (ten for the defense, six for the prosecution), and an estimate of the numbers of excuses and sustained challenges for cause that are likely to arise. The size of the venire may be increased if there are multiple defendants and multiple counts, if there has been notable pretrial publicity about the case, or if the offense is of the sort that is likely to arouse intense emotional responses.

The oath given to the venire, contained in section 4.01-6 of the *Bench Book for United States District Court Judges*, is as follows:

You do solemnly swear (affirm) that you will truthfully answer all questions that shall be asked of you, touching your qualifications as a juror, in the case now called for trial; So Help You God. (Under the penalties of perjury.)

Comments by Judges

Judge Atkins

Before the oath is given to the thirty-five venire members typically called for a single-defendant criminal trial, Judge Atkins addresses them as described below:

Step 1(A)

I welcome the prospective jurors to the courtroom and tell them I want them to be at ease even though this may be a new experience for some of them. I explain that jury trial was first conceived over 750 years ago when the barons of England forced King John to grant that right. Shortly after our Constitution was adopted, amendments were added which have guaranteed that right. I also introduce the court personnel, such as the court reporter, the courtroom deputy, and the deputy marshal. The courtroom deputy administers the oath.

Judge Clarie

In Judge Clarie's court, the clerk calls the roll of the venire immediately after administering the oath. More than twenty-eight venire members are assembled; the actual number called depends in each instance on how many juries are to be selected and whether the cases involve criminal or civil matters. (Five or six juries may be selected at one time.)

Judge Enright

In an ordinary case in Judge Enright's court, thirty-two or thirty-three venire members are assembled and sworn upon entering the courtroom. In one extraordinary case, Judge Enright reports, ninety jurors were summoned for the first day and fifty to sixty were kept on call. This case involved multiple defendants who were very well known in the community.

Judge Feikens

As he explains, Judge Feikens follows different procedures for long and short trials:

In criminal cases which are likely to last less than three weeks, and these are almost always single-defendant, single-count cases, I seat twelve prospective jurors and then have the questions directed only to them. I do this because my experience has been that the lawyers will not need to exercise all their peremptories, nor will they request many challenges for cause. By working only with the first twelve at a time, and by using particular instructions to the remaining members of the venire who are in the courtroom, I can save on the number of panelists required and the time taken for the examination. If it appears, however, that the case is more complicated and will likely take more than three weeks, or if there are multiple defendants or multiple counts, I use the "Arizona" or "strike" plan. Thus I will call and seat twenty-eight people and allow all of them to be examined and exposed to challenge for cause before moving to the peremptory challenges. For a run-of-the-mine case of this sort, I will request that between thirty-five and forty panelists be sent to the courtroom initially, allowing for

several excuses and cause challenges in addition to the sixteen peremptory challenges.

Judge Sessions

Judge Sessions uses a multiple voir dire procedure. He describes the procedure up to and including the oath:

The court calls its entire civil and criminal trial docket on the morning of the first Tuesday of each month. All cases are given trial dates compatible with the needs of attorneys and the firm setting of a date for trial. Waiver of disqualification of jurors, which allows a verdict to be reached by less than twelve jurors if a juror is unable, for some reason accepted by the court, to serve until a verdict has been arrived at, is discussed with the attorneys. All questions requested by the parties should have been filed by the previous Wednesday but may be accepted by the court as late as the call of the trial docket.

The venire [approximately 125 people, or fewer in a light month] reports at 1:00 p.m. on the same afternoon (first Tuesday), and the jury selection process begins at 1:30 with all attorneys and defendants in criminal trials being present for the selection of each of the juries in criminal cases.

All attorneys are given the complete information sheet on the venire together with large seating charts used to identify and list the jurors ultimately seated. [The oath is administered to the entire panel.]

Judge Voorhees

Judge Voorhees calls for a venire large enough to permit full exercise of peremptories and a few challenges for cause or excuses. The oath is administered shortly after the venire enters the courtroom and is seated.

STEP 1(B): A PORTION OF THE VENIRE COMES FORWARD

The details of the seating of the panel to be questioned depend on the configuration of the particular courtroom. In some courts, chairs are placed in front of the jury box. In others, panelists sit in the first row behind the bar. Typically, the names of the panelists who are to come forward are drawn at random from among those who have come to the courtroom. As the judges' comments indicate, there are several variations in this procedure and in the com-

Step 1(B)

binning of this step with the judge's introductory comments to the panel.

Comments by Judges

Judge Atkins⁴

With the assistance of the deputy marshal, the courtroom deputy draws at random and announces the names and numbers of twenty-eight members of the panel. The first twelve are seated in the jury box as the names are called. The remaining sixteen are seated in the first row. All members of the panel are seated from left to right [in the order in which their names are called].

Judge Voorhees

The courtroom deputy draws at random and announces the names and numbers of all the members of the panel. The first twelve are seated in the jury box. The remaining members of the panel are seated in numerical order elsewhere in the courtroom.

Judge Clarie

[Before twenty-eight panelists are chosen from the venire,] [e]ach member of the venire, as his or her name is called, stands and states both occupation and employer, and the occupation and employer of his or her spouse; those who are retired give their last regular occupation and employer. It is always presumed by the court that counsel for both sides have examined the jurors' questionnaires before voir dire.

The court then explains to the panel the necessity and importance of the voir dire examination procedure. Those words, voir dire, are of French derivation and are translated to mean "to speak the truth" as the prospective jurors stand and respond to the court's questions. The court explains that the purpose of the examination is to openly disclose any bias or subconscious prejudice or predisposition toward the facts of the pending case.

The court then presents those voir dire questions which counsel have submitted and which it finds to be relevant and proper. The court further supplements these questions with others of its own. Counsel are then requested to submit any supplemental questions to ask of the panel.

Twenty-eight persons are then drawn from the whole panel and instructed to take their place in the jury box; the extras are seated in fourteen additional chairs placed in two rows in front of the box.

4. Judge Enright uses essentially similar methods in seating the panel of prospective jurors.

Judge Feikens

[Whether twelve or twenty-eight persons are called forward,] I carefully instruct the remaining prospective jurors who have not been seated in the box that they must carefully listen to each question that is asked of the jurors in the box either by me or by the lawyers. I explain in detail to them that they should apply each question as it is asked to themselves so that, if subsequently they should be called forward, counsel will not have to repeat all the questions. I say to them that if they are seated, I will ask in this fashion, "Now having heard all of the questions that we have put to these people in the box, do you have any response to any question that has been asked?" I find this to be a very workable arrangement and, because of my careful explanation of this topic, I believe that I have substantial attention from the jury panel.

Judge Sessions

The court informs the clerk of the number of prospective jurors that will be required for that particular case [this will be between thirty and thirty-five for most criminal cases]. Each prospective juror, when his or her name is called, steps forward from the back of the courtroom and is seated inside the bar. Twenty-eight names are called to allow for a jury of twelve after sixteen peremptory challenges. In addition, a number of potential alternates are called at the same time. For a jury with one alternate, if each side is to have one peremptory challenge of alternates, three are called. The court then announces the trial dates involved in the particular case and inquires if there is any juror who has an absolute impediment to serving the court on those days. If so, the court deals with it and, if necessary, excuses the juror, and the clerk calls a replacement. The procedure is followed until the court is assured that all jurors can serve on those particular dates.

This last step is critical for the multiple voir dire because the trial dates are set into the future.

Information Available in Advance to Counsel

Several procedures are available for informing counsel about characteristics of the venire prior to the examination. Each venire member fills out a Juror Qualification Questionnaire (AO form 178D; see example in appendix A), which gives information about a number of basic characteristics. Some courts, including the Western District of Texas, also ask venire members to fill out the Juror Information Card (AO form 229; see example in appendix B), which is quite similar to form 178D. Western Texas takes some of the information on these forms and prepares a list for the lawyers. In addition to the name, the list also includes the home address and

Step 2

place and nature of work of each venire member and the occupation of the member's spouse. Other courts have also designed their own juror information forms. One example, provided by Judge Voorhees, inquires about the sexes and ages of the venire members' children, the name of their current or last employer, the nature of their work, number of years and type of education, the nature and duration of a spouse's work, self or family employment in law enforcement, self or family employment by the federal government, and self or family employment in the insurance industry. Finally, Judge Feikens reports that in a limited number of cases he provides the venire with a special questionnaire to fill out before questioning. (An example of the questionnaire he used in one case is provided in appendix C.)

The goal in all cases is to give the attorneys as much information as is reasonable in advance of the voir dire. The presumption is that having the information in advance should allow the examination to run more rapidly and smoothly as well as facilitate the lawyers' intelligent exercise of peremptory challenges.

STEP 2: THE JUDGE ADDRESSES THE PANEL

If the judge has not already done so, he or she gives at this point some explanation of the purpose of the voir dire examination, perhaps distinguishing for the panelists between challenges for cause and peremptory challenges; reads the indictment or other information relevant to the case; and encourages all members of the panel to pay close attention so as to avoid unnecessary repetition of the basic questions. Judges who permit lawyers to question the panel directly present the lawyers to the panel at this time.

Comments by Judges

Judge Atkins

I summarize the indictment, explaining that this is done so that the jury will have information on the nature of the case and the relevance of the questions to be asked. I state, "This is a criminal case and comes before you by reason of an indictment (information)." I instruct the jurors (a) that the indictment returned by the grand jury (information filed by the United States attorney) is a formal document which the government uses to commence its charges against the defendant and upon which it brings its case

into court, that the indictment serves no other trial purpose whatsoever, and that the sole purpose of an indictment (information) is to serve as an accusation or charge which the United States makes against the defendant and to inform the defendant of the crime of which he is charged; (b) that the indictment (information) is not evidence against the accused and affords no inference of guilt; and (c) that the government has the burden of proof to establish guilt beyond a reasonable doubt.

I inform the panel of the nature and purpose of the voir dire, explaining that the questions are not designed unduly to inquire into their private affairs, but to supply information and identity of experience so that the lawyers may exercise more intelligently their peremptory challenges. I also emphasize the objective of obtaining a fair and impartial jury that will try this case on the merits, namely, what evidence is presented to them in the courtroom and the law given to them by the court. I tell them, "The parties in this case are entitled to a fair and impartial jury. They cannot ask for more and you may not give them less."

I explain that the exercise of a peremptory challenge is no reflection whatsoever on the one excused, but simply means that the lawyer, based on his trial experience, his knowledge of this case, and the answers given in voir dire, has decided someone else should sit in that place.

Judge Atkins also explains to the panel that affirmative answers to his questions should be indicated by raising one's hand, and that he will assume that the panelist's answer to a question is "no" if the panelist does not raise his or her hand. After giving these instructions, Judge Atkins proceeds to the first steps in the examination (see his narrative in step 3).

Judge Clarie

As he describes in step 1(B), Judge Clarie explains the voir dire and begins the examination at an earlier stage in the process, before selecting from the venire twenty-eight panelists to come forward for further individual or group questioning by counsel. Once the panelists have been chosen, Judge Clarie invites prosecution and defense lawyers to proceed with their questioning of individual jurors. The lawyers "are invited to question the panel of twenty-eight individually as to their previous answers and to probe for any individual bias or prejudice."

Judge Enright

I state the nature of the case and the types of charges contained in the indictment. I indicate that the defendant has entered a plea of not guilty, which places in issue all the material allegations of the indictment and requires the government to prove its case

Step 2

beyond a reasonable doubt before there can be a conviction. I then introduce all counsel and all parties defendant and ask, generally, if any of the prospective jurors are acquainted with any of those individuals whom I've asked to stand, or with myself. Upon receiving a negative response, I then begin the individual interrogation of the jurors.

I state, generally, that each of the questions I ask is equally applicable to each of them and ask that they pay particularly close attention because, rather than repeating each question, I will be asking the broad question, that is, whether their answers are substantially the same as the responses they've heard from other jurors.

Judge Feikens

I explain to the panel what the differences are between challenges for cause and peremptory challenges. I instruct them as to what I believe to be an appropriate attitude on their part in the event they are challenged either for cause or peremptorily.

The key to the entire jury selection process is the need to set a friendly, open tone in the procedure. Most prospective jurors have never been jurors before. Most are confused, uncertain, and perhaps apprehensive. To expect that they will freely discuss their attitudes, opinions, and abilities, or openly discuss their biases and inabilities to deliberate impartially, requires getting this group of people in a frame of mind in which they will respond. My technique is to explain everything thoroughly to them. It does not take much additional time, and repeatedly it develops the bonus of openness and candor.

Depending on the kind of case that I have, I usually will give a limited number of instructions on the law. Examples would be on burdens of proof in criminal cases—the presumption of innocence, what “beyond a reasonable doubt” means, and so forth. Similarly, in a civil case, I discuss the meaning of the burden of proof. These instructions on the law, I believe, come better from the judge than from counsel; by talking about them before counsel questions the panel, I permit an examination as to whether or not there is any bias or attitude against these basic rules of law.

Judge Sessions

Judge Sessions reads the indictment or, in a civil case, a description of the case provided by the attorneys in a pretrial order.

Judge Voorhees

Judge Voorhees's procedures here are similar to those of Judge Atkins and Judge Enright.

STEP 3: PANELISTS ANSWER QUESTIONS

If they have not already done so, panelists are requested to provide basic information to the court and counsel; the extent of their recitations depends, in part, on what information they have already provided on written questionnaires. The judge then proceeds with questions devised by the court or provided by counsel. If counsel are to question panelists directly, they do so at this step in the procedure.

Comments by Judges

Judge Atkins

Each prospective juror, in the order in which his name was called, is asked to stand and, in narrative fashion, provide—

- a. his name and the area of the district in which he lives;
- b. his occupations during the past five years and the name and address of his present employer;
- c. his spouse's name and occupations during the past five years;
- d. information learned from written questions submitted by counsel that can be readily presented and approved by the court, that is, what civic organizations he is a member of, what newspapers he reads, etc. (this expedites disclosure of information and permits the juror to express himself for observation by counsel);
- e. any information that would develop identity or experience with any of the parties; for example, in a criminal case involving cocaine, panelists would be asked to state whether they, any member of the family, or close friends had had any experience with cocaine, any other narcotic drug, or marijuana. If any answers suggest further inquiry, I proceed to do so.

Panelists who have been called forward are then questioned as a group, as suggested in the *Bench Book*, beginning with question number 3.⁵ The other panelists are reminded to listen closely to the questions so that if they are called later they can state to which questions they would have answered "yes." They are told they need not raise their hands during the questioning of the first twenty-eight panelists. Again, those whose names have been called are reminded to raise their hands if their answer is "yes" to any of the questions so that further inquiry can be made as may be appropriate.

A panelist may raise his hand during the questioning, thus indicating an affirmative answer. He may also furnish information during his initial background and experience recitation that

5. The standard voir dire questions from the *Bench Book* are provided in appendix D.

Step 3

would indicate further inquiry is needed. In these instances I ask appropriate questions to develop the facts necessary to assist counsel in exercising intelligently any challenges. For instance, in the initial background statement by each panelist, if one of them said (in a trial of a case involving alleged possession of marijuana with intent to distribute), "My neighbor's son was using marijuana . . .," I would say quickly, in order to avoid prejudicing the panel, "Please don't give us the particulars, but we do want to know whether there is anything about that experience that would affect in any way your ability to be a fair and impartial juror in this case. These parties are entitled to a fair and impartial jury, which is the reason for asking this question." If I am convinced the panelist is responding in good faith to this question and to any other necessary inquiry, I don't hesitate to excuse him for cause without any motion being required, if it appears that he cannot be fair and impartial. A motion would take unnecessary time and might prejudice the panel. I am liberal in granting such excuses. If I have any serious doubt about the situation, I will call counsel to the bench for a brief conference out of the hearing of the panelists.

If the questions counsel submit to me in writing seek inquiry about reasonable doubt, the privilege not to testify, and other relevant principles of law, or if I feel it is necessary to pose such inquiry in interests of fairness, I will read a brief statement of the charge on those subjects and then ask the panel after each charge, "Is there any reason why you cannot or will not follow that instruction?" I caution the panelists that by singling out these charges I do not mean to give them greater emphasis because all of the charges must be considered as a whole.

After completing the questioning, including any appropriate written questions submitted in advance by counsel, I ask the attorneys whether they have any additional questions they would like to have me ask the panel or individual panelists. If so, a brief bench conference is held to determine these questions.

As an alternative to giving counsel an opportunity to suggest additional questions, I have permitted counsel to supplement my voir dire, if desired, by direct oral questions of the panel. I remind counsel that they should not cover areas already included in my questioning unless further explanation is required from some panelists, nor should they argue their cases.

After any additional questions are asked, I call counsel to the bench to inquire whether they have any challenges for cause.

Judge Clarie

As explained earlier, Judge Clarie proceeds through his own questioning of the venire before twenty-eight panelists are chosen to come forward. When this group has been chosen as a group or individually, the judge allows counsel to question them individually

regarding their previous answers and to probe for individual bias or prejudice.

Judge Enright

As I come to each panelist in turn, I ask for his or her occupation and the occupation of his or her spouse, how long the panelist has lived in the district, and whether or not he or she has served before on a grand jury or trial. I then ask most or all of the questions on my standard list of voir dire questions.⁶ Since I am aware that in most cases counsel will not be directly questioning the panelists, I attempt to make the individual voir dire quite comprehensive and particularly to give each panelist an opportunity to talk with me individually and expand upon his or her answers.

Judge Feikens

It is during step 3 that Judge Feikens turns the questioning over to counsel. Beforehand, however, in a chambers conference, Judge Feikens outlines the rules the lawyers must follow. In particular, he distinguishes between *probative* questioning designed to expose bias and *didactic* questioning designed to influence the panel to favor counsel's position—Judge Feikens forbids didactic questioning. The judge continues:

I also insist if there are multiple defendants in a criminal case that there be a liaison counsel for the defense so that there is not useless repetition. This does not mean that I will not permit a particular lawyer for a specific defendant to conduct some limited voir dire as it relates to his own concerns. In like fashion, I only permit one attorney for the government to conduct voir dire. In civil cases where there are multiple parties, I follow the same procedure.

Judge Sessions

Judge Sessions puts his own questions, as well as those submitted by counsel that he finds appropriate, to the panel.

Judge Voorhees

I address questions to the entire panel, asking those questions of my own choice as well as those which I have selected from the questions proposed by counsel.

If a prospective juror responds affirmatively to any particular question propounded to the panel, I announce that person's name and number and make an appropriate notation on my list of the

6. Judge Enright's list of voir dire questions is contained in appendix E.

Step 4

panelists. For example, I might propound this question in a bank robbery prosecution: "Have you or any member of your immediate family ever been employed by a bank? If so, please raise your hand." If any members of the panel raise their hands, I say something to this effect: "The following jurors have answered in the affirmative to that question: No. 1, Smith; No. 7, Jones; No. 16, Anderson; No. 23, Johnson."

After I have propounded all of the questions that I wish to ask of the panel, I conduct individual questioning in the following manner:

a. A hand microphone is handed to prospective juror No. 1 in the jury box and I state to that person, "Will you please give us your name and tell us about your prior jury experience?"

b. After the prospective juror has done that, I question that person in the following manner: "In response to my question to the panel you indicated that either you or a member of your immediate family has been employed by a bank. Please tell us about that." After the prospective juror has responded to that question, I follow up the answer, if necessary, in order to clarify the answer.

c. I then, if it is appropriate, proceed as follows: "You also answered that you or a member of your family has been a witness to a bank robbery. Please tell us about that." In like manner, I question that prospective juror about every other question to which he or she gave an affirmative response.

d. The hand microphone is then handed successively to each prospective juror. I ask each in turn about his or her individual jury experience and also ask for additional information about those of my questions to which the particular prospective juror gave an affirmative response.

After completing the individual questioning, I ask counsel if they have any additional questions which they would like to have me ask of the prospective jurors and, if so, to write down and submit those questions.

STEP 4: THE COURT RULES ON CHALLENGES FOR CAUSE

Some judges excuse for cause during their conduct of the examination (see the narrative by Judge Atkins for step 3). Other judges wait until all the questioning has been completed, then combine their own excuses, if any, with their rulings on challenges for cause made by counsel. In either event, under the struck jury system (also called the Arizona system), jurors who have been struck for cause must be replaced up to the number that will allow full exercise of peremptory challenges. At this point in the process there is

repetition of some of the earlier questioning in order to qualify the new panelists who will replace those already removed for cause. Because Judge Voorhees qualifies the entire venire rather than only twenty-eight members of the panel, he does not need to qualify new panelists if he excuses any members of the panel for cause.

Comments by Judges

Judges Atkins, Clarie, and Feikens

These judges request challenges for cause during a bench conference at the end of questioning and rule on the challenges at that time.

Judge Enright

When all twenty-eight panelists have been questioned, and I have excused none for cause (if cause appears, I say to counsel, "Unless counsel for either party objects or desires to have additional questions, it would be my present intention to excuse the prospective juror at this time"), I ask counsel to come forward to the side bar and ask if there is a stipulation as to the general qualification of the panelists, whether there are any challenges for cause, and last, if there are any additional questions counsel for any party wishes me to ask. Normally, if appropriate, those questions would then be asked of the panel. Then, that being accomplished, I direct the clerk to distribute the jury list to the panel.

Judge Sessions

Judge Sessions excuses jurors for cause, and replaces them, during the course of the individual voir dire.

Judge Voorhees

I state that if there are any challenges for cause, counsel should write down the name and number of the prospective juror and counsel's reason for challenging that particular panelist. I then rule upon any challenge for cause, without, however, naming in the hearing of the jury the panelist who is being challenged or the name of the challenging counsel.

STEP 5: COUNSEL EXERCISE PEREMPTORY CHALLENGES

The procedures of the struck jury system are aimed at giving counsel the most favorable circumstance for exercising peremptory challenges.⁷ With twenty-eight panelists seated who will not be excused for cause, the prosecution may then exercise its six challenges, and the defense its ten, to produce a twelve-person jury acceptable to both sides. There are several ways to choose among “extra” potential jurors in the event that counsel exercise fewer than their allotted numbers of challenges. Unless there are one or more panelists whom both sides wish to challenge, the order in which the challenges are made, or even whether each side knows whom the other side is challenging, is irrelevant to the outcome—this is one of the advantages of the struck jury system. Counsel, nevertheless, often prefer to trade back and forth according to some scheme. This preference, and other preferences regarding the degree to which challenges are acknowledged in open court, are responsible for variation among courts that use the struck jury system. As already noted, only one judge in the present group does not use the system in all cases: Judge Feikens uses it only for longer trials. Judges who are interested in pursuing a multiple voir dire system should note in particular the description Judge Sessions provides here.

Comments by Judges

Judge Atkins

Judge Atkins orders the exercise of peremptory challenges by giving the prosecution (plaintiff) the first opportunity to challenge any among an initial group of twelve panelists. Persons challenged from that group are replaced by other panelists, in the order of their selection. When the prosecution is satisfied and tenders the jury, the defense is given the opportunity to challenge jurors among the group of twelve as then constituted. When the defense is satisfied after exercising its challenges, the challenged panelists are replaced. The defense then tenders the panel of twelve to the prosecution. This procedure is reiterated until both sides accept the

7. The rationale for the struck jury system is fully explained in G. Bermant & J. Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy* (Federal Judicial Center 1979).

panel of twelve or have used all their challenges. Neither side may “backstrike,” that is, challenge a juror who was declared acceptable during an earlier round. All challenges are announced by counsel in the presence of the jury.

Judge Clarie

Counsel exercise their challenges in alternation, at the clerk's bench. This is usually done by allowing one challenge to government counsel and two challenges to the defendant's counsel. The former ultimately exercises six challenges and the latter exercises ten challenges. When the process has been completed, those in the jury box, and the fourteen sitting in front, return to their original seats in the panel of the whole; and after the selection wheel has been rotated several times, the drawing of the names that make up the final selection of jurors from the jury panel is undertaken by number as to position in the box.

Judge Enright

The jury list is distributed to counsel, who prepare their challenges. During this period of time, with twenty-eight jurors sitting in the box, I explain to the jurors the process that is ongoing. I indicate that they are witnessing jury selection under the Arizona system wherein each side has an allocated number of peremptory challenges, challenges for which no reason need be given. I tell them that the jury list will be passed back and forth on two occasions (unsaid but known to counsel is the following sequence: three challenges for the government, five jointly by the defendants, then back to three for the government and the last five joint challenges by the defendants), and that during that process, names will be struck by both sides. When the jury list is returned to me by the clerk, only twelve names will remain and those twelve will constitute the trial jury in the case.

During this time, while the lawyers are selecting their challenges and I am explaining the process, the jurors remain seated in their original positions. When counsel return the jury list to me, twelve names remain. If either party does not desire to exercise all peremptories, the first unstruck twelve names constitute the trial jury. Upon receipt of the jury list, I ask all of those in the box if they would be kind enough to stand down for just a moment while we call the trial jury in the matter. Then the clerk calls the first unstruck twelve names and I ask counsel if the jury has been selected in a manner agreeable and acceptable to all the parties, and upon their agreement, the jury is sworn.

Judge Feikens

While the lawyers are deciding upon their challenges, I explain to the jury what the differences are between challenges for cause and peremptory challenges. I instruct them as to what I believe to be an appropriate attitude on their part in the event that they are

Step 6

challenged either for cause or peremptorily. If the attorneys do not wish to challenge jurors openly, I will announce their challenges for them through the means of a note passed to me by both counsel simultaneously. In that way the jury does not know who is doing the excusing.

Judge Sessions

Once the questioning is completed, the prospective jurors [for case 1] are allowed to return to their seats in the back of the courtroom. The attorneys are then excused from the courtroom to exercise their challenges. Case 2 is then called and the appropriate number of prospective jurors is seated. When the attorneys have completed their strikes of the prospective jurors [and alternates; see below] in case 1, they return the appropriate form to the clerk's bench. The clerk then coordinates all the strikes, leaving the twelve jurors and the alternates who are selected. Once the voir dire examination is completed on the case 2 jury panel, the panel is allowed to return to the back of the courtroom. The attorneys selecting the case 2 jury are excused and allowed to leave the courtroom to exercise their challenges. If the case 1 jury challenges have been completed and the jury is ready for seating, the names are called, the jurors are placed in the jury box, and if the parties are satisfied with the jury, its oath is administered and a slip of paper is given to each juror to indicate the exact time of his or her reporting for the trial of case 1. The case 3 jury is then called, utilizing the procedure outlined above.

Judge Voorhees

I direct counsel to exercise their peremptory challenges in writing and simultaneously.⁸ Once the written peremptory challenges have been delivered to me by counsel, I strike from my record the names of all those panelists who have been challenged by one or the other of the parties. I then excuse from the jury box those in the box who have been challenged. I fill the first empty seat in the jury box with the lowest numbered unchallenged panelist and fill each other vacant seat by seating in order the lowest numbered unchallenged panelists.

STEP 6: ALTERNATE JURORS ARE CHOSEN

Federal Rule of Criminal Procedure 23(c) reads as follows:

Alternate Jurors. The court may direct that no more than 6 jurors in addition to the regular jury be called and impanelled to

8. Simultaneous exercise of peremptory challenges has been approved in 151 U.S. 396 (1894); 271 F.2d 791 (9th Cir. 1959); 314 F.2d 718 (9th Cir. 1963); 632 F.2d 1341 (5th Cir. 1980).

sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

This rule allows some flexibility in organizing the selection of the alternates.

Comments by Judges

Judges Atkins, Clarie, Enright, Feikens, and Sessions

After the regular jury has been selected, these judges follow briefer but essentially identical versions of the voir dire and challenge procedures they use for the regular jury.

Judge Voorhees

If I have decided to use alternate jurors, I increase the number of peremptory challenges by the number of additional challenges provided for by the rules. For example, if one or two alternates are used in a criminal case, I give each side one additional peremptory challenge. This means that in a criminal prosecution where I have elected to have one or two alternates, the government is given a total of seven and the defense is given a total of eleven peremptory challenges. All of these challenges are exercised at one time. After filling the first twelve seats in the box for the regular jury [as described in step 5], I fill the alternate seats in order with the lowest numbered unchallenged panelists. (Because this method is not strictly in compliance with rule 23(c), I advise counsel ahead of time that I propose to have the alternates selected in this manner and get their concurrence before jury selection begins.)

STEP 7: THE JUDGE MAKES ADDITIONAL COMMENTS AND THE CLERK ADMINISTERS THE FINAL OATH

After asking counsel if the jury is acceptable as constituted, the judge may make additional comments to the jury. These comments usually follow the administration of the final oath by the clerk. A set of standard preliminary instructions is contained in the *Bench Book for United States District Court Judges*.⁹

Comments by Judges

Judge Clarie

Occasionally with a twelve-person jury, but always with a six-person jury, the court advises the jury that sometimes a jury may have on it one or more very domineering personalities. So I customarily inquire, "Is there anyone among you who would simply follow blindly the decision and dictates of a domineering person, or would you insist upon expressing your opinion or your point of view and having it discussed with the other jurors?"

Judge Enright

If all counsel agree that the jury and alternates have been chosen in an agreeable manner, the jury is impanelled and sworn, and I give the brief introductory jury instruction contained in Devitt and Blackmar¹⁰ pertaining to their responsibility and the general overview of the trial to come. It is during this period of time that I introduce members of my staff to the jury, tell the jurors they are free to take notes, and have the clerk distribute pencils and paper for that purpose, and generally tell the jurors that if there is anything that we can do to make their service during the case more pleasant or comfortable, we will attempt to accommodate them in any way we can. That is the essential procedure that I follow in the normal impannellment of either a civil or a criminal jury.

Judge Sessions

Once all the juries have been selected for trial during a particular month, each juror is reminded that if he or she is uncertain about

9. In addition, the Federal Judicial Center, with the help of a committee of district court judges and a number of communication specialists, has proposed a new set of pattern instructions for publication.

10. 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977).

the times when the juror's presence is required, he or she should clarify that matter with the clerk before leaving the courtroom.

The jurors are all then reminded of the instructions which the court has previously given concerning their conduct between the time of their selection and their service in a particular case. It is particularly emphasized that should anything happen between the time of their selection and the time of their service that would in any way impair their ability to be fair and impartial jurors, they are required, under their oath, to inform the court immediately so that the court can properly deal with the circumstance (this very seldom occurs). They are also reminded that when they come into the vicinity of the courthouse they should go immediately to the jury room and remain there until they are called, and that they should not loiter in the halls, in the front of the courthouse, or anywhere there might be some activity that would in some way cause them to have a bias or prejudice in the particular case for which they were called. They are also informed to make arrangements for their transportation so that they will not be nervous about their coming or going. After these comments, the jurors are excused subject to their established responsibilities being performed and any further needs the court may have for other jurors required by another quota some time during the month.

The final oaths to jurors, contained in section 4.01-6 of the *Bench Book for United States District Court Judges*, are as follows:

Oath to Jurors in Criminal Case

[May also be administered to alternate jurors by substituting: "You as an alternate juror do . . ."]

You, and each of you do solemnly swear (affirm), that you will well and truly try, and true deliverance make in the case now on trial, and render a true verdict according to the law and the evidence; So Help You God. (Under the penalties of perjury.)

Oath to Jurors in Civil Case (Including Condemnation Cases)

[May also be administered to alternate jurors by substituting: "You as an alternate juror do . . ."]

You, and each of you do solemnly swear (affirm), that you will well and truly try the matters in issue now on trial, and render a true verdict, according to the law and the evidence; So Help You God. (Under the penalties of perjury.)

With either of these oaths, and additional comments the judge may choose to make, the jury selection process is completed.

APPENDIX A

**Juror Qualification Questionnaire
(AO Form 178D)**

APPENDIX B

Juror Information Card (AO Form 229)

Dear Juror:

In order to give the court more information about you as a juror, including any information which may have changed since your juror qualification questionnaire was submitted. **WOULD YOU PLEASE PRINT ANSWERS TO ALL QUESTIONS ON THIS POSTAGE-FREE CARD AND RETURN IT AT ONCE.** If you have moved to another state, you need only fill out the name and address section of this card.

CLERK OF THE COURT

**JUROR INFORMATION
CARD AO-299**

TO SEAL CARD FOR MAILING:
FIRST, CREASE THE FOLD LINE BELOW
THEN REMOVE TAPE AT BOTH
SIDES, MOISTEN TOP, FOLD AND SEAL

NAME		LAST		FIRST		MIDDLE INITIAL		FOLO LINE		* IF YOU HAVE NO HOME PHONE GIVE PHONE NO. OF SOMEONE WHO CAN REACH YOU	
ADDRESS		STREET		CITY		STATE		ZIP CODE		HOME (OR OTHER*)	
										WORK (include EXTENSION)	
		COUNTY		STATE		ZIP CODE				HOW LONG THIS COUNTY: YRS MOS	
										HAVE YOU LIVED IN THIS STATE: YRS MOS	
PLACE OF BIRTH		<input type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> WIDOWED <input type="checkbox"/> SEPARATED OR DIVORCED		NO OF CHILDREN		SPOUSE'S OCCUPATION (IF SPOUSE RETIRED, OCCUPATION BEFORE RETIREMENT)					
AGE		ARE YOU EMPLOYED <input type="checkbox"/> YES <input type="checkbox"/> NO		YOUR OCCUPATION OR BUSINESS		IF RETIRED, YOUR OCCUPATION BEFORE RETIREMENT					
YOUR FIRM OR EMPLOYER'S NAME		BUSINESS ADDRESS OR EMPLOYER'S ADDRESS		STREET		CITY		STATE			
ARE YOU A SALARIED EMPLOYEE OF U.S. GOVERNMENT <input type="checkbox"/> YES <input type="checkbox"/> NO		IF "YES" GIVE YOUR DAILY WORK HOURS		From (a.m.) to (p.m.)		And your regular days off					
HAVE YOU EVER BEEN CONVICTED OF A STATE OR FEDERAL CRIME PUNISHABLE BY IMPRISONMENT FOR ONE YEAR OR MORE <input type="checkbox"/> NO <input type="checkbox"/> YES		IF "YES" WERE YOUR CIVIL RIGHTS RESTORED <input type="checkbox"/> NO <input type="checkbox"/> YES		ARE ANY SUCH CHARGES NOW PENDING AGAINST YOU <input type="checkbox"/> NO <input type="checkbox"/> YES							
DO YOU HAVE ANY PHYSICAL OR MENTAL INFIRMITY WHICH WOULD IMPAIR YOUR CAPACITY TO SERVE AS A JUROR? <input type="checkbox"/> NO <input type="checkbox"/> YES		IF "YES" WHAT IS IT (IF YOU SEEK AN INFIRMITY EXCUSE SEE INSTRUCTION 2)									
ESTIMATED NO. MILES ONE WAY FROM YOUR HOME TO COURTHOUSE TO WHICH YOU ARE SUMMONED		I DECLARE THAT ALL ANSWERS ARE TRUE TO THE BEST OF MY KNOWLEDGE & BELIEF									
		SIGN HERE									

APPENDIX C

Questionnaire to Expedite Voir Dire in a Trial Involving Gambling Activity (Judge Feikens)

**Questionnaire to Expedite Voir Dire in a Trial
Involving Gambling Activity**

1. Where did you grow up?

2. How long have you lived at your present address?

3. Do you own, rent, or live with family (circle)?

4. Are you married, widowed, divorced, or separated, or have you never been married (circle)?

5. Answer if you have ever been married or widowed. Others skip to Q.7.

What type of work does, or did, your spouse do?

6. How far did he or she go in school (circle number of years)?

6 7 8 9 10 11 12 13 14 15 16 17+

7. Answer only if presently unemployed or a housewife. Others skip to Q.8.

Have you ever held a full- or part-time job (circle)? Yes No

8. Answer only if *currently employed*. Others skip to Q.11.

Do you supervise other people on your job (circle)? Yes No

9. Have you ever had any supervisory or managerial jobs (circle)? Yes No

10. Have you ever held a job in which you handled large sums of money, been an auditor, accountant, or bookkeeper (circle)?
Yes No

11. Do you have any children (circle)? Yes No

12. Answer only if you have children. Others skip to Q.13.

Appendix C

a. If any of your children are employed full-time, state their line of work, age, and sex.

Child 1:

Child 2:

Child 3:

Child 4:

b. Are any of your children in college (circle)? Yes No

13. If you are a member of a trade union or professional association, state which one(s).

14. Which civic, fraternal, professional, community, religious, or political organizations do you belong to, if any?

15. This question may be skipped if you wish.

What is your religious affiliation at this time, if any (circle)?

Protestant Catholic Jewish Other None

16. Answer only if you attend church or synagogue. Others skip to Q.17.

As a rule do you attend services more than once a week, once a week, several times a month, once in a while, or once in a great while (circle)?

17. What newspapers do you read, if any?

18. What magazines do you read, if any?

19. Do you like to read (circle)? Yes No

20. Which are your favorite TV shows, if any?

21. Have you served in the military (circle)? Yes No

22. Have you had previous jury service (circle)? Yes No

23. Do you ever play cards socially for money (circle)? Yes No

Questionnaire to Expedite Voir Dire

24. Do you ever play bingo or buy lottery tickets (circle)?
Yes No
25. Do you ever bet on sporting events (circle)? Yes No
26. Have you ever gambled in a casino (circle)? Yes No
27. Have you ever visited Las Vegas (circle)? Yes No

APPENDIX D

Standard Voir Dire Questions

Standard Voir Dire Questions*

NOTE: This section assumes that the court will conduct the voir dire examination, 12 jurors will be placed in the jury box, and the remaining prospective members of the jury will be present in the courtroom.

1. Instruct all prospective jurors whether or not in the jury box to listen to the questions and statements of the court.

2. The information called for by the following questions should have been obtained in questionnaires directed to the jurors before the panel was called and may be furnished to counsel prior to commencing the voir dire. If the information has not been furnished to counsel, the following questions should be asked of each juror in the jury box:

a. Beginning with the first juror, Mr. , please state so that the court and counsel can hear you:

- (1) your name;
- (2) the spelling of your last name;
- (3) your present address;
- (4) the addresses at which you have resided during the past five years;
- (5) your present occupation and the name and address of your employer;
- (6) your employment for the past five years;
- (7) if retired: (a) your former occupation; (b) how long you have been retired; (c) your employment for the five years preceding retirement;
- (8) if you are married, please give the employment of your spouse for the past five years;
- (9) please give a similar employment history of any other person who has resided with you during the past five years;
- (10) whether you observe all religious holidays of your faith.

*These questions are taken from section 1.12 of the *Bench Book for United States District Court Judges* (April 30, 1971, inserts).

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3. Suggested questions for the entire prospective jury panel, anticipating negative answers: (These may be supplemented by questions submitted in advance by counsel.)

(Each member of the panel in the jury box is requested to raise his hand if his answer to any question is YES. He is then questioned individually, and excused or not as appears proper.)

a. (Request defendants to rise and identify them.) Are you personally acquainted with any of the defendants, related to them by blood or marriage, or do you or any member of your immediate family have any connection of any kind with any of the defendants?

b. (If the defendant is a corporation) Are you an officer, stockholder or employee of ?

c. (Request counsel to rise and introduce them.) Do you know or are you related by blood or marriage to counsel for the government or any of the defendants?

d. Has any lawyer in this case acted as your attorney or the attorney for any of your immediate family or close friends to your knowledge?

e. Have you ever served as a juror in a criminal or a civil case, or as a member of a grand jury, either in the federal or state courts?

f. Have you or your family ever been the victim of a crime or participated in a criminal case as a complainant, witness for the government or in some other capacity?

g. Have you or your family ever participated in a criminal case as a defendant, witness for the defense or in some other capacity?

h. Do you of your own knowledge know anything at all about the facts of this case?

i. Do you remember having read or heard anything at all about this case?

j. Have you an opinion as to the guilt or innocence of any of the defendants of any of the charges contained in the indictment at this time or have you ever expressed an opinion as to the guilt or innocence of any of the defendants?

k. Has anyone talked to you about this case?

l. Have you or any of your immediate family or any of your close personal friends ever served as law enforcement officers?

Standard Voir Dire Questions

m. Are you or have you ever been an official or employee of the United States government?

n. Is or has any member of your immediate family ever been an official or employee of the United States government?

o. Do you or does any member of your immediate family have any dealings with the United States government, or any of its agencies, or with any of the defendants from which you might profit?

p. Have you ever had, or do you now have, or do you presently anticipate having, any case or dispute with, or claim against, the United States government or any of the defendants?

q. Do you know of any reason why you may be prejudiced for or against the government or any of the defendants because of the nature of the charges or otherwise?

r. Do you have any belief or opinion that any of the offenses with which any of the defendants are charged are unique in any respect, in the sense that they should be pursued with extraordinary vigor, or that they shouldn't constitute an offense, or that they carry penalties which you may consider improper? [Articulate nature of charge again as it may affect their ability to be fair and impartial.]

s. (Highly publicized cases only) Do you think your verdict would be affected by the unusual amount of publicity given this case by the news media?

t. (Capital cases only) Do you have conscientious scruples against capital punishment? (In the event of an affirmative answer, individual questioning should follow the guidelines set forth in *Witherspoon v. Illinois*, 391 U.S. 520 (1968).)

u. If you were the United States attorney charged with the responsibility for prosecuting this case, or if you were any of the defendants on trial here today charged with the same offenses, or their counsel, do you know of any reason why you would not be content to have your case tried by someone in your frame of mind?

v. (In protracted cases only) Would you object to sitting on a lengthy case which might last (considerably) beyond your term of jury duty? Would you object if it were necessary to sequester the jury during the process of the trial?

w. If you are selected to sit on this case, will you be unable or unwilling to render a verdict solely on the evidence presented at the trial and the law as I give it to you in my instructions, disre-

Appendix D

garding any other ideas, notions or beliefs about the law you may have encountered in reaching your verdict?

x. Can you think of any other matter which you should call to the court's attention which may have some bearing on your qualifications as a juror, or which may prevent your rendering a fair and impartial verdict based solely upon the evidence and my instructions as to the law?

[y. (Use if same witnesses) Some of the same witnesses may be testifying in this case who were witnesses in a prior case on which some of you served as jurors. Will you weigh the credibility of the witnesses in this case independently and uninfluenced by the fact that some of you may have heard the same witnesses in a prior case?]

4. Counsel may submit further questions in writing.

5. If any juror is excused, the venireman who replaces him should be asked:

a. The personal identification, residence and employment history questions set forth in part 2 above.

b. Did you hear and pay close attention to the questions asked by the court (counsel)?

c. Would you have answered yes to any of these questions?

(1) If yes, to which question or questions?

APPENDIX E

Voir Dire Questions (Judge Enright)

Voir Dire Questions

A. Personal Data:

1. Occupation.
2. Residence, or area of residence.
3. Length of time in county.
4. Spouse, if any, employment.

B. Prior Jury Service:

1. Have you ever served as a juror before on either a grand jury or a trial jury?
2. Have you ever served in a criminal case? Approximately how many?
3. Have you ever served on a case of this type?
4. Did anything occur in any of those cases which might influence your judgment in this case?
5. Do you have any prejudice against a case of this type?
6. Do you have any prejudice against a person who is accused in a case of this type?
7. Do you have any reluctance to sit on a case of this type?

C. Personal Experience:

1. Have you ever been a victim, or has any member of your family or close personal friend ever been a victim, in this type of charge?
2. Have you had any experience in your life which you think might influence you one way or the other in connection with this case?
3. Does the type of offense so offend you that you would require any less proof to convict in this case? Let me give you an example. I am, personally, very offended by the crime of bribery. Therefore, I might find it difficult to be completely fair if called on to be a juror in a bribery case. Is the current offense so reprehensible to you that you might be less than totally fair to the defendant?

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4. Is there anything at all about the criminal charge here involved that would make you prejudiced against someone who's merely accused of it?

D. Personal Bias:

1. The defendant is presumed to be innocent. Do you have any quarrel with that principle of law?

2. Is there any reason at all why you couldn't be absolutely fair to both sides?

E. Reasonable Doubt Concept:

1. *Read the doctrine of reasonable doubt*—Do you have any quarrel with it? Do you have any hesitancy to enforce it?

2. Do you realize there are three situations in criminal law? Explain. If the evidence in this case falls short, even though you feel the defendant is more probably guilty than not but there exists a reasonable doubt, I assume you would return a verdict of not guilty.

3. Would you accept the law from me and not overrule me in the jury room?

4. I will not attempt to indicate my opinion as to the facts, as that is not my concern or prerogative, and neither is your concern or prerogative the law. Will you accept the law from me?

5. Is there any feeling in your mind now that the defendant has two strikes against him before we start? You realize that there is no presumption of guilt and that the indictment is a mere formal charge, is not evidence, and merely provides a vehicle to get the matter to trial.

6. Do you realize the defendant need not testify or provide any proof whatsoever?

7. Do you realize that if you are offended by the nature of the charge, if someone was accused of a crime horrible enough, he could never be tried fairly as to whether or not in fact he did the act alleged?

F. Knowledge of the Case:

1. Do you know anything at all about the facts of this case?

2. Have you heard or read of this case before, on TV or in the newspapers?

3. Have you ever formed or expressed any opinion as to the merits of this case?

4. Do you feel you could put aside any knowledge you may have obtained outside the court and decide the case solely on the evidence you hear from the witness stand?

5. Do you know any of the attorneys involved? Have they ever represented you?

6. Do you know any member of the United States attorney's office? Have you ever had occasion to discuss the nature of your service with any member of that office?

7. Do you know any of the parties involved or any members of their families?

8. Do you know any of the witnesses involved? (Ask for a list of witnesses from both sides.)

9. Are you familiar with the scene in this case? To what extent?

G. Concept of the Juror's Role:

1. Do you realize your function is to decide the facts and then I will decide the law?

2. Would you give both parties the benefit of your own individual opinion of this case?

3. Will you resolve this based on your own independent judgment, and will any verdict you return to the court truly reflect your own mind on the case?

4. Would you not change your mind merely because one or more of your fellow jurors disagreed with you?

5. Would it be a fair statement that you would not be inclined to change your mind unless and until you were convinced you were wrong?

6. Will you try the defendant and not anyone else?

7. Suppose that at the conclusion of the case you didn't personally approve of one of the parties. Would you try him on this charge only?

8. Suppose you like one side better than the other. You wouldn't let anything like that influence you in this case. ("You are not twelve people selected to see who has the best attorney.")

9. Is there any reason you couldn't give your full attention to this case? (Get estimate of the length of time of trial.)

Appendix E

10. If by some tragedy or misfortune one of your own people happened to be sitting here charged with this crime and all you wanted was twelve people to give him a full and fair trial regardless of the result, would you be willing to have twelve people who think as you think right now sit and try the case?

11. Would you use the same common sense you use in the conduct of your own affairs to reach a decision in this case?

12. Would you treat this as you would any serious legal problems? Do you feel you could do it dispassionately and without any sympathy or prejudice?

13. Will you call the case as you see it?

14. Would you treat it as you would any other legal problem?

15. Would you decide the case without sympathy or prejudice?

16. Do you think you can give each side a full and fair hearing, regardless of the eventual result that occurs?

17. Am I correct that both sides start off even? Will you wait and hear both sides of the case before you make up your mind about it?

18. Would you ever take the position, "Stop, I've heard enough, I don't want to hear any more"?

19. All the United States attorney and the defense attorney want is twelve persons who will give them a fair trial—no more, no less. I assume you'd tell us if you couldn't conscientiously do that?

20. Would you do this job as you see it? No one will intimidate or coerce you; it is your responsibility to make a serious, factual determination here. Do you know of any reason why you could not do that?

H. General Background:

1. Have you ever worked for any government agency, or have any members of your immediate family? If so, when, in what capacity, and for how long?

2. Have you or any member of your family testified in a case where the government was a party?

3. Have you ever worked for any law enforcement agency or have you ever been involved in any claims work? Do you have any close friends or relatives in law enforcement?

4. Would you treat a police officer or a government agent as you would any other person, in other words, not give him additional credit for that fact, but not penalize him for that fact?

5. Have you ever participated in any court martial activity while a member of the service? If so, in what capacity? Before or after the Uniform Code of Military Justice was adopted?

6. Do you speak Spanish? If so, will you accept the version of the interpreter as reported here in court and not, in effect, take different evidence from that of the other jurors?

I. Attorneys:

1. You realize that objections will be made; you won't hold that against the side that makes them. Will you realize they're just trying to follow the law as they have been taught it?

2. You realize that both the attorneys are officers of the court; both want a full and fair trial. It is their function to present all relevant facts to you for your decision.

3. If you were in the shoes of the United States attorney or the defense attorney and all you wanted was a fair trial regardless of the result, knowing your own mind as only you can, would you be willing to select twelve people like yourself to discharge that kind of responsibility?

J. Instructions:

1. Would you follow all of the instructions whether you agreed with them or not?

2. Will you render a verdict solely based upon the evidence and not upon anything that you haven't heard here in court from the witness stand or produced by documentary evidence? In other words, you would not try this case based on speculation, prejudice, or sympathy.

3. Will you accept the law as I give it to you and disregard any idea or notion you have about what the law should be or ought to be?

K. Miscellaneous (areas that may need to be explored in some cases):

1. Medical testimony—Are you prejudiced against doctors or those who perform the healing arts?

2. Alcohol.

3. Prior record:

a) Would you try this defendant on this charge and no other charge?

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- b) If evidence is received of any prior conviction, will you accept the limiting instructions I give as to the limited purpose for its reception in evidence; in other words, will you not make someone pay twice for something he's paid for already?
- 4. Drugs—Do you have any belief or opinion that an offense is unique in that it—
 - a) should be pursued with extraordinary vigor,
 - b) shouldn't constitute an offense at all, or
 - c) carries a penalty you consider inappropriate?
- 5. Black or Mexican:
 - a) Do you feel that any such person is any less entitled to the protection of the law?
 - b) Do you feel that a different law should be applied to them or that the same law should be applied to all persons?
 - c) If such a person is either the complaining witness or the defendant, cover this situation.
- 6. If the evidence is unpleasant:
 - a) If the evidence in this case is not pleasant, would that in any way deter you from your responsibility?
 - b) Would you throw up your hands and not go forward with the evidence if you felt it was in some way reprehensible to you?
 - c) Would you permit this in any way to deter you from your responsibility?

L. Civil Category:

- 1. Do you feel any prejudice against a plaintiff's coming to court seeking money damages? You realize that's the only method of recompense we have under our system of laws; we can't give someone a new back or an unbroken arm.
- 2. Have you ever had, or do you have, any claim or dispute with the United States government?
- 3. Have you ever been a witness in any case involving a claim or dispute with the United States government or in a case of this type?
- 4. Have you ever been involved as a claimant or witness, or has anyone in your family been so involved, in an automobile accident or personal injury claim or lawsuit?
- 5. Can you think of any matter or experience in your own life which would prevent you from being a completely fair and impartial juror in this case?

APPENDIX F

Recommendations for the Conduct of the Voir Dire Examination and Juror Challenges

(by Donna Chmielewski and Gordon Bermant)

Recommendations for the Conduct of the Voir Dire Examination and Juror Challenges

There is no satisfactory substitute for the recommendations that follow from the experience of the six seasoned judges whose voir dire and juror challenge practices are described in the main body of this report. It seems useful, nevertheless, to supplement the judges' recommendations with recommendations that stem from analysis based on the methods of psychological and linguistic research. The conclusions of a researcher, who can observe jury selection processes without having to participate in them at the same time, may add useful dimensions to the recommendations of expert practitioners such as these judges. The outside observer may notice events or relationships that are too close to the participants, or too routine, to be observed by them. The outside observer can also make relevant comparisons with activities that are similar to the voir dire examination: employment, medical, or public opinion interviewing, for example. The expectation is that the recommendations of the outside observer and the expert participants will overlap considerably, perhaps even totally, but that their points of emphasis, and the vocabularies in which they phrase their recommendations, will differ. We hope these differences will be helpful in broadening the frames of reference with which the expert participant views the process of jury selection.

The preceding considerations contributed to the Federal Judicial Center's decision to undertake an observational analysis of the processes of federal jury selection. The study was made possible by the complete cooperation of four federal district judges, who allowed us to tape-record the voir dire conducted in several cases. The tapes were subjected to thorough analysis along several lines, ranging from the pacing of questions, through the proportions of total time occupied in speech by various participants, to a consideration of how persons in various social categories were addressed by court and counsel. The results of these analyses were interpreted in light of relevant linguistics and social science literature as well as the legal purposes of the jury selection process. No effort was made to sample randomly or exhaustively among judges. The goal of the research was to arrive at a small number of straightforward recommendations that judges could evaluate in the context of their own needs and experience.

We have arrived at twelve recommendations in which we have confidence. Four of these concern the organization of the selection process, and eight pertain to the ways in which panelists are addressed by the judge. We provide brief rationales to support these recommendations and assume that the reader has considerable familiarity with the procedures discussed in the main body of the report.

Recommendations for Organization

1. Discuss the questioning and challenge practices with counsel before the venire is called.

We observed unnecessary delay and confusion occasioned by counsel's unfamiliarity with the way jury selection was to be organized. These problems can be avoided if the judge goes over the procedures with counsel in advance. There should also be some agreement between judge and counsel about the likely sensitivity of panelists to the case, and thus the likely number of panelists that will be required to select a jury, so that the appropriate number of panelists can be called up from the waiting room. It can be very time-consuming to request the additional panelists required as a result of a larger-than-expected number of excuses or sustained challenges for cause. In addition to wasting time, these delays can produce unfavorable attitudes toward the judicial process on the part of the panelists who must wait for the process to resume.

2. Examine the venire on the most likely grounds of excuse before calling a panel forward.

There are several important grounds for excusing a panelist *sua sponte*: nonavailability for the duration of the trial, excessive travel distances to and from the courthouse, hearing difficulties and other health problems, and language comprehension or speaking difficulties. The existence of these problems among the members of the venire should be ascertained before any members are brought forward for questioning more specific to the case. In this way, time will not be wasted in examining persons on case-related material only to excuse them on more general grounds.

3. Minimize the need to repeat portions of the examination in order to qualify new panelists.

The recommendation to minimize the need to repeat portions of the examination in order to qualify new panelists is equivalent to a recommendation for the struck jury method. We believe that there are net time savings, and improvements in the quality of the pro-

ceedings, when a sufficient number of panelists are cleared through the challenges for cause before counsel exercise peremptory challenges. In the simplest of cases, we recognize, this may not be necessary. But in multidefendant cases in particular, in which several lawyers may be submitting questions or asking them directly, the exercise of peremptory challenges of a small number of panelists, which will require repeating the complete examination for replacements, can consume time unnecessarily and detract from the apparent orderliness and rationality of the selection process.

4. Encourage counsel to exercise their peremptory challenges concurrently.

Little seems to be gained by having prosecution and defense counsel take turns challenging panelists during the exercise of peremptory challenges. The struck jury method guarantees counsel maximum information about the panel before any peremptories are called for. It is reasonable to suppose that there will be little overlap between the lists of panelists the two sides wish to challenge. When there is overlap, it does not seem reasonable to exploit the overlap for adversary purposes, which is what happens when counsel trade challenge sheets back and forth. The only other rationale for sequential challenging would be that counsel has a theory of the jury's structure that calls for certain combinations of jurors to be placed together, so that counsel's decisions about whom to challenge depend on what the opponent has done on the last round. This theory is only viable when "backstriking" is permissible, and we note that backstriking is prohibited by judges even when they permit sequential challenging. Thus, sequential challenging merely encourages false theorizing and game playing by counsel, both of which waste time.

Recommendations for the Form of Questions

1. Limit extraneous remarks by the court and counsel.

Information about panelists cannot be gained while either the judge or the lawyers are speaking. The probative purposes of the examination are best served by maximizing the proportion of time the panelists are vocal and the judge and lawyers are silent. The judge has considerable didactic responsibilities, of course; he or she must put the panelists at ease and explain the procedures to them, as well as ask them direct questions. But we observed several instances of digression that, on grounds of efficiency at least, were unnecessary.

A more serious problem is the effort of lawyers to inject didactic elements into their questioning. Lawyers were often observed to

give information rather than attempt to receive it. Lengthy remarks, often appearing to be short lectures, were thinly disguised with opening phrases such as “Do you understand that . . . ?” Such a “question” is not truly probative, but is rather an effort to condition the jury. Similar tactics have been used to elicit compliance from potential jurors. For example, a lawyer’s lecture explaining facets of the law relevant to the case might be followed by the question, “Can you promise me you will do what the law requires?” This is not a true question, but a request for a future decision related to the contents of the just-preceding lecture. It is an effort to obtain obedience to the lawyer’s interpretation of the law. Neither assent nor obedience to such interpretations should be requested by attorneys during voir dire.

2. Frame questions so as to allow all possible answers.

Questions that dictate their own answers are not likely to elicit open, honest, and accurate replies from panelists. For example, in one voir dire that we observed, panelists were asked, “Do you believe in our wonderful system of presuming the defendant innocent until proven guilty?” Whatever useful information might have been forthcoming on the issue of presumption of innocence was forever lost by the form of the question. Questions that allow for only yes-or-no answers can only determine assent or denial, and they generate that much information, reliably, only when each question is answered aloud by each person. Without further instruction, a question such as “Do all of you understand the law as I have just explained it?” allows for silence as an acceptable answer. Silence can indicate understanding, or it can indicate mute compliance and an effort to stay out of the limelight of further questioning. If the generation of useful information is desired during group questioning, failure to respond should be taken as a sign that further individual questioning is in order, and panelists should be informed that this is the court’s intention.

During individual questioning, general questions on a single theme may be more useful than a series of particular queries designed along the lines of a cross-examination. Thus, a single general request—“Tell the court about your social relationships with Latinos”—may be more probative than a series of specific questions—“Do you live next door to any Latinos?” “Do you go to parties with Latinos?” “Do you have any Latino friends?” “Do you work with Latinos?” and so on. The judge can proceed to more detailed questions if the response to the general query seems to warrant them. To repeat the point made above, the goal of voir dire is for the panelists, not the officers of the court, to speak.

A similar approach to the basic questions about home life and occupation creates a friendlier atmosphere as well as a richer opportunity to gain information. Thus, it is preferable to ask a woman panelist, "Tell us about your husband's employment" than to go through an interchange such as "Is your husband employed?" "Yes." "Where?" "At the x company." "What does he do there?" and so forth. Of course, inarticulate panelists may need specific probes from the judge or counsel, but that need can be determined after the more general approach has been attempted.

3. Set a reasonable pace for questions.

The answers to some questions require the use of memory, judgment, or introspection, possibly regarding matters the panelist has not thought about recently. This mental activity requires time, and panelists will differ in the amount of time they need. A sensitive and effective interviewer will respect the time some answers require and will also allow for differences between persons.

The pace of the examination will not necessarily be aided by repetition of questions in identical form; indeed, repetitions may further inhibit a panelist who is already having difficulty with a question. There are some phrases that can be inserted into sensitive questions to soften their potentially negative impact on the panelist. For example, one might say, "Tell me, *if you can*, about your previous experiences with this sort of crime." The italicized phrase gives the implicit message that the questioner is aware that the panelist may have strong, unpleasant feelings associated with the matter at hand and may as a consequence find talking about it in public somewhat difficult.

4. Substitute statements for questions when possible.

As may be inferred from the previous recommendations, it is a sound interviewing principle that a direct, pointed question has limited usefulness. Despite its apparent brevity and precision, the question is not the technique of choice in conducting a general interrogatory interview (as opposed to a cross-examination, in which direct, pointed questions may serve counsel's purposes exactly). In general, information that is best captured with simple, direct questions may be efficiently obtained through written juror questionnaires distributed to the venire in advance.

Other information can be effectively gained by prefacing questions with such phrases as "Tell me please about . . .," "I'd like to know more about . . .," or "I was wondering about . . ., could you please elaborate on that?" There are many alternatives of this sort, and using a variety of them adds to the effectiveness of the interviewer's rapport with the panelist.

The use of statements instead of questions may require additional specific probes when important information has not been elicited. The interviewer can say, for example, "Thank you for your answer. It appears that you omitted the location of your employment. Could you fill us in on that please?"

5. Develop areas of information from the general to the specific, and introduce each area with a statement.

All voir dire examinations cover certain information areas, including the basic background data provided on the Juror Qualification Form. Insofar as possible, written material should be consulted for this information so that courtroom questioning can focus on information pertaining more specifically to the case in question. If the panelist understands the structure of the questioning, he or she is more likely to provide truthful, useful answers. The interviewer can begin each area of questioning with a brief description: "Now, Mr. Smith, I'd like to go over a few questions about your experiences with the police." By beginning with general questions, the interviewer can focus on more detailed queries if they seem warranted by the panelist's answers. If the judge is conducting the questioning, he or she may be aided by the questions submitted by counsel.

6. Respond positively to good answers.

Although the recommendation to respond positively to good answers may seem to be an obvious idea, we observed that some judges do not remember to encourage or praise full answers by panelists. It is well established that such recognition from the judge increases a panelist's tendency to give additional full responses. The judge can also guide answers to relevant topics by appropriate and polite interruptions. For example, if the panelist begins to ramble, the judge might interject with "Excuse me, Mr. Smith, but I was especially interested in your statements about your son's arrest. I'd like to learn about the details." This guiding response is preferred to a more directive one such as "Could you please come to the point, Mr. Smith?"—which not only fails to provide a focus for the response but may also make the panelist either more nervous or angry. By rewarding good answers and interrupting poor ones by offering suggestions for improvement, the judge assists the panelist and also sets standards for the responses of those who remain to be examined.

7. Address each panelist with the same degree of formality and politeness.

We observed some awkwardness or insensitivity in the forms of address judges and lawyers used with panelists. Specific problems

arose when judges or lawyers addressed females and members of racial or ethnic minorities. Some women feel strongly about their status as Miss, Mrs., or Ms., and a judge or lawyer who unwittingly picks the wrong form runs the risk of reducing the effectiveness of the examination of that panelist. The safest course to follow in this regard is simply to ask which form the woman prefers and then use it. This practice communicates a degree of tact and sensitivity that will be well received by the panel and may enhance the interviewer's success at eliciting honest answers on delicate questions. Antiquated forms of address, such as "madam," or offensive ones, such as "little lady" or "young lady" (as one 63-year-old woman was referred to during our research), will not sound as gallant or complimentary as the speaker may believe.

Establishing uniform forms of address is particularly important for guarding against giving unwitting offense to members of racial or ethnic minorities. In some portions of the country there may be long traditions of addressing members of certain minorities by their given names rather than their surnames; this practice should be avoided during the voir dire. Another potential point of sensitivity is the appropriate label for a person's racial or ethnic group as a whole. Some individuals may prefer the name of the original national identity as opposed to the generic terms now popular, such as Latino and Chicano. Avoidance of these terms is probably advisable unless they are central to the matter at hand; in addition to unintentionally offending the panelist, the terms can be problematic if their endings, which designate gender, are ignored or used incorrectly.

8. Achieve consistency without excessive redundancy.

The recommendation to achieve consistency without excessive redundancy pertains to the organization of the examination in its entirety, but it also applies to the organization of the various questions and additional probes that make up each division of the examination. Deviations from consistent patterns of questions for certain panelists may lead to a loss of information from each panelist as well as create an impression among the panelists that the questioner is disorganized.

Excessive redundancy for the purpose of consistency should also be avoided, however, because it may bore the panelists and thus reduce the effectiveness of the examination. Some repetition is valuable to ensure that all the panelists understand the questions and have time to think about them; it also impresses the panelists with the orderliness of the procedure. But overdependence on a single way of asking a question, as opposed to varying the introduction as described in recommendation 4, can create a soporific atmosphere

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within the courtroom. Useful information will not be gathered, and the interviewer will give the panelists less than a positive impression.

Conclusion

These twelve recommendations are offered as supplements to the many recommendations of the trial judges who contributed to the main body of this report. Our observations suggest that some attorneys and trial judges are superb interviewers who get as much from the examination as the circumstances allow: They elicit information from panelists that counsel can use in the intelligent exercise of challenges. Other judges and attorneys appear to pay less attention to the nuances of the interviewing process and thus do not extract from the examination what is there to be gained. It is our hope that this material will be useful in fostering efficient, effective interviewing and juror challenge management.

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