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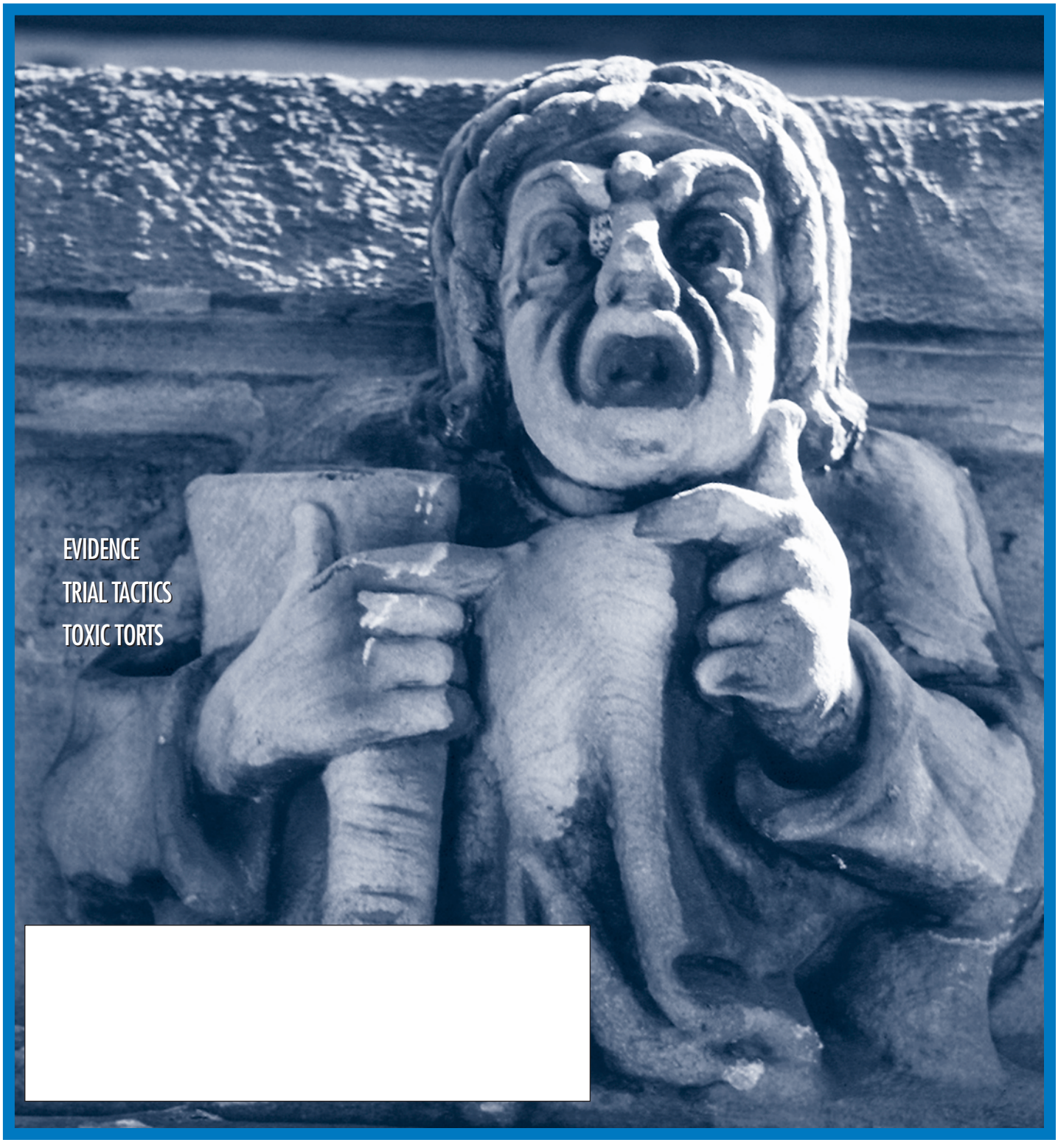

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Overcoming Juror Bias: The Motion for Expanded Voir Dire and Supplemental Jury Questionnaires

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Introduction

Juror bias against injured plaintiffs is a pervasive and troubling reality in our courtrooms today. Fortunately, the plaintiff's bar has recognized this reality and has aggressively addressed the situation with research, articles and seminars. However, most of the emphasis has been focused on the actual conduct of jury selection within the existing confines of limited voir dire. This article focuses on how to get expanded voir dire through motion practice so that practitioners will have more time and a much greater opportunity to implement the techniques learned through juror bias articles and seminars.

I. The Motion for Expanded Voir Dire

The Plaintiff, through undersigned counsel, respectfully moves the Court for an Order allowing supplemental jury questionnaires and expanded voir dire by counsel. The bases for this motion are: 1) to facilitate the selection of a fair and impartial jury by assisting the court and counsel to more effectively identify those jurors who are competent to serve as jurors in this particular case as well as to identify those jurors who may not be competent to serve as jurors due to health, family, personal or philosophical reasons; and 2) to assist jurors in discerning whether they are competent to serve as jurors in this particular case.

A. Jury Selection Is Not a Prelude to Trial. It Is the Most Important Component of the Trial

Jury selection is not a preliminary and essentially ministerial act. It is an essential instrument of a party's constitutionally required right to due process.[1] Voir dire is an essential ingredient to obtaining a fair and impartial jury.[2] An impartial jury is fundamental to a fair trial and due process.[3] The essential function of voir dire is "to enable counsel to gather sufficient information to make well informed judgments about jurors whose biases may interfere with a fair consideration of evidence."[4]

No matter how fair the procedures, the evidence, the argument and the rulings, a trial is a total sham if the decision maker is not fair and impartial. Indeed, nothing offends the conscience so much as, for example, a "kangaroo court" sending a man to his death due only to the color of his skin. It can hardly be denied that jury selection is the most important component in the trial of an African American defendant upon charges of rape or murder - whether the trial is in the South in the 1960's or in California in the 1990's or in Colorado in 2006. This is not a rape or murder case, but the selection of the jury in this personal injury case is no less important. The United States Constitution requires the selection of a fair and impartial jury in all jury trials, recognizing that anything less would be a reversion to the arbitrary and capricious tyranny of a decision maker not bound by the rule of law and due process. Jury selection being the most important component of trial, counsel for the parties must be allowed to have meaningful participation in it; otherwise, the trial could be a long exercise of the delayed application of bias.

B. Juror Life Experiences, Beliefs, Attitudes and Biases

Everyone's beliefs, opinions, attitudes, biases and prejudices are shaped by life experiences, and everyone has biases and prejudices despite sincere belief to the contrary. Further, it is not possible for a juror to "put aside" beliefs, biases and prejudices during a trial, since life experiences shape perceptions of evidence and these perceptions influence decision making.[5] Attitudes and biases are held very deeply and are extremely unyielding to other-

wise persuasive appeals.[6] One legal commentator states, "Indeed, research indicates that jurors' prior experiences and attitudes are more likely to influence their verdict than the arguments presented to them at trial."[7]

This means that juror experiences and attitudes must be thoroughly examined in voir dire in order to identify biases and prejudices that could compromise the fairness and impartiality that is constitutionally required in jury trials.

There is a structural problem, however, in the manner in which juries are currently selected. The structural problem is that jury selection is based upon 1) a rudimentary juror questionnaire based upon juror characteristics rather than upon juror experiences and attitudes, and 2) judge-conducted voir dire that often encumbers jurors with a well nigh impossible task: "putting aside" their experiences, attitudes, biases and prejudices in order to render an impartial verdict. As discussed above, the sincere belief that one does not have, or can put aside, biases and prejudices does not make it so.

C. The Problem with Demographic Stereotyping

Most jury questionnaires are designed to obtain demographic information about the juror and the juror's family. However, juror information limited to demographic information such as age, gender, occupation, etc. leads inevitably to demographic stereotyping. Demographic stereotyping consists of inferring bias from juror characteristics rather than juror experiences and attitudes. For example, attorneys sometimes rely on such stereotypes as "Blacks are good for plaintiffs," "Retirees are bad for plaintiffs," "Blue collars are good for plaintiffs," and "Gen X'ers are horrible for plaintiffs."

This demographic approach to jury selection has "significant drawbacks" and is crude and inefficient."[8] A recent summary of research studies based on both mock and actual trials concluded that "demographics explain relatively little in the way of juror…behavior."[9] Another study shows that life experi ences and attitudes are much more powerful predictors of decision-making and verdicts than demographic characteristics.[10] Consequently, it is imperative that jury selection go beyond demographic questionnaires and "can you be fair and impartial?" voir dire.

D. The Problem of Juror Self Disclosure of Attitudes and Biases

Jurors are uncomfortable in court. They, understandably, are concerned about revealing certain personal experiences, beliefs, attitudes and biases. In fact, they are so concerned that they will refuse to disclose certain things, will limit disclosure of certain things, will "spin" certain things, and will deliberately lie about other things. Why?

Beyond the obvious (jurors are human), jurors limit disclosure for several reasons:

- The court setting is very formal, causing jurors to feel intimidated in what they can do and say;[11] Attitudes and behaviors are influenced by situational conditions.[12]
- Jurors are hesitant to share personal information in public in front of strangers with the information being officially recorded.
- "People in unfamiliar or uncomfortable environments, such as the courtroom, look for someone who has the answers as a guide for their own behavior."[13]
- Consequently, many jurors follow the crowd rather than expressing their own true feelings.[14]
- Some potential jurors say what is expected of them due to fear of rejection.[15]
- Many jurors fear public speaking and thus remain silent or say as little as possible.
- Some jurors want to please the judge.[16]
- Some jurors are "stealth" jurors who deliberately conceal biases and prejudices or even actively engage in misrepresentation in order to be seated on the jury so they can advance personal agendas.

Ironically, even if jurors want to honestly disclose their biases, they usually can't do so very well. People underestimate their own biases.[17] And people are not conscious of many of the significant factors that shape their behavior.[18] Further, many people believe that their opinions or biases are objective facts.[19]

Consequently, inadequate juror disclosure of attitudes and biases remains a problem. Unfortunately, the problem is often exacerbated by the purported solution: judge-conducted voir dire.

E. Unintended Consequences: Judge-conducted Voir Dire Exacerbates the Problem of Juror Nondisclosure

Judges want fair and impartial juries. So why does judge-conducted voir dire exacerbate the problem of juror nondisclosure? Three reasons:
1) status/authority and its effect upon juror behavior, 2) question form and "rehabilitation" and 3) limited voir dire.

1. Please the Judge

Role or status is very influential in regard to self-disclosure. A questioner with high status will induce limited self-disclosure.[20] Judges have high status. They wear black robes. They sit high, looking down at everyone. They are addressed as "Your Honor." Attorneys, who have high status outside the courtroom, grovel before the judge (or at least, they are deferential). The judge maintains order and control. The judge can exclude evidence, strike witnesses, put parties, witnesses and spectators into jail for contempt, throw a case out of court and sometimes even hold the life of a litigant in his or her hands. In short, the judge is the king of the court room. Most subjects do not want to displease the king.

Judge status fosters an increased sense of authority and detachment from the jurors.[21] Questioning from the bench reduces juror candor, and jurors

will alter already expressed attitudes when questioned by the judge.[22] Jurors are determined to appear honest and open minded to the judge because they believe the judge wants that from them.[23] "The message communicated by the judge is that impartiality or lack of bias is the desirable state of mind for a juror. . . . The end result is that jurors give the judge the answers they believe the judge wants to hear."[24] In other words, judges inadvertently constrain jurors from engaging in full self-disclosure.[25]

2. "Can You Be Fair and Impartial?"

Even if the prospective juror gets past judge status induced nondisclosure, the prospective juror then faces judicial question induced nondisclosure. That is, the form of the questions asked by the judge inhibits juror self-disclosure.

Typically, the judge asks a series of qualifying (or disqualifying) questions to the prospective jurors and then the judge (and sometimes attorneys) follow up individually with those who answered affirmatively to the initial questions. For example, a routine question in a criminal case is whether any of the prospective jurors or any member of their family have been a victim of crime. Such a question calls for a "yes" or "no" answer. No problem, a "yes" answer can always be followed up, right? Right, but that's only half the picture. A research study indicated that 25% of prospective jurors did not reveal that they or a family member had been victims of crime. And 52% of jurors who themselves were victims of crime did not disclose it in response to the initial question![26]

Judge Gregory E. Mize of the District of Columbia Superior Court followed the typical approach, but decided to experiment with a different approach. Under his experimental approach, he asked those who did not respond affirmatively to his initial questions: "I notice that you did not respond to any of my questions. I just wondered why. Could you explain?" or "Is it because the question did not apply to you?" Judge Mize reports that although many jurors indicated that the questions did not apply to them, a significant number said that they actually did have something to say in response to the initial questions. Some of the prospective jurors provided disturbing information that led to their removal for cause. Judge Mize concluded that individual voir dire of all prospective jurors is "an indispensable way of ferreting out otherwise unknown juror qualities."[27]

Finally, after getting past judicial status-induced nondisclosure, judicial question form-induced nondisclosure, the prospective juror, having answered that he or she is biased in some way then faces judicial "rehabilitation" through loaded, leading questions: "Although your wife was mugged by an African American man, could you put that aside and be a fair and impartial juror in this case?" Who is going to admit in public to racial bias? Not many people. In fact, some judges will go out of their way to channel the prospective juror into a portrayal of a noble character who has overcome their past bad experience and potential biases. Another loaded, leading question: "Can you follow the law?" Who is going to say that they are going to ignore the law and do what they darn well please to do? Only those who are angling to get struck for cause.

There may need to be a study on the "rehabilitation" of prospective jurors. What could explain extensive judicial rehabilitation of prospective jurors? The fear that excusing one juror for cause will lead to a stampede of other jurors seeking to get struck for cause upon exaggerated or even fictitious grounds? Arguably biased prospective jurors should not be herded onto the jury; there must be an available and fair procedure to cull them out.

3. Limited Voir Dire and the Fear of Attorney-Tainted Voir Dire

Judges tend to conduct less extensive voir dire than attorneys. That's because, some judges might say attorneys do such a shoddy job of it; and/or they waste time; or attorneys don't really want an impartial jury; they want a jury partial to them, so they argue their cases in voir dire. In other words, attorney-conducted voir dire is inefficient and tainted with attorney incompetence and/or misconduct. These objections to attorney-conducted voir dire may be addressed as follows: First, however important judicial efficiency is – and it is important, - the selection of a fair and impartial jury is more important. Second, the cure – banishment of attorneys from voir dire (or limitations so severe as to prevent meaningful voir dire) – is worse than the purported disease (attorney-tainted voir dire). Third, judges are quite capable of monitoring and enforcing the proper conducting of voir dire by attorneys. Jury selection should not be driven by the fear of attorney-tainted voir dire. Now, having disposed of the voir dire elephant in the courtroom that nobody wants to talk about, expanded voir dire by counsel can be addressed on the merits regarding bias and impartiality.

F. Expanded Voir Dire by Counsel

1. Effective Voir Dire requires atleast 5 minutes per prospective juror. Expanded Voir Dire is Not Just Extended Time Voir Dire.

Effective voir dire in a civil case requires at least five minutes of questioning per prospective juror. If counsel questions 18 jurors, then voir dire would take 90 minutes. However, many state court judges allow only 15 minutes and some federal court judges do not allow any attorney-conducted voir dire. Effective voir dire simply cannot be accomplished with one to two minutes per prospective juror.

Expanded voir dire is not simply extended time voir dire. Expanded voir dire encompasses the use of supplemental juror questionnaires, the number and range of questions, the type of questions, sequestered voir dire, and voir dire by counsel. The table below compares

traditional limited voir dire and expanded voir dire.[28]

Traditional Limited Voir Dire	Expanded Voir Dire
No supplemental pretrial juror questionnaire	Supplemental pretrial juror questionnaire
Limited number of questions	Larger number of questions
Questions very specific to trial	Broader range of questions
Close ended questions that prompt yes or no responses	Combination of close ended and open ended questions
Group questioning of prospective jurors	Individual questioning; Sequestered questioning regarding sensitive matters
Judge alone conducts voir dire	Judge and attorneys conduct voir dire

2. Expanded Voir Dire by Counsel promotes the informed use of peremptory challenges and challenges for cause.

If potential jurors are unable to disclose their true attitudes and opinions in response to judicial questioning as discussed above and if counsel has less than 2 minutes per juror to explore juror life experiences, beliefs, attitudes and opinions, then the informed use of peremptory challenges and challenges for cause is not possible - or only possible in the most obvious cases of bias or egregious cases of prejudice.

Parties are entitled to "considerable latitude" during good faith examination of prospective jurors to enable the parties properly to excise both peremptory challenges and challenges for cause.[29] The peremptory challenges "should not be required to be exercised before an opportunity is given for such inspection and examination of prospective jurors as is reasonably necessary to enable the accused to have some information upon which to base an exercise of that right."[30]

3. Supplemental Jury Questionnaires

A supplemental jury questionnaire is an aid to voir dire that goes one step beyond the general jury questionnaire. Its special purpose is to obtain case specific information that bears on the prospective juror's qualifications but that cannot be easily obtained during voir dire. Seeking the information through voir dire might unduly prolong the process or, because of the sensitivity of the issue, subject jurors to embarrassment.[31]

Supplemental jury questionnaires have many advantages. Counsel can get an overview of possible bias for the entire venire, not just the people seated in the box. Questionnaires are efficient in that they can quickly pinpoint for the court and counsel the specific areas that require individual follow-up questioning. The private nature of the questionnaire can be a relatively comfortable way to reveal sensitive information. The questionnaire encourages completeness, as prospective jurors have more time to contemplate their answers. Prospective jurors are also more candid in answering questionnaires than they are in answering questions from the judge and counsel.[32]

The American Bar Association has endorsed supplemental jury questionnaires and the ABA has also asked the courts to consider special questions for the particular issues of the case.[33]

G. Conclusion

The selection of a fair and impartial jury is not only constitutionally required, but it is the foundation upon which the entire trial, and our jury trial system, is based. Consequently, the empanelling of a biased jury is simply the delayed application of bias or the advancement of personal agenda rather than the application of the law to the facts of the case. Traditional, limited voir dire has been shown to be inadequate for detecting and addressing prospective juror biases. Therefore, supplemental jury questionnaires and expanded voir dire should be used to ensure a fair and impartial jury, and thus a just trial and verdict.

WHEREFORE, the Plaintiff respectfully prays that the Court grant expanded voir dire as follows:

1) the use of the attached supplemental juror questionnaire,
2) attorney-conducted voir dire in addition to court conducted voir dire,
3) ninety (90) minutes of attorney-conducted voir dire per side,
4) individual questioning of jurors and
5) sequestered questioning of prospective jurors regarding sensitive matters.

II. Other Techniques to Expand Voir Dire

If the judge will not allow any attorney-conducted voir dire, then submit a list of questions to the judge for consideration along with a polite request that the judge ask follow up questions as appropriate. Provide a short, persuasive rationale for each of the questions.

If the judge allows only group questioning with individual follow up questioning (and allows you to submit questions to be put to the group), then devote a lot of time and energy into crafting questions that will provoke responses and lead to extensive follow up. For example, "Does anyone on the jury panel have any concerns about frivolous lawsuits like, for example, the McDonald's hot coffee case, or any concerns about excessive litigation?" or "Has anyone on the jury panel been injured or have had a family member, relative, friend or co-worker injured as a result of someone's carelessness?"

Advise the court that if the court allows you more time for voir dire, then you will shorten the presentation of your case by a specific amount of time with regard to a specific witness. Back this up with your witness list and make a credible case; otherwise, the judge may see it as a manipulative ploy. Another option is to offer to shorten your closing argument time, but be sure that there is adequate time left for closing.

Ask for extra peremptory strikes if voir dire time is severely limited. Put a lot of time and thought into identifying jurors to be struck for cause. Many people have problems with accepting the preponderance of the evidence standard, especially when it is framed as a "51%" burden of proof. Many of the prospective jurors will want a standard in the 70 – 80% range and some of them will insist upon it. Getting these jurors struck for cause early will give you more time for questioning other jurors.

III. Conclusion

Many trials are already won or lost at the time the jury is empanelled. Consequently, it is imperative that the attorney not only learn techniques to address juror bias during voir dire, but it is just as important to put in the time and effort beforehand to shape the playing field so that the techniques can be more effectively applied. The within motion, when supplemented with and strengthened by the unique facts of your case, will go a long way toward convincing the court to give you adequate time and methods to conduct an effective voir dire.

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Dr. Matlon is a pioneer in the trial consulting profession and his firm, Matlon & Associates, is a preeminent jury and trial consulting practice. He is one of the founders of the American Society of Trial Consultants, where he served as its first President, and where he continues to serve as the only Executive Director the Society has ever had. He has trained numerous other consultants who also serve as leaders in the profession through their own firms. Dr. Matlon has published widely on *voir dire* and other aspects of litigation and trial practice and has conducted seminars and workshops for lawyers, judges and other audiences throughout the country. He can be reached at www.matlonlitigation.com, matlon1005@earthlink.net, or 410-472-0693.

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