St. Mary's Law Journal

Volume 16 | Number 3 Article 4

9-1-1985

Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation.

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Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation.*, 16 St. Mary's L.J. (1985).
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JURY SELECTION: INNOVATIVE APPROACHES TO BOTH CIVIL AND CRIMINAL LITIGATION

MARGARET COVINGTON*

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I. INTRODUCTION

Every successful trial lawyer knows that the most important people in the courtroom are the jurors. The power of the jury is a force that the litigator needs to harness. The trial judge can be against the case and the lawyer, witnesses can turn, documents can become lost, and memories fade, but if the jury likes the client and doesn't think poorly of the attorney, the case can still be a success.[1]

Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings.[2] In fact, once

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1. Address by Gerry Spence, attorney, Association of Trial Lawyers' of America Conference, in Reno, Nevada (June 24, 1980).

2. *See, e.g.*, 1 A. GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS, at x (2d ed. 1984) ("jury selection cuts near the heart of our democratic judicial system"); W. JORDAN, JURY SELECTION § 1.01 (1980) (selection has significant impact); 1 F. LANE, GOLDSTEIN TRIAL TECHNIQUE § 9.01 (3d ed. 1984) (selection is vitally important). *But cf.* Zeisel & Dia-

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the last person on the jury is seated, the trial is essentially won or lost.[3]

There are several psychological techniques which can be used in jury selection to enhance the attorney's already developed selection skills. It is important for attorneys to be aware of these methods, not only for their own use, but also to be able to recognize when an opponent is employing such specialized techniques. In fact, due to the large awards and not guilty verdicts received by prominent attorneys who have employed jury selection techniques and trial simulations, there is increasing demand for psychological consultants who understand and use these concepts.[4]

Many lawyers believe that they can convince an impartial jury; however, there are no impartial jurors[5] since jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case.[6] Jurors, as well as other people, function with preconceived notions, prejudices, feelings, beliefs, biases, and attitudes of a lifetime.[7] They were children, brothers, sisters, mothers, or fathers before becoming prospective jurors. The actual jury selection process in the courtroom allows only limited opportunity to determine the effect of an individual's life experiences; therefore, a juror's biases and

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mond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial,* 1976 AM. B. FOUND. RESEARCH J. 151, 173 (winning case on merits preferable to jury selection ability).

3. *See* Spada, *For Margaret Covington, The Best Defense is the Jury,* 46 TEX. B.J. 1164, 1164 (1983).

4. *See, e.g.,* D. HERBERT & R. BARRETT, ATTORNEY'S MASTER GUIDE TO COURTROOM PSYCHOLOGY—HOW TO APPLY BEHAVIORAL SCIENCE TECHNIQUES FOR NEW TRIAL SUCCESS § 13 (1980) (application of psychological techniques in trial has increased); NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES, at ix (B. Bonora & E. Krauss 2d ed. 1983) (increasing number of consultants); Zeisel & Diamond, *The Jury Selection in the Mitchell—Stans Conspiracy Trial,* 1976 AM. B. FOUND. RESEARCH J. 151, 152, 166-72 (public opinion survey utilized). *See generally* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 175, 227-40 (1983) (interaction between social science and law will increasingly benefit legal field).

5. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 2.04 (B. Bonora & E. Krauss 2d ed. 1983) (studies show jurors prejudge cases, have prejudicial attitudes, and frequently have bias against criminal defendants).

6. *See* J. BURKE, JURY SELECTION: THE TA SYSTEM FOR TRIAL ATTORNEYS 1 (1980) (several systems predict effect of jurors' personalities); Covington, *Jury Selection Techniques,* VOICE FOR DEF., Oct. 1983, at 5, 5 ("nature of these preconceived biases . . . critical to the attorney in jury selection").

7. *See* T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 32 (1980) ("jurors usually think and act in ways that are consistent with their backgrounds"). Social scientists have successfully measured attitudes with various techniques. *See* R. DAWES, FUNDAMENTALS OF ATTITUDE MEASUREMENT 2 (1972).

predispositions remain unknown variables.[8] In everyday life, ideas are pretested or pre-examined for content by techniques such as marketing research and theatre dress rehearsals.[9] The prosecutor has the benefit of pretesting his case before a grand jury.[10] However, in spite of the limited availability for pretesting ideas by the defense, or by both sides in civil litigation, more predictable results in trial may be obtained by using information and principles learned from social scientists.[11] What social scientists know about human behavior can be tailored for use on the jury system and advantageously applied in the trial court.[12] Receiving a reversal on appeal is great, getting a new trial is wonderful, but receiving a favorable jury verdict is better than anything else. It is winning!

The purpose of this article is to make the trial attorney aware of the techniques used during voir dire and the trial itself, and to acquaint him with innovative procedures and methods that are now available to help him obtain the best result possible from a jury trial.

II. EVOLUTION OF APPROACHES TO JURY SELECTION

Traditionally in selecting juries, attorneys, especially in criminal cases, have adhered to the basic premise that the least desirable jurors should be excluded and the remainder of the panel indoctrinated to the theory of the case.[13] In the past, litigators selected jurors based on hunches, instinct, and educated guesswork. For example, at one time

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8. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 11.02[2] (B. Bonora & E. Krauss 2d ed. 1983) (selection is complex process); Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Approach,* 56 IND. L.J. 245, 247 (1981) ("typical voir dire does not produce sufficient information to identify prejudicial jurors").

9. Address by Don Keenan, attorney, National Lawyers' Guild Southern Regional Conference, in Atlanta, Georgia (Oct. 12, 1984).

10. *See* Lawless & North, *Prosecutorial Misconduct,* TRIAL, Oct. 1984, at 26, 28.

11. *See, e.g.,* 1 A. GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS § 8.9 (2d ed. 1984) (innovative principles may be learned from social sciences); NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES §§ 2.01-.04 (B. Bonora & E. Krauss 2d ed. 1983) (empirical research from social sciences addresses many variables, including "[p]sychosocial [d]ynamics of the [c]ourtroom" and "[j]uror's [o]pinions and [a]ttitudes"); Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck,* TRIAL, Sept. 1983, at 84, 84 (successful use of statistical and psychological principles in jury selection); *see also* S. HAMLIN, WHAT MAKES JURIES LISTEN 34 (1985) (help from social sciences in jury selection).

12. *See* Starr, *Behavioral science in the courtroom,* TRIAL DIPL. J., Spring 1981, at 10, 10 (impact of social science in courtroom increased as direct effect of trials resulting from Viet Nam anti-war effort).

13. Address by Margaret Covington, State Bar of Texas Convention, in Dallas, Texas (Oct. 15, 1980).

men with mustaches were considered unreliable, and women were considered to be more soft-hearted than men.[14] Today, such generalizations are considered invalid. In fact, women have a greater tendency to convict than do men.[15] For example, research findings indicate that both women with college degrees and secretaries are conviction oriented.[16]

The majority of trial lawyers do not devote the time, interest, or money to jury selection or its function as they do to other aspects of the case.[17] Most trial counsel have the tendency to feel that they understand jurors and how they are going to react.[18] There are, however, successful trial attorneys who have recently turned to the social sciences for guidance, not only in the art of jury selection, but also in the presentation of evidence.[19] An effort is made to predict accurately how certain evidence will be received by the jury, whether the jury will be convinced by it, whether certain impressions have been created, and what action the jury will take in response to the evidence.[20] To provide the trial team with more information, both before and af-

14. Address by John Malloy, author of the best-seller, *Dress for Success,* Dynamics of Jury Selection Seminar, in Naples, Florida (Sept. 30, 1983).

15. *See* Nagel & Weitzman, *Women as Litigants,* 23 HASTINGS L.J. 171, 174-75, 182-83 (1971). Since research has shown that juries perceive women differently from men when they are criminal defendants or plaintiffs in personal injury actions, this factor makes prediction even more difficult when combined with the factor that women jurors tend to convict more often than do men. *See id.* at 174-75, 182-83.

16. *See* Sannito & Arnolds, *Jury Study Results: The factors at work,* TRIAL DIPL. J., Spring 1982, at 6, 8. The article also discusses other factors which indicate that jurors are conviction-prone, including occupations as engineers or accountants, or an Irish ethnic background. *See id.* at 8.

17. *See* Zeisel & Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial,* 1976 AM. B. FOUND. RESEARCH J. 151, 173. However, the importance of jury selection has been increasingly recognized by successful trial lawyers, as exemplified by a quote from west Texas attorney R. Temple Dickson:

> The jury is the beginning and end of a successful trial. Close battles will invariably go to the side that has done its job in developing insight into the jury's attitude. In short, work done in pursuit of understanding the jurors is as important as developing the facts of the case.

Interview with R. Temple Dickson (Oct. 22, 1984) (after his $1.6 million verdict in Nolan County, Texas, in Jowers v. Atchinson, T. & S.F. Ry., No. 15,373 (Dist. Ct. of Nolan County, 32d Judicial Dist. of Texas, May 3, 1984), presently on appeal).

18. *See* H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 193 (Phoenix ed. 1971); W. WAGNER, JR., ART OF ADVOCACY—JURY SELECTION § 1.00 (1984).

19. *See* Atkinson, *Preparing and Presenting Evidence Shows,* TRIAL, Feb. 1984, at 36, 40; Vinson, *Shadow Juries: Monitoring Jurors' Reactions,* TRIAL, Sept. 1983, at 75, 76.

20. *See* Vinson, *Shadow Juries: Monitoring Jurors' Reactions,* TRIAL, Sept. 1983, at 75, 76 ("feedback of the shadow jury is invaluable in that it allows the attorney to prepare his or

ter jury selection, unique and novel applications of psychology and statistics are being used with much success.

Pretrial jury research and simulations have evolved within the last ten years.[21] Cases of a more notable character in which such techniques have been successfully utilized include: *United States v. Hinckley*,[22] *United States v. Mitchell*,[23] *State v. Davis*,[24] *United States v. DeLorean*,[25] *United States v. Conover*,[26] and *State v. Burnett*.[27] Other cases which have used psychological techniques successfully include: a Texarkana medical malpractice case in which the plaintiff was awarded $3.11 million in damages,[28] a suit brought by the persons injured on the "Enterprise" ride at the State Fair of Texas which settled for $30 million,[29] a will contest settlement of $6 million,[30] a grain elevator explosion case,[31] child custody cases,[32] and many others successfully concluded.

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her presentation or witnesses for the next day"); Mulroy, *Getting an Edge With Mock Juries*, Nat'l L.J., Sept. 24, 1984, at 15, col. 1 (mock juries evaluate testimony and mannerisms).

21. *See, e.g.*, Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck*, TRIAL, Sept. 1983, at 84, 86 (techniques tested during recent trials); McConahay, Millin, & Frederick, *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, LAW & CONTEMP. PROBS., Winter 1979, at 203, 203 (highly publicized trials stemming from political unrest during the 1960's and 1970's began trend); Zeisel & Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 AM. B. FOUND. RESEARCH J. 151, 167 (recent trend to use social science).

22. No. 81-306 (D.D.C. June 21, 1982) (not guilty by reason of insanity).

23. No. 73 CR 439 (S.D.N.Y. Apr. 28, 1974) (not guilty).

24. No. 16,838 (Crim. Dist. Ct. No. 4 of Tarrant County, Texas, Nov. 9, 1979) (not guilty).

25. No. CR 82-910-1 (C.D. Cal. July 12, 1984) (not guilty).

26. No. 83-70-CR-T-8 (M.D. Fla. Dec. 12, 1983) (8 to 4 vote for convictions, hung jury).

27. No. 83 CR 1823 (Dist. Ct. of Bexar County, 186th Judicial Dist. of Texas, Aug. 17, 1983) (life sentence instead of death).

28. *See* Birchfield v. Texarkana Memorial Hosp., No. 76-C-1206 (Dist. Ct. of Bowie County, 202d Judicial Dist. of Texas, Sept. 18, 1984) (case presently on appeal).

29. *See* Phillips v. Heinr, Withelm, Huss & Co., No. 83-13587-K (Dist. Ct. of Dallas County, 192d Judicial Dist. of Texas, June 1, 1984).

30. *See In re* Estate of Madsen, No. 81-3081-P (Probate Ct. No. 1 of Dallas County, Texas, 1984).

31. *See* Canales v. Louis Dreyfus Corp., No. 81-1501-C (Dist. Ct. of Nueces County, 94th Judicial Dist. of Texas, Dec. 29, 1983).

32. *See In re* I.N.S. & R.D.S., Minors, No. 80-42670 (Dist. Ct. of Harris County, 308th Judicial Dist. of Texas, Sept. 26, 1980, Dec. 30, 1982) (case was tried twice in Texas, retried in Hamilton, Ontario, Canada, and mother was awarded custody).

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III. Jury Selection and Voir Dire

It is imperative for the trial attorney to master the art of jury selection. Many potential jurors have reached decisions regarding the case and the litigators within a few minutes of exposure to the participants, and most have made a decision before voir dire has ended. These opinions rarely change. In addition, research in the social sciences indicates that ninety percent of the juror's individual decisions are formed prior to jury deliberation, and that jury deliberation, contrary to popular notion, does not so much decide the case as contribute to a consensus.[33]

Principles necessary for the litigant's position may be compromised by preconceived notions, biases, and attitudes. Illustrative of a juror's preconceived disposition is the sociological finding that approximately two-thirds of most jury panels are biased in some way against the accused.[34] As many as twenty-five percent of jurors believe from the outset that the accused is guilty; otherwise, he would not have been charged with an offense.[35] Research further indicates that thirty-five percent of prospective jurors believe incorrectly that the accused must prove his innocence.[36] These prejudices combine to weight the average jury panel against the defense.

Trial counsel encounters many obstacles during voir dire, beginning with time constraints imposed by the court, which probably hamper information gathering. In addition, the courtroom examination of a prospective juror encourages socially desirable responses and inhibits truthful answers.[37] Jurors do lie about their attitudes and prejudices during voir dire;[38] however, they frequently do so because they want to be selected for the jury in order to perform their civic duty.[39] Nevertheless, a juror's failure to reveal his prejudices and certain attitudes regarding legal principles could interfere with his ability to sit fairly

33. *See* Miles & Bohannan, *Do Personality or Peer Pressures Influence the Way Jurors Decide?*, CHAMPION, Nov. 1981, at 10, 10.

34. *See* Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, LAW & CONTEMP. PROBS., Autumn 1980, at 116, 122.

35. *See id.* at 123.

36. *See id.* at 123.

37. Address by Margaret Covington, Trial Techniques Conference, in Las Vegas, Nevada (May 3, 1984).

38. *See* Saks, *Social Scientists Can't Rig Juries*, PSYCHOLOGY TODAY, Jan. 1976, at 48, 49.

39. Address by Richard Haynes, attorney, Dynamics of Jury Selection Seminar, in Naples, Florida (Oct. 1, 1983).

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and impartially in judgment of the accused or in judgment of a plaintiff's cause of action. One survey conducted by the author for a highly publicized criminal trial indicated that eighty-six percent of the community eligible for jury service had a fixed opinion about the accused's guilt, but less than twenty percent of the actual panel would admit it.[40] With the high percentage of prospective jurors reporting for jury duty with a fixed opinion, the trial lawyer should avail himself of all psychological techniques possible to discover the juror with this fixed opinion and to diffuse the opinion.

It is not surprising that prospective jurors are less than candid in their responses to questioning. Communication is inhibited and distorted by the courtroom size and architecture, the process of group questioning, the distance between the questioning attorney and prospective jurors, and the trial proceedings.[41] Jurors have a basic need to be correct and to please; therefore, many prospective jurors will respond in a manner they believe to be correct, positive, and pleasing.[42] Jurors are sensitive to cues from the judge as an indication of correct responses since the judge is perceived as the authority figure in the courtroom, and jurors tend to respond to authority.[43] This sensitivity to the judge's authority occurs not only during voir dire, but continues throughout the trial.[44]

Trial counsel's goal in jury selection should be to develop as much objective information as possible. This information will serve to reinforce the trial attorney's intuition or cause him to hesitate about his decision and reevaluate a prospective juror. Noted criminal defense attorney Richard "Racehorse" Haynes discusses the role of information and intuition in jury selection:

> The bottom line as I see it is that in jury selection you have to use as

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40. The survey was conducted for State v. Davis, No. 16,838 (Crim. Dist. Ct. No. 4 of Tarrant County, Texas, Nov. 9, 1979).

41. Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 IND. L.J. 245, 261, 266, 268 (1981); Address by Gerry Spence, attorney, Association of Trial Lawyers' of America Conference, in Reno, Nevada (June 24, 1980).

42. *See* Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case,* LAW & CONTEMP. PROBS., Autumn 1980, at 116, 131.

43. Address by Richard Haynes, attorney, Trial Techniques Conference, in Las Vegas, Nevada (May 5, 1984). Jurors often "look to the judge for the 'socially desirable' answers and refuse to reveal their opinions." *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 10.01[3] (B. Bonora & E. Krauss 2d ed. 1983).

44. Address by Richard Haynes, attorney, ABA National Institute on Criminal Defense and Prosecution, in New York City, New York (Mar. 2, 1984).

> many advantages as possible, and social science and statistics in the courtroom are just the latest of our ever more sophisticated techniques. That does not mean that I would ever permit a social scientist to preempt my option to make the seat-of-the-pants, back-of-the-neck judgment based on everything I've learned and read in my career. Jury selection is still guesswork right down to the wire. The difference is that now jury selection is a little more intelligent guesswork.[45]

Prior to the voir dire process, counsel should have identified the type of juror he desires, frequently referred to as the profile of the "ideal" juror.[46] Based upon the ideal profile, a checklist of comprehensive basic questions to be propounded should be used in jury selection for both criminal and civil trials.[47] The attorney should have an associate help record the prospective juror's response, observe the other panel members, and note the group dynamics.[48] The associate should check off each area of inquiry and remind trial counsel if he has not examined a prospective juror on one of the designated topics.[49] Voir dire is also used by trial counsel to determine if a prospective juror satisfies statutory requirements.[50] Jurors may be questioned about and should be committed to participating in the deliberation phase based only on the law and evidence presented at trial.[51] However, it is the rare juror who admits that he cannot be a fair person.

A. *Legal Limitation Imposed Upon Voir Dire*

The right to counsel guaranteed by article I, section 10, of the

45. *See* Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck*, TRIAL, Sept. 1983, at 84, 86 (quoting Richard "Racehorse" Haynes).

46. The author termed the "ideal" juror profile and "least desirable" profile as a result of demographic and statistical analyses for State v. Davis, No. 16,838 (Crim. Dist. Ct. No. 4 of Tarrant County, Texas, Nov. 9, 1979). The analysis was used to develop a function and classification procedure for predicting how a prospective juror is likely to react. *See generally* Engen, *Psychophysics—Discrimination and Detection*, in EXPERIMENTAL PSYCHOLOGY 11, 11-46 (J. Kling & L. Riggs 3d ed. 1972) (theoretical discussion of an "ideal standard").

47. *See* Haynes, *How to Try a Jury Case: A Lawyer's View*, LITIGATION, Fall 1980, at 12, 12, 57.

48. *See* Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck*, TRIAL, Sept. 1983, at 84, 88. "Group dynamics" refers to the interaction within a group and the effect on group members and the group as a whole. *See* P. SECORD & C. BACKMAN, SOCIAL PSYCHOLOGY 201, 201-398 (2d ed. 1974).

49. Address by Margaret Covington, Criminal Law Seminar for Legal Assistants and Attorneys, in Dallas, Texas (Sept. 18, 1982).

50. *See* II A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 328 (1967).

51. *See* Hare, *Voir Dire and Jury Selection*, 29 ALA. LAW. 160, 173 (1968).

Texas Constitution[52] has been construed to include the right to voir dire.[53] The purpose of voir dire is to enable counsel to make an intelligent exercise of peremptory challenges and to establish a basis for any challenges for cause.[54] The Texas Court of Criminal Appeals has stated that jurors may be questioned to determine if they are biased or prejudiced as a matter of law, noting that

> [t]he voir dire process is designed to insure, to the fullest extent possible, that an intelligent, alert, disinterested, impartial, and truthful jury will perform the duty assigned to it. . . . [D]efense counsel has an obligation to ask questions calculated to bring out that information which might be said to indicate a juror's inability to be impartial, truthful, and the like.[55]

Although voir dire questions are broad and cannot be unnecessarily limited, voir dire is subject to control at the sound discretion of the trial court.[56] The Dallas court of appeals noted that a trial court's "decision as to the propriety of a particular question or specific area of inquiry will call for reversal only upon a showing of abuse of discretion. Such discretion is abused when the trial court prohibits a proper question about a proper area of inquiry."[57] The questioning allowed during voir dire is so broad that there have been only a few cases over the years in which a trial court has in some way limited the questioning during the voir dire process. One permissible limitation which has usually been upheld is a reasonable time limit placed on

52. TEX. CONST. art. I, § 10.

53. *See, e.g.,* Graham v. State, 566 S.W.2d 941, 953 (Tex. Crim. App. 1978) (while right to counsel mandates right to voir dire, right has limits); Smith v. State, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974) (free and broad questions allowed); Gonzales v. State, 638 S.W.2d 132, 133 (Tex. App.—Corpus Christi 1982, pet. ref'd) (court has discretionary control over use of right).

54. *See, e.g.,* Hughes v. State, 562 S.W.2d 857, 862 (Tex. Crim. App.) (questions may not be limited unnecessarily), *cert. denied,* 439 U.S. 903 (1978); Abron v. State, 523 S.W.2d 405, 408 (Tex. Crim. App. 1975) (traditional applications of constitutional principles); Johnson v. Reed, 464 S.W.2d 689, 691 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (basic purpose of voir dire same in civil cases as in criminal cases), *cert. denied,* 405 U.S. 981 (1972); *see also* Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure That Our Juries Are Representative and Impartial?,* 3 HASTINGS CONST. L.Q. 65, 75 (1976) (attorney, not judge, should question jurors).

55. *See* Jones v. State, 596 S.W.2d 134, 137 (Tex. Crim. App. 1980) (citing De La Rosa v. State, 414 S.W.2d 668, 671 (Tex. Crim. App. 1967)) (emphasis deleted).

56. *See* Hughes v. State, 562 S.W.2d 857, 862 (Tex. Crim. App.), *cert. denied,* 439 U.S. 903 (1978); Smith v. State, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974).

57. Patterson v. State, 654 S.W.2d 825, 827 (Tex. App.—Dallas 1983, pet. ref'd).

voir dire.[58] A time limit imposes a duty on counsel to reasonably budget his time and to avoid asking irrelevant or unnecessarily repetitious questions. Another limitation which has been placed on the voir dire process in civil cases is the mention of liability insurance.[59] It has long been the practice in Texas to prohibit any direct or indirect comments as to the existence of liability insurance.[60] Such a comment injected into voir dire questioning is considered reversible error.[61]

It is also considered proper to restrict questions concerning the verdicts rendered in past cases by juries in which a prospective juror participated.[62] Another restriction on voir dire which has been upheld is the questioning of prospective jurors concerning their personal understanding of various undefined terms used in statutes applicable to the case.[63] Questioning prospective jurors about their personal habits is also restricted.[64] While the trial court restricts such an inquiry into the personal habits of prospective jurors, it allows an inquiry into personal prejudices or moral beliefs.[65]

Restrictions have also been placed on the information given prospective jurors regarding the punishment phase of the trial.[66] If the

58. *See* Whitaker v. State, 653 S.W.2d 781, 782 (Tex. Crim. App. 1983) (50 minute limitation upheld). However, each case is reviewed on a case-by-case basis to determine if a time limitation is an abuse of discretion. *Compare* Barrett v. State, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974) (30 minute limitation upheld when attorney failed to give reason why additional time needed and proposed disorganized, repetitious questions), *cert. denied*, 420 U.S. 938 (1975) *with* Thomas v. State, 658 S.W.2d 175, 176 (Tex. Crim. App. 1983) (35 minute limitation unduly restrictive when attorney asked organized questions, but was unable to complete questioning of individual jurors). The requirement that the time limit be reasonable prohibits "arbitrary limitation of voir dire." *See* Barrett v. State, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974).

59. *See* TEX. R. CIV. P. 226a.

60. *See* Dennis v. Hulse, 362 S.W.2d 308, 309 (Tex. 1962).

61. *See* A.J. Miller Trucking Co. v. Wood, 474 S.W.2d 763, 766 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); Johnson v. Reed, 464 S.W.2d 689, 691 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

62. *See* Redd v. State, 578 S.W.2d 129, 130 (Tex. Crim. App. 1979).

63. *See* Esquivel v. State, 595 S.W.2d 516, 525 (Tex. Crim. App.), ("deliberately" and "probability"), *cert. denied*, 449 U.S. 986 (1980); Battie v. State, 551 S.W.2d 401, 405 (Tex. Crim. App. 1977) ("criminal acts of violence"), *cert. denied*, 434 U.S. 1041 (1978).

64. *See* Densmore v. State, 519 S.W.2d 439, 440 (Tex. Crim. App. 1975) (questions regarding jurors' drinking habits restricted in D.W.I. trial); Rodriguez v. State, 641 S.W.2d 669, 674 (Tex. App.—Fort Worth 1982, pet. granted) (inquiry into jurors' drinking practices restricted in murder trial).

65. *See* Densmore v. State, 519 S.W.2d 439, 440 (Tex. Crim. App. 1975).

66. *See* TEX. CODE CRIM. PROC. ANN. art. 36.01 (Vernon 1981) (prior convictions used for enhancement only may not be presented to jury until punishment phase).

state attempts to enhance the conviction by proving a prior conviction, the "prosecutor may inform the jury panel of the range of punishment applicable . . . but it may not inform the jury of any of the specific allegations contained in the enhancement paragraph of a particular defendant's indictment."[67] Nor should a jury be informed of any applicable parole statutes during voir dire because parole is not considered part of any range of punishment, and a jury has no power over the minimum parole eligibility on any sentence.[68]

Also properly excluded from voir dire inquiry are questions regarding attitudes, bias, or prejudice which might exist with respect to psychiatric testimony.[69] This exclusion also restricts discussion of the possible consequences of a verdict of not guilty by reason of insanity, including possible civil commitment proceedings.[70]

The final and most widely applied limitation placed on the voir dire process is that which specifically limits unnecessarily repetitious questions.[71] This limitation does not restrict all repetitious questions and "defense counsel may not be precluded from the traditional voir dire examination because the questions asked are repetitious of those asked by the court and prosecutor."[72]

B. *Using Voir Dire Effectively*

The limits imposed on voir dire by the law, as discussed above, set the parameters of time and the area of inquiry. However, the creative attorney is limited only by his imagination in the way he will use the voir dire time allotted to him. The more information counsel obtains about a venireman, the better he is able to effectively and intelligently

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67. *See* Frausto v. State, 642 S.W.2d 506, 509 (Tex. Crim. App. 1982).

68. *See* King v. State, 631 S.W.2d 486, 490 (Tex. Crim. App.), *cert. denied,* 459 U.S. 928 (1982).

69. *See* Hughes v. State, 562 S.W.2d 857, 862 (Tex. Crim. App.), *cert. denied,* 439 U.S. 903 (1978).

70. *See* Ussery v. State, 651 S.W.2d 767, 772 (Tex. Crim. App. 1983) ("effect of civil commitment" not appropriate inquiry); Patterson v. State, 654 S.W.2d 825, 827 (Tex. App.—Dallas 1983, pet. ref'd) ("consequences of a not guilty by reason of insanity verdict is not a proper area of inquiry").

71. *See, e.g.,* McManus v. State, 591 S.W.2d 505, 520 (Tex. Crim. App. 1979) (reasonable to restrict questions which unnecessarily duplicate); Bodde v. State, 568 S.W.2d 344, 350 (Tex. Crim. App. 1978) ("Duplicitous questions may, within the court's discretion, be limited to curb the prolixity of what can become the lengthiest part of a criminal proceeding."), *cert. denied,* 440 U.S. 968 (1979); Leopard v. State, 634 S.W.2d 799, 801 (Tex. App.—Fort Worth 1982, no pet.) (within discretion of court to limit repetitious questions).

72. *See* Mathis v. State, 576 S.W.2d 835, 839 (Tex. Crim. App. 1979).

use his peremptory challenges. The importance of a skillful and systematic voir dire has been consistently verified by scientific research.[73]

Voir dire provides trial counsel with the opportunity to condition and reiterate his theory of the case to them.[74] Seasoned trial attorneys attempt to cover the important positive aspects of their case, as well as reveal and explain, or put in perspective, any damaging facts.[75] These lawyers understand the psychological dynamics of reduction of impact by first exposure, that is, that people tend to believe what they first hear about any given matter.[76]

Highly successful plaintiff's attorney Don Bowen, of Houston, describes his voir dire goal as follows:

> Many prospective jurors appear with a preconceived idea that the entire judicial system is a farce or crooked or both. The insurance companies have effectively advertised that plaintiffs and their attorneys hurt the overall economy by trying to get "something for nothing." The plaintiff's lawyer must overcome this bias, prejudice, hostility, and irritation by quickly convincing the prospective jurors that this case is legitimate, fair and clearly important enough to warrant the expenditure of the time by the jurors.[77]

First impressions of both client and advocate are lasting and most difficult to change. The appearance of competency and preparedness may be as important to the juror as actual competence and preparation. Counsel should talk with the prospective juror, rather than interrogate him. Asking non-threatening questions is an effective means of relaxing the juror. Many jurors complain that lawyers twist their words.[78] The attorney should be most careful in quoting a juror. Exact words should be used. It is recommended that trial counsel begin

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73. *See* Saks, *Social Scientists Can't Rig Juries,* PSYCHOLOGY TODAY, Jan. 1976, at 48, 50.

74. *See* 1 A. GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS §§ 8.17-.19 (2d ed. 1984).

75. *See id.* §§ 8.17, .18.

76. *See* Crawford, *Opening Statement for the Defense in Criminal Cases,* LITIGATION, Spring 1982, at 26, 26. The concept of primacy indicates that people tend to believe what they hear first about any given matter. *See id.* at 26.

77. Interview with Don Bowen, attorney, in Houston, Texas (Oct. 4, 1984) (following Mr. Bowen's successful $6 million judgment in a wrongful death case, Huebner v. Missouri Pac. Ry., No. 83-H-0157-C (Dist. Ct. No. 4 of Matagorda County, 130th Judicial Dist. of Texas, Dec. 28, 1983)).

78. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 10.01[3] (B. Bonora & E. Krauss 2d ed. 1983).

his questioning of the prospective juror at the counsel table which should be at least fifteen feet away from the prospective juror. When good rapport has been established, counsel may move closer, to within three to six feet of the jury box. This distance has been shown to be best to receive meaningful, personal information.[79]

An important principle in jury selection, in both civil and criminal trials, is to find out who the prospective jurors are and what they think about themselves. A basic rule of human behavior is that if one thinks negatively about himself, he is unlikely to think positively of the client.[80] Research indicates that a person's perception of his growing years affects his attitudes about life.[81] These developed attitudes are like a second skin and accompany the juror into the jury box. It is helpful to inquire about where a person grew up and note the emotional reaction to revealing this information. Care should be taken when asking about the school attended. A person's childhood home and school are psychological cue responses that can be analyzed to reveal much about a juror's basic feelings about himself.[82]

The Juror Information Card, which provides general background information about a juror, is used in some districts and supplies facts on which to base preliminary questions.[83] Trial counsel is entitled to a legible copy of the card, but should not rely exclusively upon the information contained on this card since it may be incomplete and, in some respects, inaccurate. Many times trial counsel learns through

79. *See* Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case,* LAW & CONTEMP. PROBS., Autumn 1980, at 116, 130.

80. *See* Sheerer, *An Analysis of the Relationship Between Acceptance of and Respect for Self and Acceptance of and Respect for Others in Ten Counseling Cases,* 13 J. CONSULT. PSYCHOLOGY 169, 175 (1949); Stock, *An Investigation into the Interrelations Between Self-Concept and Feelings Directed Toward Other Persons and Groups,* 13 J. CONSULT. PSYCHOLOGY 176, 180 (1949).

81. *See* Hirshberg & Gilliland, *Parent-Child Relationships In Attitude,* 37 J. ABNORMAL SOC. PSYCHOLOGY 125, 129 (1942).

82. In addition, facial expressions and body placement and movements can reveal an individual's true feelings. *See, e.g.,* R. BARON, D. BYRNE & W. GRIFFITT, SOCIAL PSYCHOLOGY 323 (1974) ("certain facial expressions . . . indicative of particular emotional states"); J. RASICOT, JURY SELECTION, BODY LANGUAGE AND THE VISUAL TRIAL 56 (1983) ("[b]ody language assessment is a visual polygraph test"); Suggs & Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire,* 20 ARIZ. L. REV. 629, 634-37 (1978) (cues include eye contact, facial expressions, posture, and movement of body and hands).

83. Many Texas counties mail a simple questionnaire with the jury summons that provides basic information about the juror, such as length of residence in the county, employment, spouse's employment, prior jury service, and number and gender of children. Some counties request additional details.

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questioning that a prospective juror holds two jobs, has had two families, and owns a second residence. These important facts may not be stated on the Juror Information Card. Trial attorneys may use this information to frame initial questions to the juror to put him at ease. For example, he may ask the juror to explain the specifics of his job responsibilities, wages, employment of his children, and spousal employment.

Whether the attorney is seeking money damages or a not guilty verdict, another important tenet in jury selection is to become familiar with the community from which the jurors are chosen. It is important that trial counsel know which sections of the town comprise ghetto or "silk stocking" areas. The best way to obtain this information is to place a pin on each prospective juror's home on a map and identify his neighborhood and the circumstances of his residence. It is important to determine whether the jurors live near each other or even in the same or similar economic section of town. Drive-by photographs of the prospective jurors' homes can produce useful data. They will reveal bumper stickers, burglar bars, neatly trimmed lawns, and other significant information that, if properly evaluated by the behavioral scientist, can be of great assistance to the trial attorney.

Observations should be made and noted of the jury panel in their unguarded moments prior to beginning of voir dire, during recesses, and at lunch periods. The observer should note who talks to whom, who reads and the nature of the reading material, who is friendly with whom, who is nervous, and similar behavior. All available information should be noted and evaluated by the jury consultant.

Sometimes it is effective to prepare a portion of the charge, which trial counsel knows the judge has given on other occasions, for use during voir dire. It is then possible, with leave of the court, to approach the prospective juror and hand him the charge to read. Decisions can be made concerning the juror's acceptance of the definition or other elements presented by the segment of the charge by noting his reactions and expressions. Open-ended questions which are designed to elicit verbal responses are the key to understanding the thought processes of a prospective juror.[84] Positively reinforcing

84. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 10.01[2] (B. Bonora & E. Krauss 2d ed. 1983); Baron & Blue, *Voir Dire in the Occupational Disease Case—Sorting Out Prospective Jurors,* TRIAL, April 1983, at 45, 45. For example, maintain good, direct eye contact and ask "How do you feel about serving on a jury where a

those veniremen who make self-disclosing statements which reveal their beliefs or fears can lead to others responding in a like manner.[85]

The foregoing techniques, when mastered, can be used to obtain information which will allow the attorney to apply the following general concepts:

Psychological research indicates a conviction-prone juror believes:
(a) society is too permissive toward sex,
(b) misfortunes are the result of laziness,
(c) alcoholics are moral degenerates,
(d) jurors often acquit out of pure sympathy,
(e) courts protect criminals too much, and
(f) the death penalty should be used in some circumstances.[86]

Similar studies reveal that an acquittal is more likely to be received from a juror who:
(a) is married to a liberal or to a less-educated spouse,
(b) would rather read than watch T.V.,
(c) has several children,
(d) has older siblings,
(e) has returned a "not guilty" verdict before,
(f) does not believe criminals are too protected by the courts,
(g) does not agree that jurors are too sympathetic toward criminals,
(h) does not like the victim,
(i) has had prior difficulties with the law, and
(j) does not believe the prosecutor is competent and well prepared.[87]

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person's liberty is at stake?" This type of question requires the juror to respond with more than a "yes" or "no" and can give real insight into the person's biases. As an example, consider the choice of words used by the prospective juror. Prospective Juror 1 responds, "Somebody has to do it," while Juror 2 responds, "It is a frightening task." A social scientist might observe that Juror 1 would be more likely to convict than Juror 2.

85. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 10.01[3] (B. Bonora & E. Krauss 2d ed. 1983). If a prospective juror responds in a revealing manner, such as "I dislike insurance companies," trial counsel should reinforce the candor by thanking the juror and praising him for his honesty. A reinforcer is defined as something, for example, a piece of food, that alters the probability of, or otherwise strengthens, the response that produces it. "Reinforcer" and "reward" have practically the same meaning. *See* P. SECORD & C. BACKMAN, SOCIAL PSYCHOLOGY 463-64 (2d ed. 1974). Successful trial attorney Gerry Spence's effective utilization of self-disclosure involved revealing his fear of the responsibility for deciding an individual's fate to the jurors, who responded with fears that they held. *See* G. SPENCE & A. POLK, GUNNING FOR JUSTICE 396 (1982).

86. Sannito & Arnolds, *Jury Study Results: The Factors at Work,* TRIAL DIPL. J., Spring 1982, at 6, 11.

87. *See id.* at 10, 11.

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While research has focused on juror characteristics in criminal trials, attempts have been made to describe the type of person who may be more inclined to award damages in certain civil cases.[88] Some of the same research techniques discussed above may be used to gather information on these cases.

While the type of juror selected is indeed important, the courtroom is a theatre that can be used to shape jurors' feelings. Like an actor who commands the attention of the audience by occupying center stage, the attorney who dominates the middle of the courtroom captures the attention of the jurors. Since "[t]rial work is a performing art. . . . [and] lawyers, like actors, use words, voice, and body to communicate thought and emotion," it has been said that:

> There are two principles in litigation. One: Litigation is conducted on a public stage in the presence of a sophisticated audience. You cannot fool the fans. They know quality or the absence of it when they see it. Two: Litigation is an emotional experience. It calls for identification with the client. I've never seen a good actor who did not identify with the character he impersonated. The same is true of the successful litigator.[89]

Most lawyers do not appreciate the power of the courtroom stage, and few know how to perform on it. Lawyers receive no formal training in the theatrical arts. Law schools are more concerned with well-written briefs than eloquent oral presentations. Lawyers should make the effort required to learn about the important forum presented by the courtroom stage and how to make effective use of it.

C. *Something More than Questioning a Prospective Juror*

Psychological concepts and systematic jury selection techniques which have been applied successfully in jury selection include the following:

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88. *See* Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck*, TRIAL, Sept. 1983, at 84, 85.

89. *See* Herman, *The Theatre of Summation: Acting, Directing and Play-writing for the Criminal Defense Lawyer*, FORUM, June-July-Aug. 1984, at 20, 20 (quoting Simon Hirsch Rafkind). New Orleans attorney Lawrence Smith states that

> [l]awyers think juries decide cases based on their great presentations. Judges think jurors decide cases on the wonderful instructions on the law that the judge has made. But actually, studies have shown that juries decide cases on how they feel about them, and the silent communication that goes on in the courtroom helps establish those feelings.

Reaves, *Feelings—Communicating with a jury*, A.B.A. J., Feb. 1984, at 37, 37.

1. Ranking scales[90]
2. Community attitudinal surveys[91]
3. Juror investigations
   a. Community network models[92]
   b. Drive-by photographs of potential jurors' homes[93]
4. In-court assessment of juror non-verbal communication[94]
   a. Juror observation
   b. Design of questions for voir dire to elicit maximum information from each individual
   c. Design of voir dire process as a maximum conditioning tool
5. In-court assessment or juror verbal communication[95]
6. Group dynamics analysis[96]
   a. Identification of forepersons and subgroups[97]
   b. Identification of cohesive versus fragmented juries[98]

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90. Address by Robert Gordon, attorney, Texas Criminal Defense Lawyers' Ass'n Seminar, in Dallas, Texas (May 19, 1978). A ranking scale is a technique by which scores are ordered according to a particular measure or scale.

91. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 11.02[3][b] (B. Bonora & E. Krauss 2d ed. 1983); Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck,* TRIAL, Sept. 1983, at 84, 84.

92. *See* NATIONAL JURY PROJECT, INC., JURYWORK—SYSTEMATIC TECHNIQUES § 9.03[1] (B. Bonora & E. Krauss 2d ed. 1983) (model based on demographic data and interview responses).

93. *See* Spada, *For Margaret Covington, The Best Defense is the Jury,* 46 TEX. B.J. 1164, 1164 (1983).

94. *See, e.g.,* Mackey, *Jury Selection: Developing the Third Eye,* TRIAL, Oct. 1980, at 22, 23 (plan observations ahead); Mitcham, *Psychotherapy Techniques in Voir Dire Selection,* TRIAL, Sept. 1980, at 52, 53 (juror posture, clothing, eye contact); Peskin, *Non-verbal communication in the courtroom,* TRIAL DIPL. J., Summer 1980, at 6, 6 ("[t]o fully understand the non-verbal message we are receiving we must understand the congruence of gestures"). *See generally* G. NIERENBERG & H. CALERO, HOW TO READ A PERSON LIKE A BOOK 1-170 (1971) (descriptions and explanations of various non-verbal behavior).

95. *See* Mitcham, *Psychotherapy Techniques in Voir Dire Selection,* TRIAL, Sept. 1980, at 52, 53.

96. *See* M. SHAW, GROUP DYNAMICS 12-14 (3d ed. 1981).

97. *See, e.g.,* Arnolds & Sannito, *Jury Study Results Part II: Making use of the findings,* TRIAL DIPL. J., Summer 1982, at 13, 15 ("typical foreperson is a college-educated, white male professional who earns about $35,000 a year and is politically middle-of-the-road"); Hastie, Penrod & Pennington, *What Goes on in a Jury Deliberation,* 69 A.B.A. J. 1848, 1849 (1983) (one quarter of jurors make over "half of the communications in deliberation"); Wasserman & Robinson, *Extra-Legal Influences, Group Processes, and Jury Decision-Making: A Psychological Perspective,* 12 N.C. CENT. L.J. 96, 114-22 (1980) ("group polarization phenomenon" indicates subgroups).

98. *See* M. SHAW, GROUP DYNAMICS 58-59, 213-26 (3d ed. 1981) (cohesive jurors tend to vote as a group or groups, whereas fragmented juries tend to vote individually or in splintered groups); Hastie, Penrod & Pennington, *What Goes on in a Jury Deliberation,* 69 A.B.A. J. 1849, 1852-53 (1983).

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7. Focus group[99]
8. Mock trial[100]
9. Shadow, gallery, or mirror jury[101]
   a. This procedure allows positive and negative feedback on a daily basis by monitoring the responses of a group of persons who are similar in demographics to the actual jury selected.
10. Final argument
    a. Setting the jury up for argument[102]
    b. Incorporation of shadow or mirror jury feedback and other information obtained through jury selection.

At the very least, counsel and client desire a neutral jury. At best, counsel seeks a jury based upon age, lifestyle, socio-economic status, sex, education, employment, and other factors, that is not negatively predisposed to counsel's character, cause, and client. This negative predisposition cannot be identified during voir dire alone.

Attitudes and behavior cannot be predicted based solely upon the potential juror's stated answer. Other techniques must be employed with the voir dire questioning to accurately predict how a person will respond to the facts of the case and what attitudes and beliefs he probably holds. Therefore, the pretrial research, the development of juror profiles, the formulation of questions, the utilization of a focus group or mock or mini trial, and the feedback from daily monitoring of a mirror jury are essential to maximize counsel's opportunity for a favorable verdict for his client. Selecting jurors who are not negatively inclined to the client and the client's position in the litigation

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99. Address by Don Keenan, attorney, National Lawyers Guild Southern Regional Conference, in Atlanta, Georgia (Oct. 12, 1984). For a discussion of focus group, see *infra* p. 595.

100. *See* Mulroy, *Getting an Edge With Mock Juries*, Nat'l L.J., Sept. 24, 1984, at 15, col. 1. For a discussion of mock trial, see *infra* p. 596.

101. *See* Vinson, *Shadow Juries: Monitoring Jurors' Reactions*, TRIAL, Sept. 1983, at 75, 75; address by David Best, attorney, Trial Techniques Conference, in Las Vegas, Nevada (May 5, 1984). The author has conducted shadow or mirror juries in several major cases. Mirror jurors consist of individuals, similar in characteristics to the actual jury, who are employed to observe the trial each day and report their observations and opinions. The mirror jurors are interviewed daily for their reactions to the courtroom evidence.

102. Properly conducted voir dire would include conditioning the jury to perceive the anticipated evidence in a given manner. For example, in personal injury litigation, films of the plaintiff swimming could be evaluated positively by the jury if they had been perceptually set to receive this film as evidence of the plaintiff's effort and courage to overcome a serious back operation, rather than as evidence of malingering. In addition, the final argument should "[b]egin by reminding the jury what you told them in your opening statement you would prove." *See* Cicero, *Nondefensive Final Argument for the Defense*, LITIGATION, Spring 1982, at 45, 46.

can be more nearly accomplished by these innovative methods, and counsel should utilize every available technique.

To obtain the best verdict or largest award possible for the client, a community attitudinal analysis is recommended.[103] The purpose of this analysis is to determine the characteristics of the person who, if not sympathetic to the client, at least is not antithetical. The community attitudinal analysis has the objective of determining the profile of the "ideal" juror. This profile can assist the trial team by verifying their choices of jurors. To formulate a profile of the "ideal" juror, a survey of the community from which the jury will be drawn is conducted. Potential subjects for the survey are selected at random.[104] Questions are carefully designed for use in a telephone interview of randomly selected members of the community. Interviewees are asked demographic and attitudinal questions. The responses are analyzed statistically to determine the profiles of those positively or negatively predisposed to the client and the issues.[105]

Useful information about prospective jurors may be obtained from property records, credit agencies, police accident reports, and the tax assessor's office. Additionally, a juror questionnaire should be developed for use on the day of trial.[106] With approval of the opponent and the court, this questionnaire can be submitted to the panel for comple-

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103. *See* Covington, *State-of-the-Art in Jury Selection Techniques: More Science Than Luck,* TRIAL, Sept. 1983, at 84, 84. In order to properly conduct a community attitudinal analysis, a jury selection expert is needed to assist the trial attorney in identifying the proper issues, facts, and attitudes to be surveyed, as well as to assess the meaning of the data obtained.

104. Researchers use random selection techniques to draw individual telephone numbers for the sample. The random sample is unbiased in that all individuals who are eligible respondents have an equal chance of being interviewed. Potential subjects for the sample may be selected by the generation of random numbers. *See* B. WINER, STATISTICAL PRINCIPLES IN EXPERIMENTAL DESIGN 5 (2d ed. 1971). The computer can be programmed so that the first digits of the random numbers are exchanges in the designated counties. Alternate statistical methods are available for sample selection from a current telephone directory for the area.

105. Complex statistical analyses are performed to derive the characteristics of those individuals who are favorable and those who are not favorable. *See, e.g.,* L. COOPER & D. STEINBERG, METHODS AND APPLICATIONS OF LINEAR PROGRAMMING §§ 12-1 to -7 (1974) ("parametric and post-optimal analysis"); C. GERALD & P. WHEATLEY, APPLIED NUMERICAL ANALYSIS § 6.5 (3d ed. 1984) ("eigenvalues of a matrix by iteration"); G. LEVINE & C. BURKE, MATHEMATICAL MODEL TECHNIQUES FOR LEARNING THEORIES 236-56 ("observable states and identifiable parameters").

106. In addition to biographical questions, other questions tailored to the case may be used. In a medical malpractice case, for example, the following questions would be appropriate: "Do you subscribe to or purchase any health magazines? Do you have a home remedy for an illness?"

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tion and, if properly prepared from the previous studies of the panel, a decided advantage can be gained.[107]

After the "ideal" juror profile has been formulated, it is possible to rank the juror on a scale for comparison to this "ideal" through the use of non-verbal communication, verbal communication, and demographic information about the juror. Multiple sources of information should be used since it is risky to use a single behavioral observation or response to eliminate a juror.

Part of good trial technique is to be aware of the sense of intimacy that is established between the panel and counsel and between the panel and opposing counsel. Manipulation of the jury panel by trial counsel is a dangerous tactic. Counsel should let the juror believe, however, that he is in control of the voir dire questioning.

There are five basic categories of questions which are used in effective voir dire examination: (a) analogy; for example, "How many jurors remember in grade school an incident when little Johnny was accused of something he did not do?" (b) educational; for example, "Total and permanent disability does not mean an inability to work, but rather one is so disabled he cannot get and keep employment doing the usual and customary tasks of a workman." (c) commitment; for example, "Is there any reason you could not award damages for personal injury to a passenger when the driver of the automobile was not injured in the same accident?" (d) correlational;[108] for example, "How many have written a letter to the editor of the newspaper?" (e) selectional;[109] for example, "How do you feel about insurance companies?"[110] In addition, the time it takes a juror to make a positive re-

107. Drive-by photographs, community network reports, and prospective juror background investigations have revealed specific information about identifiable jurors. The questionnaire, coupled with this information, pinpoints specific jurors to strike. The litigation team should consider how the above information supports or contradicts conclusions derived from the in-court behavior of the prospective juror.

108. Correlational questions are those which elicit information in one area that reveal characteristics in a related area. A "letter to the editor" writer is assertive, outspoken, and will probably be a leader on the jury. *Cf.* R. YOUNG & D. VELDMAN, INTRODUCTORY STATISTICS FOR THE BEHAVIORAL SCIENCES 413 (3d ed. 1977) ("[c]orrelation represents the relationship between two variables").

109. Selectional questions are those which elicit relevant and meaningful information from prospective jurors. Such questions are usually open-ended so that prospective jurors can reveal their feelings and biases. Their responses provide clues as to the attitudes and personalities of the prospective jurors and assist the attorney in "selecting" the appropriate jurors.

110. Address by Lisa Blue, attorney, Mississippi Trial Lawyers' Seminar, in Jackson, Mississippi (Apr. 27, 1984) (defining categories).

sponse to a question is an indication of his acceptance or rejection of the principle contained in the question. The longer the time, the less reliable is the response. Quick, positive responses indicate genuine, candid, and non-controlled answers.

Group dynamics of the twelve person jury are important in predicting how they will react to the evidence in the case.[111] Most attorneys conceptualize the jury as twelve citizens who, because of the their life experiences, education, and intelligence, will be inclined to view the case in a certain manner. However, the trial attorney must consider the group dynamics of the jury. The attorney has not selected twelve independent people; rather, two groups of six each, or three groups of four each, or any other combination. Each subgroup will have its leader and followers. The attorney should attempt to select a jury with the perfect balance of dominant, passive, and flexible personalities. Evaluation of each juror and how he will fit into the subgroups is necessary if the attorney is to be successful in predicting jury results.[112]

IV. Innovative Concepts

A. *Focus Group*

A focus group can be used to great advantage.[113] The group is composed of three to nine participants who, ideally, have similar characteristics to people likely to be chosen as jurors in a particular area and are employed as group members. The group is presented with important facts and issues of the case in an unbiased manner for discussion. The group discussion, which is conducted by the group leader, is monitored by the trial team via closed circuit television. No

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111. *See* M. Shaw, Group Dynamics 58-59 (3d ed. 1981) (research subjects acting as jurors evaluated truth of witness' testimony); Mackey, *Jury Selection: Developing the Third Eye,* Trial, Oct. 1980, at 22, 24 ("[g]roup dynamics of juries are little known and less articulated").

112. *See* Hastie, Penrod & Pennington, *What Goes on in a Jury Deliberation,* 69 A.B.A. J. 1848, 1850-51 (1983). The probability that individuals will speak decreases as the number of subgroups increases. Males, in general, speak more than females, and higher socio-economical status individuals speak more than lower socio-economical status jurors. *See id.* at 1850-51.

113. Address by Don Keenan, attorney, National Lawyers Guild Southern Regional Conference, in Atlanta, Georgia (Oct. 12, 1984). For example, the focus group may be utilized to evaluate how the jury can be expected to react to a plaintiff seeking recovery for a traumatic neurosis. The leader can generate discussion concerning the group's bias and prejudice against damages for an injury that exists predominately in a person's mind. The feedback can reveal that the evidence at trial should emphasize a physical effect, such as loss of brain matter.

witnesses are actually presented during the discussion. The basic issues are presented, evaluated, and discussed by the group. The leader determines the feelings, impressions, reactions, and opinions of the participants.[114] These discussions may be several hours or days depending upon the complexity of the issues and the feedback. This procedure can be repeated with different groups to ensure accurate and consistent results.

The focus group is less expensive than a mock trial or mirror jury. It provides pointed feedback to specific issues. However, the focus group is not as reliable as the mock trial or mirror jury because the issues are not presented in a trial-like or trial atmosphere. The focus group has the advantage of being guided to deal with specific facts; whereas, the mock jury may select those facts which they consider important.

B. *Mock or Mini Trial*

A more elaborate method of testing the acceptance of the case by a jury is by using a mock or mini trial.[115] This procedure involves simulation of an actual trial, complete with witnesses and evidence. Using a courtroom created within a studio, the case can be presented to a mock jury that has been carefully selected. Twelve people who are representative of the type of persons who are likely to appear on a jury in the area of trial are employed as simulated jurors.[116] The case is presented to this mock jury in a simplified fashion. The attorney may voir dire the mock jury panel. Typically, attorneys decide not to voir dire the panel and devote the time to opening statements, questioning witnesses for each party, and closing arguments. The case is abbreviated and reduced to three or four critical witnesses and issues. These witnesses are placed before the mock jury and their testimony is elicited. The attorney who will try the case presents the direct examina-

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114. The group leader is the jury and trial consultant who, through training and experience, can identify the issues and generate discussion about those issues which can provide meaningful feedback. Leading a focus group effectively is an art. The behavior of the focus group leader is purposeful and goal-directed. The leader's responses are intended to have various impacts on group members. *See generally* S. DELANEY & D. EISENBERG, THE COUNSELING PROCESS 145 (2d ed. 1977) (general overview of leading a group).

115. *See* Mulroy, *Getting an Edge With Mock Juries,* Nat'l L.J., Sept. 24, 1984, at 15, col. 1.

116. Mock jurors are screened by the consultants and selected for characteristics which most nearly match characteristics of probable jurors in the trial county. For example, if the case is to be tried in a rural county, mock jurors who have a rural background are selected.

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tion. The cross-examination is conducted by an associate, acting as the opposing attorney. Photographs, charts, or other demonstrative evidence can be introduced. An abbreviated version of the charge is presented, together with condensed arguments for both sides. The jury is then allowed to deliberate and actually answer issues, including assessing the damages in a civil action. The entire proceeding, including the deliberations of the jury, is videotaped. The tapes of the mock jury are transcribed and categorized for important points and issues.[117] Even experienced lawyers, who believe they instinctively know which theories will work best with the jury, are surprised as they watch the videotape of this jury working its way through the evidence to a verdict. An attorney noted that "[b]ecause practice and rehearsal comprise a large part of trial preparation, it makes sense to practice the impact of a potential trial strategy on a mock jury."[118] The trial team can observe the reactions of this simulated jury to the issues and theories presented in the case. This procedure is probably most valuable in helping the experienced trial lawyer accurately evaluate the jury's acceptance of the witnesses' testimony and demeanor. The technique is invaluable for preparation and testing of a trial strategy. Discussing the mock jury's impressions, opinions, and reactions after the verdict produces a better understanding of the case and its potential impact on the actual jury.

During jury selection for the actual trial and throughout the trial, reference should be made to information gained from the mock trial for guidance in the presentation of the case. The profile of the "ideal" juror can be influenced by the facts learned from the test jurors. During voir dire a potential juror's attitudes and opinions may be compared with those of the mock jury and, thereby, a more predictable verdict is possible. The strengths and weaknesses of the case may be more accurately evaluated.

The information obtained also may be used in settlement negotiations. A brochure which contains a videotape of selected parts of the mock jury's deliberations, including the damages awarded, can be a powerful tool for settlement. The mock jury techniques allow for a

117. For example, the feedback during the mock trial might focus on a visual aid or chart which presented a comprehension problem for the mock jury. Analysis of mock trial feedback can provide suggestions for alternative ways to present the evidence or information on the chart prior to the actual trial.

118. Mulroy, *Getting an Edge With Mock Juries,* Nat'l L.J., Sept. 24, 1984, at 15, col. 2.

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St. Mary's Law Journal, Vol. 16 [1984], No. 3, Art. 4

determination of the probable outcome of a case and can give insight into the reason for such a result.

C. *"Mirror" Jury*

Startling accuracy has been obtained by the use of a simulated jury during the actual trial. The simulated jury also has been designated a "mirror" or "shadow" jury.[119] A group of six to twelve people is selected which matches the demographic characteristics and background of the actual jury panel as closely as possible. This "mirror" jury is employed to attend the trial on a daily basis, leaving the courtroom when the actual jury does and, therefore, hearing and seeing only the evidence presented to the actual jury.[120] The "mirror" jury deliberates each evening, and the information, both positive and negative, is analyzed and interpreted by the trial consultant for use by the trial attorney. This method has the advantage of permitting the trial attorneys to have objective and unbiased feedback as to the status of the case on a daily basis at a time when the attorney still has the opportunity to correct misimpressions, or to clarify an important point by calling additional witnesses or presenting other evidence. There is no substitute for the information obtained from this "mirror" jury which attends the real trial on a daily basis. One commentator has noted that "[t]he shadow becomes an on-the-spot lay adviser for the trial lawyer."[121]

V. CONCLUSION

Only ten percent of cases filed will be presented to a jury. These cases are generally close questions as to guilt, liability, or damages. The trial lawyer who takes advantage of the available techniques, including community attitudinal survey, in-depth voir dire preparation, focus group, mock or mini trial, and shadow or mirror jury, will have the edge and generally will be more successful. In the cases where such systematic jury selections have been utilized, the results have been consistently favorable.[122]

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119. *See* Vinson, *Shadow Juries: Monitoring Jurors' Reactions,* TRIAL, Sept. 1983, at 75, 75; address by David Best, Trial Techniques Conference, in Las Vegas, Nevada (May 5, 1984).

120. The cost of the mirror jury is a function of the case, location, and number of mirror jurors employed.

121. Mulroy, *Getting an Edge With Mock Juries,* Nat'l L.J., Sept. 24, 1984, at 16, col. 1.

122. *See, e.g.,* United States v. DeLorean, No. CR82-910-1 (C.D. Cal. July 12, 1984) (not

A fitting summary for this article might be the sentiment expressed by trial lawyer Aubrey Roberts, who said: "Since the life, liberty, or property of a client will rest in the hands of an ordinary human being, the more one can learn about him and how he functions, the better job can be done for the client."[123]

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guilty); United States v. Mitchell, No. 73CR439 (S.D.N.Y. Apr. 28, 1974) (not guilty); State v. Davis, No. 16,838 (Crim. Dist. Ct. No. 4 of Tarrant County, Texas, Nov. 9, 1979) (not guilty).

123. Interview with Aubrey Roberts, attorney (Mar. 27, 1984) (interview regarding use of systematic jury selection techniques).