I believe that voir dire matters. It matters because this is the first time the “judges” of the fact will hear from you. While you are making notes about the prospective jurors they are evaluating you as well. They are getting an idea about what kind of person you are. Are you “business like” and to the point or are you wasting their time and overly impressed with yourself. Are you serious about your work and your case and are in interested in your client’s case? Are you concerned about their privacy and cognizant of the jurors sacrifices in serving. As the Supreme Court has written in *Gonzales v. U.S.*, 553 U.S. 242 (2008):

Under Rule 24 of the Federal Rules of Criminal Procedure, the presiding judge has significant discretion over the structure of voir dire. The judge may ask question of the jury pool or, as in this case allow the attorneys for the parties to do so. Fed. Rule Crim. Proc.

24 (a); App. 20. A magistrate judge’s or a district judge’s particular approach to *voir dire* both in substance

– the questions asked-and in tone – formal or informal – may be relevant in light of the attorney’s own approach. The attorney may decide whether to accept the magistrate judge based in part on these factors. As with other tactical decisions, requiring personal, on the record approval from the client could necessitate a lengthy explanation the client might not understand at the moment and that might distract from more pressing matters as the attorney seeks to prepare the best defense.

The *Gonzales* Court concluded there was no error in having the lawyer consent to

the voir dire proceeding being conducted a the United States magistrate judge.

Rule 24 of the Federal Rules of Criminal Procedure is entitled “Trial Jurors” and provides as follows:

1. Examination.
2. In General. The court may examine prospective jurors or may permit the attorneys for the parties to do so.
3. Court Examination. If the court examines the jurors, it must permit the attorneys for the parties to:
4. ask further questions that the court considers proper; or
5. submit further questions that the court may ask if it considers them proper.
6. Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.
   1. Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.
   2. Other Felony Case. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.
   3. Misdemeanor Case. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.
7. Alternate Jurors.
8. In General. The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.
9. Procedure.
10. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.
11. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.
12. Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.
13. Peremptory Challenges. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.
    1. One or Two Alternates. One additional peremptory challenge is permitted when one or two alternates are impaneled.
    2. Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternates are impaneled.
    3. Five or Six Alternates. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

As noted above jury selection and voir dire procedure are matters that lie in the “sound discretion” of the trial court. Many times in attempting to define “discretion” we destroy its meaning. However, I like to believe that two very old cases from the Supreme Court help with the contours of the term. *The Stryria v.*

*Morgan*, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027 (1962) (internal quotations omitted) (emphasis in original). “[Discretion] takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result.” *Burns v. United States*, 287 U.S. 216,223, 53 S.Ct. 154, 77 L.Ed. 266 (1932) (Internal Quotations Omitted).

Why is a lawyer asking questions as contemplated by Federal Rule of Criminal Procedure 24(a) (2) (A) more effective and important for a party than merely submitting written question to the presiding judge as the Rule sets out in subsection (a) (2) (B) which permits but does not require that the judge ask prospective jurors questions prepared by defense counsel? The fact is that the lawyers who have worked with the case much longer than any judge and, therefore, have superior knowledge of the facts of the case and of the law that is probably applicable to the case. As the late great Judge Richard S. Arnold of the Eighth Circuit has written in *United States v. Samuels*: “Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.” *See United States v. Samuels*, 808 F2d 1298, 1300 (8th Cir. 1987). The lawyers may bring to their voir dire examination their previous involvement with the case and they may know of pertinent areas of

inquiry of which the Judge is unaware. These areas should be pointed out to the Judge, perhaps in prospective questions that the parties wish the Judge to ask during his or her own voir dire. However in my view that submission cannot replace the examination of the panel by defense counsel. Some research has established that prospective jurors tend to respond more openly and frankly to questions asked by the lawyers for the parties than the presiding judicial officer.

As noted in the Rule governing Trial Jurors, while Rule 24 provides that the judge must either afford counsel the opportunity to submit questions to the judge prior to jury selection or permit counsel to do his or her own voir dire, the rule nonetheless provides in 24 (a) (2) (A) that the court will permit the lawyer to ask questions “that the court considers proper.” Herein lies the dilemma for defense counsel. Making a record as to why examination by counsel is a necessary part of effective assistance of counsel guarantee contained in the 6th amendment will be an important part of preserving the record for possible appellate review. As a practical matter this requires telling the presiding judge both in writing and orally why it is that defendant needs further examination to determine cause and peremptory challenges. It is not sufficient for counsel just to make a pro forma request, but rather specific case related reasons should be given. Whether it be to explore expert witnesses opinions of the jurors or to establish that race is not an

issue for the prospective jurors, demonstrating why the lawyer needs to engage in his/her own voir dire to effectively represent their client needs to be put on the record for error preservation purposes.

I believe the best method of conducting voir dire is for the Court to begin by explaining to the panel the Court’s role and the Juror’s role in the proceedings which are about to follow. Before being summoned the prospective venire persons have completed a “Juror Questionnaire.” It is obviously necessary as well as helpful to the Court and the lawyers to have reviewed these questions and answers before beginning the voir dire process. My experience has been that this is time well spent for a number of reasons. The questionnaires will be the source of much initial information about the panel and will provide the background necessary to ask further questions of the panel or individual jurors.

Understanding that most of the panel will be unfamiliar with voir dire and the trial process itself and that this will be the first time they meet you and your client. I have included at the end of these materials the form that jurors fill out in my district and that is provided to counsel before trial. I always make mention to the jurors that we will not ask any questions regarding previously asked questions. In this way, I tell them, we will show you that we appreciate the considerable time that it takes to fill out the answers on the questionnaire. I believe that shows the

Court and the Lawyers respect for the work of the panel that has been assembled.

As part of my preparation for trial I always review the juror questionnaire answers before the panel comes into the Courtroom. With the advent of problems that have arisen with “new technology” entering the lawyer and juror world the Committee on Model Jury Instructions of the Eighth Circuit has suggested that the Court instruct the entire venire about technology concerns before anything else. I have enclosed that proposed instruction at the end of these materials.

I have found the easiest way to start a voir dire examination, after a “general discussion,” is to particularize the questions and try to have them to demonstrate what individual and juror attitudes are in their responses to questions. By general discussion, I believe it important to try and make the potential jurors “stakeholders” in our system of justice. Their role as fact finders will only be enhanced by the idea that they are playing a vital role in advancing the rule of law by their participation as jurors. By informing them at the outset of the voir dire examination that we value their service and want their input into how to improve our system, I believe they will be much more likely to render valuable service in the case they are selected to serve on. I believe it important for lawyers and judges to understand that almost all of the people called are nervous, anxious and reluctant to serve. After all, the jury service summons is taking them out of

their personal and work lives. This service is really the only form of conscription left in the United States. Additionally, for those who have never previously been called they are frankly worried about their privacy and have many misconceptions about jury service and about the law and lawyers. It is the job of the judge and the lawyers to eliminate, to the extent possible, the reluctance on the part of the jurors to serve. Using this time to develop as much information about the panel within the time permitted is vital to effective use of peremptory and cause strikes.

Sometimes written questions to the trial judge may be more helpful to defendant than examination by defense counsel. Often times defense counsel has asked that I examine the entire panel with respect to diversity problems which involve attitudes on race gender and other important characteristics of a defendant. With that said, I have heard many complaints about the limitations placed on voir dire examination in the federal courts. Generally these complaints revolve around prohibited discussions about disputed factual or legal contentions of the parties.

It is my belief that lawyers who attempt to “try” their case during voir dire confuse the voir dire phase of the trial with the evidence presentation part of the trial.

Attempting to prove your claims or defenses during the voir dire process is not effective as well as being contrary to obtaining a fair and impartial jury.

Judges realize that while the court wants a “fair and impartial jury” they also

realize that the parties want a “partial jury.” A jury that looks favorably on their side of the case. These different objectives may result in counsel pursuing, or wanting to pursue, a line of inquiry that the court will find objectionable. A best practice to follow is that if you are unsure as to the appropriateness of a line of inquiry ask the court before voir dire begins whether or not your inquiry will be permitted. This is much better than having opposing counsel object in front of the panel and having the judge rule the inquiry will not be allowed.

Additionally, in most cases there will be important areas that you will want to know the juror attitudes about and yet be afraid of offending the potential juror. In this instance it is always better to inform the judge and to let the judge ask the difficult or uncomfortable questions. In this way you will avoid offending any of the prospective jurors. Examples of this would be previous experience with the judicial system of the juror. Many people have had bad experiences with police, with lawyers, with past employers and with others depending upon the particular facts of the case. Tell the judge this and let him/her ask those sensitive questions.

A technique that I use during voir dire is to first discuss previous jury service with the prospective jurors. The questionnaire has already provided the information needed to begin a discussion with the juror regarding his/her previous service. I usually expand the questionnaire information by asking if any spouses

or significant others have previously served as well. The impact of prior jury service has been noted by lawyers, judges and social scientists in the past. As a review of juror comments that I have received after trial indicates jury service has a profound impact on most individuals and they will usually come to court with praise for their past experiences as well as firm opinions about the duty to serve. I have found that the best way to impress others with a sense of duty is to begin individual voir dire by discussing their past service on the jury. A National Law

Journal/Decision Quest Juror Outlook Survey confirms my anecdotal experiences. For instance, if a lawyer picks a juror who has served, the person is likely to be less prejudiced, less skeptical about the jury system and are more willing to be fair than those who have not served. For example, only 31% of those responding to the survey and who had served on juries agreed that when a defendant in a criminal case does not testify, the defendant “probably has something to hide.”

Of the survey participants who had not previously served, 41% agreed that a defendant who does not testify has something to hide. According to this survey former jurors are more likely to give police a fair trial as well. Only 15% said that in light of recent news of police brutality and racial profiling they would be less likely to believe the testimony of a police officer. 25% of those who had not served said they would be less likely to believe the police. These findings are

consistent with comments that I receive from jurors after their service. While not all former jurors express satisfaction with their service, I have found that the overwhelming majority are genuinely pleased that they served and find our system a fair one.

The “education process” of voir dire obviously is helpful but cannot replace having had previous experience. I also believe it is helpful to inquire of those who have previously served, about the kinds of actions on which they were jurors. It is especially so because it allows the Court to discuss differences in burden of proof in civil versus criminal cases as well as explain the jurors role. If your questionnaire does not ask what kind of cases the juror has previously served on, inquiry should be made as to whether the case or cases were civil or criminal. I then ask whether or not the juror was the foreperson of the previous panel and what the verdict in the case was. This helps me by indicating who is likely to be capable of leadership within the jury room, or who has been “looked up to” in the past by their peers.

Other empirical evidence tends to indicate that rather than juror demographics (class, religion, ethnicity, race, gender, education), what really matters is the jurors’ personal beliefs and attitudes. In a study published by the University of Houston, Roy Lachman, a psychology professor, concluded:

“much to my surprise, demographics are not very important.” His wife, an employment lawyer comments: “everything you can get with demographics, you can get better with the right attitude questions.” The attitudinal questions also avoid the problems that demographic questions raise when it comes to *Batson* or *Edmonson* problems.

The National Law Journal/Decision Quest Juror Outlook survey published a number of years ago mentioned some of the personal qualities that jurors do not like regarding lawyers. The Law Journal Article is entitled “Dare to be Dull.” The observations of the survey were very consistent with my anecdotal experience in the voir dire process. For instance, the survey noted that while 3% of those polled indicated they would react favorably to a lawyer who made a few jokes, 38% percent said they would prefer a “no-nonsense” approach. I try to find out juror attitudes since the questionnaire will have answered some of the demographic questions. A lawyer’s personal appearance, the enthusiasm shown for the case and other intangibles cannot be conveyed by the Judge. The lawyer, of course, has his/her first opportunity to do this in voir dire.

A recent American Judicature Society study alluded to a continuing problem that lawyers, judges and litigants face with respect to voir dire. In an article entitled “Jurors’ Views of Voir Dire Questions,” the study revealed that the

primary concern of jurors’ regarding their privacy involved three areas: 1) previous involvement with courts or crime; 2) juror and family demographic questions; and, 3) questions regarding their interests and associations. With respect to this survey it is again important to note that most of the questions that concern juror privacy can be resolved by reading the answers contained on the juror questionnaires and then asking for “in camera” examination for questions that are not answered on the questionnaire.

Some obvious matters are often overlooked by both judges and lawyers when it comes to voir dire. Often, lawyers patronize jurors by attempting to “explain” their case or “explain” the law to the venire during voir dire. This can be perceived as “talking down” to the jurors and can be resented by them because they feel the lawyer thinks they are not smart enough to understand. Be careful when “explaining” your case that your credibility is not damaged.

If the record will be rather straight forward and is one that does not require complex or scientific testimony tell the jury that. On the other hand, if many experts will be called by the parties tell them the purpose of experts is to attempt to be helpful in trying to decide what the facts are in the case.

As can be seen from the juror comments, do not waste the jurors time or be overly argumentative. Jurors generally come to the courthouse anxious and

nervous and not really enthused about their potential service. If they are convinced that the lawyers are wasting their time they will resent the party or lawyer who does that. Resist the temptation to contest every possible legal or factual matter that could be disputed and focus on the factual and legal matters that genuinely hurt your clients case. If a lawyer shows respect for all participants in the case including clerks, bailiffs, witnesses, parties and yes even opposing counsel that attitude will carry over to the jurors and your credibility will be enhanced.

I listed below are some voir dire questions that I have used in criminal and civil cases. Hopefully they tell the lawyers, litigants and the Court something about the jurors’ that we don’t already know. These are by way of example only. I particularize the questions, of course, depending on the submitted questions of counsel and based upon my own view of the facts and the law of the case that is being tried.

Do you have a belief that there are “too many” lawsuits filed?

Do you believe that it is “too easy” to file a lawsuit regarding race, gender, disability or age discrimination?

Have you seen instances of governmental or corporate wrongdoing that has gone unremedied?

Do you believe that civil law claims are an important part of “law and order?” Do you believe government is wrong when it pursues “affirmative action” in attempt to eliminate past discrimination?

Do you believe that businesses’ are “over-regulated?”

Do you think the government is capable of making a mistake?

How many of you trust all the decisions of local, state and federal government officials?

Has any member of the jury panel ever written a letter to the editor? What was the subject matter of the letter?

Have you or any members of your family ever called a talk radio show? What was the subject of the call?

Do you now, or have you in the past, displayed bumper stickers on your vehicles?

# Making the Record Regarding Voir Dire Procedure

It is necessary to make an adequate record when alleging trial court error during the voir dire procedure. In a recent case, involving medical malpractice claims, the Court of Appeals for the Eighth Circuit reviewed the standard with

respect to voir dire and error preservation. In *Smith v. Tenet Healthsystem SL, Inc*. 436 F. 3d 879, 884 (8th Cir. 2006) the court wrote:

Smith argues that the district court abused its discretion in disallowing certain of his questions during voir dire because this limitation prevented an inquiry into potential juror biases regarding tort reform, medical malpractice and plaintiffs with preexisting medical conditions. Because Smith contemporaneously failed to object to the way in which voir dire was conducted and did not request permission to rephrase his questions, we review this issue for plain error to determine if the limitation was so prejudicial as to cause a miscarriage of justice.” *Ratliff v. Schiber Truck., Inc*., 150 F. 3d 949, 956 (8th Cir. 1998).

Given the questions asked of the potential jurors by the district court and Smith’s attorney we find no error. District courts have broad discretion to determine the scope of voir dire. *Id*. at 956. Voir dire is proper provided that there is an adequate inquiry to determine any juror bias or prejudice. *See Nanninga v. Three Rivers Elec. Coop.*, 236 F.3d 902, 906-07 (8th Cir. 2000). In this case, the district court questioned the prospective jurors about experiences involving medical malpractice. The court also gave each party twenty minutes to supplement the court’s examination. *See* Fed.R.Civ.P. 47 (a) (explaining that when the court examines prospective jurors, “the court shall permit the parties or their attorneys to supplement the examination by such further inquiry *as it deems proper*”) (emphasis added).

Prior to voir dire, the parties submitted proposed questions in writing. The district court disallowed certain of Smith’s questions because they called for lengthy responses from individual jurors. However, during Smith’s supplementary examination, Smith’s counsel was permitted to ask questions to individual potential jurors. [*footnote*: For example, Smith submitted the question: “Some people think that lawsuits are

frivolous-what are your thoughts?”]. However, during Smith’s supplementary examination, Smith’s counsel asked about tort reform and medical malpractice despite the district court’s instruction before voir dire that Smith’s counsel was not to ask those questions. Voir dire provided an adequate inquiry to determine any juror bias or prejudice.

# SOME SUGGESTIONS FOR EFFECTIVE VOIR DIRE

1. Don’t waste your time by asking pointless questions that will not produce any further information about the panel.

* This could be either repeating questions that have already been asked and answered on the juror questionnaire or just asking obvious or pointless questions ( a good example of a pointless question: questioning a prospective jury regarding a car accident and the attorney begins his voir dire by asking "who here has a car?")
* I think this is important not only because you don't want to waste the jury and the court's time, but also because it is your very first chance to interact with the jury. By asking pointless questions, you look disorganized, unprepared, or just plain incompetent. Either way, you undermine your credibility.

- Every case has or should have a “theme” Ask creative thought provoking questions that will fit in or suggest your theory of the case.

* In my opinion, the stock questions that are often asked (i.e., "can you find the Defendant not guilty if the Government doesn't prove each and every element of the crime?" or "would you give a law enforcement officer's testimony more credibility than any other witness?") serve two important purposes. They emphasize to the panel what they shouldn't do (i.e., give extra credence to a police officer's testimony), and they help to identify the individuals who simply do not want to serve on a jury (who are likely to say that they can't do whatever is asked of them just so they can get off the jury).

-However often times these questions do not tell you much about the panel members. Most people, simply because they do not want to unduly prolong the process, will figure out what the

“right” answer is, and then give it. This will tell you that the juror is not stupid, but little else.

1. Given the formal and artificial environment during jury selection, I think the best way to get people to really open up and share their actual views on a topic is to give them a “safer” proxy topic to discuss.

* I often ask---"Do you post on any blogs", or "have you ever written a letter to the editor"— can serve as just such a proxy. It provides insight into what a juror’s potential opinions are without directly putting them on the spot.

-Other creative questions I have heard: "Do you think marijuana should be legalized?"; “What might be some of the positive effects of legalizing drugs?” "Who here watches CSI?"

* In general, I think questions that about peoples pastimes, the TV shows they watch, etc., provide more insight into their thoughts or beliefs than direct questions about the subject of the trial do

1. Call on individual jurors.

-When attorneys ask questions to the panel generally, they seem to get very few, if any, real answers.

* It seems much more effective when attorneys simply call on individual jurors first to ask a question, and then follow up with the group if necessary. A good example of this is when the a defense lawyer explained to the jury panel that he was going to call on individual jurors because he thought he got better answers, and then did just that. It seemed as if he was careful to try to question a variety of people, so that he didn't "pick" on one or two jurors. While I think the jury was tense at first, after they got over the initial fear, they seemed to open up and provide better and more in depth answers than any other juries I have observed.

1. Use this time to "prime" the jury.

Perhaps a duplication of giving the jurors a “theme” and while it doesn't really have anything to do with the actual purpose of voir dire, but I think good lawyers ask questions to the panel in such a way as to plant ideas or thoughts in the jury's mind.

* The most straight forward example of this is, which seems to be done in nearly every trial, is the Defense attorney asking: "Do you understand that you must find the Defendant not guilty if the Government fails to meet their burden of proof on every element?" or the prosecutor asking "Can you find the Defendant guilty if the Gov. proves each element beyond a reasonable doubt?"
* But I have observed better, or more sophisticated examples. An example comes to mind. During voir dire defense counsel asked the jury panel if any of them were afraid of firearms, and then following that question up by asking: "So you wouldn't be afraid if the Government brings a gun into the Courtroom and shows it to you?" He was obviously planting a seed that the Government would be producing the firearm, when he already knew that they would not be (as it had been destroyed) . I think that, as long as this is done in a subtle manner, and doesn't cause any significant delay in the voir dire, it is something that could provide a tactical advantage to a defendant. It enhances your credibility which is what being a good trial lawyer is all about.

**EXERCISING PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE**

Find out before voir dire begins how you are to properly not only make your record regarding the procedure that the court employs but also how the judge wishes you to exercise your “for cause” strikes (excused for no reason) and when and how to challenge a juror based upon the juror’s either written responses to the questionnaire or based upon the responses the juror has made during the examination in court. Even though strangers at the outset of their service many

jurors become friends and will not take kindly to a lawyer saying in front of the rest of the panel, “I challenge juror x because she has testified she would favor a police officer’s testimony over that of a non-police officer. Make your objections known at sidebar if you cannot do it adequately during a recess. Also Batson challenges can be problematic so when making an objection to the prosecution striking a juror for a prohibited reason (race, age, gender etc) be certain that the prosecution is unable to articulate a legitimate non-discriminatory reason for their strike.