

# Some Practical Tips for Jury Selection

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**P**reparing for jury selection begins before you file your *Complaint or Answer*. The Strategies you develop for jury selection impact every aspect of your case and step of the trial. Your use of those strategies doesn't stop until the jury's verdict is accepted by the Court.



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## *Where Do Juries Come From?*

The method of identifying and summoning jurors for civil trials is set forth in Chapter 9 of the North Carolina General Statutes. Provisions regarding jurors in the United States District Courts are found at 28 U.S.C. §§ 1861-1876. With a bare-bones understanding of the statutory process for selecting prospective jurors, an attorney will correctly conclude that the process collects individuals who are registered voters, holders of valid drivers' licenses, property holders, and those with telephones, but may exclude a portion of the population which does not fit any of those categories. No person is to be excluded from jury service on account of sex, race, color, religion, or national origin. There is a long case history of challenges to jury selection systems which tended to exclude jurors based on sex, race, color, religion, or national origin. As a result of such court challenges and scrutiny, the processes for creation of jury lists have been modified to the point that systematic discriminatory exclusion of jurors from jury lists has been eliminated.

## *Preparing for Jury Selection*

Effective interaction with prospective jurors in the box is important, but such "effectiveness" is largely the result of forethought, preparation, and hard work. How much you put into a given case depends on the time, personnel, and financial resources available.

**The Jury List.** The jury list for the session of court where the case is scheduled for trial is available from the Clerk of Court shortly after the list is created for each session, and may be updated by the Clerk as the Sheriff reports return of service of jury summonses and as disqualified, excused, or deferred persons are eliminated. In federal court, the list is available as soon as it is prepared for that term of court to

counsel in the Western and Eastern Districts of North Carolina, and on the first day of the term in the Middle District. The list of prospective jurors should be reviewed by the attorney handling the case, other members of the law firm, employees of the law firm, the individual client and the client's spouse, adult children and/or parents and appropriate officers or management personnel of corporate clients to ascertain knowledge of and reactions to individuals on the list of prospective jurors. When your client is a municipality or company that does a lot of business in the community, check to see whether any prospective jurors have billing or other disputes in their business dealings with your client. It is naive to assume that a juror would volunteer such potentially embarrassing information in open court during jury selection. Depending on the time and resources available, individuals listed can be researched via court records, internet search engines, social networking sites, public record databases, etc., to glean information about potential jurors that may be pertinent to jury selection in your case.

**A Map.** A valuable technique in many cases is to obtain a good road map of the county or multi-county district where jurors have been summoned, and locate the residence of each prospective juror on that map. For example, if your case involves a motor vehicle accident, did the accident happen near or distant from a particular juror's residence or place of employment? Where does each prospective juror live in relationship to the parties? Where is the prospective juror's place of employment relative to the client's business or employment of the parties?

**The Drive-By.** A paralegal or other assistant can drive past the residence of each prospective juror and make simple, salient observations regarding each juror's residence. A prospective juror with a carefully-fenced yard full of children's toys may not be a juror you want deciding the dog-bite case against your client, whose pit bull terriers wandered the neighborhood. Likewise, you can make certain assumptions about a prospective juror whose tractor trailer rig is parked along side a mobile home in a rural community as distinguished from a juror who lives in an urban town home with restrictions prohibiting pets, children, and the parking of tractor trailers. NOTE: Juror contact by attorneys, parties, witnesses or their agents is specifically prohibited by local rules in all three North Carolina federal districts, and by Rule 7.8(a) of the Rules of Professional Conduct.

### *Identify Biases, Prejudices, Attitudes, and Values that May Impact Your Case*

The outcomes of similar cases, with similar facts, vary tremendously depending largely on the demographic makeup of the jury pool, the makeup of individual juries, the individual litigants and attorneys, and the influence of the presiding judge. You must consider the interaction of these factors throughout the litigation process, as the ultimate outcome may depend upon the secret deliberations of a group of strangers. It is probably a good idea to run the case, or different components of it, past some strangers before you get to trial. "Focus groups" can be folks waiting with you in the waiting area at Jiffy Lube or they can be dozens of folks specifically recruited and paid as mock jurors in a full-blown mock trial, and everything in between. The point is the same: What about your case is going to hit a nerve?

### *Understanding the Method Used for Examination of Prospective Jurors*

It is essential to have an understanding of the method that will be used for jury selection and what techniques will be allowed. N.C. Gen. Stat. § 9-15(a) provides that "the court and any party to an action or his counsel of record shall be allowed, in selecting the jury, to make *direct oral inquiry* of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person . . ." (Emphasis added.) Yet, the courts have ruled that a motion to examine jurors individually, rather than collectively, is directed to the sound discretion of the trial court, *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978), and that the actual questioning of the prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel, in the discretion of the court. *State v. Dawson*, 281 N.C. 645, 190 S.E.2d 196 (1972). There is no specific provision for jury questionnaires in Chapter 9 of the General Statutes or in the Rules of Civil Procedure and their use will be dictated by the discretion of the trial judge.

Rule 47 of the Federal Rules of Civil Procedure provides that jurors may be questioned by the court or parties/counsel in the discretion of the court, and such questioning may be supplemented by questions from the parties/counsel when the court conducts examination or with questions from the court when examination is conducted by the attorneys. The local rules for the federal district courts in North Carolina differ: E.D.N.C. Local Rule 47.1 provides that the court shall examine prospective jurors, and that counsel shall file, at least five days prior to trial, a list of any *voir dire* questions that counsel suggests regarding non-routine matters; M.D.N.C. Local Rule 47.1 provides that the court will examine jurors and after the court has

finished, parties/counsel may request additional questions to be submitted by the court to the prospective jurors; W.D.N.C. Local Rule 47.1 provides that ordinarily, in the interest of time, the court will examine prospective jurors but may permit counsel to do so, and that if the court conducts the examination, counsel may suggest additional questions. W.D.N.C. Local Rule 47.1 contemplates submission of written questionnaires to be exchanged with opposing counsel before submission to the court.

When available, written jury questionnaires can elicit information on issues that pre-trial preparation and focus group activity have identified as critical.

### *Make Sure You Understand the Method to be Used for Exercise of Peremptory Challenges*

Verify with the Court (1) how many peremptory challenges each party will have, (2) the court's intentions regarding the method for exercising peremptory challenges, and (3) the court's intentions for the passing of the jury after challenges have been exercised. Hopefully, this can be determined before the jury panel is summoned.

N.C. Gen. Stat. § 9-19 provides that the parties may exercise eight peremptory challenges per side, but N.C. Gen. Stat. § 9-20 specifies that in civil cases having several defendants with antagonistic interests between them, the presiding judge may apportion among the defendants the eight challenges or the judge may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest; and when there are two or more plaintiffs with antagonistic interests, the judge has discretion to apportion among the plaintiffs the eight challenges, or the judge may give up to six challenges for each plaintiff or class of plaintiffs representing the same interest. The judge may also increase the number of challenges for the opposing side, not to exceed the total number given to the other side. Thus, if there are multiple plaintiffs or defendants, it is important to determine in advance whether there are antagonistic interests among the multiple plaintiffs or multiple defendants or both, whether the plaintiffs on one side or defendants on the other wish to jointly propose an apportionment scheme to the court, and whether a brief should be prepared to support the argument to seek or oppose the granting of additional peremptory challenges.

In addition to knowing how many peremptory challenges will be allowed, you need to know how to use them. The method of exercising peremptory challenges in civil cases is completely within the discretion of the trial court. Some federal courts require all counsel to simultaneously submit their peremptory challenges to the court in writing, without consultation between parties. This discour-

ages collusion among counsel and “comparison shopping” among prospective jurors. Alternatively, the court may insist that an attorney questioning prospective jurors announce peremptory challenges of those jurors currently seated at one time, coupled with an acknowledgment that the remaining jurors are satisfactory. The alternative is exercising challenges one at a time, continuously comparing each new juror placed in the box to the other eleven already seated. North Carolina criminal practice requires that the prosecution always pass a full panel of twelve jurors to the defendant, N.C. Gen. Stat. §§ 9-21, 15(a)-1217, and some judges require this in civil cases as well. Prior knowledge of the method to be used by the trial judge enables better-planned *voir dire* examination.

You need to know whether the Clerk will call jurors to the box in random or predetermined order. For example, the jury list may be arranged in the order in which the jurors were drawn for the list, rather than alphabetically, and those jurors may be placed in the box in the same order as the names appear on the jury list. In that case, counsel will have prior knowledge of which prospective juror will fill a seat vacated by the use of a peremptory challenge or upon the granting of a motion to excuse a juror for cause. If jurors are selected in random order, then counsel can make no predictions about who will fill a vacated seat except by looking over one’s shoulder at those jurors left in the courtroom and derive mathematical probabilities from that assessment.

### *Courtroom Techniques for Jury Selection*

**Active Listening.** The most important skills in jury selection are first, *preparation*, second, *listening* and *paying attention* to non-verbal communications from prospective jurors, and third, *organization*. Pay attention to jurors’ demeanor as questions are being asked. Look for reactions to certain bits of information or phrases. If you cannot hear a juror’s responses, ask the court to instruct jurors to keep their voices up. Sit on the front edge of your chair, with your hands on the table in front of you, even when opposing counsel is questioning the jury. If you actively listen to jurors, that will be obvious to the jurors and the court. Conversely, jurors conclude that their time is being wasted if the attorneys are not listening to their answers to earlier questions and repeat the same questions or misstate previous answers.

**Organization and Comparative Assessment.** In a complex civil trial, jury selection may take several days. It is crucial that the information elicited during jury selection is carefully recorded, organized, and continuously reorganized. Develop a system that works for you. Attorneys use gridded paper, sticky notes, multiple colors of pens and markers, numbers, and symbols in order to record and keep track of their observations, reactions, and intentions regarding prospective jurors. Take along a colleague or assistant to make notes regarding each prospective juror called to the box, freeing you up to watch and listen to

the jurors rather than writing. Prepare in advance many pages which have been gridded *in the same arrangement as the seats in the jury box, numbered correctly*. Be sure to include the alternate jurors’ seats in the correct locations. If you have developed information regarding prospective jurors from the jury list and from other pretrial preparation, place that information on a small index card or sticky note for each individual, so that card or note can be attached to your larger gridded paper, placing basic information at your fingertips. Additional information can be added on additional sticky notes or in additional space on the paper.

**Be the Right Person Asking the Right Questions the Right Way.** “You can’t tell yourself anything that you don’t already know.” – *Anonymous*

**No Super Lawyers Allowed:** If you find yourself buttoning your coat, straightening your tie, checking your watch or talking like a television news anchor as you start to address a jury panel, perhaps you should take a moment to let your inner-superhero come, and then go, so the person who walked the dog before driving to the courthouse can meet those other persons on the jury.

**No Slacker Lawyers Allowed, Either:** The best chance an attorney has for losing credibility with jurors is the first time he or she starts talking. An attorney who is insincere, unfamiliar with the facts of the case or the names of the witnesses, unfamiliar with the protocols of the court, or who gives jurors *any* reason to believe that this attorney (1) is too lazy to adequately prepare for this trial or (2) is willing to say anything but unwilling to listen, will place his or her client at a huge disadvantage. Building credibility, on the other hand, takes time and discipline. It requires the time and effort to ascertain, well in advance, the preferences and protocols of the presiding judge regarding jury selection, rather than fumbling and wasting the time of jurors and court personnel attempting to conduct jury selection in a manner at odds with the judge. It requires advance research regarding the locale of the trial to be familiar with the names and relative locations of communities where the jurors live and with large employers in the area, so that you don’t mispronounce those community names or ask juror after juror to repeat themselves. It requires researching the local media coverage, if any, of the events at the heart of the litigation. It requires making a decision in advance of whether time spent in jury selection can be meaningfully and beneficially shortened through use of a jury questionnaire.

Building credibility with jurors requires showing them respect and letting your respect for the Court and your opponent show as well. It requires polished shoes and a tie without food stains on it. It requires extensive preparations to enable your *voir dire* to proceed smoothly. It requires sitting up straight in your chair and listening attentively and purposefully. It requires watching without staring at jurors while they are being questioned. It requires smiling at the right time and laughing, if ever, only at yourself.

**Don’t Out Jurors:** Building and keeping credibility



with jurors includes not threatening their sense of well-being. Even though your thorough trial preparation may have generated lots of information about each potential juror, it is *not* a good idea to mention anything you might have learned about a potential juror *before* they entered the court room and thereby give jurors an indication that their sense of security in anonymity is misplaced. While misleading or patently dishonest responses by a potential juror would be a red flag about whether you ought to look for reasons to challenge a juror, only in the event of an obvious false statement by a juror regarding facts which would *disqualify* the juror from serving (e.g., felony conviction, moved outside the county) should an attorney reveal any of this work product, and then such information should be provided to the judge and opposing counsel outside the presence of the panel, *not* used to impeach a juror during *voir dire*.

**Don't Give 'Em the Third Degree:** Likewise, jurors should not be probed, prodded, and pushed to reveal highly personal information which is clearly irrelevant to a determination of whether to challenge a juror for cause or with a peremptory challenge. Attorneys who try too hard to "build rapport" by eliciting and remarking on irrelevant personal information are quickly identified by jurors as disingenuous.

**Giving Them a Way Out is Giving Them a Way In:** Whenever possible, ask open-ended questions during jury selection. This applies whether asking questions of the entire panel or to individuals in the box. This leaves each juror room to think about the question as he/she heard it and formulate an answer within their own frame of reference rather than being confined by your specific, or worse, leading, questions. Each juror may answer the question differently; indeed, how different jurors answer a seemingly straightforward question, e.g., "*Tell me about your regular job, when you're not on jury duty?*" is likely to be as important in giving you a sense of those potential jurors' suitability for your case than knowing what their actual employment duties are. For example, does their answer suggest a sense of responsibility for the outcome/finished product of their work? A sense of affiliation with their employer? A sense of pride in their occupation? Embarrassment or anger about their current station in life? Leadership qualities? In almost every case, this information is likely to be more important than their "occupation."

Open-ended questions about specific issues in your case leave potential jurors room to formulate the issue as *they* hear it and respond according to *their* perceptions, beliefs, and biases that may be activated by the questioned topic. Jurors who react negatively to what you are saying will, given an opportunity, find a way to let you know. At the same time, jurors who find that your client's situation resonates with something in their own life can, given an

open-ended question, begin the process of internalizing and associating with your client's cause much better than if you had asked them to raise their hand and pledge outright allegiance to the cause.

**If There are "Hot Button" Issues, Give the Jurors a Button to Press:** If focus group activities or plain common sense indicate that there are particular facts or legal issues in the case that are likely to have significant impact on jurors' reactions to the case, pushing them toward or away from one side or the other, the least effective means of getting at individual juror's true reactions, feelings, biases, or prejudices is to ask a blunt, yes/no question focused on the fact or issue. If, instead, the fact or issue is woven into a short "story," especially one given as an introduction to an open-ended question such as, "*Does that sound like anything you've ever had to deal with?*," jurors will pick the "hot buttons" out of the story that they react to, rather than the ones you tell them they should react to. If you haven't driven them into a corner on particular issues, they have no reason to feel anxious or self-conscious about the issues or facts they bring out in their response. Further, if one juror brings out and comments on such a "hot button," others may soon chime in. Again, the *way* they talk about such a fact or issue is at least as important as the fact that they identified it as an issue and what "side" of that fact or issue they seem to associate with.

### *Use of Jury Instructions During Jury Selection*

Jurors have little information upon which to form expectations about what will happen during jury service unless they have been on a jury before. Likewise, jurors may harbor grossly incorrect notions about the civil justice process and applicable law. The use of jury instructions to formulate questions to the panel can be an effective tool for introducing crucial concepts of your case or defense and potentially identify jurors who will reject or hesitate to follow the law because of personal biases or beliefs. Such questions should be prefaced by an acknowledgment that the law of the case will be provided to the jurors by the presiding judge, but that such information typically comes at the end of the case following all of the evidence and arguments of counsel. This preface creates a logical basis for your offering certain legal concepts to the jury early on. Using the exact language of the pattern jury instructions, or special instructions you have drafted and plan to submit, is effective because the jurors will be more attentive when they hear that same language again at the end of the case. Depending upon the case, and which side you represent and the situation, appropriate and effective questions can be based on the jury instructions regarding burden of proof and proximate causation, negligence, standard of

care, and many other terms that non-lawyers do not use in their daily lives or which may have vastly different connotations when used by the jurors.

### *Group Dynamics*

While a lot of attention is placed on selecting, or more accurately, eliminating, individual jurors, less focus has been placed on the function of a jury as a group process and the importance of identifying likely dynamics within the group of individuals ultimately placed in the jury box. This includes consideration of which individuals are likely candidates to be selected as jury foreperson as well as those who are likely to avoid that responsibility. Placement of individuals within the jury box, essentially a random occurrence, has a significant impact upon the ability of individual jurors to see and hear witnesses in the witness box, the display of exhibits, questions, statements, and arguments by counsel from their respective counsel tables or lectern, and even the private discussions between attorneys and their clients at counsel table. Likewise, jurors who sit close or next to each other are more likely to develop bonds, especially during a long trial, which may produce alliances during deliberations. This is especially true when individual jurors of similar demographic characteristics are “clustered” in one area of the jury box. Conversely, jurors who would, by choice, locate themselves away from

jurors with distinctly different demographic characteristics, might become anxious, distracted, and possibly even intimidated or agitated when placed in close proximity to fellow jurors who they would otherwise avoid. Location within the jury box tends to be closely reflected when jurors sit around a table in the jury room for deliberations. All of these factors may have an impact upon an attorney’s decision to exercise or reserve a peremptory challenge with respect to a specific prospective juror.

### *Conclusion*

I hope that the above comments, observations, and tips will be of some help as you approach jury selection. May your selection go well. 🌀

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