North Dakota Law Review

Volume 72 | Number 3 Article 7

1996

Voir Dire: What Can I Ask and What Can I Say

Michael J. Ahlen

VOIR DIRE: WHAT CAN I ASK AND WHAT CAN I SAY?

MICHAEL J. AHLEN*

I. INTRODUCTION

All good trial attorneys have a deep appreciation for the importance of voir dire in jury selection. The North Dakota Supreme Court has said, "It is the role of the skilled attorney and the purpose of voir dire to search for the individual, 'good' juror and eliminate the individual, 'bad' one."[1] In addition, voir dire provides the first opportunity for attorneys and jurors to meet, and first impressions are important.[2] By the completion of voir dire, jurors may have important impressions concerning the competence and trustworthiness of the attorneys, and the justice of their client's cases.[3]

Although voir dire offers the opportunity to make a good impression on prospective jurors, it also provides countless opportunities to stumble. Questions can embarrass or anger jurors,[4] lead to sustained objections,[5] or in extreme cases, can lead to a mistrial or reversal on appeal.[6]

There is no shortage of advice to attorneys on how to conduct voir dire. Continuing education programs feature such inviting titles as *How To Win In Voir Dire*.[7] Thick books are also now devoted to the subject.[8] There is considerable conflicting advice from fellow attorneys concern-

---

* Professor of Law, University of North Dakota School of Law; J.D., 1968, Vanderbilt University; B.A., 1965, Denison University; Private practice, 1968-1970, Marion, Indiana; Deputy Prosecuting Attorney, 1969-1970, Grant County, Indiana; Trial Attorney, 1970-1979, United States Department of Justice; Assistant Chief, Criminal Section, Tax Division, 1979-1981, United States Department of Justice. Professor Ahlen has served as an instructor in trial advocacy seminars for the United States Attorney General's Advocacy Institute, The National Institute for Trial Advocacy, The National Judicial College, the North Dakota Supreme Court, the North Dakota Association of State's Attorneys, and the State Bar Association of North Dakota.

1. City of Mandan v. Fern, 501 N.W.2d 739, 746 (N.D. 1993).

2. John A. Call, *Making the Research Work for You*, TRIAL, Apr., 1996, at 20, 23.

3. *See* IRVING YOUNGER, JURY SELECTION 12-19 (1984) (noting that the purpose of voir dire includes teaching the jurors about the case and letting the jury get to know your personality).

4. V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS § 11.25 (2d ed. 1993).

5. *See* State v. Huber, 361 N.W.2d 236, 237-39 (N.D.), *cert. denied*, 471 U.S. 1106 (1985).

6. *See* State v. Mehralian, 301 N.W.2d 409, 418-19 (N.D. 1981) (reversing trial court and finding that defendant was denied a fair trial).

7. *See* GERRY SPENCE, GERRY SPENCE IN TRIAL: HOW TO WIN IN VOIR DIRE (1995) (a videotape featuring lectures and film from an actual murder trial in an Oregon state court).

8. *See* STARR & MCCORMICK, *supra* note 4; WARD WAGNER, JR., ART OF ADVOCACY—JURY SELECTION (1995).

ing what to ask during jury selection, and almost every litigator can provide an example to disprove any other attorney's approach.[9]

This viewpoint considers the legal limits on what may be asked of jurors during voir dire in North Dakota. Attorneys have also been using voir dire to provide information to jurors,[10] and consideration is given to the limits applicable to such information sharing. While trial judges have considerable discretion in what to allow during voir dire, there are some definite boundaries.[11] There are also some areas, that while not forbidden, are dangerous territory because the court can suddenly exercise discretion and cut off inquiry in a manner that makes the attorney look bad.[12] Finally, there are some areas which should be the subject of inquiry, and failure to do so can have significant adverse consequences.[13]

North Dakota Supreme Court decisions provide substantial guidance to attorneys on how to avoid stumbling during jury selection. Similarly, North Dakota trial judges have been innovative in finding practical solutions to problems in voir dire.[14] This viewpoint is intended to piece together the law and practice of voir dire in North Dakota, and to offer suggestions on avoiding the problems which have most often arisen while questioning jurors.

II. THE BASIC NORTH DAKOTA LAWS OF VOIR DIRE

A. DISTINCTION BETWEEN CIVIL AND CRIMINAL VOIR DIRE

In North Dakota state courts, attorneys have the right to conduct voir dire of prospective jurors in both civil[15] and criminal[16] jury trials. Criminal jury selection is governed primarily by Rule 24 of the North Dakota Rules of Criminal Procedure and by Chapter 29-17 of the North Dakota Century Code. Civil jury selection is governed primarily by Rule 47 of the North Dakota Rules of Civil Procedure and by Chapter 28-14 of the North Dakota Century Code.

The common law concerning voir dire in criminal cases frequently involves federal constitutional issues. Criminal defendants have a right

---

9. THOMAS A. MAUET, TRIAL TECHNIQUES § 2.1 (4th ed. 1996).

10. *See* YOUNGER, *supra* note 3, at 12-14.

11. *See infra* part III (discussing prohibited areas of voir dire).

12. *See infra* part IV (discussing discretionary areas in voir dire).

13. *See infra* part VI (discussing potential issues in voir dire).

14. A substantial amount of voir dire practice has never been commented upon in North Dakota appellate decisions. The author relies on personal observation of voir dire as conducted by judges in voir dire both in real trials and mock trials at the North Dakota School of Law in commenting on North Dakota practice.

15. N.D. R. CIV. P. 47(a).

16. N.D. R. CRIM. P. 24(a).

to trial by an impartial jury "under the Sixth Amendment of the federal constitution, as applied to the states through the Fourteenth Amendment."[17] The North Dakota Supreme Court has also relied on the Equal Protection clause of the Fourteenth Amendment of the United States Constitution to forbid gender-based exercise of peremptory challenges in a criminal case,[18] and noted that questions asked during voir dire, together with responses, may be significant in determining whether challenges were gender-based.[19]

State civil cases involving voir dire issues have been decided by the North Dakota Supreme Court under state rules and statutes rather than federal or state constitutional provisions. The Sixth Amendment to the United States Constitution applies only to criminal cases.[20] Although the Equal Protection Clause of the Fourteenth Amendment might apply to jury selection in civil actions in state court,[21] such application has not yet been made.

Courts often use the same principles of voir dire in both civil and criminal cases,[22] but such similarity should not be assumed.[23] Even when a common principle is embraced by civil and criminal courts, the fact that the criminal defendant's rights spring from the Sixth Amendment to the United States Constitution, while the civil parties do not, provides potential for greater protection to be afforded in the criminal case.

B. SCOPE OF VOIR DIRE IN CIVIL CASES

The scope of voir dire in civil cases is quite broad. Prior to adoption of the North Dakota Rules of Civil Procedure,[24] the North Dakota Supreme Court discussed the scope of voir dire in a way which, with one exception, accurately describes the practice of civil voir dire today:

---

17. State v. Smaage, 547 N.W.2d 916, 919 (N.D. 1996).

18. City of Mandan v. Fern, 501 N.W.2d 739, 747 (N.D. 1993).

19. *Id.* at 748-49 (citing Batson v. Kentucky, 476 U.S. 79, 96-97 (1980)).

20. U.S. CONST. amend VI. The Sixth Amendment states that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." *Id.*

21. There is potential for state courts to apply the Equal Protection clause of the Fourteenth Amendment to jury selection in civil cases which excludes jurors on the basis of race. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (noting that the *Batson* approach is applicable to civil cases).

22. *Compare* State v. Purdy, 491 N.W.2d 402, 407 (N.D.1992) *with* Loveland v. Nieters, 54 N.W.2d 533, 536-37 (N.D. 1952) (both embracing the idea that the purpose of voir dire is to select a fair and impartial jury).

23. *See* Cassaday v. Souris River Tel. Coop., 520 N.W.2d 803, 806 (N.D. 1995) (refusing to apply "an unexplained blanket disqualification" from a past criminal case to a civil case).

24. The North Dakota Rules of Civil Procedure became effective on July 1, 1957. N.D. R. CIV. P. 86 (1996-1997) (providing effective date of rules).

> "Examination into the qualifications, attitudes, and inclinations of jurors, before they are impaneled and sworn to try a case, is necessarily incident to the practice of challenging. Only such an examination can provide the information or suspicion to constitute a basis for the intelligent and practical exercise of challenges to accomplish the end desired—exclusion from the jury of those who would act from prejudice or interest or without qualification to judge soundly.
>
> An examination of a prospective juror on his voir dire is proper so long as it is conducted strictly within the right to discover the state of mind of the juror with respect to the matter in hand or any collateral matter reasonably liable to unduly influence him, and questions which go primarily to the ascertainment of any probable bias or ground of incompetency, as a basis of a challenge for cause, or possibly, of a peremptory challenge, are permissible. However, while the scope of the inquiry will not be confined strictly to the subjects which constitute grounds for the sustaining of a challenge for cause, if it extends beyond such subjects it must be conducted in good faith with the object of obtaining a fair and impartial jury, and must not go so far beyond the parties and the issues directly involved that it is likely to create a bias, a prejudice, or an unfair attitude toward any litigant. Nevertheless, the adverse litigants should be given the right to inquire freely about the interest, direct or indirect, of the proposed juror, that may affect his final decision. The scope of inquiry is best governed by a wise and liberal discretion of the court, but the court should not at any time ask, or permit counsel to ask, a prospective juror any question the answer to which would tend to incriminate or disgrace him."[25]

The exception to modern practice involves prohibition of questions, "the answer to which would tend to incriminate or disgrace him."[26] Today jurors are routinely asked about prior experiences with courts. Such broad inquiries result in disclosure of arrests for driving under the influence and a number of other activities which might "disgrace" them in the minds of some.

A broad scope of voir dire in civil cases is necessary because parties and prospective jurors often have some relationship before trial, especial-

---

25. Loveland v. Nieters, 54 N.W.2d 533, 536-37 (N.D. 1952) (citations omitted) (quoting 31 AM. JUR. *Jury* §§ 104, 107 (1940)).

26. *Id.* at 537 (quoting 31 AM. JUR. *Jury* § 107 (1940)).

ly in sparsely populated areas, and the venire often has some knowledge of the subject matter of the trial.[27] The North Dakota Supreme Court has refused to adopt automatic or blanket disqualifications of potential jurors simply because of membership in cooperatives which are parties to a lawsuit[28] or remote business relationships.[29] "Instead, [the trial court must] adhere to a challenge-for-cause basis for dismissal of potential jurors,"[30] with individualized inquiry as to the nature of the alleged excluding interest. Where potential prejudice exists, the North Dakota Supreme Court has urged trial courts to allow both parties "liberal voir dire examination,"[31] or "great latitude" in voir dire in order to determine the existence of prejudice or bias.[32]

C. SCOPE OF VOIR DIRE IN CRIMINAL CASES

The primary purpose of voir dire in criminal cases is to permit examination "to determine whether any [prospective] juror is biased for or against any party."[33]

> Under section 29-17-35 of the N.D.C.C., a party may challenge a juror for cause based on actual bias or implied bias. Actual bias is "[t]he existence of a state of mind on the part of the juror . . . that he cannot try the issue impartially without prejudice to the substantial rights of the party challenging." Implied bias exists in certain legally specified circumstances, which are listed in section 29-17-36, N.D.C.C.[34]

---

27. *See* Slaubaugh v. Slaubaugh, 499 N.W.2d 99, 103-07 (N.D. 1993) (noting use of voir dire in deciding on change of venue where prospective juror knew the litigants or witnesses).

28. Larson v. Williams Elec. Co-op., 534 N.W.2d 1, 3-4 (N.D. 1995); Cassady v. Souris River Tel. Coop., 520 N.W.2d 803, 806 (N.D. 1994).

29. *See Larson*, 534 N.W.2d at 3-4 (citing cases); Jerry Harmon Motors, Inc. v. First Nat'l Bank & Trust Co., 440 N.W.2d 704, 709 (N.D. 1989) (refusing "to require automatic disqualification of [bank] depositors from serving on a jury in an action involving that bank"); Basin Elec. Power Coop. v. Miller, 310 N.W.2d 715, 718-19 (N.D. 1981) (finding that an employee of one of the parties need not be "disqualified as a matter of law, particularly in the absence of a challenge for cause to that particular prospective juror"); Farmers Union Grain Terminal Ass'n v. Nelson, 223 N.W.2d 494 (N.D. 1974) (holding that "[a] blanket disqualification for GTA members would not appear advisable" where members in question did not do business with particular GTA elevator in question and where most prospective jurors have had some business with "GTA-owned or associated" facilities).

30. *Larson*, 534 N.W.2d at 4.

31. Marshall v. City of Beach, 294 N.W.2d 623, 626, 628 (N.D. 1980) (noting Plaintiff's argument that, as taxpayers, prospective jurors "would have an interest of a financial nature in the outcome of the case").

32. Basin Elec. Power Coop. v. Boschker, 289 N.W.2d 553, 559 (N.D. 1980) (noting that some prospective jurors may have had access to or read certain articles published in cooperative's magazine).

33. N.D. R. CRIM. P. 24 explanatory note.

34. State v. Smaage, 547 N.W.2d 916, 919 (N.D. 1996) (citations omitted) (alteration in original).

Voir dire also provides information which may assist attorneys in the exercise of peremptory challenges,[35] as well as provide information to assist the attorneys and court to determine whether a change in venue should be granted.[36] "While there are some cases in which prejudice to the defendant is so clear that a change of venue should be ordered promptly, generally voir dire examination is an appropriate occasion to determine whether it is possible to select a fair and impartial jury."[37]

Several factors lead to the conclusion that the scope of voir dire should be broad in criminal cases. Jurors may be reluctant to admit prejudice[38] or may not even be aware that they are prejudiced.[39] Determining whether a juror has a bias for or against a party may require extensive questioning as to juror background and life experiences,[40] and should be at least as broad as the broad inquiry allowed in civil cases, relying to a great extent on the discretion of the trial judge.[41]

North Dakota's sparse population often results in prospective jurors with knowledge of the parties, the event which is at the heart of the dispute, and the attorneys.[42] As the North Dakota Supreme Court has noted: "Although a defendant is entitled to a panel of impartial jurors, qualified jurors need not be totally ignorant of the facts and issues involved in a case. A distinction must be made between mere familiarity with the defendant or his past and an actual predisposition against him . . . ."[43] To make such a distinction, attorneys often need to question jurors in great detail about the impact of their familiarity with the case and personalities involved.

The need for broad voir dire is also great because of the reluctance of courts to imply bias simply because of a prospective juror's occupation. For example, implied bias was not assumed of a state Highway Patrolman who was a prospective juror in a D.U.I. case brought by a city,[44] nor against a part-time police officer in a murder trial.[45] The

35. *Cf.* City of Mandan v. Fern, 501 N.W.2d 739, 748-49 (N.D. 1993) (noting that certain voir dire questioning may indicate whether peremptory challenges are being used for discriminatory purpose).

36. State v. Breding, 526 N.W.2d 465, 468 (N.D. 1995).

37. *Id.*

38. Amy Singer, *Selecting Jurors: What to Do About Bias*, TRIAL, Apr. 1996, at 29, 30.

39. STARR & MCCORMICK, *supra* note 4, § 9.4.

40. MAUET, *supra* note 9, at 25-26.

41. *See* Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (citing Connors v. United States, 158 U.S. 408, 413 (1895) for the proposition that in criminal or civil cases, the breadth of voir dire is left to the court's discretion).

42. *See e.g.*, State v. Smaage, 547 N.W.2d 916, 918-20 (N.D. 1996) (noting that prospective jurors were aware of Defendant and the accident and that one juror had contacts with the prosecutor).

43. *Id.* at 919 (quoting State v. McLain, 301 N.W.2d 616, 623 (N.D. 1981)).

44. City of Bismarck v. Holden, 522 N.W.2d 471, 473-74 (N.D. 1994).

45. State v. Ternes, 259 N.W.2d 296, 298 (N.D. 1977), *cert. denied*, 435 U.S. 944 (1978).

existence of actual bias must be determined from meaningful voir dire examination of the prospective juror.[46]

An attorney requesting a change of venue has "the burden of demonstrating a reasonable likelihood of prejudice so pervasive that a fair and impartial jury could not be found."[47] Reversal on appeal will only take place "when the prejudice to the defendant is so palpable and clear from the record that it was unreasonable, arbitrary, or capricious for the court to conclude that a fair and impartial jury could be impaneled."[48] Such heavy burdens necessitate wide latitude in voir dire.

III. PROHIBITED AREAS OF VOIR DIRE

A. PREJUDICIAL QUESTIONS

Highly inflammatory and irrelevant questions during voir dire in a criminal case can lead to reversible error, as in the case of references to an Iranian defendant's religious beliefs and nationality at the time of the hostage crisis at the American embassy in Iran.[49] In determining if reversible error has occurred, the trial court may consider other prejudicial conduct during the trial, together with the conduct in voir dire.[50]

There is no reported North Dakota civil case in which a reversal resulted due to prejudicial questions or statements made during voir dire. Such conduct at the very beginning of a trial would normally result in a mistrial.[51] If a motion for a mistrial is denied, the potential for reversal is great if it appears that an attorney attempted "to create a bias, a prejudice or unfair attitude toward any litigant"[52] in voir dire. North Dakota's stringent rules against the mention of insurance coverage should serve as a warning against improperly advising the prospective jurors in voir dire of any party's insurance coverage.[53]

B. AMOUNT OF DAMAGES

Questions concerning the amount of damages which potential jurors would be willing to return are not appropriate because:

---

46. *Id.*

47. State v. Austin, 520 N.W.2d 564, 566 (N.D. 1994).

48. *Id.* at 568.

49. State v. Mehralian, 301 N.W.2d 409, 418-19 (N.D. 1981) (holding that prejudicial remarks during voir dire, highly prejudicial questions during the case-in-chief, and improper remarks in closing argument, all combined to render the trial unfair).

50. *See supra* note 49 and accompanying text (discussing when a case may be reversed for prejudicial conduct).

51. *See* STARR & MCCORMICK, *supra* note 4, § 9.1.6 (discussing avoiding mistrials).

52. Loveland v. Nieters, 54 N.W.2d 533, 537 (N.D. 1952).

53. *See* Smith v. Anderson, 451 N.W.2d 108, 110-11 (N.D. 1990) (discussing related cases).

> they may tend to influence the jury as to the size of the verdict, and may lead to the impaneling of a jury which is predisposed to finding a higher verdict by its tacit promise to return a verdict for the amount specified in the question during the voir dire examination.[54]

It was not error, for an attorney to question prospective jurors if they would be reluctant to return a large monetary award, when a specific figure was not mentioned.[55]

C. POST-VERDICT DISPOSITION

The defendant in a criminal trial is not entitled to inquire if prospective jurors know that in the event that the jury finds the defendant not guilty by reason of lack of criminal responsibility, that the state's attorney is required to file a petition for involuntary treatment of the defendant.[56] "The purpose of the jury is to find the facts and determine a defendant's guilt or innocence. The consequences of a verdict of not guilty by reason of a lack of criminal responsibility have no bearing on any issue which the jury must decide."[57]

IV. DISCRETIONARY AREAS IN VOIR DIRE

A. THE DANGER OF DISCRETIONARY SUBJECTS OF VOIR DIRE

The subject matter of some questions and statements is not prohibited in voir dire, but can be limited by the judge's exercise of discretion. Several North Dakota judges will halt voir dire without an objection if they believe an attorney has gone too far. When a judge repeatedly halts an attorney's voir dire, and advises the jury to disregard a line of questioning, the attorney may appear incompetent to potential jurors. If a judge becomes obviously irritated by an attorney who continually asks questions which are objectionable, the jury might draw an inference that the attorney is intentionally violating the rules.

B. TELLING THE JURY ABOUT THE CASE

Attorneys are often allowed to make a few comments to the jury before starting the questioning. The commentary normally provides some background information regarding the questions which follow.

---

54. Trautman v. New Rockford-Fessenden Co-op Transp. Ass'n, 181 N.W.2d 754, 759 (N.D. 1970).

55. Dehn v. Otter Tail Power Co., 251 N.W.2d 404, 415 (N.D. 1977).

56. State v. Huber, 361 N.W.2d 236, 237-38 (N.D.), *cert. denied*, 471 U.S. 1106 (1985).

57. *Id.* at 238.

Attorneys sometimes push the limits of such commentary in an effort to indoctrinate or win over jurors.[58] A North Dakota judge has never been reversed for terminating an attorney's salesmanship in voir dire.

Statements may be made to jurors in addition to those made as introductory comments. Almost any statement can be phrased as a question.[59] For example an attorney who wants the jury to know that his client is generous in contribution of time to local charities might ask, "Are any of you associated with the Red Cross, the American Lung Association or the United Fund, or have you come into contact with my client or his family in their volunteer work for these organizations?" The questioner is not really interested in the answer to the question,[60] but is using the question as a tool to sell the case.

Judges will often cut off the attorney if it appears that the questions or statements are a sales device rather than an attempt to find a fair and impartial jury. There is simply no North Dakota authority which supports the use of voir dire to sell a case.

Statements which are not questions are sometimes allowed during voir dire if necessary to explain the background for questions. For example, a prosecutor's comment during voir dire, that "someone will not get up and say I did it," was seen in the context of questions asked as only an assurance that the trial would not proceed in the manner of a television drama.[61] The comments would, however, have created a significant problem if they could have been reasonably interpreted as a comment on the defendant's failure to testify.[62]

C. DISCUSSIONS OF LAW

Some judges allow attorneys to discuss the law of the case in voir dire, particularly in criminal cases in which the entire defense rests upon burden of proof or presumption of innocence. Nationally, there is a trend toward restricting attorneys' discussion of law.[63]

A prosecuting attorney's assertive statements during voir dire regarding law governing the case are risky. A prosecutor's statement that "the Defendant never has to take the stand, and I'm not saying that he should or should not take the stand,"[64] was held not to result in reversible error.[65] However, the court stated that such remarks "are not

58. *See* STARR & MCCORMICK, *supra* note 4, § 11.6.7 (discussing judges' concerns).
59. *See* YOUNGER, *supra* note 3, at 13-14.
60. *Id.*
61. State v. Skjonsby, 319 N.W.2d 764, 787 (N.D. 1982).
62. *Id.*
63. MAUET, *supra* note 9, at 17.
64. State v. Flohr, 310 N.W.2d 735, 736 (N.D. 1981).
65. *Id.* at 737.

to be praised"[66] and noted the judge's prompt corrective instruction to the jury to disregard the assertion.[67]

If the attorney misstates the law, or states it in a confusing manner, it may be impossible for the judge to straighten out through curative instructions. In one instance, the North Dakota Supreme Court found that the attorney's discussion of the law in voir dire invited error with regard to the court's subsequent instructions.[68] A growing number of North Dakota courts have avoided or minimized the problem of attorneys seeking to discuss the law of a case by instructing the jury as to key provisions of law before voir dire.[69]

D. REPETITIVE QUESTIONS

The court may prevent "the propounding of . . . repetitious questions."[70] This restriction may pose a problem for attorneys who question last in multi-party cases since preceding attorneys may already have covered most relevant topics. If the attorney conducts voir dire, objections may be sustained, thus risking jurors will think the attorney incompetent. To fail to question denies the attorney the opportunity to have an equal opportunity to gauge the jurors reactions to the attorney, as well as to risk that the jurors will perceive that he or she is disinterested.[71]

E. VEXATIOUS QUESTIONS

A trial court may also prevent vexatious questions.[72] Although the North Dakota Supreme Court has never defined *vexatious* as it relates to questions during jury selection, in another context it has adopted a dictionary definition of vexatious as meaning "lacking justification and intend[ing] to harass."[73] Similarly, confusing questions are sometimes disallowed whether or not they are technically vexatious. The logic behind such rulings is so obvious, and the cure so readily available that such rulings are not likely candidates for appeal.

---

66. *Id.*

67. *Id.* at 736.

68. State v. Austin, 520 N.W.2d 564, 569-70 (N.D. 1994).

69. *See* Basin Elec. Power Coop. v. Boschker, 289 N.W.2d 559-60 (N.D. 1980) (affirming denial of motion for change of venue on condition that "prior to voir dire examination, the trial court give preliminary instructions to the jury panel on the law"). The trend may not be reflected in appellate decisions because it prevents error before it occurs.

70. State v. Purdy, 491 N.W.2d 402, 407 (N.D. 1992).

71. *See* STARR & MCCORMICK, *supra* note 4, § 11.2.2 (discussing the depth of questioning).

72. *Purdy*, 491 N.W.2d at 407.

73. Bloom v. Northern Pac. R.R. Beneficial Ass'n, 193 N.W.2d 244, 253 (N.D. 1971) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2548 (1961), in case involving a defendant-insurer's alleged "vexatious" refusal to pay plaintiff-insured's claims) (indication of alteration added).

F. ADMITTING WEAKNESSES

Parties frequently admit weaknesses in their own cases during voir dire.

> In many cases, it is effective trial strategy to precondition jurors to any potentially negative aspects of a defendant's case at the earliest and least prejudicial time of a trial—and during the voir dire examination of the jury is an ideal time to do so because it permits a party to remove jurors who are found to be prejudiced by such information in the event it should happen to be revealed in the course of a trial.[74]

However, a problem occurs when the attorney not only volunteers a weakness, but then begins to comment on the evidence which will be presented to overcome the weakness. It would be proper and perhaps good strategy for an attorney to volunteer during voir dire that his client had a prior conviction and ask if jurors could still be fair and impartial.[75] The problem occurs when the attorney tries to use voir dire to inform the jury that the client has reformed since the conviction, or offers similar mitigating information. Such mitigating information may not even be admissible at trial, let alone in voir dire, and there have been no successful appeals of limiting this tactic.

V. POTENTIAL ISSUES IN VOIR DIRE

A. JUROR PRIVACY

North Dakota appellate decisions have not yet directly addressed the issue of juror privacy interests during voir dire. The issue is becoming more important in other jurisdictions. A full review of privacy issues in other jurisdictions is beyond the scope of this viewpoint, but there are a number of developments to follow because of their potential impact here.

Some federal courts have begun to protect privacy interests of jurors. Courts have allowed jury selection to be conducted with identity of jurors kept from the parties when there was a credible threat to jury

74. State v. LaFromboise, 246 N.W.2d 616, 620 (N.D. 1976) (holding that disclosure of the defendant's prior criminal record during voir dire did not constitute ineffective assistance of counsel).

75. *Id.*

safety.[76] In other instances, juror identity has been kept from the media out of concern for jurors' privacy interests.[77]

A federal court in a criminal drug prosecution has denied distribution of the defense questionnaire which called for, among other things, information about the prospective jurors' thoughts about illegal and legal immigrants, jurors' memberships in racially exclusive clubs, and instances in which jurors referred to minorities in derogatory language.[78] The court found that many of the matters listed on the questionnaire were "unduly invasive and violat[ed] the right to privacy of prospective jurors."[79] The court did not specify which portions of the questionnaire were disallowed because of invasion of privacy, and which were merely duplicative of other questions which the court proposed to ask.[80]

In another case, a federal magistrate judge set aside a state juror's imprisonment for contempt for refusing to answer a questionnaire concerning her family income, her religious preference, her political views, the medications which she was taking, and a number of questions concerning organizations to which she belonged and the media which she relied upon.[81] The court noted that there had been a failure of the trial court to determine the relevance of the questions and to weigh the competing interests of the juror's constitutional right to privacy, the defendant's right to an impartial jury, and the public's right of access to jury information.[82] The opinion faults the trial court for failing to advise the juror of the option of discussing private matters in camera.[83] Even if the juror should be required to answer, she should have the least intrusive means to provide private information.[84]

Good litigators tend to be mindful of jury privacy even without court supervision. Asking questions which jurors regard as an unwarranted invasion of privacy is likely to embarrass and anger jurors.[85] North Dakota attorneys and judges have developed a number of procedures to reduce the impact of voir dire on privacy concerns.[86]

---

76. United States v. Ross, 33.F.3d 1507, 1519-20 (11th Cir. 1994) (citing similar cases from other jurisdictions), *cert. denied*, 115 S. Ct. 2558 (1995); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 130 (1996).

77. King, *supra* note 76, at 130-31.

78. United States v. Padilla-Valenzuela, 896 F. Supp. 968, 970-73 (D. Ariz. 1995).

79. *Id.* at 972.

80. *Id.*

81. Brandborg v. Lucas, 891 F. Supp. 352 (E.D. Tex. 1995).

82. *Id.* at 361.

83. *Id.*

84. *Id.*

85. *See* STARR & MCCORMICK, *supra* note 4, § 11.2.1-.8.

86. *See infra* part VI.E-F.

B. QUESTIONING ABOUT MEDIA TORT REFORM CAMPAIGNS

In *Tighe v. Crosthwait*,[87] a medical malpractice action, the Mississippi Supreme Court found that the trial court erred in precluding questions regarding the possible prejudicial effect of public campaigns concerning the so-called "medical malpractice crisis" and "insurance crisis."[88] The court found that the error was harmless because the media campaign was primarily directed at the issue of excessive damages rather than the issue of liability, and since the jury found no liability, the publicity regarding the amount of damages was harmless.[89] The court also noted that some of the other questions during voir dire covered many of the same areas covered by the excluded questions.[90]

Tighe is significant because the plaintiff established how a media and letter writing campaign had been conducted by the insurance industry, together with a deposition from another case in which an insurance company executive had admitted to a letter writing campaign aimed at influencing readers in the event that they should ever be called for jury duty.[91] It also contains citations to the growing number of states which have ruled to some degree that voir dire questions should be allowed with regard to media campaigns for tort reform.[92]

It would appear that the scope of voir dire in North Dakota is broad enough to allow questions concerning prospective jurors' exposure to public relations efforts of business and insurance companies to limit damages and/or reduce plaintiffs' verdicts.[93] The questions should be posed in such a way that jurors are not advised of the insurance coverage of the parties.[94]

C. CONCERNS OVER "RIGGED" JURIES

Some courts have expressed concern over the growing use of jury consultants and computers to aid in the selection of jurors. The concern is that such experts are not really attempting to secure a fair and impartial jury, but rather to conduct voir dire in such a way as to "mold the

87. 665 So. 2d 1337 (Miss. 1995).
88. Tighe v. Crosthwait, 665 So. 2d 1337, 1338, 1341 (Miss. 1995).
89. *Id.* at 1341.
90. *Id.*
91. *Id.* at 1339.
92. *Id.* at 1340-41. *See also* Barrett v. Peterson, 868 P.2d 96, 104 (Utah 1993) (holding that it was error for trial court to not inquire about "exposure to tort-reform").
93. *See* Loveland v. Nieters, 54 N.W.2d 533, 536-37 (N.D. 1952) (discussing scope of voir dire).
94. *See* Smith v. Anderson, 451 N.W.2d 108, 110-11 (N.D. 1990) (discussing effect of statement concerning insurance).

jury" to be more receptive to the employer's case.[95] The tone of the comments comes close to accusing consultants of rigging juries.

The sudden concern with jury consultants is somewhat puzzling. Some attorneys have been trying to "mold" juries during voir dire even without the help of jury consultants,[96] and have been doing so for a long time. The North Dakota Supreme Court recognized the importance of a broad scope of voir dire long before jury consultants became popular,[97] and the need for such inquiry is at least as great now as it was then. Judges, using their discretion, have prevented improper voir dire practices when attorneys have attempted to improperly "mold" favorable juries during voir dire, and appear just as capable with jury consultants.

Jury consultants have provided a valuable service to the justice system. They have caused attorneys to focus on the wide range of activities of prospective jurors to test for bias rather than to rely on stereotypes previously used.[98] They have also provided studies to test how well their theories of jury selection work.[99] The growth or survival of the consultants is likely to depend on how well they assist attorneys in finding individual "good" jurors and eliminating "bad" ones as the supreme court advised skilled attorneys to do.[100]

Over the past two years, many students of the University of North Dakota School of Law have had the opportunity to work with students of U.N.D.'s Department of Psychology under the direction of Douglas Peters, Ph.D. Peters and the psychology students have been extremely helpful in teaching the law students how to ask questions in voir dire which elicit useful information about jurors' prejudices. They have also proved to be remarkably accurate in analyzing juror responses, and in picking up both verbal and nonverbal clues provided by jurors. Peters and the psychology students have had great success in helping the future attorneys spot people who were to be the leaders during jury deliberation.

---

95. *See* United States v. Padilla-Valenzuela, 896 F. Supp 968, 971-72 (D. Ariz. 1995) (citing Schlinsky v. United States, 379 F.2d 735, 738 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967) and Brandborg v. Lucas, 891 F. Supp 352, 356 (E.D. Tex. 1995)).

96. *See* Spence, *supra* note 7 (use of jury consultants is discouraged).

97. *See Loveland*, 54 N.W.2d at 536-37 (discussing scope of voir dire).

98. MAUET, *supra* note 9, at 24-26 (discussing approaches to questioning prospective jurors).

99. *Id.*

100. City of Mandan v. Fern, 501 N.W.2d 739, 746 (N.D. 1993).

VI. AVOIDING TRAPS IN VOIR DIRE

A. HAVE A RECORD OF VOIR DIRE MADE

Absent a request that the court reporter transcribe voir dire, or an objection to the lack of transcription, failure of the court reporter to transcribe voir dire is not per se reversible error.[101] The appellate court is seriously limited in review of errors relating to voir dire without a transcript.[102]

B. ESTABLISH ON THE RECORD THE GROUNDS FOR BOTH CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES

Once a request has been made to have voir dire recorded, it is essential that attorneys ask sufficient questions to detail the facts evidencing bias or prejudice on the part of a prospective juror before challenging for cause. There are numerous examples from both criminal[103] and civil[104] cases where an appeal from the trial court's denial of a challenge for cause was rejected because the record failed to disclose sufficient evidence of bias or prejudice. Attorneys cannot expect either a trial court or appellate court to find bias simply because a prospective juror had some knowledge of the case or the parties,[105] or because of a minor business relationship.[106]

Making a record with regard to peremptory challenges is increasingly important in view of prohibitions against gender-based or race-based peremptory challenges. The questions and answers of prospective jurors during voir dire, together with each juror's demeanor may play an important role in determining whether the peremptory challenges were made on an impermissible basis.[107]

---

101. State v. Rougemont, 340 N.W.2d 47, 51 (N.D. 1983).

102. *See* State v. Smaage, 547 N.W.2d 916, 919 n.1 (N.D. 1996); Larson v. Williams Elec. Co-op., 534 N.W.2d 1, 3 n.2 (N.D. 1995); State v. Gross, 351 N.W.2d 428, 432-33 (N.D. 1984).

103. *See Smaage*, 547 N.W.2d at 919; State v. McLain, 301 N.W.2d 616, 622-23 (N.D. 1981).

104. *See Larson*, 534 N.W.2d at 4; Cassady v. Souris River Tel. Coop., 520 N.W.2d 803, 806-07 (N.D. 1994).

105. *See supra* notes 27, 42-43 and accompanying text (discussing same).

106. *See supra* notes 28-29 and accompanying text (discussing same).

107. City of Mandan v. Fern, 501 N.W.2d 739, 749 (N.D. 1993).

C. MAKE A RECORD OF VOIR DIRE SUFFICIENT TO PROTECT AGAINST WRONG ANSWERS

Jurors may give an incorrect answer to questions during voir dire. To obtain a new trial with regard to such a mistake, a party must demonstrate that the incorrect answer "might affect a juror's impartiality."[108]

When a juror is alleged to have withheld information about being in a similar accident, despite a specific question on that point, the party making a motion for a new trial must establish that at the time of voir dire, the questioning attorney was without information that the juror was involved in the accident and also that the attorney "could not have acquired such information through diligent effort on his part."[109] The North Dakota Supreme Court also indicated that even if the plaintiff fulfilled these conditions, it would also be necessary to establish that but for the omission, "a different verdict would have been rendered or a new trial will probably result in a changed verdict."[110]

It will obviously be difficult to establish reversible error in any case, but impossible without a record sufficient to illustrate that the question and answer were important. If dishonesty is alleged with respect to the response, the record must be sufficiently detailed to establish that there has been an intentional misstatement rather than an innocent mistake or misunderstanding.

D. PROTECT AGAINST UNREASONABLE TIME RESTRICTIONS

The trial court may impose reasonable time limits on voir dire.[111] However, arbitrary and unreasonable time limits may result in reversible error if a party demonstrates that the trial court precluded the asking of relevant and proper questions to prospective jurors.[112] Thus, the record should reflect the subjects which the attorney was unable to inquire about due to the time limit.[113]

The problem of unreasonable time limits can be avoided through the use of flexible time guidelines,[114] or agreements between the parties as to time limits.

---

108. Sathren v. Behm Propane, Inc., 444 N.W.2d 696, 698 (N.D. 1989) (noting that juror responded that he had no business relationship with a party, when he had conducted a single transaction with a party).

109. Leake v. Hagert, 175 N.W.2d 675, 691 (N.D. 1970).

110. *Id.* (noting however, that the court did not have to reach this issue because the complaining party had not fulfilled other requirements for a new trial).

111. State v. Purdy, 491 N.W.2d 402, 407 (N.D. 1992).

112. *Id.* at 407-08.

113. *Id.* at 408 (noting that "defendants did not submit additional questions to the trial court that they were unable to ask because of the two-hour time restriction").

114. *Id.*

E. PROVIDE CONFIDENTIALITY FOR JUROR RESPONSES TO SENSITIVE QUESTIONS

1. Use of Jury Questionnaires

Questionnaires are used in some North Dakota courts in both criminal and civil trials.[115] Rule 17.1 (C)(1) of the North Dakota Rules of Criminal Procedure specifically points out that questionnaires are one item which can be considered at pretrial conferences. The use of written jury questionnaires has the potential to save courts time[116] and protect juror privacy interests.[117] Most important of all, there is substantial research which indicates that questionnaires result in more truthful answers from prospective jurors.[118]

Some voir dire questions are very difficult to ask and to answer, yet they should be asked. A prospective juror's experience with sexual misconduct by others may well result in important emotional reactions should he or she be called to sit in judgment of a gross sexual imposition case or one involving sexual harassment. A venire person's experiences with drug or alcohol addiction may result in prejudice in considering driving under the influence or dram shop cases.

In mock trials held at the law school, we have seen prospective jurors with important information concerning possible prejudice and bias, sit silently while attorneys ask them personal questions which would cause some embarrassment if answered in public. No doubt in the minds of some mock trial jurors, and real prospective jurors, it is better to remain silent than to embarrass themselves or their friends or family members who have some personal secret. Consider the following question allegedly asked by an attorney in a recent gross sexual imposition trial: "Does anyone here believe that having sexual relationships with a child should be legal or there shouldn't be laws against it . . . ."[119] Assuming that any juror believes such acts should be legal, does anyone actually believe that they would make such a statement in open court in North Dakota?

It is impossible to predict in advance which questions might require an embarrassing answer from a prospective juror. Even the simple

---

115. *See* State v. Smaage, 547 N.W.2d 916, 919 (N.D. 1996) (noting that defendant used questionnaire which asked jurors of their familiarity with defendant's drinking habits to support his motion); Copenhaver v. Geier, 508 N.W.2d 877, 877 (N.D. 1993) (noting use of questionnaire).

116. STARR & MCCORMICK, *supra* note 4, § 2.8.

117. *See supra* part V.A (discussing juror privacy).

118. MAUET, *supra* note 9, at 16-17.

119. State v. Gonderman, 531 N.W.2d 11, 15 (1995).

question of where someone is employed might call for disclosure of loss of employment or bankruptcy, something that many people would find embarrassing.

Questionnaires may be abused. A series of questions may be constructed in such a way as to suggest information to prospective jurors in an attempt to influence their opinions. Where the purpose of a questionnaire is primarily to serve as a sales device, rather than to find a fair and impartial jury, the trial court may limit the questionnaire just as oral voir dire may be limited.[120]

2. *Individual Questioning of Jurors*

Trial courts may allow the "singular examination of prospective jurors in chambers" in both civil[121] and criminal cases.[122] A judge has also held such individual question in the courtroom with only a single juror present at a time during voir dire.[123] Another judge allowed jurors to be questioned in small groups.[124] Such individualized questioning may make jurors more willing to admit to embarrassing facts. If a juror responds with an answer which may unfairly prejudice one of the parties, the fact that the answer is made out of the presence of other prospective jurors guards against the contamination of the whole panel by such a prejudicial remark.

3. *Judge's Comments to Jurors*

Judges customarily make comments to prospective jurors prior to voir dire, and then ask some questions of jurors before turning the matter over to attorneys. Judges who relax jurors during the initial comments and who explain the reasons for voir dire, seem to help jurors to open themselves up during questioning. The manner in which the judge questions the jurors also is important. Rather than asking point blank whether any of the jurors has had a particular problem, a more indirect method of questioning draws jurors out, especially if the judge lets jurors know that there are private means to disclose personal information. For example, some North Dakota judges have lunch with the attorneys in chambers and advise jurors that they are available to discuss problems in a private setting at that time. Jurors can simply notify the

120. *See supra* part IV.B. (telling the jury about the case).
121. N.D. R. CIV. P. 47(a).
122. N.D. R. CRIM. P. 24(a).
123. State v. Olson, 290 N.W.2d 664, 666 (N.D. 1980).
124. State v. Breding, 526 N.W.2d 465, 467 (N.D. 1995).

clerk if they desire such a meeting, and the other jurors and spectators will not know the request had been made.

F. USE OF PRETRIAL CONFERENCES AND AGREEMENTS

There appears to be substantial variety in how judges supervise voir dire in their courts. Some judges allow considerably more leeway to attorneys than others. A pretrial conference in which the judge explains the local rules of voir dire can save considerable embarrassment to attorneys who have not appeared before the judge. It is sometimes possible to reach agreement of the parties as to the number of peremptory challenges, jury questionnaires, the time to be spent in jury selection, tactics which will not be used,[125] and topics which should be avoided.[126] Where agreement is not possible, a motion in limine may furnish solutions to many potential problems.[127]

It may also be possible to have the judge ask questions to jurors on sensitive matters. In such an event, the jurors may be less likely to be angry with attorneys for causing them embarrassment.

VIII. CONCLUSION

Trial courts must always have considerable discretion in determining what attorneys may ask and say during voir dire. There are simply too many variables in the types of trials heard and the biases of potential jurors to allow voir dire to be governed by a few specific rules.

Attorneys can substantially reduce the risk of unfavorable court rulings during jury selection by getting to know as much as possible about how individual judges exercise their discretion. They can further reduce their risk by reviewing the common law limitations on voir dire, spotting potential problems before trial, and advising the court of potential problems. The time spent in preparation is insignificant when compared to the time and cost of a mistrial or reversal on appeal. The court can always exercise its discretion more wisely with time to reflect on options available.

Preparation for voir dire also is important for the image of our profession. The people who see us most often are the prospective jurors who are drawn from families and work, often at considerable economic sacrifice. The attorney who wastes their time, unduly embarrasses them or makes unwarranted invasions of their privacy risks condemnation not

---

125. Windle Turley, *Voir Dire: Preparation and Execution, in* THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 409, 411 (John G. Koeltl ed., 1989).

126. *See* South v. National R.R. Passenger Corp., 290 N.W.2d 819, 838 (N.D. 1980) (noting parties prohibited from discussing certain topics during the voir dire).

127. Turley, *supra* note 125, at 410-11.

only for himself or herself, but for the client and the entire judicial system as well.

The reader may note that most of the cases cited in this article are fairly recent cases. The selection of cases was not just a result of an attempt to keep current. The number of cases involving alleged deficiencies in jury selection is increasing in North Dakota. This would appear to be a good time to review our work in this crucial area, and to borrow from some of the wisdom of the past.