

The Importance of Voir Dire: Essential Techniques for Choosing Finders of Fact

Michael D. Mulvaney[†]
John A. Little, Jr.^{††}

Introduction

Many lawyers recognize that a case may be won or lost before opening statements based solely on the composition of the jury.¹ Despite these high stakes, lawyers often do not devote the time and attention to jury selection it deserves.² This error puts lawyers at an immediate disadvantage to counsel who have approached and prepared for voir dire in light of its unrivaled importance to the outcome of a trial.

The wide variation in courts' voir dire procedures, however, complicates these preparation efforts. The rules grant judges significant discretion to manage voir dire,³ which means voir dire may vary from courtroom to courtroom and even case to case. This makes it impossible to craft a one-size-fits-all approach. Nonetheless, basic strategies should be employed regardless of a court's jury selection method in order to maximize the chance of success at trial.

[†] B.S. (1983), Auburn University; J.D. (1987), University of Alabama School of Law. Mr. Mulvaney is a shareholder in the Birmingham, Alabama office of Maynard Cooper & Gale, P.C.

^{††} B.A. (2005), Wake Forest University; J.D. (2011), University of Georgia School of Law. Mr. Little is an associate in the Birmingham, Alabama office of Maynard Cooper & Gale, P.C.

This Article is based on a presentation by Mr. Mulvaney at a symposium—"The Alabama Trial Attorney: Litigation Lessons from Birmingham's Finest"—sponsored by the *Cumberland Law Review* on November 20, 2015, at Cumberland School of Law.

¹ See Lisa A. Blue & Robert B. Hirschhorn, *Goals and Practical Tips for Voir Dire*, 26 AM. J. TRIAL ADVOC. 233, 234 (2002).

² See *id.*

³ See *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981) ("The content and conduct of the questioning are generally committed to the sound discretion of the district court in both civil and criminal cases."); *James v. Cont'l Ins. Co.*, 424 F.2d 1064, 1065 (3d Cir. 1970) (The Federal Rules of Civil Procedure "confer[] upon the trial judge broad discretion as to the manner in which voir dire is conducted and the type and scope of questions to be asked.").

Basic Procedures for Voir Dire

Although courts rarely conduct voir dire in the exact same manner, the rules do offer some parameters. In federal court, Federal Rule of Civil Procedure 47 sets out the basic requirements:

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. §1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.⁴

As the rule's text reveals, judges have significant discretion to adopt their own method of jury selection,⁵ which has created differing approaches to both questioning panelists and the selection of jurors. Some courts give counsel significant latitude to question panelists, while in others the judge primarily conducts voir dire.⁶ Some judges also use a hybrid approach, where both the lawyers and the judge question the potential jurors.⁷ All of these modes of questioning fall within the bounds of the federal rules.⁸

Although the rules provide little guidance regarding the actual method of juror selection, judges typically use one of two approaches: the struck system and the jury box system.⁹ In the struck system, questioning of

⁴ FED. R. CIV. P. 47.

⁵ See *McCray v. R.J. Reynolds Tobacco Co.*, 579 F. App'x 912, 915 (11th Cir. 2014) ("A district court has wide discretion in conducting the jury selection process.") (citations omitted).

⁶ Compare CONN. GEN. STAT. § 51-240 (1982); FLA. R. CIV. P. 1.431(b) (2013); KAN. STAT. ANN. § 60-247(b) (2010), with ARK. CODE ANN. § 16-33-101(a)-(b) (2007); COLO. R. CIV. P. 47(a)(3); ME. R. CIV. P. 47(a).

⁷ See ALA. R. CIV. P. 47(a); ALASKA R. CIV. P. 47(a); D.C. R. CIV. P. 47(a); OR. R. CIV. P. 57(c).

⁸ See generally FED. R. CIV. P. 47 (giving broad latitude to trial courts for determining the manner in which voir dire will be conducted).

⁹ Judge David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and The Arrival of Batson*, 23 TEX. TECH. L. REV. 407, 451-53 (1992).

potential jurors is done *en masse*.¹⁰ Under the jury box system, the judge seats a subset of potential jurors that correlates to the number of jurors needed in the case and then adds to the group as panelists are removed.¹¹

Given the differing procedures across various jurisdictions, it is imperative to review the court's local rules and to any pretrial or standing orders governing jury selection. These orders or rules may specifically detail the court's procedures,¹² provide an overview of the questions the judge will ask the panelists,¹³ or simply indicate whether the lawyers will have an opportunity to question the panelists.

Striking the Jury

Regardless of the court's procedures, the questions asked during voir dire will likely fall into two broad categories: (1) determining whether the panelist satisfies the basic statutory requirements for jury service; and (2) determining bias or prejudice of the panelist to serve as a juror in the particular case.¹⁴ Both of these areas of questioning provide a basis to challenge the prospective juror for cause.¹⁵

In federal court, 28 U.S.C. § 1865 defines the threshold qualifications for jury service.¹⁶ A person is presumed

qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

¹⁰ Hittner & Nichols, *supra* note 9, at 451 (“Under [the struck jury] method, the judge or the attorneys examine the entire venire, whose members sit in the ‘audience’ section of the courtroom.”).

¹¹ ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 5:9 (2015) (discussing voir dire methods used in federal courts).

¹² *See, e.g.*, Hon. Frank D. Whitney, In re: Standing Order Governing Jury Selection and Instruction in Civil Cases, 3:07-mc-00047 (2007) (providing a comprehensive thirteen-page plan with exhibits for how voir dire should be conducted); Appendix 1, *infra*.

¹³ *See, e.g.*, Hon. Karon O. Bowdre, Standard Voir Dire in a Civil Case (setting out standardized questions that the court asks during every voir dire); Appendix 2, *infra*.

¹⁴ *See* LARSEN, *supra* note 11, at § 5:18.

¹⁵ *See, e.g.*, ALA. CODE § 12-16-150 (1975); FLA. STAT. ch. 913.03 (1998).

¹⁶ *See* 28 U.S.C. § 1865 (2014).

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.¹⁷

In some cases, the court will screen the panelists to assess whether they meet these requirements prior to voir dire. Of course, if that does not occur, and counsel learns that a panelist does not satisfy the statutory requirements, counsel has grounds to strike the panelist for cause.¹⁸

These statutory requirements, however, usually are not the focus of voir dire. More attention is often devoted to determining whether a prospective juror is biased. If the “court finds the juror has a bias that is so strong as to interfere with his/her ability to properly consider evidence or follow the law,” the juror may be challenged for cause.¹⁹ “Bias can be shown either by the juror’s own admission of bias or by proof of specific facts which show the juror has such a close connection to the parties, or the facts at trial, that bias can be presumed.”²⁰ When making a challenge for cause due to bias, the “burden of showing partiality on the part of jurors is upon the challenger. To meet this burden, [the challenger] must show that particular jurors actually hold opinions raising a presumption of partiality.”²¹

Prospective jurors’ responses during voir dire may also provide counsel a reason to exercise one of their peremptory challenges. The federal rules grant each party three peremptory challenges²² that can be exercised for almost any reason.²³ Through a series of United States

¹⁷ *Id.*

¹⁸ Hittner & Nichols, *supra* note 9, at 440.

¹⁹ FEDERAL TRIAL HANDBOOK CIVIL § 21:1 (4th ed. 2015).

²⁰ *Id.*

²¹ *Shapiro v. Kauffman*, 855 F.2d 620, 621 (8th Cir. 1988).

²² *See* 28 U.S.C. § 1870 (2014).

²³ *See Dunham v. Frank’s Nursery & Crafts, Inc.*, 919 F.2d 1281, 1287 (7th Cir.

Supreme Court opinions, the Court ruled a juror may not be stricken from the panel based on race,²⁴ gender,²⁵ or ethnic origin.²⁶ Moreover, if a party believes opposing counsel has exercised a peremptory challenge to exclude a juror based on one of the above-protected criteria, then the party may pursue a *Batson* challenge.²⁷

Strategies for an Effective Voir Dire

As demonstrated above, and despite the variation in procedures, voir dire essentially consists of questioning the panelists and then selecting—or more accurately, striking—jurors based on their responses to questions. Below are strategies for an effective voir dire.

1. Questioning the Venire: An Opportunity for Conditioning and Commitment

Voir dire is the first time the jurors meet the lawyers and hear about the case, which means voir dire is the first opportunity to condition the jury, introduce them to potential trial themes, and diffuse potential negative aspects of the case. Although a court's restrictions on counsel's opportunity to directly question potential jurors may make this task more

1990) (recognizing that peremptory challenges are “a device admittedly intended to allow a party to strike a potential juror for any reason”).

²⁴ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (“Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.”).

²⁵ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (“We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.”).

²⁶ See *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (“Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race.”).

²⁷ See *Batson v. Kentucky*, 476 U.S. 79, 80 (1986) (In order to make a prima facie argument for discrimination during the voir dire process, the defense must show that members of a particular race are uniformly stricken from the venire, and must present “such facts and any other relevant circumstances [that] raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race.”); see also LARSEN, *supra* note 11, §§ 5:83-5:87 (discussing the basic framework for a *Batson* challenge).

difficult, counsel will, at the very least, be provided an opportunity to submit potential voir dire questions to the judge.²⁸ These proposed questions should be drafted in a way that serves these goals.

Aside from the jurors' first introduction to the case, voir dire should be used to secure commitments from the jurors to be fair, impartial, and to follow the law even if they may not like the consequences or find the applicable law distasteful. This provides an anchor and reference point at the close of the case, as jurors can be reminded of the personal commitment they made during voir dire to adhere to the law even if they do not like the result.²⁹

Of course, voir dire is also the prime opportunity to develop any potential challenges for cause. Because most jurors are unwilling to admit they are unable to be fair, pinpointing and establishing bias requires almost a cross-examination mindset. Questions must be creative to successfully draw out bias and establish a panelist's partiality. One strategy for achieving this goal is to premise questions against a backdrop of neutral evidence. For example, ask questions that begin: "Even if the facts are neutral, would you be more inclined to" Once one panelist admits they would be inclined one way or the other, counsel can build on the response by asking other jurors if they agree with the response.³⁰ This line of questioning provides an opportunity for further questioning of the panelists to develop a for-cause challenge.

Finally, follow-up is vital during questioning. Just as counsel would during cross-examination, attorneys should press the panelists on issues and topics that are important to their case. Responses that provide reason for concern should, of course, be explored further.

2. "Selecting" the Jurors: Stressful and Strategic

After skillfully questioning the panelists, strikes and challenges must be made. In many instances, this is one of the most—if not the most—

²⁸ See, e.g., *Hayes v. Maryland*, 90 A.3d 1197, 1198-1200 (Md. Ct. Spec. App. 2014) (discussing whether the trial court should have allowed certain specific written questions submitted by defendant during voir dire).

²⁹ See, e.g., *State v. Knoche*, 515 N.W.2d 834, 840 (S.D. 1994) (stating a juror who expresses an opinion about the case during voir dire need not be excused if she states under oath that she can be fair).

³⁰ Blue & Hirschhorn, *supra* note 1, at 244.

stressful aspects of trial because of the severe time constraints imposed by courts.³¹ Courts may only grant counsel a few minutes to digest what they have learned during questioning and decide how to proceed with their challenges.³²

This means that there is little time to develop an overall strategy for making challenges and exercising peremptory strikes for each panelist. Rather, counsel should determine in advance the characteristics of an undesirable juror. Data and consultants attempt to simplify this task, but rarely are able to predict how an individual will view the unique circumstances of the case at hand. Identifying a “disfavored” juror, therefore, should be tailored to the specific facts of the case, and counsel should recognize that the ability of data or consultants to predict a certain outcome is limited.

Exercising challenges and peremptory strikes must be done with the goal of keeping the most disfavored panelist off the jury. Given the fast-paced atmosphere of jury selection, there simply is no opportunity to expend energy on those panelists who do not create a strong negative impression. Efforts to protect or identify a “favorite” juror will not likely pay dividends because opposing counsel will probably strike this panelist. Accordingly, the most effective strategy for managing jury selection is to stay focused on keeping disfavored panelists off the jury.

Conclusion

For better or worse, by the time a case reaches trial, a jury will likely decide the outcome. Voir dire, therefore, cannot be neglected. Counsel should learn the court’s practices, develop questions for voir dire that will favorably introduce the jury to the case, get commitments to follow

³¹ It is important to note that, although there are often strict time restraints on voir dire for the sake of judicial economy, “the trial court may not impose arbitrary time limits on voir dire.” *Miller v. State*, 785 So. 2d 662, 664 (Fla. Dist. Ct. App. 2001).

³² See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.33(d) (2012) (“The trial judge shall establish time limitations for the questioning of prospective jurors during the voir dire. At the discretion of the judge, the limits established may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of panels of jurors or individual jurors.”).

applicable law that leads to a desirable outcome, and clearly identify the type of juror that should be kept off the jury. Utilizing these strategies ensures a proper foundation for a positive result at the end of the case.

Appendix 1

Jury Selection and Instruction in Civil Cases

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MISCELLANEOUS NO. 3:07-MC-47
(Doc. No. 5)

IN RE:)
STANDING ORDER GOVERNING)
JURY SELECTION AND)
INSTRUCTION IN CIVIL CASES)
BEFORE THE HONORABLE)
FRANK D. WHITNEY)
_____)

The terms of this Order shall apply to all pending and future civil cases on the docket of the Honorable Frank D. Whitney in which a trial by jury has been demanded.

1. **VOIR DIRE.** Pursuant to Rule 47(a) of the Federal Rules of Civil Procedure, the Court will conduct all jury voir dire according to the following procedures.
 - a. Prior to a scheduled trial term of Court, the Jury Coordinator will mail to each person selected for jury service a “Confidential Juror Questionnaire,” a copy of which is attached to this Order as Exhibit A. Counsel shall be provided copies of the completed juror questionnaires prior to jury selection and voir dire. Counsel should be aware that, because it is the Court’s custom to hold mixed criminal/civil trial terms which draw on a common juror pool, some of the questions asked on the Confidential Juror Questionnaire may not seem especially relevant to civil jury selection.
 - b. After the prospective jurors are sworn, the Court will:
 - i. Explain to the jury panel the purpose of voir dire;
 - ii. Indicate to the jury panel how long the case is expected to take to try, and ask if any member of the jury panel has

- special circumstances (including personal obligations and/or medical conditions) that would make serving as a juror difficult;
- iii. Read the joint statement of the case provided by counsel in advance of trial, and ask if any member of the jury panel has previously heard or read anything about the case;
 - iv. Have counsel introduce themselves and their clients, and ask if any member of the panel has any relationship with any of them.
 - v. Have counsel identify all potential witnesses, and ask if any member of the panel has any relationship with any of them.
 - vi. Ask any necessary follow-up questions that may arise from a juror's answer to any question (including written answers to questions on the Confidential Juror Questionnaire);
 - vii. Ask any questions requested by counsel, as the Court may allow in its discretion;
 - viii. Ask if any other reason suggests itself to any member of the jury panel as to why he or she could not sit on this jury and render a fair and impartial verdict based on the evidence presented in the context of the Court's instructions on the law.

2. JURY SELECTION.

- a. **Method.** Jury selection will be conducted according to a modified "strike and replace" method. This method generally works as follows: A number of jurors equal to the size of the trial jury are called into the box. Only the jurors seated in the box initially are examined by the judge. Requests to excuse jurors for cause and hardship are made, in writing on a form to be provided by the Court, and may be heard and ruled upon in sidebar. Peremptory challenges are then indicated on a form to be provided by the Court and are announced by the Judge. Failure to exercise a peremptory challenge as to a juror during the round in which he/she is first seated in the box will result in waiver of counsel's right to challenge that juror during later rounds. When a juror is removed for cause or hardship or is peremptorily removed by one of the parties, another juror is called forward to replace the departing juror. The replacement is then asked for his or her

answers to all previous questions. This process continues until all challenges for cause and peremptory challenges have been exhausted and the required number of jurors remain. Counsel should note that jurors will be called at random and counsel will not know the order in which jurors in the pool will be called to fill vacant seats in the box.

- b. **Number of Peremptory Challenges.** All plaintiff(s) collectively shall be entitled to three (3) peremptory challenges. All defendant(s) collectively shall likewise be entitled to three (3) peremptory challenges. The Court may allow additional peremptory challenges (no more than three per party) in exceptional cases.
- c. **Number of Trial Jurors.** Civil juries will consist of eight (8) jurors with no alternates; however, no mistrial will result if a juror must be excused mid-trial so long as at least six (6) jurors remain at the time a verdict is returned.

3. JURY INSTRUCTIONS. Jury instruction will be conducted in four (4) phases. The purpose of this methodology is to break up the monotony of a single final charge, instruct the jury at points in time in which the Court's directives will have the greatest efficacy, and allow the jury to retire to deliberate with counsel's summations fresh in mind.

- a. **Phase One.** Phase one instructions will be given after the jury is empaneled and before opening statements. Topics covered in phase one instructions include: (i) juror conduct during trial; (ii) the province of the judge and jury; (iii) what is/is not evidence; and (iv) assessment of witnesses. The Court's phase one pattern instructions are attached to this Order as Exhibit B. Ordinarily, these instructions WILL NOT be repeated during the final jury charge but WILL be included in a set of written jury instructions that will be sent back with the jury during deliberations.
- b. **Phase Two.** Phase two instructions will be given during the course of trial as needed to explain why certain evidence has been admitted or excluded. Issues arising during trial that would warrant an instruction include: (i) if judicial notice of a fact is taken, or a stipulation is read into the record, or an expert witness is qualified to testify concerning matters of opinion, the Court will explain these procedures to the jury at the appropriate time;

(ii) if charts, summaries, or transcripts are used to aid the jury but not admitted into evidence, an appropriate instruction concerning the use of the aid will be given; and (iii) if evidence is admitted for a limited purpose (e.g., prior bad acts, impeachment by prior inconsistent statement or criminal conviction), an appropriate cautionary instruction will be given at that time. Ordinarily, these instructions WILL NOT be repeated during the final jury charge and WILL NOT be included in a set of written jury instructions that will be sent back with the jury during deliberations. Accordingly, if counsel believe that a cautionary or explanatory instruction is needed at any time during trial, counsel shall immediately make himself heard or any objection to the Court's failure to instruct shall be deemed waived.

- c. **Phase Three.** Phase three instructions will be given after the close of all evidence but before closing arguments. Topics covered in phase three instructions include: (i) the burden of proof; (ii) a reading of each jury interrogatory on the verdict form, together with the elements of each claim or defense and relevant definitions of terms; and (iii) damages. The Court's phase three pattern instructions are attached to this Order as Exhibit C, although the Court will be guided by the parties' requests as this phase of jury instructions is largely case-specific. These instructions WILL be included in a set of written jury instructions that will be sent back with the jury during deliberations.
- d. **Phase Four.** Phase four instructions will be given after closing arguments and before the jury retires to deliberate. The Court's phase four pattern instructions are attached to this Order as Exhibit D. These instructions WILL be included in a set of written jury instructions that will be sent back with the jury during deliberations.

IT IS SO ORDERED.

Signed: May 14, 2007

Frank D. Whitney
United States District Judge

Exhibit A
CONFIDENTIAL JUROR QUESTIONNAIRE
(To be Reviewed Only by Counsel and the Court)

Name: _____ Age: _____
Town/City of Residence: _____
County of Residence: _____ Years at this Residence: _____
Highest Level of Formal Education: _____
Current Employer/Workplace: _____ Years at this Employer: _____
Position of Employment/Type of Work: _____
Marital Status (Check One): ☐ Single
☐ Married/Remarried:
If married, years married: _____
☐ Divorced and not remarried
☐ Widow/Widower
Children (Check One): ☐ No
☐ Yes: If yes, ages and genders: _____

Hobbies: _____
Last books read or favorite books: _____
Favorite movies or television shows: _____
Have you ever sat on a jury before? ☐ No
☐ Yes:
If yes, was it a Civil Jury _____
or a Criminal Jury _____
If yes, did you reach a verdict:
_____ No or _____ Yes
(Do **NOT** indicate what the verdict was)

Other than serving as a juror and other than minor traffic violations, have you ever had any other involvement in a court proceeding (as a party, witness, or other role)? ☐ No or ☐ Yes
If yes, briefly describe _____
Do you know any attorney or employee in the United States Attorney's Office? ☐ No or ☐ Yes

Do you **personally** know any other law enforcement officer or special agent? ____ No or ____ Yes

If yes, briefly describe: _____

Other than minor traffic violations, have you ever had any unpleasant or bad encounter with a law enforcement officer or law enforcement agency? ____ No or ____ Yes

If yes, briefly describe: _____

Has anyone close to you, such as a friend or relative, had any run-ins, difficulty, or disagreement with a law enforcement agency or other government agency? ____ No or ____ Yes

If yes, briefly describe: _____

Do you have any religious convictions or moral scruples against sitting as a juror and deciding whether or not a criminal defendant is guilty or not guilty? ____ No or ____ Yes

Exhibit B

Members of the Jury:

Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in this trial.

First, a few words about your conduct as jurors.

1. I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you all retire to the jury room at the end of the case to deliberate on your verdict, you must not talk about this case.
2. Do not read or listen to anything touching on this case in any way – that includes newspaper articles or television or radio reports on this case. If anyone should try to talk to you about it, bring it to my attention promptly.
3. Do not try to do any research or make any investigation about the case on your own.
4. Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

If you wish, you may take notes. If you do, remember that they serve merely as an aid to your memory; they are not a substitute for your own memory or the memory of any other juror. It is each juror's individual responsibility to listen carefully to and remember the evidence. Remember that your notes are not evidence, and your individual recollections must control your deliberations. Those of you who take notes should leave them in the jury room when you leave the courthouse each evening.

As members of the jury, you are the sole and exclusive judges of the facts. You determine the credibility of the witnesses and resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence. You are to perform the duty of finding the facts without bias, prejudice, or sympathy to any party.

As judge, it is my responsibility to preside over the trial, decide what testimony and evidence is admissible under the law for your consider-

ation, and instruct you as to the legal principles governing this case. It is your duty to accept my instructions of law and apply them to the facts as you determine them. You should not single out any instruction as alone stating the law, but must consider all of my instructions as a whole. You may not substitute or follow any personal or private notion or opinion as to what the law is or ought to be. Nothing that I may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find. Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by the lawyers or myself are not evidence. It is the witnesses' sworn testimony that is evidence. Thus, if a lawyer makes a statement or propounds a question that assumes certain facts to be true, this must not be taken as evidence unless a witness adopts or agrees to the assumed facts in his answer.
2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is overruled, treat the answer like any other. If the objection is sustained, ignore the question. Do not attempt to guess what answer might have been given had I allowed the question to be answered.
3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.
4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two types of evidence which you may properly assess in determining whether a party has met its burden of proof—direct evidence

and circumstantial evidence. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness to something he knows by virtue of his own senses. Circumstantial evidence is proof of a set of facts from which you may infer or conclude, on the basis of your reason, experience, and common sense, that some other fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that your verdict must be based on a preponderance of all the evidence presented.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or none of it, or believe part and disbelieve part. In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of a fact. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

In considering the testimony of any witness, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your daily life. You should consider any bias or hostility the witness displays for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness has to see, hear, and know the things about which he testifies, the accuracy of his memory, his candor or lack of candor, his intelligence, the reasonableness and probability of his testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony. Always remember that you should use your common sense, your good judgment and your own life experience.

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence. Next, the plaintiff will present his [her] witnesses, and the defendant may cross-examine them. Then the defendant will present his [her] witnesses, and the plaintiff may cross-examine them. After the evidence is in, I will instruct you on the law, and the attorneys will make their closing arguments to summarize and interpret the evidence for you. You will then retire to deliberate on your verdict.

Exhibit C

Members of the Jury:

Now that you have heard the evidence and soon will hear the arguments of counsel, I will instruct you as to the law that applies in this case. If any difference appears to you between the law as stated by the attorneys in closing arguments and that stated by me in these instructions, you are to be governed by my instructions.

I remind you that it is your duty and your responsibility in this trial to judge the facts in accordance with the law as I instruct you. You may find the facts only from the evidence which I have allowed to be admitted during this trial. You must not consider anything which I have instructed you to disregard, and evidence which I have admitted only for a limited purpose you must consider only for that purpose.

[Insert any additional general instructions as may be necessary here.]

In a civil case, the party with the burden of proof on any given issue has the burden of proving every disputed element of his claim or affirmative defense to you by a preponderance (or the greater weight) of the evidence. To establish a fact by a preponderance (or the greater weight) of the evidence means to prove that the fact is more likely true than not true. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. If you conclude that the party bearing the burden of proof has failed to establish any essential part of his (her) claim or affirmative defense by a preponderance of the evidence, you must decide against him (her) on the issue you are considering.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind.

[Insert instructions specific to the claims and defenses at issue here. The following italicized language is included as an example.]

* * * * *

The first issue on the verdict form reads: “Do you find that the Defendant is liable to the Plaintiff on account of violating the Racketeer Influenced and Corrupt Organizations Act?”

To establish that the defendant has violated RICO, the plaintiff must prove each of the following six elements by a preponderance of the evidence:

- 1. That an “enterprise” existed;*
- 2. That the enterprise engaged in, or had some effect upon, interstate or foreign commerce;*
- 3. That the defendant was employed by or associated with the alleged enterprise;*
- 4. That the defendant knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the alleged enterprise;*
- 5. That the defendant did so knowingly and willfully through a “pattern of racketeering activity;” and*
- 6. That the plaintiff was injured in its business as a proximate result of the defendant’s commission of the pattern of racketeering activity.*

The term “enterprise” includes any individual, sole proprietorship, partnership, corporation, association or other legal entity, and any union or other group of individuals associated in fact although not a legal entity, that is engaged in, or the activities of which affect, interstate or foreign commerce.

The term “racketeering activity” includes, among other things, any act in violation of 18 U.S.C. § 1341 (relating to mail fraud) and 18 U.S.C. § 1343 (relating to wire fraud). Under those laws it is a criminal offense for anyone, knowingly and with intent to deceive, to participate in a scheme to defraud another out of money or property by making materially false and fraudulent representations, and then to attempt to execute or carry out the fraudulent scheme through use of the mails or interstate wire communication facilities. The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant

actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.

Each separate use of the mails or wires in connection with a scheme to defraud is a separate offense or what is commonly referred to in the RICO context as a “predicate act.” In order to constitute a “pattern of racketeering activity” under RICO, you must find that the defendant committed at least two such predicate acts within 10 years of each other.

To prove that the predicate acts constituted a “pattern of racketeering activity,” the plaintiff must also prove that the two or more predicate acts are related to each other and that they pose a threat of continued criminal activity. A series of disconnected crimes alone does not constitute a pattern of racketeering activity, nor do they alone amount to, or pose a threat of, continued racketeering activity. To prove that the acts of racketeering are related, the plaintiff must prove that the acts had the same or similar purposes, results, participants, victims, or methods of commission, or that they are otherwise interrelated by distinguishing characteristics and are not isolated events. To prove that the racketeering acts pose a threat of continued racketeering activity, the plaintiff must establish that (1) the acts are part of a long-term association that exists for criminal purposes, (2) the acts are a regular way of conducting the defendant’s ongoing business, or (3) the acts are a regular way of conducting or participating in an ongoing RICO enterprise.

Finally, for the plaintiff to prevail under RICO, it must prove by a preponderance of the evidence that the defendant’s RICO violations were the proximate cause of injury to the plaintiff’s business or property. Therefore you must find that the plaintiff justifiably relied, to its detriment, on the conduct of the defendant giving rise to the violation of RICO; and that as a direct consequence, the plaintiff suffered an injury to his business or property.

The second issue on the verdict form reads: “What amount of compensatory damages, if any, is the Plaintiff entitled to recover from the Defendant?”

If the plaintiff has proven any of its claims against the defendant by a preponderance of the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff’s damages as an indication in any

way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable on any of the plaintiff's claims. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant.

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which resulted from the defendant's wrongful conduct. If you find that the defendant is liable on the claims, as I have explained them, then you must award the plaintiff sufficient damages to compensate it for any injury proximately caused by the defendant's conduct. These are known as "compensatory damages." Compensatory damages seek to make the plaintiff whole – that is, to compensate it for the actual damage suffered. At a minimum, you may award some nominal amount of damages to the plaintiff even in the absence of proof of actual damages.

You may award compensatory damages only for injuries that a plaintiff proves were proximately caused by a defendant's allegedly wrongful conduct. The damages that you award must be fair and reasonable, neither inadequate nor excessive. You should not award compensatory damages for speculative injuries, but only for those injuries that a plaintiff has actually suffered. In awarding compensatory damages, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require a plaintiff to prove the amount of its losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. You are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

* * * * *

With these instructions in mind, you will now hear the closing arguments of counsel.

Exhibit D

Now, members of the jury, you have heard the evidence and the arguments of counsel. It is your duty to remember the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence in your deliberations.

It is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions urged by the attorneys and any other contention that arises from the evidence, and to weigh them all in the light of your common sense, and as best you can, to determine the truth of this matter.

The law, as indeed it should, requires the presiding judge to be impartial. Therefore, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case.

I instruct you that a verdict is not a verdict until all [eight] jurors agree unanimously as to what your decision shall be. Each one of you must decide the case for yourself. However, you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

I suggest that as soon as you reach the jury room, before beginning deliberations, you select one of your members to serve as foreperson. This individual has the same vote as the rest of the jurors, but simply serves to preside over the discussions. Once you begin deliberating, if you need to communicate with me, the foreperson should send a written message to me by ringing the buzzer next to the door and handing your note to the Marshal. However, you are not to tell me how you stand numerically as to your verdict – for instance, should you be split in your voting at any particular time, you would not tell me the specific numbers of division in your note.

We use a verdict sheet. This is simply the written notice of the decision that you reach in this case. As soon as you have reached a verdict as to the claims alleged in the pleadings, you will return to the

courtroom and your foreperson will, on request, hand the verdict sheet to the Clerk. There are places on the verdict sheet for the foreperson to enter the verdict, sign it, and date it.

During the trial, several items were received into evidence as exhibits. You will not be taking the exhibits into the jury room with you at the start. If, after you have begun your discussions of the case, you think it would be helpful to have any of the exhibits with you in the jury room, have the foreperson send me a note asking for them.

If you need a break during deliberations, you may do so in the jury room, or if you need a break outside the jury room, a Marshal will escort you. But you must not deliberate during a break unless all [eight] of you are together. If you are not together, then do not talk about the case until all of you are all back together.

You may now take the case and see how you find.

Appendix 2

Standard Voir Dire in a Civil Case

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
[REDACTED] DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CR
[REDACTED],	)	
Defendant.	)	

VOIR DIRE (CIVIL)

We are about to select a jury for the trial of this case that has been announced ready for trial. To assist the Court and the attorneys in that selection process, we are going to proceed with what is called “voir dire” examination.

The purpose of voir dire examination is to give the lawyers a full opportunity to inform themselves about the jury panel so that they may responsibly exercise their duties to their respective clients to select a fair and impartial jury for the trial of this particular case. No one wishes to probe unnecessarily into your private affairs, but the lawyers need to know, and the parties are legally entitled to know some information about you. Therefore, please answer each question as fully and as accurately as you can. We need you to give your best, honest, and sincere effort to answer each question. The information you give in response to the court’s and the lawyers’ questions will be used only by the court and the lawyers to select a qualified jury for the trial of this case.

I am now going to request the courtroom deputy to call the roll of jurors who have been summoned to this courthouse for a term of jury service through a random selection process, and have been selected

through a similar type random selection process to come into this courtroom as a possible jury venire, and who are now seated in the order in which that random selection process put you. As the courtroom deputy calls your name, would you please stand and tell us in a loud voice the information requested on the card each of you has been given.

As I indicated a few minutes ago, we are commencing the trial of the case of Plaintiff v. [REDACTED]. This case generally involves [insert summary of the case contained in the Pretrial Order].

Now, ladies and gentlemen, as indicated earlier, I am going to ask you some questions after which the attorneys will be allowed to ask you some additional questions, if they so desire. Please answer these questions completely and truthfully. If the answer is “Yes”, raise your hand and only give your name in a loud, clear voice when called upon to respond.

1. Has anyone read or heard anything about this case?
2. Is any juror familiar with the facts that may be involved in this particular case? How did you become familiar?
3. Does any member of the jury panel know of any reason why you may be prejudiced for or against the government—or—for or against the Defendant because of the nature of this particular case or otherwise? In other words, is there anyone of you who could not be fair to both sides in this case because this case involves allegations of [REDACTED]?
4. Are you related by blood or marriage to Defendant [REDACTED]?
5. Do you know Defendant [REDACTED]?
6. Have any of you or any person related to any of you by blood or marriage ever been employed by the Defendant [REDACTED]?
7. The attorneys in the case are Assistant U.S. Attorney [REDACTED], representing the United States of America, and [REDACTED] representing Defendant [REDACTED]. Do any of you know personally any of the attorneys in the case? Which one and how?
8. Are any of you members of the jury panel related by blood or marriage to any of the attorneys in this case?
9. Have any of you, or any members of your immediate family, ever been represented by any of the attorneys in the case or to your knowledge been involved in any matter in which any of these attorneys were involved?
10. Are any of you members of the jury panel related by blood or marriage to any of the other members of the jury panel?

11. Has anyone talked with you about this case or discussed it in your presence prior to your coming into this courtroom today?

12. Would any of you be the least bit hesitant promptly to report to me or the courtroom deputy should someone approach you about this case or talk to you about it while you are serving as a juror?

Enter proposed voir dire and any witness list.

13. Is there anyone who believes for whatever reason that they would be unable, if chosen to serve on the jury in this case, to be fair and impartial to both sides and to return a verdict based solely on the facts as you determine them to be from the evidence and the law as I give it to you to be applied to those facts?

14. Can any of you think of any other matter that you should call to the court's attention that may have some bearing on your qualifications as a juror or that may prevent you from rendering a fair and impartial verdict based solely on the evidence and my instructions as to the law?

15. We anticipate that this case will take [redacted] days to try. Would this length of trial work an undue hardship on anyone?

I have now asked the questions I needed to ask. Now, the attorneys may ask you some questions. Please answer them fully and truthfully.

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