Voir Dire For Dummies: Using Visual and Auditory Cues and Question Design to Avoid the Pitfalls of Bunk Science, Gender Stereotypes, Perceptual Errors, and the Social Desirability Bias

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INTRODUCTION

The aura of the jury is universal. A group of strangers randomly selected from the community has the power to decide the fate of an attorney's client. An attorney must convince them, for they will decide. In a criminal trial, their decision is the difference between freedom and incarceration, or even between life and death. Nothing is more important. But who are these strangers? What makes an optimal juror? An attorney must figure out which jurors will be sympathetic to his client and his side of the case. Voir dire is the tool.

Voir dire, however, is extremely challenging. An attorney has no more than a few minutes to uncover the biases in this group of strangers. From that limited interaction, decisions must be made about which jurors to keep and which to discard. But what advice should the attorney follow in deciding between jurors? What questions should be asked? How can the attorney tell if the jurors are answering honestly? And will the jurors really admit their biases? This article seeks to provide guidance to attorneys so they can make the most of voir dire.

The legal system's goal for jury selection is to seat an impartial jury.[1] The Supreme Court describes an impartial jury as one "comprised of a representative cross-section of the community."[2] The representative cross-section is supposed to ensure that "a range of biases and experiences will bear on the facts of the case" since the "interplay of this spectrum of views and personalities is supposed to guarantee the fairness and impartiality of the jury."[3] If that is the case, lawyers should not focus on reducing individual bias, but should rather focus on increasing the jury's representativeness of the community.[4] However, that is not what happens in practice.

During voir dire an attorney's goal is to seat a jury more likely to favor his own client than the client of opposing counsel. This is especially important since "the distribution of individual jurors' predeliberation verdict preferences is a strong predictor of the jury's final verdict. . . ."[5] Resultantly, both attorneys try to prevent adverse jurors from serving on the jury.[6]

There are two ways an attorney can remove a jury from the panel. The first is a challenge for cause. A challenge for cause may be made if a juror fails to meet certain statutory requirements, such as being a county resident.[7] A challenge for cause may also be made for "the presence of bias or prejudice,"

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1. JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY 2 (3d ed. 2012).

2. Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 55 (1992).

3. Forman, *supra* note 2, at 55 (internal quotation marks omitted); *See* Erin York and Benjamin Cornwell, *Status on Trial*: *Social Characteristics and Influence in the Jury Room*, 85 SOCIAL FORCES 455 (Sept. 2006) (reflecting that, although "[t]he American jury is heralded as an institution that is simultaneously representative and egalitarian," "increased statistical representation in the jury pool does not guarantee that diverse views will affect verdicts").

4. Forman, *supra* note 2, at 55.

5. Jessica M. Salerno and Shari Seidman Diamond, *The Promise of a Cognitive Perspective on Jury Deliberation*, 17 PSYCHONOMIC BULL. & REV. 174, 174 (2010).

6. FREDERICK, *supra* note 1, at 2.

7. *Id.*

whether inferred or actual.[8] Inferred bias can be the "result of a relationship between a potential juror and features of the case, e.g., a blood relationship between the potential juror and one of the parties or a financial interest in the outcome of the case."[9] Whereas "[a]ctual bias is imputed to potential jurors as a result of statements reflecting prejudice or bias made during the questions process or actual admissions of bias."[10] These challenges for cause are "limited in scope [but] unlimited in number."[11]

The second way an attorney can eliminate a juror from the jury panel is by using a peremptory challenge. Attorneys are given a limited number of peremptory challenges, depending on the jurisdiction and type of case at hand.[12] Lawyers can use a peremptory challenge against a juror for any reason, as long as the challenge is "exercised in a nondiscriminatory manner in terms of the juror's race, gender, or national origin."[13] To effectively utilize available peremptory challenges, an attorney must use voir dire to learn the "prospective jurors' attitudes toward the opposing parties, the counsel representing those parties, and the factual and legal issues that are relevant to the case."[14]

However, there are many obstacles to effective voir dire: the formal setting of the court room, the subordinate position of the jurors, the brief duration of the examination period, the public disclosures required in traditional voir dire, the jurors' failure to recognize or admit their biases, the evaluation apprehension jurors may feel, the process of group questioning, and the limited number of questions attorneys are able to ask.[15] Additionally,

> [m]any judges permit only very limited questioning of prospective jurors, and these constraints on the scope of questions may interfere with the discovery of bias. Some judges conduct the questioning themselves, and do not allow the lawyers to ask additional questions. Prospective jurors are often expected to volunteer information about their own biases and to judge for themselves whether they could be impartial jurors. But people vary greatly [in] their ability or willingness to do so. While some people may be quite aware of their prejudices, others may be honestly unaware of them. There are obvious social pressures not to admit either to oneself or to others that one is prejudiced. Compounding these problems is the fact that some prospective jurors actually lie on the stand.[16]

An attorney must overcome all of these obstacles to successfully execute

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. FREDERICK, *supra* note 1, at 3; *See* Batson v. Kentucky, 476 U.S. 79, 89, 97-99 (1986) (holding that the Equal Protection Clause "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant," and that a pattern of strikes against black jurors would shift the burden to the government to show a race-neutral explanation for the strikes).
14. JOEL D. LIEBERMAN & BRUCE D. SALES, SCIENTIFIC JURY SELECTION 125 (2007).
15. *Id*. at 90.
16. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 68-69 (2008).

voir dire.

This article aims to provide guidance that attorneys can use to make the most of the few minutes they have for voir dire. First, Section I explains some of the pitfalls attorneys should avoid when conducting voir dire, including relying on bunk science and gender stereotypes or being deceived by perceptual errors. Section II details how attorneys can decipher the visual and auditory cues emanating from potential jurors. Lastly, Section III discusses how an attorney should design the specific questions potential jurors will be asked, in light of common threats to question validity and the social desirability bias. The techniques discussed in this article will enhance an attorney's effectiveness in conducting voir dire, thereby allowing the most effective use of the tool of voir dire.

I. PITFALLS TO AVOID

A. Bunk Science

Many theories claim to hold the key to deciphering jury behavior. These theories derive meaning from everything from a juror's race, religion, gender, or occupation to a juror's clothing color or body type. However, many of these theories are not backed by empirical data and should be avoided.

One theory links specific facial features to indicators of a person's character and desirability for jury service.[17] For example, one theory suggests, that "individuals with a concave or turned-up nose are good helpers, but do not handle money well."[18] But, "if an individual has a hook nose it is an indication that he or she is an excellent business person."[19] However, "[t]hese attributions appear to be based on gross generalizations and stereotypes, with no empirical basis. As a result, there is no reason to believe these indicators will have any utility in the courtroom."[20]

It has also been suggested that attorneys should "carefully examine the way potential jurors are dressed to discern cues as to their personality and ideology."[21] One theory advises plaintiffs to "avoid 'meticulously dressed' jurors."[22] Another theory advises gives meaning to the colors jurors choose to wear noting that "[t]he variety of colors a juror does (or does not) wear [and] the comparison of one juror's colors with those of the other jurors. . .can be useful information."[23] According to that theory, red signifies strength, orange signifies

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17. LIEBERMAN & SALES, *supra* note 14, at 136; Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 234-35 (1990).

18. LIEBERMAN & SALES, *supra* note 14, at 136.

19. *Id.*

20. *Id.*

21. *Id.* at 137.

22. Fulero & Penrod, *supra* note 17, at 235 (citing Dennis C. Harrington and James Dempsey, *Psychological Factors in Jury Selection*, 37 TENN. L. REV. 173, 178 (1969)).

23. SUNWOLF, PRACTICAL JURY DYNAMICS2: FROM ONE JUROR'S TRIAL PERCEPTIONS TO THE GROUP'S DECISION-MAKING PROCESSES 59 (2007); *see also* JAMES RASICOT, JURY SELECTION, BODY LANGUAGE & THE VISUAL TRIAL 99-101 (1983) (breaking down, color by color, the possible

generosity, yellow signifies extraversion, blue signifies serenity, green signifies independence, and gray signifies indecision.[24] However, while "it is possible for clothing to provide a crude indicator of wealth or of tendencies to adopt or reject conventional norms," there is "no existing published research that has demonstrated clothing to be a useful predictor of juror behavior."[25]

Gender has also been suggested as a factor to rely upon in jury selection.[26] One theory warns that women are "unpredictable since they are influenced by their husbands' experiences."[27] Another advises, "old women who wear too much makeup are unstable and bad for the state."[28] Yet another suggests "avoiding housewives, as their experience is limited."[29] Another recommends that the defense keep women if the plaintiff is a male, but not if the plaintiff is a child.[30] And the plaintiff should keep women "[i]f the 'femaleness' of the plaintiff is a factor in the case" because female jurors will identify with the plaintiff.[31] Finally, one theory warns that women should be avoided when plaintiffs are seeking large damage awards "since they are not used to thinking in large sums."[32]

However, such gender stereotypes are baseless and should be avoided. Shadow jury studies attempted to determine if attorneys had successfully exercised their peremptory challenges.[33] In those studies, "[t]he post-trial juror verdict preferences of groups of peremptorily challenged jurors and randomly selected jurors, all of whom heard actual complete trials along with the real jury, were examined."[34] The studies revealed that gender was "the least accurate indicator" of a potential juror's verdict preference.[35] Not only is reliance on gender stereotypes to make jury selection decisions offensive, but more importantly, it is not empirically supported.

Race has also been suggested as a useful category from which to make juror decisions.[36] For example, one theory posits that since Jews, Blacks, the Irish, Italians, Hispanics, and Puerto Ricans have experienced oppression, they will be sympathetic to plaintiffs.[37] The theory further proposes that Germans, Norwegians, Swedes, Englishmen, and Asians will be better for the defense.[38] And that Irish jurors "could forgive the plaintiff's intoxication" easier than

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implications of color psychology for jury selection).

24. SUNWOLF, *supra* note 23, at 59; Rasicot, *supra* note 23, at 99–101.
25. LIEBERMAN, *supra* note 14, at 137.
26. Fulero & Penrod, *supra* note 17, at 232.
27. *Id.* (internal citations omitted).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 233.
32. *Id.* at 232.
33. *Id.* at 242–43.
34. *Id.*
35. *Id.* at 243.
36. *Id.* at 233-34.
37. *Id.* at 234.
38. *Id.*

Italian jurors could.[39] The theory goes on to note that since Jews are "enamored of the medical profession," a plaintiff should avoid them in medical malpractice cases.[40] These highly offensive and baseless generalizations should not factor into an attorney's selection of jurors.

Religion, marital status, and age have also been touted as valuable categories from which to base selections or exclusions of potential jurors.[41] For example, one theory recommends that defense attorneys should avoid Presbyterians, Baptists, and Lutherans, but that they should select Jews, Unitarians, Universalists, Congregationalists, and agnostics.[42] Another theory advises that married people are good for civil plaintiffs and criminal defendants because they "are more experienced in life and more forgiving . . . ."[43] Yet another theory posits that the defense should select younger jurors, while the plaintiff should select older jurors, since older people "can identify with the experience of aches and pains . . . ."[44] Nevertheless, a different theory warns that "[t]hose over fifty-five who live on relatively fixed incomes may hesitate to award large verdicts."[45]

Another theory claims a person's body type can be used to predict jury verdicts.[46] This theory distills the wide range of body types to three groups: endomorphs, mesomorphs, and ectomorphs.[47]

> The endomorph is a round, heavyset person whose body is soft. This type of individual is even-tempered and tends to be outgoing and jolly. The mesomorph is a physically fit, athletic person whose body is hard and muscular. Mesomorphs enjoy risk-taking behaviors and can be aggressive and challenging in nature. Finally, ectomorphs are thin and often weak. They tend to enjoy mental activity and engage in activities by themselves. As a result, they are introverted people.[48]

The theory suggests that since endomorphs are easygoing, they are the optimal type of juror for criminal defendants, but "if a mesomorph can be convinced to adopt an attorney's viewpoint, he or she is typically an ideal juror because the mesomorph's aggressive and dominating nature can cause him or her to be a leader in the deliberation room."[49] However, "the basic assumptions about body types have not been empirically tested within the context of jury decisions. In addition, as the assumptions are based on gross generalizations about individuals, they are likely to be inaccurate," and therefore should not be

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39. *Id.* (internal citations omitted).
40. *Id.* (internal citations omitted).
41. *Id.* at 236-37.
42. *Id.* at 236.
43. *Id.*
44. *Id.* at 236-37.
45. *Id.* at 237.
46. LIEBERMAN & SALES, *supra* note 14, at 139.
47. *Id.*
48. *Id.* (emphasis omitted).
49. *Id.*

relied upon.[50]

Another theory touts that a potential juror's occupation is a valid criterion.[51] For example, the theory suggests that jurors with the same occupation as the opposing party should be avoided, but that jurors with the same occupation as the client are desirable.[52] However, the theory also cautions attorneys to avoid "jurors with knowledge in areas in which expert witnesses will testify, since they will feel superior to the expert and to other jurors."[53]

These baseless theories are not supported by empirical data and should be avoided by attorneys conducting voir dire. Moreover, the advice given in these various theories is often conflicting.[54] For example, one theory suggests attorneys select jurors who smile at them, but another warns that smiling jurors are "trying to disarm you" so they can "get on the jury and murder you."[55] One theory recommends avoiding intelligent jurors, while another claims that ignorant jurors are the ones who should be avoided.[56] One theory asserts that the poor are desirable for a civil defendant because those in poverty "are not used to thinking in large sums," while another theory advises the civil defendant to select white-collar workers since they are used to dealing with large sums and are therefore "less likely to give large awards."[57]

> Despite the conflicts in advice, despite the fact that the advice is often based on racial, sexual, ethnic, or other stereotypes, and despite the fact that the advice is based on the idiosyncratic experiences of the advisors rather than on more reliable forms of data, this kind of advice appears to have enduring currency among practicing trial attorneys.[58]

However, it is important that attorneys wade through the myriad of bunk science and rely only on techniques that are backed by empirical research.

B. Stereotypes

Another pitfall attorneys should be aware of is how the reliance on stereotypes can influence and distort their perception of potential jurors. When people make snap judgments, they often rely on stereotypes.[59] "The social categories to which people belong each activate a network of knowledge structures that are associated with the particular category . . . [and o]nce these knowledge structures are activated, they are thought to have a pronounced impact on basic perceptual processes."[60] The result is that "stereotyped

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50. *Id.*
51. Fulero & Penrod, *supra* note 17, at 230–32.
52. *Id.* at 230.
53. *Id.*
54. *Id.*
55. *Id.* at 234-35 (internal quotation marks omitted).
56. *Id.* at 235.
57. *Id.* at 236.
58. *Id.* at 237.
59. Shannon E. Holleran et al., *Eavesdropping on Social Life: The Accuracy of Stranger Ratings of Daily Behavior From Thin Slices of Natural Conversations*, 43 J. RES. PERSONALITY, 660, 660 (2009).
60. Jonathan B. Freeman et al., *The Social-sensory Interface: Category Interactions in Person*

expectations that are elicited from cues to a social category can bias low-level aspects of perceptions."[61] For example, "perceiving another person to be Asian brings to mind stereotypes such as shy and family-oriented; perceiving another person to be male brings to mind stereotypes such as assertive and dominant."[62] This knowledge shapes "not only a person's attitudes, but also his or her actions directed toward [the other] person."[63] Furthermore, certain categories such as sex, race, age, and sexual orientation are especially "prone to have a pervasive impact on attitudes and actions . . . ."[64] Moreover, these biases are already ingrained in us as early as age six.[65] However, the use of stereotypes is dangerous because it "can have negative consequences, namely lead[ing] to biased or erroneous judgments."[66]

For example, there are many stereotypes about women that can affect an attorney's perception of women jurors:

> (1) that women favor the criminal defendant more than men, except in cases involving threats to a child or the family; (2) that women are more likely to favor the plaintiff in civil cases, but will make smaller awards than men; (3) that women are less likely than men to favor female defendants or plaintiffs; (4) that women are more apt to convict rape defendants, unless there is some indication that the victim encouraged her own victimization or was 'not respectable'; and (5) that women are more likely than men to be affected by physically attractive parties, especially by attractive men.[67]

But are these stereotypes about women supported by empirical data? At best, the results are mixed.[68] "Overall, the empirical evidence falls considerably short of establishing significant gender differences in attitude or verdicts."[69] Therefore, relying on these gendered stereotypes in rejecting or selecting women from a pool of potential jurors is likely to be an ineffective technique. Additionally, in *Batson v. Kentucky*, the United States Supreme Court prohibited the use of peremptory challenges where such a challenge would discriminate against a group protected by the Equal Protection Clause, such as race and

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Perception, 6 FRONTIERS IN INTEGRATIVE NEUROSCIENCE, Oct. 2012, Art. 81 at 4 (internal citations omitted).

61. *Id.*

62. Kerri L. Johnson, *Person (Mis)Perception? On the Biased Representation of the Human Body*, *in* PEOPLE WATCHING: SOCIAL, PERCEPTUAL, AND NEUROPHYSIOLOGICAL STUDIES OF BODY PERCEPTION 203, 204 (Kerri Johnson & Maggie Siffrar, eds., 2012).

63. *Id.*

64. *Id.*

65. *Id.* at 214.

66. Holleran, *supra* note 59, at 660; Aldert Vrij et al., Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection, Psychological Science in the Public Interest 11(3) 89-121, 98 (2010) [hereinafter "Pitfalls and Opportunities"].

67. Forman, *supra* note 2, at 51 (citing Ann R. Mahoney, *Sexism in Voire Dire: The Use of Sex Stereotypes in Jury Selection*, *in* WOMEN IN THE COURTS 114, 121 (Winifred L. Hepperle & Laura Crites, eds., 1978)).

68. Forman, *supra* note 2, at 52-53; Jeffrey T. Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N.U. L. REV. 571, 572-73 (1978).

69. Forman, *supra* note 2, at 53. Also consider the shadow jury studies discussed in section I.A.

gender.[70]

Everyone uses stereotypes, but it is important for an attorney judging potential jurors during voir dire to realize that not every member of a certain group will fit into the stereotype of that group. Therefore, attorneys should base their judgments on specific observations of each juror rather than on these social heuristics.

C. Perceptual Errors

A third pitfall attorneys should be aware of is how perceptual errors can incorrectly color their perception of potential jurors. Some perceived differences between jurors may result from perceptual errors rather than from any real difference between the jurors. For example, people typically associate men with aggressiveness and anger while they associate women with happiness.[71] However, research has revealed a similarity between masculine facial features and the way a face appears when expressing anger, and between feminine facial features and the way a face looks when expressing happiness.[72]

> For instance, anger displays involve the center of the brow drawn down-ward, a compression of the mouth, and flared nostrils. However, men also have larger brows which may cause them to appear drawn down-ward. They also have a more defined jaw and thinner lips, which may make the mouth to appear more compressed, and they have larger noses, which may lead to the appearance of flared nostrils. A similar overlap exists for happy displays and the female face. For instance, women have rounder faces than men, and the appearance of roundness increases when displaying happiness (i.e., a smile draws out the width of the face).[73]

This "confounded nature between emotional expression and gender" may result in people more commonly perceiving happiness in the faces of women and anger in the faces of men.[74] However, a man is not more likely to be angry than a woman, nor is a woman more likely to be happy than a man. Furthermore, this perceptual error may actually make it more difficult for attorneys to detect angry females and happy males, since those combinations are counter to the "sex categorization" the brain expects.[75] Therefore, it is important for attorney's to realize that their perceptions could be the result of this perceptual error and not due to any cue emanating from the juror.

Research has also shown that the "morphological changes in the face due to ageing can be misinterpreted as emotional cues due to their resemblance to aspects of various expressions."[76] For example, the "[d]rooping of the eyelids or

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70. Batson v. Kentucky, 476 U.S. 79, 89, 97-99 (1986) ("Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause."); Forman, *supra* note 2, at 56.

71. Freeman, *supra* note 60, at 4, 9.

72. *Id.* at 9.

73. *Id.* (internal citations omitted).

74. *Id.* at 5 (internal citations omitted).

75. *Id.* at 10.

76. Reginald B. Adams, Jr. et al., *Emotion in the Neutral Face: A Mechanism for Impression*

corners of the mouth . . . might be misinterpreted as sadness."[77] However, elderly people are not more likely to be sad than younger people are. The fact is that "our basic construals of others are always compromises between the sensory information 'actually' there and the variety of baggage we bring to the perceptual process."[78] That is why attorneys need to be mindful of these perceptual errors as they make judgments about potential jurors during voir dire.

II. DECIPHERING VISUAL AND AUDITORY CUES

A. Introduction

Effective communication is essential for meaningful voir dire. However, communication entails much more than the words spoken aloud by the jurors and attorneys. Studies have shown that between 60 to 70 percent of communication is non-verbal.[79] By paying attention to these nonverbal cues, "[l]awyers can uncover the underlying opinions, feelings, and biases of potential jurors during the jury selection process . . . ."[80] And both visual and auditory cues can reveal a juror's anxiety level.[81] Jurors may display anxiety in the court room for many reasons:

> First, a prospective juror may experience greater levels of anxiety when questioned by an attorney he or she dislikes, or when questioned by an attorney who represents a party toward whom the juror has a negative bias. Second, anxiety should be increased when a juror must respond to questions regarding 'sensitive issues [about] which he has strong feelings (e.g., racial prejudice, death penalty, 'law and order').' Third, greater anxiety should be experienced when jurors provide deceptive responses.[82]

Therefore, an attorney attuned to the cues that reveal a juror's anxiety level will be able to discover insights into that juror's biases, sensitivities, and truthfulness.[83]

However, perception is an extremely sophisticated process because people are comprised of "highly complex stimuli . . . ."[84] From a single face, a multitude of judgments can be made, from basic categories such as sex, race, age, and sexual orientation, to more complex manifestations of emotions, personality traits, and intentions.[85] And, the face is only one part of perception.[86]

Formation?, 26(3) COGNITION & EMOTION, 431, 440 (2012).

77. *Id.*

78. Freeman, *supra* note 60, at 6.

79. FREDERICK, *supra* note 1, at 43; CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 36 (7th ed., 2012); *Pitfalls and Opportunities*, *supra* note 66, at 98.

80. FREDERICK, *supra* note 1, at 44.

81. LIEBERMAN & SALES, *supra* note 14, at 126-27.

82. *Id.* (alteration in original) (internal citations omitted).

83. *See* FREDERICK, *supra* note 1, at 44 (providing examples of juror anxieties and appropriate inferences from those anxieties).

84. Freeman, *supra* note 60, at 1.

85. *Id.*

> All the features and configural properties of a person's face must be bound together, along with that person's hair and array of bodily cues. Auditory cues of a person's voice are available as well, and these must be bound together with the person's visual cues to form a coherent social percept. [87]

Moreover, this bottom-up processing must be combined with top-down processing, which is equally complex.[88] "[P]eople bring a great deal of prior knowledge, stereotypic expectations, and affective and motivational states to the process of perceiving others."[89] These top-down processes also affect the perceptual process.[90] Yet people are extremely effective at person perception.

Even though visual and auditory cues only last a few seconds, studies show that people are "unexpectedly accurate in the judgments they make on the basis of minimal information and minimal amounts of cognitive processing."[91] People are able to accurately judge the personality traits of complete strangers on the basis of extremely brief interactions or "thin slices" of behavior.[92] For example, people can accurately perceive extroversion,[93] intelligence,[94] anxiety,[95] and depression[96] from very short interactions. And, people relying on thin slices of behavior are particularly accurate when predicting interpersonal factors.[97] Moreover, "the thinness of the slice does not seem to affect the accuracy of predictions."[98] The interaction can be as short as 375 milliseconds.[99]

One explanation for the accuracy of thin slices of behavior is the "absence of distracting [external and internal] stimuli." [100]

> When people are involved in actual interactions, they may be distracted by factors such as the verbal component of the interaction or the demands of impression management and self-presentation. Besides distracting external stimuli, distracting internal processing might also decrease the accuracy of judgments. Too much thinking and reasoning can sometimes be disruptive of judgmental accuracy. People make better affective judgments and decisions

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86. *See id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Nalini Ambady & Robert Rosenthal, *Thin Slices of Expressive Behavior as Predictors of Interpersonal Consequences: A Meta-Analysis*, 111(2) PSYCHOLOGICAL BULL., 256, 257 (1992) [hereinafter "*Thin Slices*"]; *see also* Nalini Ambady et al., *Accuracy of Judgments of Sexual Orientation From Thin Slices of Behavior*, 77(3) J. PERSONALITY & SOC. PSYCHOL., 538, 538 (1999) [hereinafter "*Accuracy of Judgments*"].
92. *Thin Slices*, *supra* note 91, at 256; *Accuracy of Judgments*, *supra* note 91, at 538; Peter Borkenau et al., *Thin Slices of Behavior as Cues of Personality and Intelligence*, 86(4) J. PERSONALITY & SOC. PSYCHOL., 599, 600 (2004).
93. *Accuracy of Judgments*, *supra* note 91, at 538.
94. Borkenau, *supra* note 92, at 610.
95. *Thin Slices*, *supra* note 91, at 258.
96. *Id.*
97. *Id.* at 269.
98. *Id.* at 267.
99. *Id.* at 256.
100. *Id.* at 268.

> when they introspect less and do not seek reasons to explain their feelings. Judgments that are based on thin slices of behavior may be accurate precisely because they are snap judgments.[101]

Since people sometimes "make better judgments when they rely on their intuition rather than when they introspect or reason," an attorney's intuitive judgments may be the most reliable.[102] This bodes well for attorneys who have to make quick decisions about jurors' personalities to decide which jurors they should use their peremptory challenges on.

But what behavior should attorneys be looking for? "Some natural human behaviours (e.g. shivers) are signs rather than signals: they carry information for observers but do not have an indicating function . . . Other human behaviors (e.g. smiles) are signals: they are inherently communicative, and do have an indicating function."[103] It is these signals, in the form of visual or auditory cues, that attorneys should look for when they are conducting voir dire.[104] Visual cues include: body movement, body posture, body orientation, inadvertent emblems, illustrators, shrugs, eye contact, facial expressions, microexpressions, and squelched expressions.[105] Auditory cues include: speech disturbances, vocal hesitancy, vocal pitch, amount of speech, speed of speech, tone of voice, tense laughter, and word choice.[106]

However, in order to properly analyze any of these cues, it is important to remember that no one cue should be considered determinative; rather, it should be analyzed in conjunction with all other observable cues.[107] "There is no sign of deceit itself – no gesture, facial expression, or muscle twitch that in and of itself means that a person is lying. There are only clues that the person is poorly prepared and clues of emotions that don't fit the person's line."[108] "[T]aken alone, almost any trait will be misleading."[109] Further, any one cue could have multiple meanings that are only distinguishable when the context is considered.[110] "For example, when potential jurors fold their arms, it may reflect animosity toward what is being said, or it may simply mean the air conditioning has made them cold."[111] That is why it is so important that attorneys analyze cues in the context of all the other cues they observe.[112] "The key concept for

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101. *Id.*

102. *Thin Slices*, *supra* note 91, at 257, 269; Marc-André Reinhard et al., *Unconscious Process Improve Lie Detection,* 105 J. Soc. Psychol. 721, 721, 736 (2013).

103. TIM WHARTON, PRAGMATICS AND NON-VERBAL COMMUNICATION 13 (2009).

104. FREDERICK, *supra* note 1, at 44.

105. FREDERICK, *supra* note 1, at 47; PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE 104, 131 (3d ed. 2001).

106. FREDERICK, *supra* note 1, at 55.

107. FREDERICK, *supra* note 1, at 44; Frederick, *supra* note 68, at 584; LIEBERMAN & SALES, *supra* note 14, at 133; *Pitfalls and Opportunities*, *supra* note 66, at 104.

108. EKMAN, *supra* note 105, at 80; *see also* LIEBERMAN & SALES, *supra* note 14, at 133; *Pitfalls and Opportunities*, *supra* note 66, at 98.

109. LIEBERMAN & SALES, *supra* note 14, at 133 (internal quotation marks and citation omitted).

110. FREDERICK, *supra* note 1, at 46.

111. *Id.* at 44.

112. Frederick, *supra* note 68, at 584.

evaluation of [visual and auditory] cues lies in consistency."[113] Cues indicating contradictory emotions should raise a red flag in the mind of an attorney that something is askew and needs further investigation.[114] This inconsistency can occur between several different cues, for example nodding in agreement while frowning, or between different iterations of one specific cue at different times, for example, an increase in verbal pauses when a sensitive issue is being discussed.

Additionally, some sources of information are more reliable than others.[115] "Liars usually do not monitor, control, and disguise all of their behavior . . . Instead liars conceal and falsify what they expect others are going to watch most."[116] They are most careful with their word choice because it is common knowledge that words are closely scrutinized.[117] But liars are "less adept at controlling their facial, vocal, and bodily expressions."[118] Since the less controllable non-verbal channels of communication more accurately reflect a person's true feelings, when signals received from these channels conflict with a person's words, the non-verbal signals should drive interpretation of the speaker's true message.[119] "It is only when the nonverbal signals are consistent with the words being expressed that the verbal representations become credible."[120]

Finally, an attorney should observe the potential jurors at all times because non-verbal communication does not just occur when the potential juror is being questioned in the jury box.[121] For example, an attorney should watch potential jurors' reactions to the questions being posed to other jurors.[122] "Jurors will often nod in agreement, show skeptical or critical facial expressions, or give other nonverbal indicators of their own opinions and feelings in response to the voir dire of their fellow jurors."[123] Additionally, attorneys should observe potential jurors while they are in the gallery of the courtroom before they have been called into the jury box.[124] "Jurors are less likely to feel as though they are in a fishbowl when they are in the spectators' section rather than the jury box. As a result, jurors tend not to inhibit their nonverbal reactions when they are in the spectators' section."[125] Attorneys should also pay attention to jurors' reactions

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113. FREDERICK, *supra* note 1, at 57; *see also* LIEBERMAN & SALES, *supra* note 14, at 130 ("The key issue for attorneys and consultants ultimately appears to be attending to the consistency between facial and body cues.").

114. FREDERICK, *supra* note 1, at 57; LIEBERMAN & SALES, *supra* note 14, at 130; *Pitfalls and Opportunities*, *supra* note 66, at 104.

115. EKMAN, *supra* note 105, at 81.

116. *Id.*

117. *Id.*

118. *Thin Slices*, *supra* note 91, at 259.

119. *See id.*

120. CRAVER, *supra* note 79, at 37.

121. FREDERICK, *supra* note 1, at 59–60.

122. *Id.* at 59.

123. *Id.*

124. *Id.* at 60.

125. *Id.*

when the court is introducing the parties.[126] "Inability to make eye contact or to direct their gaze at the party can reveal the jurors' negative reactions to the party. In addition, jurors can often be seen with sympathetic, concerned, or even hostile expressions on their faces."[127] This invaluable information can give an attorney a glimpse of potential jurors' true feelings about the case before the jurors get put on the spot with specific questions and begin actively monitoring the non-verbal cues they are displaying.[128]

B. Establish a Baseline

It is also important for attorneys to realize that individuals and their emotional responses vary. Thus, a cue that would indicate deception in one juror may simply be part of another juror's normal pattern of behavior.[129] Some jurors may exhibit anxiety simply because they are being questioned by an attorney or judge in a courtroom and not because they are hiding anything.[130] And "there are large individual differences in people's behavior and speech. Some people typically make many movements, others do not; some people are eloquent, others are not; some people show large variations in physiological responses, others do not, and so on."[131] Furthermore, some differences in individual behaviors are culturally related.[132] For example, while making eye-contact is polite in Western cultures, it is considered to be rude in other cultures, such as Japan.[133]

The key is to detect situational anxiety – anxiety "generated by the particular situation at hand rather than being a stable personality trait of the individual."[134] To do this, an attorney must establish a baseline of each juror's pattern of normal behavior that can be used as a comparison with future behavior.[135] "By establishing a baseline of activity or anxiety, lawyers can interpret subsequent changes in behavior within the context of the jurors' typical behavior. The best way to establish this baseline is to observe the jurors' nonverbal communication while they answer questions concerning their backgrounds."[136] Since these questions are non-threatening, they will not produce high levels of anxiety, and can therefore serve as a control group that the rest of the voir dire responses can be compared against.[137]

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126. *Id.*

127. *Id.*

128. *Id.*

129. EKMAN, *supra* note 105, at 91.

130. FREDERICK, *supra* note 1, at 58; LIEBERMAN & SALES, *supra* note 14, at 132; *Pitfalls and Opportunities*, *supra* note 66, at 98.

131. *Pitfalls and Opportunities*, *supra* note 66, at 99.

132. *Id.* at 100.

133. *Id.*

134. LIEBERMAN & SALES, *supra* note 14, at 127 (internal quotation marks and citation omitted).

135. CRAVER, *supra* note 79, at 47; FREDERICK, *supra* note 1, at 58.

136. FREDERICK, *supra* note 1, at 58; *see also* LIEBERMAN & SALES, *supra* note 14, at 132 (noting the importance of forming a baseline at a time when the jurors are unlikely to be anxious or diverging from normal patterns of behavior).

137. *See* FREDERICK, *supra* note 1, at 58 ("These questions produce the least anxiety."); *see also*

After a baseline for behavior has been established, "evaluations [of subsequently observed cues] are made in light of how the jurors' subsequent behaviors change."[138] Lawyers should pay particular attention to whether changes in behavior occur when a juror is being questioned by a specific attorney or about a specific topic, whether a juror's behavior is markedly different than that of the other jurors being questioned in voir dire, or whether the cues observed from one juror conflict with each other.[139]

Yet, when an attorney notices something amiss about a juror's non-verbal behavior, the attorney should not make an immediate decision as to what the juror's true feelings are. Instead, the attorney should seek clarification of the discrepancy by asking follow-up questions.[140] "However, care should be taken in providing feedback on cues. Jurors may not understand the connection or may react negatively to your drawing attention to certain behaviors, particularly if the behavior is unknown to the juror . . . and/or carries a negative connotation."[141] Additionally, "when individuals are probed after making a deceptive statement they are less likely to exhibit nonverbal cues of deception" because people "exert greater control over their behaviors when they believe an interviewer is suspicious of them."[142] Furthermore, "[a]ccusing somebody in itself can lead to strong nonverbal reactions in both liars and truth tellers."[143] There is arguably nothing more anxiety provoking than defending oneself against a false acquisition.[144] Therefore, an attorney should make sure that any follow-up questions are not accusatory and do not embarrass the juror being questioned.

C. Visual Cues

There are many visual cues attorneys should be aware of, as they signal valuable information an attorney can use in deciding how to best use his peremptory challenges. These visual cues include body movement, body posture, body orientation, inadvertent emblems, illustrators, shrugs, eye contact, facial expressions, microexpressions, and squelched expressions.[145]

The first visual cue attorneys should pay attention to is body movement. "[B]iological motion provides a rich source of information from which observers' judgments achieve a surprising degree of accuracy."[146] While controlling a

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LIEBERMAN & SALES, *supra* note 14, at 127 ("[I]t is helpful to establish a baseline for the individual's typical nonverbal behaviors while responding to question that are not likely to produce anxiety before observing behavior displayed during responses to critical questions.").

138. FREDERICK, *supra* note 1, at 58.

139. *Id.* at 58-59.

140. *Id.* at 59.

141. *Id.*

142. LIEBERMAN & SALES, *supra* note 14, at 134.

143. Aldert Vrji & Pär Anders Granhag, *Eliciting Cues to Deception and Truth: What Matters are the Questions Asked*, *1* J. OF APPLIED RESEARCH IN MEMORY & COGNITION 110, 114 (2012) [*hereinafter* "*Eliciting Cues*"].

144. *Id.*

145. FREDERICK, *supra* note 1, at 47; EKMAN, *supra* note 105, at 104, 131.

146. Johnson, *supra* note 62, at 205.

person's body is not difficult for that person, "most people don't bother [because t]hey have grown up having learned it was not necessary to do so."[147]

Research shows there is a positive correlation between the amount of movement observed in a potential juror and the amount of anxiety that juror is experiencing.[148] Some movements to look out for are shifting body postures, wringing hands, tapping fingers, feet shuffling, fidgeting, squirming, rubbing the hands together, twisting an object such as a necklace, bracelet, or ring, playing with pens or keys, scratching one's head, pulling or twirling one's hair, briefly touching one's face, grooming oneself, and picking at or straightening one's clothing.[149]

Charles Craver also details some commonly-observable body movements in his book *Effective Legal Negotiation and Settlement*: 1) Scratching one's head indicates puzzlement; 2) Wringing hands signifies frustration or tension; 3) Biting one's lower lip or fingernails shows stress or frustration; 4) Wandering eyes, crossing and uncrossing legs, doodling, and head resting indicate boredom; 5) Opening and closing one's mouth without speaking is a sign of indecision; 6) Leaning forward in one's chair shows interest in the speaker; 7) Stroking of one's chin is a sign of contemplation; 8) Massaging one's neck evidences stress; 9) Gnashing teeth shown by the tensing and relaxing of the jaw muscles is an indication of anxiety or anger; 10) Rubbing one eye shows the listener finds what is being said difficult to accept; 10) Head nodding indicates comprehension, but not necessarily agreement; 11) A tilted head indicates the listener is paying close attention; and 12) Increased blinking shows stress and emotional arousal.[150] Additionally, covering one's mouth while speaking, touching one's nose, running one's tongue over one's teeth, or head nodding inconsistent with a juror's verbal statement can all indicate deception.[151] Yet, some studies have shown that "gaze aversion and grooming gestures are not reliable cues to deception."[152] That is why it is so important not to derive meaning from one cue in isolation, but rather, to pay attention to all the cues a speaker is emitting.[153]

Additionally, some observable body cues indicating emotional arousal result from changed body chemistry. Changed body chemistry can cause a dry mouth (exhibited by lip licking), perspiring, heavy breathing, facial discoloration (blushing[154] or blanching), pupil dilation, stomach noises, frequent swallowing, and general nervous twitching.[155] These cues are especially reliable because they "occur involuntarily when emotion is aroused, [and] are very hard to inhibit . . . ."[156] However, it is difficult to know exactly which emotion is causing

147. EKMAN, *supra* note 105, at 85.

148. FREDERICK, *supra* note 1, at 45; EKMAN, *supra* note 105, at 111.

149. EKMAN, *supra* note 105, at 109-10; FREDERICK, *supra* note 1, at 45; RASICOT, *supra* note 23, at 57.

150. CRAVER, *supra* note 79, at 40-46, 48-50; EKMAN, *supra* note 105, at 142.

151. CRAVER, *supra* note 79, at 48-50; RASICOT, *supra* note 23, at 56.

152. *Pitfalls and Opportunities*, *supra* note 66, at 96.

153. LIEBERMAN & SALES, *supra* note 14, at 133; *Pitfalls and Opportunities*, *supra* note 66, at 104.

154. Research shows that blushing is more common in women than in men. EKMAN, *supra* note 105, at 143.

155. EKMAN, *supra* note 105, at 114, 142; RASICOT, *supra* note 23, at 57.

156. EKMAN, *supra* note 105, at 114.

the reaction.[157]

It is also important to note that some body movements can indicate positive emotion rather than anxiety.[158] For example, "rubbing the palms together in a bank-and-forth motion can indicate confidence or anticipation of something desirable" and "[s]teepling the hands, where hands are placed palms together with the fingers pointed skyward, indicates confidence in one's position or in what one is saying."[159]

Moreover, while a variety of these behaviors have been associated with increased body tension and anxiety, research has also shown that "individuals who are being deceptive make fewer hand and finger movements."[160] That is because "[t]hey know that fidgety speakers appear less credible. They attempt to counteract this phenomenon by making a discernible effort to decrease their gross body movements for the purpose of enhancing the trustworthiness of their mendacious comments."[161] The key is to pay attention to when a prospective juror "alters his or her frequency" of body movements.[162]

A second visual cue that attorneys should pay attention to is body posture.[163] A rigid body posture is a sign that a juror is experiencing anxiety.[164] "Signs of rigidity include an erect, stiff posture and the tightening of muscles."[165] One way to spot the tightening of muscles is to look for the tell-tale white knuckles that result from someone clasping their hands or their chair tightly.[166] The lack of normal head and body movements is another sign of rigidity which "can manifest itself in crossed arms, crossed legs, and legs crossed at the ankles."[167]

A third relevant visual cue is the body orientation between the potential juror and the attorney.[168] "Open orientation can be seen in the 'squaring' of the listener's body to the speaker."[169] This orientation "leaves the vulnerable parts of the body exposed, a position people are reluctant to take in the presence of someone (or something) that makes them feel uncomfortable."[170] Additionally, "[w]hen [a person is] relaxed and confident [that person's] body language is open, including arms, hands, legs, feet, and body angles."[171] Such an open orientation indicates a "lack of anxiety, positive feelings toward the speaker, or

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157. *See id.* at 143 (discussing how some physiological reactions are caused potentially by multiple, unknown emotions).

158. FREDERICK, *supra* note 1, at 46.

159. FREDERICK, *supra* note 1, at 46; CRAVER, *supra* note 79, at 42.

160. LIEBERMAN & SALES, *supra* note 14, at 131; Reinhard, *supra* note 102, at 722.

161. CRAVER, *supra* note 79, at 48; EKMAN, *supra* note 105, at 112.

162. LIEBERMAN & SALES, *supra* note 14, at 131.

163. FREDERICK, *supra* note 1, at 46–47.

164. *Id.* at 46.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 47.

169. *Id.*

170. *Id.*

171. RASICOT, *supra* note 23, at 56.

agreement with the speaker or his or her position."[172] Closed orientation is evidenced by a body orientation that is angled away from the speaker.[173] "When we are stressful, or we are lying, we tend to bring our body into our imaginary centers – much like a ball. And when we do extend ourselves, it will be for shorter distances than our usual gestures and movements."[174] Such a closed orientation reflects "resistance to the speaker or his or her position."[175]

An attorney should pay particular attention to whether a potential juror displays an open orientation towards one attorney and a closed orientation towards the other attorney.[176] A juror who displays an open orientation towards Attorney A but a closed orientation towards Attorney B would more likely favor Attorney A.[177] Similarly, the degree to which a listener is leaning towards or away from the speaker "can reveal the degree of interest in the lawyer or the position advocated."[178] Leaning forward shows "interest, attention, or receptiveness."[179] However, "this is not necessarily a positive sign for the lawyer. A hostile potential juror, whose forward lean indicates attention to the lawyer or party, reflects a more combative interest, not the presence of any positive feelings."[180] Moreover, while leaning away is generally an indication of "less interest or less receptivity," this cue may solely indicate a level of comfort with what is being said.[181] Resultantly, body posture must not be considered alone, but rather in connection with every other cue a lawyer detects.[182]

A fourth visual cue attorneys should be aware of is inadvertent emblems.[183] "Emblems are gestures that can be made in place of a word."[184] They are universally understood.[185] For example, nodding one's head means "Yes," shaking one's head side to side means "No," waving one's hand means "Hello" or "Goodbye," cupping one's hand behind one's ear means "Speak louder," and the hitchhiker's thumb means "Can you give me a ride?."[186] However, a leaked emblem can unconsciously display a person's true feelings.[187] And, these emblematic slips tend to increase as anxiety level increases.[188] Attorneys should

172. FREDERICK, *supra* note 1, at 47.

173. *Id.*

174. RASICOT, *supra* note 23, at 56.

175. FREDERICK, *supra* note 1, at 47.

176. *See id.* (discussing body orientation and its implications).

177. *See id.*

178. FREDERICK, *supra* note 1, at 48; LIEBERMAN & SALES, *supra* note 14, at 133.

179. FREDERICK, *supra* note 1, at 48.

180. *Id.*

181. *Id.*

182. LIEBERMAN & SALES, *supra* note 14, at 133; *see also Pitfalls and Opportunities*, *supra* note 66, at 104 ([D]eception research has revealed that no single behavioral or verbal cue is uniquely related to deception.").

183. FREDERICK, *supra* note 1, at 48.

184. FREDERICK, *supra* note 1, at 48; EKMAN, *supra* note 105, at 101.

185. EKMAN, *supra* note 105, at 101.

186. EKMAN, *supra* note 105, at 102; FREDERICK, *supra* note 1, at 48.

187. FREDERICK, *supra* note 1, at 48.

188. EKMAN, *supra* note 105, at 104.

pay attention to emblems that are displayed at inappropriate times, in partial form, or in contradiction to the actual words a potential juror is speaking.[189]

A fifth visual cue is illustrators.[190] Illustrators are body movements that "illustrate speech as it is spoken."[191] However, they do not have meaning independent of the words being illustrated.[192] For example, hands can draw a picture in space, show an action, or trace the flow of thought in the air.[193] Illustrators tend to decrease as people's anxiety level rises, when they are having difficulty deciding what to say, when they are choosing their words carefully, or when they are lying.[194] Therefore, an attorney should look for "a decrease in the number of illustrators shown" from a juror's established baseline.[195]

A sixth visual cue attorneys should pay attention to is shrugs.[196] Shrugs can indicate lack of confidence, anxiety, deception, embarrassment, lack of commitment to what is being said, indifference, or uncertainty, or they can serve to qualify an answer.[197] They may also indicate helplessness or powerlessness.[198] Additionally, a partial shrug of one-shoulder may indicate deception.[199] Since shrugs can indicate a many different emotions, they should not be evaluated alone, but rather in connection with all the other cues the attorney observes.[200]

A seventh visual cue is eye contact.[201] Increased eye contact can be evidence of positive feelings.[202] As the level of stress rises, anxious jurors may break eye contact, may change their normal pattern of eye contact, may avert their eyes at crucial times, or may blink more often.[203] However, there are three exceptions to the relationship between eye contact and anxiety.[204]

> First, although steady eye contact is usually an indication of juror ease or interest, an increase in eye contact can reflect hostility. This phenomenon is captured by the expression "know your enemy" (e.g., "I don't like you, and I am keeping my eye on you"). Second, an increase in eye contact has also been associated with attempts to deceive or hide one's true feelings. As such, when jurors choose to lie or mislead and believe that a steady gaze would make them appear more truthful, they may increase their eye contact. Third, cultures differ

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189. *See* FREDERICK, *supra* note 1, 48 (discussing emblems and their implications); *see also* EKMAN, *supra* note 105, at 102.

190. EKMAN, *supra* note 105, at 104.

191. *Id.*

192. *Id.* at 108.

193. *Id.* at 105.

194. *Id.* at 107-08.

195. EKMAN, *supra* note 105, at 106; *Pitfalls and Opportunities*, *supra* note 66, at 96.

196. FREDERICK, *supra* note 1, at 48.

197. *Id.* at 48-49.

198. CRAVER, *supra* note 79, at 40.

199. *Id.* at 48.

200. LIEBERMAN & SALES, *supra* note 14, at 133; *Pitfalls and Opportunities*, *supra* note 66, at 104.

201. FREDERICK, *supra* note 1, at 49.

202. LIEBERMAN & SALES, *supra* note 14, at 129.

203. CRAVER, *supra* note 79, at 50; FREDERICK, *supra* note 1, at 49; LIEBERMAN & SALES, *supra* note 14, at 129; RASICOT, *supra* note 23, at 57.

204. FREDERICK, *supra* note 1, at 49.

> in their view of the appropriate levels of eye contact. For example, potential jurors of Hispanic and Asian backgrounds may exhibit lower levels of eye contact, which simply reflects their cultures' views.[205]

These exceptions highlight the importance of not relying on one cue in isolation. Additionally, some studies have found no relationship between eye contact and deception.[206] Therefore, eye contact must be considered in the context of all the other cues an attorney observes.[207]

An eighth visual cue attorneys should be aware of is facial expressions.[208] Facial expressions are useful indicators of attitude because "there are universally common attributions in the expression of happiness, sadness, surprise, anger, disgust, and fear."[209] Charles Craver details some commonly observable facial expressions in his book *Effective Legal Negotiation and Settlement*: 1) Taut lips indicate anxiety or frustration; 2) Pursed lips indicate that the person does not agree with what is being said; 3) A flinch or pained facial expression indicates that what is being said is unacceptable to the listener; 4) Raising one eyebrow shows skepticism; 5) Raising both eyebrows indicates surprise; 6) Beady eyes show disagreement or disapproval; and 7) Wandering eyes indicate boredom.[210]

Facial expressions are reliable because "[w]hen emotion is aroused, muscles on the face begin to fire involuntarily. It is only by choice or habit that people can learn to interfere with these expressions . . . ."[211] "Few are aware of the expressions emerging on their face until the expressions are extreme."[212] However, people are more aware that facial expressions can leak their true feelings so they are more likely to attempt to control their facial expressions than their body movement and posture.[213]

The duration of a facial expression is also a clue to its genuineness.[214] For example, if a smile lasts longer than is appropriate for a certain situation, it can reveal deception or masking.[215] In addition, felt expressions usually aren't manifested on the face for longer than five seconds.[216] Therefore, expressions lasting longer than that are likely faked.[217]

Asymmetry is another clue that a facial expression is false.[218] Asymmetrical expressions appear stronger on one side of the face than the other.[219] For

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205. *Id.* at 49-50.
206. Reinhard, *supra* note 102, at 722.
207. LIEBERMAN & SALES, *supra* note 14, at 133; *Pitfalls and Opportunities*, *supra* note 66, at 104.
208. FREDERICK, *supra* note 1, at 50.
209. LIEBERMAN & SALES, *supra* note 14, at 129.
210. CRAVER, *supra* note 79, at 39-41; *see also* EKMAN, *supra* note 105, at 136.
211. EKMAN, *supra* note 105, at 84.
212. *Id.*
213. LIEBERMAN & SALES, *supra* note 14, at 129-30; CRAVER, *supra* note 79, at 39.
214. EKMAN, *supra* note 105, at 143-44; *Pitfalls and Opportunities*, *supra* note 66, at 104.
215. FREDERICK, *supra* note 1, at 50.
216. EKMAN, *supra* note 105, at 147-48.
217. *Id.*
218. *Id.* at 143-44.
219. *Id.* at 144-46. This should not be confused with unilateral expressions that appear only on one side of the face such as a wink or the skeptical raise of one eyebrow. *Id.* at 144.

example, a crooked smile where "the lips turn up in a smile on one side while the lips on the other side remain horizontal or turn slightly down, in a frown or grimace."[220] If an expression is genuine, it is typically symmetric and involves the whole face.[221] However, "asymmetry is not certain proof that the expression is unfelt."[222]

The key to analyzing facial expressions is consistency with all of the other cues an attorney is picking up. Attorneys should watch for times when facial expressions and other body cues send conflicting messages because "the degree of consistency of nonverbal cues is a major factor in uncovering a juror's true feelings."[223]

> Are there wrinkles or crow's-feet at the outside corners of the juror's eyes that should accompany genuine smiling? Is there a softness to the eyes that is associated with positive feeling, or are the eyes hard, as would be consistent with the expression "eyes that looked daggers"? Is the smile asymmetrical . . . ? Is the smile consistent with other nonverbal cues such as body orientation and posture? Always beware of the potential juror who smiles but angles his or her body away and maintains a rigid posture![224]

If an attorney notices that a juror's facial expressions do not match the other cues the attorney is observing, it should raise a red flag in the attorney's mind.

A ninth visual cue that attorneys should be mindful of is microexpressions.[225] "Microexpressions are very short or fleeting expressions, measured in terms of milliseconds."[226] Though they can last for as little as a quarter second, they still involve full-face emotions.[227] However, microexpressions are "inconsistent with the dominant expression and reflect the suppression of [the dominant] expression by the individual."[228] Therefore, when detected they reveal a juror's true feelings. Moreover, microexpressions "may influence us on a subconscious level as well and may be an important source of lawyers' 'gut' feelings about jurors, where lawyers have a positive or negative reaction to a juror yet cannot give an objective reason for that feeling."[229]

A tenth visual cue is squelched expressions.[230] A squelched expression is a partial expression that begins to form on the face but is reversed before it fully forms.[231] "As an expression emerges the person seems to become aware of what is beginning to show and interrupts the expression, sometimes also covering it

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220. FREDERICK, *supra* note 1, at 50.
221. *Id.*
222. EKMAN, *supra* note 105, at 147.
223. FREDERICK, *supra* note 1, at 50.
224. *Id.* at 51.
225. *Id.*
226. *Id.*
227. EKMAN, *supra* note 105, at 129.
228. FREDERICK, *supra* note 1, at 51.
229. *Id.*
230. EKMAN, *supra* note 105, at 131.
231. *See id.* (discussing squelched expressions).

with another expression."[232] Consequently, the expression being squelched reveals the juror's true feelings. However, "[e]ven if the message does not leak, the squelch can be a noticeable clue that the person is concealing feelings."[233] Therefore, even noticing that a squelch occurred could alert an attorney that the emotion on display is not the emotion the juror actually feels.[234]

D. Auditory Cues

An attorney should also be aware of the auditory cues emanating from jurors during voir dire, as they contain valuable information about a juror that the attorney can use during jury selection. These auditory cues include speech disturbances, vocal hesitancy, vocal pitch, amount and speed of speech, tone of voice, tense laughter, and word choice.[235]

Auditory cues are reliable because "[t]he voice, like the face, is tied to the areas of the brain involved in emotion. It is very difficult to conceal some of the changes in voice that occur when emotion is aroused."[236] In fact, some studies have shown that paying attention to auditory cues increases accuracy in lie detection.[237] However,

> [t]here is a danger in interpreting any of the vocal signs of emotion as evidence of deceit. A truthful person who is worried she won't be believed may out of that fear show the same raised pitch a liar may manifest because she is afraid of being caught. The problem for the lie catcher is that innocents are also sometimes emotionally aroused, not just liars.[238]

Resultantly, as with all other cues, auditory cues must be analyzed in the context of the other cues an attorney observes.[239] However, it is also important to remember that the absence of verbal cues does not necessarily evidence truth telling.[240]

The first auditory cue that an attorney should pay attention to is speech disturbances.[241] Speech disturbances are "[d]isruptions in the juror's normal pattern of speech . . . ."[242] These disruptions typically increase in frequency as the level of stress and anxiety rise.[243] Speech disturbances can occur for three reasons: either the liar did not plan the lie in advance, the liar has been caught off

232. *Id.*
233. *Id.*
234. *See id.*
235. FREDERICK, *supra* note 1, at 55.
236. EKMAN, *supra* note 105, at 84, 93.
237. *Pitfalls and Opportunities*, *supra* note 66, at 103.
238. *Id.* at 94.
239. LIEBERMAN & SALES, *supra* note 14, at 133.
240. *Pitfalls and Opportunities*, *supra* note 66, at 105.
241. FREDERICK, *supra* note 1, at 51-52; *Pitfalls and Opportunities*, *supra* note 66, at 104.
242. FREDERICK, *supra* note 1, at 52.
243. *Id.*

guard by a particular question, or high detection apprehension has made the liar forget his lie.[244] Some examples of speech disturbances are verbal pauses like "um," "uh," "ah," and "er," word repetition within an answer, saying only partial words, failure to complete sentences, stuttering, or beginning a sentence, stopping, and starting a new sentence.[245] However, speech disturbances can also be manifested as a change in the formality or rigidity of responses.[246] Further, "the avoidance of certain words or the trailing off of the incomplete answer" should also alert the lawyer to potential problems.[247]

A second auditory cue is vocal hesitancy.[248] "Vocal hesitancies are pauses that occur in a juror's answers."[249] These cues tend to increase in frequency as the anxiety level of a juror rises.[250] The pauses become more noticeable because they are either "too long or too frequent."[251] "Pauses can [] occur during deception when more cognitive resources are needed to construct and monitor [a] lie."[252] Or, pauses can evidence a juror's attempt to censor his or her response.[253] An attorney should also pay attention to latencies – the length of time between the question being asked and the beginning of the juror's response – because "longer latency periods are associated with greater levels of anxiety, particularly when a speaker is being deceptive."[254]

A third auditory cue is rising pitch.[255] "Anxiety can cause the muscles in the throat to tighten, resulting in speech that is higher in pitch. Noting when a rise in pitch in the juror's answers occurs in response to different topic areas can reveal those areas that cause greater anxiety."[256] However, rising pitch can also evidence that a juror is uncertain in his answer.[257] Therefore, a juror's pitch should be considered in conjunction with other available cues.[258]

A fourth auditory cue is the amount of speech the juror uses.[259] "The presence of positive feelings toward the lawyer or an expectation of social approval from the lawyer can reveal itself in the amount of speech the juror provides. When jurors feel positively toward a lawyer, they are more willing to talk with that lawyer."[260] Similarly, "[w]hen jurors do not like a lawyer or party, their willingness to talk or provide full and candid answers in response to the

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244. EKMAN, *supra* note 105, at 92.
245. EKMAN, *supra* note 105, at 92; CRAVER, *supra* note 79, at 50; FREDERICK, *supra* note 1, at 52.
246. LIEBERMAN & SALES, *supra* note 14, at 128.
247. FREDERICK, *supra* note 1, at 52.
248. *Id.*
249. FREDERICK, *supra* note 1, at 52; LIEBERMAN & SALES, *supra* note 14, at 127.
250. FREDERICK, *supra* note 1, at 52; LIEBERMAN & SALES, *supra* note 14, at 127.
251. EKMAN, *supra* note 105, at 92.
252. FREDERICK, *supra* note 1, at 52.
253. *Id.* at 53.
254. LIEBERMAN & SALES, *supra* note 14, at 127.
255. FREDERICK, *supra* note 1, at 53.
256. EKMAN, *supra* note 105, at 93; CRAVER, *supra* note 79, at 50; FREDERICK, *supra* note 1, at 53.
257. FREDERICK, *supra* note 1, at 53.
258. LIEBERMAN & SALES, *supra* note 14, at 133; *Pitfalls and Opportunities*, *supra* note 66, at 104.
259. FREDERICK, *supra* note 1, at 53.
260. FREDERICK, *supra* note 1, at 53; LIEBERMAN & SALES, *supra* note 14, at 128.

lawyer's questioning decreases."[261] Attorneys should pay attention to any juror who is terse in response to their questioning but becomes talkative when being questioned by the other side as this could be a reflection of the juror's negative feelings towards the attorney or his client.[262] But "this measure would be confounded by the fact that the respondent would almost certainly be answering different questions for each party, so a better indicator might be a measure of the average time of response to each question posed by both sides," thought that would be difficult to calculate mid-voir dire.[263]

Furthermore, there is an exception to the general rule that talkativeness is evidence of positive feelings.[264]

> Answers that provide irrelevant information or are evasive can indicate deception or anxiety. A juror who feels anxious or is trying to deceive the lawyer may use irrelevant information as a screen. The juror's goal is to tell the lawyer something to satisfy the need to provide an answer, yet at the same time not reveal his or her true feelings.[265]

Therefore, attorneys need to pay attention to whether a loquacious juror is actually deflecting.

Additionally, the amount of detail a juror gives when describing an event from their past can give insight into whether his story is fabricated or not.[266] [W]hen asked to recall an event, truth tellers reconstruct the event from memory and prefer a 'tell it all' approach, aiming to provide a detailed description of what happened."[267] But liars "prefer a 'keep it simple' approach; incorporating enough detail so as not to raise suspicion, but avoiding giving excessive detail for fear that the interviewer may know or could subsequently find out that the story is fabricated.[268] Yet, "persons who have prepared elaborate lies may provide an excessive amount of information in an effort to make their fabrication more credible."[269] Furthermore, "[g]uilty suspects are inclined to use avoidance strategies (e.g., in a free recall, avoid mentioning where they were at a certain place at a certain time) or denial strategies (e.g., denying to be in a certain place at a certain time when directly asked)."[270] However, it should be noted that not mentioning a certain topic or event "does not establish guilt, because truth tellers may simply have forgotten to mention this minor detail."[271] This is why, as

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261. FREDERICK, *supra* note 1, at 53; LIEBERMAN & SALES, *supra* note 14, at 128.

262. FREDERICK, *supra* note 1, at 53; LIEBERMAN & SALES, *supra* note 14, at 128.

263. LIEBERMAN & SALES, *supra* note 14, at 128.

264. FREDERICK, *supra* note 1, at 53.

265. *Id*. at 54.

266. *See* Shyma Jundi et al., *Who should I Look at? Eye contact during collective interviewing as a cue to deceit*, 19 PSYCHOL., CRIME & L. 661, 662 (2013) (discussing truth tellers' approach to answering interview questions as a tell-it-all approach).

267. Jundi, *supra* note 266, at 662; *see also* CRAVER, *supra* note 79, at 48; *Eliciting Cues*, *supra* note 143, at 114; *Pitfalls and Opportunities*, *supra* note 66, at 108.

268. Jundi, *supra* note 266, at 662; *see also* CRAVER, *supra* note 79, at 48; *Eliciting Cues*, *supra* note 143, at 114; *Pitfalls and Opportunities*, *supra* note 66, at 108.

269. CRAVER, *supra* note 79, at 48.

270. *Pitfalls and Opportunities*, *supra* note 66, at 108.

271. *Id.*

always, it is important to remember that no cue should be considered determinative on its own. Any particular cue must be analyzed in the context of the other cues being observed.[272]

A fifth auditory cue that attorneys should be aware of is the speed of the juror's speech.[273] "Jurors may rush their answers when they feel anxious about them. By speaking faster, jurors reduce the duration of their anxiety."[274] In this way, increased speed of speech can signal anxiety in a potential juror.[275] However, the key is "whether the respondent deviates from their normal pattern of speaking when responding to questions that could be anxiety producing."[276]

A sixth auditory cue is the juror's tone of voice.[277] In fact, this cue is likely a more accurate barometer of deception than any of the other auditory cues.[278] "A cold and condescending tone of voice generally indicates deception, aloofness, or potentially negative opinions, such as animosity."[279] Resultantly, an attorney should be very cautious of a juror who uses such tone in response to questioning.[280]

A seventh auditory cue is tense laughter.[281] "Jurors can reveal their tension through the quality of the laugh itself and the appropriateness of laughter for the situation."[282] Tense laughter may be too loud for the situation, may abruptly cut off when the juror realizes the inappropriateness of the laughter for the situation, or may occur at inappropriate times considering the topic being discussed.[283]

An eighth auditory cue attorneys should focus on is word choice.[284] The specific words jurors select to communicate their answers are laden with information.[285] "The choice of words can reflect a psychological distance the jurors impose between themselves and the objects about which they are speaking."[286] Psychological distance can indicate negative feelings, anxiety, or the presence of prejudice against certain groups.[287] One way psychological distance can be seen is in the directness or indirectness of the communication.[288]

Attorneys should also be aware of a juror's use of "powerless" speech

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272. LIEBERMAN & SALES, *supra* note 14, at 133.

273. FREDERICK, *supra* note 1, at 55; *Pitfalls and Opportunities*, *supra* note 66, at 104.

274. FREDERICK, *supra* note 1, at 55; *Pitfalls and Opportunities*, *supra* note 66, at 104; CRAVER, *supra* note 79, at 50.

275. FREDERICK, *supra* note 1, at 55; *Pitfalls and Opportunities*, *supra* note 66, at 104; CRAVER, *supra* note 79, at 50.

276. LIEBERMAN & SALES, *supra* note 14, at 128.

277. FREDERICK, *supra* note 1, at 55.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 56.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

because such speech can reflect deception or anxiety.[289]

> Characteristics of powerless speech include hedges (e.g., "I think," "I believe," or "kind of"), intensifiers (e.g., "so," "too," or "very"), hesitations (e.g., "you know," "uh," "well," or pauses), polite or overly formal diction (e.g., "sir," "please," or "thank you"), and an interrogative tone (i.e., the rise in intonation or pitch associated with questioning, even in declarative contexts).[290]

The use of powerless speech should raise a red flag in an attorney's mind.

Another aspect of word choice attorneys should pay attention to is verbal leaks. Verbal leaks are employed when someone feels uncomfortable lying, perhaps because they were raised to believe speaking falsely is morally wrong.[291] "To assuage their consciences, they include modifiers that make their statements more truthful."[292] For example, a juror states, "I've never been charged with a crime in this county" to conceal having been charged with a crime in a neighboring county. While the statement may be technically true, the modifier "in this county" should alert an attorney to pay more attention to what is actually behind the juror's words. Attorneys should also pay attention to the use of signal words that are used by a speaker "to create disingenuous impressions in the minds of [the listener]."[293] For example, the phrase "to be perfectly candid" often "accompanies a misrepresentation to enhance its credibility."[294] The use of such a signal word does not in itself evidence dishonesty, but when a signal word "appear[s] in a context suggesting a lack of candor, listeners should be particularly vigilant."[295]

Additionally, attorneys should be aware of the use of the conjunction "but."[296] Use of "the negation conjunction 'but' to connect two statements can serve to invalidate the first statement. For example, a juror might say in response to a question, 'I could be fair, but I did read in the paper that the defendant admitted killing the victim.'"[297] In this example, the statement that comes after the "but" indicates that the juror will likely not be able to be fair despite what the first clause says.

If an attorney pays attention to the above detailed visual and auditory cues, the attorney will be better equipt to detect a juror's true feelings and will be able to make more effective use of voir dire.

E. Use A Partner

A final technique in effectively interpreting visual and auditory cues is the use of multiple observers. No single attorney will be able to detect every cue

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289. *Id.* at 56-57.
290. *Id.* at 56.
291. CRAVER, *supra* note 79, at 26.
292. *Id.*
293. *Id.* at 28.
294. *Id.*
295. *Id.*
296. FREDERICK, *supra* note 1, at 57.
297. *Id.*

emitted from every juror after every question. "The attorney will be too busy generating questions and attending to prospective jurors' verbal responses and will not be able to carefully observe, interpret, and record a wide variety of nonverbal behaviors from the prospective juror being questioned . . . ."[298] For this reason, it is imperative that the questioning attorney enlists the help of as many other observers as possible who can pick up on the cues the attorney misses.[299]

III. QUESTION DESIGN

A. Introduction

In addition to learning how to recognize and interpret the visual and auditory cues emanating from potential jurors, it is also important for an attorney to consider the actual questions to be asked. What information should the questions try to glean from the jurors? What is the best way to phrase the question so the jurors will understand what is being asked? How can an attorney get the jurors to speak honestly about sensitive topics? And, can an attorney get the jurors to reveal their biases and prejudices?

B. Construct Validity

The specific wording of each question is extremely important. If a question is confusing, a juror may not know how to answer, or may answer a different question from the one the attorney is asking. If a question implies the answer the attorney wants, a juror may respond with that answer rather than with his true feelings. For these reasons, the question design is paramount. Dr. Terri Scandura described some common question construction errors in her article "*Garbage-in, Garbage-out*".[300] A question containing a construction error will not produce a meaningful answer. This is especially important for attorneys conducting voir dire since jury selection decisions must be made on the basis of the juror's answers to voir dire.

The first and most common error is ambiguity.[301] An ambiguous question is "confusing, vague, or otherwise subject to multiple interpretations."[302] The problem is that potential jurors may have trouble understanding exactly what the attorney is asking.[303] If jurors answer anyway, the response may or may not answer the question the attorney thought was being asking. This is especially troublesome when the juror responds with only a "Yes" or "No", since there will be no way for the attorney to know an error in communication has occurred.

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298. LIEBERMAN & SALES, *supra* note 14, at 134.

299. LIEBERMAN & SALES, *supra* note 14, at 134; CRAVER, *supra* note 79, at 37.

300. Terri A. Scandura & Lucy R. Ford, *Garbage-In, Garbage-Out: Item Generation as a Threat To Construct Validity*, MGMT. FAC. ARTICLES & PAPERS at 6-9 (2005), available at http://works.bepress.com/terri_scandura/3. While Dr. Scandura's article focuses on written questionnaires, the same threats to validity can occur in questions asked verbally.

301. *Id.* at 6, 12.

302. *Id.* at 6.

303. *Id.*

Consider, for example, the question "Have you ever repaired the brakes on your car?" There are at least two interpretations of this question. A juror could think the attorney is asking whether he has ever had the brakes on his car repaired. But a juror could also think the attorney is asking whether he has ever done the repair himself. The juror may respond "No" to this question because he has never done a brake repair himself, even though he took his car in for brake work last month. If the attorney was asking about brake repair regardless of who performed the repair, the attorney will not have received an answer to the question, even though it seems as if he has. A better formation of this question would be: "Has your car ever needed the brakes repaired?" Or "Have you ever repaired the brakes on your car, whether you did so yourself or took it to a mechanic?" The key to avoiding ambiguity is to be explicit in what you are actually asking.

A second error is the use of double negatives.[304] A question with a double negative includes two negative parts that offset each other, thus making the underlying question positive in form.[305] The issue with double negatives is that they can be confusing for potential jurors.[306] Consider, for example, the question "Who does not think the result of the OJ Simpson trial was unjust?" The question is really trying to uncover which jurors agree with the result of the trial. However, jurors will raise their hands if they understood the question and agreed with the result of the trial and if they disagreed with the result of the trial but were confused by the question. Additionally, jurors who agreed with the result of the trial but were confused by the question will not raise their hands. A better way to ask this question is to remove both negatives and simply ask, "Who thinks the result of the OJ Simpson trial was just?" This formulation gets at the same information but is much easier to understand.

A third construction error is the use of industry jargon, colloquialisms, or acronyms within a question.[307] For example, the radio astronomy jargon "Blueshift," the colloquialism "putting the cart before the horse," or the acronym CMO may not be understood by all of the potential jurors.[308] Therefore, it is best to eliminate them from the question or to explicitly explain what the phrases mean.

A fourth error is asking leading questions.[309] Leading questions direct the listener to the answer the attorney wants.[310] However, an attorney should avoid having any influence on a juror's response. "Leading questions are little more than outright assertions, accompanied either by a tone of voice or language clue that you desire a particular answer. They are closed questions in assertive

304. *Id.* at 7-8.

305. *See id.*

306. *Id.*

307. *Id.* at 8.

308. *Id.* Blueshift is a decrease in wavelength as when an object is moving towards the observer. Putting the cart before the horse means doing things in the wrong order. CMO is an abbreviation for Collateralized Mortgage Obligation.

309. *Id.* at 6-7.

310. *Id.*; *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 66 (3d ed. 2012).

form."[311] For example, "Many people are opposed to tort reform. How do you feel about it?" Asking a question this way prompts a juror to begin considering the issue from the frame of being opposed to tort reform. It also encourages a juror to respond with the answer the attorney wants in an effort to please the attorney. Because of these influences, the attorney may not learn the juror's true feelings. Therefore, a better way to ask this question is to simply say, "How do you feel about tort reform?," without hinting at how other people feel about the issue. This way, the juror will only consider his own feelings in formulating his answer and the attorney is more likely to get an untainted response.

A fifth construction error is asking double-barreled questions.[312] Double-barreled questions ask about more than one issue in the same question.[313] The danger here is that there is no way for the attorney to know what part of the question the potential juror intended to answer.[314] Consider, for example, the statement "Raise your hand if you would vote for a candidate who supports tax cuts and immigration reform."[315] Is a juror who raises his hand agreeing with the taxation part of the question, the immigration part of the question, or both parts? Any of these responses are valid answers to the question. However, there is no way for the attorney to tell which response the juror intended to provide. This example illustrates why it is so important that an attorney only ask one question at a time. A better way to structure this question is to ask each part separately. That way the attorney can be sure what a juror is trying to communicate with his answer.

Avoiding these construction errors will help ensure the attorney is able to communicate effectively with the potential jurors. His questions will not be confusing, they will be interpreted in the same way by all of the jurors, and he will be able to understand the jurors' responses. After all, the relevance of an attorney's conclusions is a function of the quality of the questions he asks.[316]

C. Social Desirability Bias

The goal of voir dire is to learn who each juror is, deep down, and what their biases and prejudices are. But how can an attorney get a juror to admit his deep-seated feelings in open court in front of his peers? To get a juror to answer candidly in response to sensitive questions, an attorney must overcome the social desirability bias. "The social desirability bias refers to the tendency of individuals to over-report socially desirable characteristics and behaviors and

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311. BINDER, *supra* note 310, at 66.

312. Scandura & Ford, *supra* note 300, at 7.

313. Scandura & Ford, *supra* note 300, at 7; *see also* FREDERICK, *supra* note 1, at 108 (suggesting avoidance of compound questions).

314. Scandura & Ford, *supra* note 300, at 7; *see also* FREDERICK, *supra* note 1, at 108.

315. This question is also ambiguous. Is the attorney asking jurors to raise their hand if they would vote for a candidate who supports *either* abortion or immigration reform? Or is the attorney asking jurors to raise their hand only if they would vote for a candidate who supports *both* abortion and immigration reform?

316. *See* Scandura & Ford, *supra* note 300, at 14.

under-report undesirable characteristics and behaviors."[317] People want to "present themselves in a positive light, independent of their actual attitudes and true behaviors . . . ."[318]

> [W]hen people are placed in important social situations, there is pressure on them to respond in a manner that is socially acceptable. In terms of verbal interactions, people tend to make socially desirable responses or statements when placed in these situations. Serving on jury duty is one such situation. Therefore, it is likely that there will be considerable pressure on the potential juror to make statements that are considered to be socially acceptable.[319]

People give socially desirable answers for several reasons, including to gain social approval (impression management) and to maintain a positive self-image (self-deception).[320]

> In the case of the impression management mechanism, respondents strive for social approval via selecting the answer that is expected to maximize positive valuations and minimize negative reactions by other subjects. In contrast, the concept of self deception assumes that interviewees want to maintain a positive self-image, to maximize self-worth and to reduce cognitive dissonance resulting from divergence between social norms, self-perception and self-demands on the one hand, and reality on the other hand.[321]

Additionally, people give socially desirable answers when asked about a wide range of topics.[322] For example, socially undesirable behaviors like illicit drug use, smoking, alcohol consumption, abortion, crime victimization, income, welfare status, and unpopular attitudes like racism and anti-Semitism are under-reported, while socially acceptable behaviors like voting, seat belt use, environmentally responsible activities, and religious participation are over-reported.[323]

Sensitive questions are especially likely to trigger the social desirability bias in potential jurors.[324] "These questions can potentially disclose private or socially undesirable behavior, criminal acts or antisocial attitudes. Therefore [the questions] are often regarded as embarrassing or threatening by the interviewees."[325] Yet, individual jurors will respond differently to the same

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317. Derek Dalton & Marc Ortegren, *Gender Differences in Ethics Research: The Importance of Controlling for the Social Desirability Response Bias*, 103 J. BUS. ETHICS 73, 73 (2011); Scandura & Ford, *supra* note 300, at 9; Ivar Krumpal, *Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review*, 47 QUAL. QUANT. 2025, 2028 (2013).

318. Krumpal, *supra* note 317, at 2027-28.

319. Frederick, *supra* note 68, at 583.

320. Anatol-Fiete Näher & Ivar Krumpal, *Asking sensitive questions: the impact of forgiving wording and question context on social desirability bias*, 46 QUAL QUANT 1601, 1603 (2012); *see also* Krumpal, *supra* note 317, at 2028.

321. Krumpal, *supra* note 317, at 2030.

322. *Id.*

323. *Id.*

324. Näher & Krumpal, *supra* note 320, at 1601, 1603.

325. *Id.*

question.[326] A particular question may be highly sensitive to one juror while the same question may be less sensitive or not sensitive at all to another juror.[327]

Additionally, research shows that women are more likely to feel the pressure of the social desirability bias.[328] One explanation for this is that as a result of "gender socialization, females are, in general, more concerned for the wellbeing of others. Further, women are more likely to be influenced by societal norms to create a favorable impression, which, in turn, leads to a greater propensity for females to respond in a socially desirable manner."[329] Research has also shown that the influence of the social desirability bias varies according to educational attainment.[330] Better-educated people are "more likely to report socially desirable behaviors that diverge from their actual behaviors" than their less educated peers.[331] This difference could exist because highly educated people are "more aware of social norms, and feel greater pressure to present their behavior or attitudes in alignment with these norms."[332]

One way of minimizing the social desirability bias is by forming questions with "wording that 'forgives' the behavior in question . . . ."[333] This can be accomplished by choosing words that convey the undesirable behavior is appreciated by authorities, has been carried out for understandable reasons, is already presumed by the interviewer, or is commonly done in society.[334] This process of "normalization" will increase the likelihood of an honest response from a potential juror.[335]

Another way to deal with the social desirability bias is to build up to sensitive topics and questions.[336] Attorneys should "address less sensitive or less difficult topics first."[337] This allows jurors the opportunity to get comfortable answering questions and interacting with the attorney.[338] Once the attorney is ready to move to more sensitive topic areas, he should "embed[] the sensitive question in a series of questions starting with unoffending general questions connected to the topic of interest, and then gradually narrow[] the focus to more specific behaviors."[339] This technique removes the focus from the undesirable behavior the attorney is trying to inquire about.[340]

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326. *Id.* at 1603.

327. *Id.*

328. *See* Dalton & Ortegren, *supra* note 317, at 73, 75-76 ("[W]omen are more likely to be influenced by societal norms to create a favorable impression.").

329. *Id.* at 76.

330. Jennifer A. Heerwig & Brian J. McCabe, *Education and Social Desirability Bias: The Case of a Black Presidential Candidate*, 90 SOC. SCI. Q. 674, 676 (2009).

331. *Id.* (internal emphasis omitted).

332. *Id.* at 677.

333. Näher & Krumpal, *supra* note 320, at 1602.

334. *Id.*

335. Näher & Krumpal, *supra* note 320, at 1602; FREDERICK, *supra* note 1, at 122.

336. Krumpal, *supra* note 317, at 2036; FREDERICK, *supra* note 1, at 120.

337. FREDERICK, *supra* note 1, at 103.

338. *Id.*

339. Krumpal, *supra* note 317, at 2036; FREDERICK, *supra* note 1, at 103.

340. Krumpal, *supra* note 317, at 2036.

Attorneys can also broach sensitive questions by giving jurors a way out if they reveal their biases.[341]

> Let [the jurors] know they may have opinions because of past experiences that would make it best for them not to sit on the case, stressing at the same time that there is nothing wrong with this – it is not a failure on their parts. Because of their experiences, however, it would be better that they be considered for a different jury.[342]

This technique encourages jurors to be candid because revealing their bias could get them out of hearing this case, which many potential jurors are eager to do.[343] However, this technique opens the door for jurors to fabricate biases in an effort to get out of their civic duty.

A final way to minimize the social desirability bias is to increase the privacy of disclosure.[344] This can be accomplished by requesting individual and separate voir dire of each potential juror or by requesting that jurors be allowed to respond to sensitive questions through individual questionnaires rather than having to respond in open court.[345] However, the availability of these solutions rests in the sole discretion of the judge, so while they effectively deal with the social desirability bias, they will not always be an option for an attorney who needs to ask sensitive questions.

In order to get a juror to reveal their true biases and prejudices an attorney must overcome the social desirability bias that pressures jurors to respond in a socially acceptable way. Understanding why the bias exists and how to lessen its effects will help an attorney elicit truthful information from jurors in response to the sensitive questions that are necessarily part of voir dire.

CONCLUSION

Jury selection is critically important to a client and his trial. The jury has his fate in their hands. Voir dire is all that stands between a randomly selected jury pool and the lucky few retained in the jury box. Yet, it is a complicated and difficult process. However, instead of relying on untested tricks and unfounded stereotypes to determine which jurors to retain and which to remove, attorneys should make use of empirically supported methods. Attorneys must pay attention to the visual and auditory cues exhibited by potential jurors, since these cues can provide clues as to when a juror's emotions have been triggered or when a juror is being deceptive. Nevertheless, it is equally important that attorneys pay attention to the construction of the questions they are asking, since the effectiveness of the communication process and the ability of the attorneys to elicit sensitive information from jurors depends on it. When an attorney is able to decipher cues and reveal biases and prejudice in potential jurors, he is able to stack the deck in favor of his client. That is the art of voir dire.

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341. FREDERICK, *supra* note 1, at 139.
342. *Id.*
343. *Id.*
344. Krumpal, *supra* note 317, at 2032-33.
345. *See id.* at 2034.