

JURY SELECTION

Third Edition

V. Hale Starr

Ph.D. in Communications Research

Mark McCormick

**Former Justice, Supreme Court of Iowa
Member, Iowa Bar**

ASPEN
PUBLISHERS

111 Eighth Avenue, New York, NY 10011
www.aspenpublishers.com

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional person should be sought.

—From a *Declaration of Principles* jointly adopted
by a Committee of the American Bar Association
and a Committee of Publishers and Associations

Copyright © 2001 by V. Hale Starr & Mark McCormick

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of the work should be mailed to

Permissions
Aspen Publishers
111 Eighth Avenue
New York, NY 10011

Printed in the United States of America

2 3 4 5 6 7 8 9 0

Library of Congress Cataloging-in-Publication Data

Starr, V. Hale.

Jury selection / V. Hale Starr, Mark McCormick—3rd ed.

p. cm.

Includes index.

ISBN 0-7355-1572-7

1. Jury selection—United States. I. McCormick, Mark. II. Title.

KF8979. S73 2000

347.73'752—dc21

00-063954

About Aspen Publishers

Aspen Publishers, headquartered in New York City, is a leading information provider for attorneys, business professionals, and law students. Written by preeminent authorities, our products consist of analytical and practical information covering both U.S. and international topics. We publish in the full range of formats, including updated manuals, books, periodicals, CDs, and online products.

Our proprietary content is complemented by 2,500 legal databases, containing over 11 million documents, available through our Loislaw division. Aspen Publishers also offers a wide range of topical legal and business databases linked to Loislaw's primary material. Our mission is to provide accurate, timely, and authoritative content in easily accessible formats, supported by unmatched customer care.

To order any Aspen Publishers title, go to www.aspenpublishers.com or call 1-800-638-8437.

To reinstate your manual update service, call 1-800-638-8437.

For more information on Loislaw products, go to www.loislaw.com or call 1-800-364-2512.

For Customer Care issues, e-mail CustomerCare@aspenpublishers.com; call 1-800-234-1660; or fax 1-800-901-9075.

Aspen Publishers
a Wolters Kluwer business

SUBSCRIPTION NOTICE

This Aspen Publishers product is updated on a periodic basis with supplements to reflect important changes in the subject matter. If you purchased this product directly from Aspen Publishers, we have already recorded your subscription for the update service.

If, however, you purchased this product from a bookstore and wish to receive future updates and revised or related volumes billed separately with a 30-day examination review, please contact our Customer Service Department at 1-800-234-1660, or send your name, company name (if applicable), address, and the title of the product to:

ASPEN PUBLISHERS
7201 McKinney Circle
Frederick, MD 21704

ABOUT THE AUTHORS

V. Hale Starr (Ph.D., Communication Research, University of Iowa) is the president of Starr Litigation Services, Inc., a legal consulting firm. She is a founding member of the American Society of Trial Consultants, has been a member of the Society's board of directors for five years, and was the chair of the Society's Committee to Develop Professional Standards. She is a Fellow of the International Association of Ethicists, critical reviewer of *Law and Society Review*, and a member of the National Council on Public Polls, the National Forensic Center, and the International Communication Association.

Mark McCormick (LL.B., Georgetown University; LL.M., University of Virginia) is an Iowa attorney who practices primarily in litigation. He served 14 years as a justice of the Supreme Court of Iowa. He previously served as both a district court judge and an assistant county attorney. He lectures frequently, has written several law review articles, has been on the National Judicial College faculty, and is currently chair of the Iowa State Bar Association Jury Instruction Committee.

CONTENTS

PART I LEGAL ASPECTS OF JURY SELECTION . . . 1

Chapter 1

THE RIGHT TO TRIAL BY JURY 3

§ 1.01	Constitutional Foundations	5
§ 1.02	Jury Size Under Court Decisions	6
§ 1.03	Unanimity Requirements	8
§ 1.04	The Right to a Jury Trial	10
	[A] Civil Cases	10
	[B] Criminal Cases	13
§ 1.05	Waiver of the Right to Jury Trial	17
	[A] Civil Cases	17
	[B] Criminal Cases	17
§ 1.06	Jury Selection: The Fair Cross-Section Principle	20
§ 1.07	Proof of Discrimination	24
§ 1.08	Impartiality in Jury Selection	27

Chapter 2

STATUTES, RULES, AND CASE LAW ON JURY SELECTION 35

§ 2.01	Introduction	37
§ 2.02	Jury Size and Unanimity Requirements	38
§ 2.03	Right to Jury Trial in Civil Cases	39
§ 2.04	Waiver of Jury	40
§ 2.05	Source Lists	41
§ 2.06	Juror Qualifications	42
§ 2.07	Exemptions	43
§ 2.08	Selection Methods	44
§ 2.09	Use of Jury Questionnaires	45
§ 2.10	Jury Orientation	46
§ 2.11	Voir Dire	46
§ 2.12	Challenges for Cause	47
§ 2.13	Peremptory Challenges	48

[A]	Generally	48
[B]	<i>Batson</i> and Its Progeny	50
[1]	Leveling the Charge	51
[2]	Making a Prima Facie Case	52
[a]	Court Expansion of Groups Covered by <i>Batson</i>	54
[b]	Circuit Court Expansion of <i>Batson</i> Protection	55
[c]	Groups Not Covered by <i>Batson</i>	55
[3]	Rebutting a Prima Facie Case	56
[4]	Responding to the Prosecutor's Explanation ...	58
[5]	Creating an Inference of Discrimination	59
[a]	A Pattern of Using Strikes to Remove Certain Jurors	60
[b]	Group Memberships as Sole Common Characteristic	60
[c]	The Nature of the Juror's Voir Dire Responses	61
[d]	The Nature of the Voir Dire Questioning .	61
[e]	The Race of Defendant, Victims, Witnesses, or Even Counsel	61
[f]	Prior Peremptory Challenge Abuses by Counsel	62
[g]	Premature Explanation by Counsel Making Strike	62
[h]	Importance of Making Record Regarding Racial or Ethnic Identification of Venire ..	62
[6]	Timing of the <i>Batson</i> Challenge	63
[7]	Remedy for a <i>Batson</i> Violation	63
[8]	Defense Tactics	63
[9]	Preserving the Record of the <i>Batson</i> Violation— A Recap	64
[C]	Recent Federal Applications of <i>Batson</i> and Its Progeny	65

Chapter 3

CURRENT ISSUES AND DEVELOPMENTS IN

JURY LAW **77**

§ 3.01	Introduction	79
§ 3.02	General Sources of Controversy About the Jury System ...	79
§ 3.03	Disparities in Results Between Jury and Bench Trials	80
[A]	Disparities in Civil Cases	81

CONTENTS

	[B] Disparities in Criminal Cases	81
	[C] Status and Leadership	84
	[D] Prior or Inadvertent Knowledge	86
	[E] Jury Behavior	88
	[F] Juror Discussions Prior to Deliberations	89
§ 3.04	Improving Jury Management	90
	[A] Administration of the Jury System	91
	[B] Notification	93
	[C] Monitoring	94
	[D] Maximizing Use of Jurors	95
	[E] Improving Facilities	96
	[F] Juror Compensation	96
	[G] Time and Cost Comparisons	97
§ 3.05	The American Bar Association/Brookings Institution Symposium	98
§ 3.06	Jury Size	102
§ 3.07	Unanimity Requirements	107
§ 3.08	Methods of Selecting Prospective Jurors	108
	[A] Opportunity for Jury Service	108
	[B] Source Lists	108
	[C] Random Selection	109
	[D] Eligibility	110
	[E] Availability for Service	110
	[F] Avoiding Service	111
§ 3.09	Jury Orientation and Pre-trial Instruction	112
§ 3.10	Voir Dire and Resulting Verdicts	114
	[A] The ABA Standards in General	115
	[B] Challenges for Cause	116
	[C] Peremptory Challenges	117
	[D] The Rise of Social Science Techniques as an Aid in Jury Selection	118
§ 3.11	Juror Competency	119
	[A] Jury Instructions	120
	[B] Juror Note-Taking	122
	[C] Allowing Questions from the Jury	123

PART II PRE-TRIAL PREPARATION 125

Chapter 4

CHANGE OF VENUE 127

§ 4.01	Introduction	129
	[A] What Constitutes Bias?	129

	[B] Concern Not Cured by Challenge for Cause	131
	[C] Percentage of Bias Sufficient to Support a Change of Venue	132
§ 4.02	Why Change of Venue Is the Answer	133
§ 4.03	Using a Community Attitude Study to Support the Change- of-Venue Motion	134
	[A] Sampling	134
	[1] Margin of Error	134
	[2] Qualified Respondents	135
	[3] Equal Opportunity for Inclusion	135
	[B] Source Materials	136
	[C] Records That Should Be Introduced in Court	136
	[D] Hearsay Challenge	138
§ 4.04	Challenging a Community Attitude Study Used to Support a Change of Venue	138
	[A] Qualifications of the Researcher	139
	[B] Flawed Methodology: Use of Proper Frame	140
	[C] Proper Identification of Respondent as Qualified to Be a Juror	142
	[D] Random Selection of Respondents Within the Households Polled	143
	[E] Sample Does Not Accurately Reflect the Venue: Inappropriate Inclusion or Exclusion	144
	[F] Question Design Introduces Bias or Prejudice	144

Chapter 5

THE ISSUES STUDY AND COMMUNITY ATTITUDE ASSESSMENT

147

§ 5.01	The Issues Study	149
§ 5.02	Determining the Purpose of the Study	150
§ 5.03	Constructing the Questionnaire	151
§ 5.04	Recruiting Participants	154
§ 5.05	Coding the Responses and Analyzing the Results	155
§ 5.06	The Community Attitude Assessment	156
	[A] Necessity for	156
	[B] Types of Community Attitude Assessments	158
	[1] Polls	158
	[2] Surveys	159
	[3] The Community Attitude Study	160
	[4] The Psychological Interview	164
§ 5.07	Personnel for Conducting a Community Attitude Assessment	166

CONTENTS

	[A] Personnel Selection	166
	[B] Personnel Training and Supervision	169
§ 5.08	Selection of the Sample	170
§ 5.09	Constructing the Questionnaire	172
	[A] The Introduction	173
	[B] Screening and Source of Information Questions	173
	[C] Questions About the Amount of Information in the Community	174
	[D] Attitudes Toward the Case's Major Issues	175
	[E] Attitudes Toward the Case Facts or Other Case-Specific Questions	175
	[F] Demographic Questions	176
	[G] Pre-testing Questions	176
§ 5.10	Method of Contacting Respondents	178
§ 5.11	Conducting the Interview	181
	[A] Following the Interview Schedule and Maintaining a Neutral Attitude	181
	[B] Recording Responses	182
	[C] Wrapping Up the Interview	183
	[D] Maintaining Confidentiality	183
	[E] Coding the Questionnaire	184
	[F] Verification Methods	184
	[G] Determining the Completion Rate	185
§ 5.12	Analysis of the Results	186

Chapter 6

DEMOGRAPHIC ANALYSIS OF THE JURY PANEL 191

§ 6.01	In General	193
§ 6.02	Evaluating Demographic Information	193
	[A] Statistical Analysis	193
	[B] Nonstatistical Analysis	194
§ 6.03	Sample Demographic Analysis	197
§ 6.04	Reliability of Demographic Analysis	199

Chapter 7

TRIAL SIMULATION 201

§ 7.01	In General	203
§ 7.02	Preparing a Trial Simulation	204
	[A] Nonjurors	206
	[B] Jurors	207
	[1] Basic Sources of Jurors	209

	[2] Advertising for Jurors	210
	[3] Other Sources of Jurors	210
§ 7.03	Conducting the Simulation	213
	[A] Structuring Simulation Time	213
	[B] Presenting Witnesses	215
§ 7.04	Simulation Measures	216
	[A] Pre-simulation Measures	217
	[B] Trial Simulation Measures	217
	[C] Pre-deliberation Measures	220
	[D] Post-deliberation Measures	222
§ 7.05	Sample Results from Simulation Measurements	222
	[A] Opening Statement Measures	222
	[B] Evaluating Witnesses	225
	[C] Track Analysis	229
	[D] Measure After Rebuttal	229
	[E] Deliberation Analysis	230

PART III VOIR DIRE 233

Chapter 8

INTRODUCTION TO VOIR DIRE 235

§ 8.01	Importance of Voir Dire	237
§ 8.02	Purpose of Voir Dire	237
	[A] Discovering Juror Attitudes and Background	238
	[B] Relaxing the Jurors	239
	[C] Establishing Lawyer Credibility	239
	[D] Educating the Juror on Points of Law	240
	[E] Educating Jurors About the Particular Case	242
	[F] Avoiding Mistrials	243
	[G] Nominating the Foreperson	244
	[H] Preparing for the Opening Statement and Summation	244
§ 8.03	Types of Juror Prejudice	245
	[A] Beliefs	245
	[B] Predispositions	246
	[C] Emotional Response System	247
	[D] Pre-judgments	248
	[E] Combined Prejudices	248
	[F] Hindsight Bias	249
	[1] Applications of the Hindsight Bias	250
	[2] Hindsight Bias As It Applies to Defendants	252

CONTENTS

	[3] Hindsight Bias As It Applies to Plaintiffs	252
	[4] Voir Dire Questions to Reveal Potential Hindsight Bias Problems	255
	[5] Hindsight Affects Judges' Decisions	255
§ 8.04	Juror Bias or Prejudice and Sympathy	256
§ 8.05	Why Jurors Retain Prejudices During Voir Dire	261
§ 8.06	Juror Stress in the Emotional Trial	266

Chapter 9

MECHANICS OF VOIR DIRE 271

§ 9.01	Basic Voir Dire Procedure	273
	[A] Judge-Conducted Voir Dire	273
	[B] Attorney-Conducted Voir Dire	274
	[C] Voir Dire Conducted by Both Judge and Attorney	276
§ 9.02	Seeking a Change in the Voir Dire Method	276
§ 9.03	Submitting Questions	278
§ 9.04	Introductory Remarks by Judge	279
§ 9.05	Remarks by Attorney	281
	[A] Sample Introductory Remarks by Attorney (Criminal Case)	282
	[B] Sample Introductory Remarks by Attorney (Civil Case; Defendant)	283
	[C] Sample Introductory Remarks by Attorney (Civil Case; Plaintiff)	284
§ 9.06	Treatment/Mistreatment of Jurors	287
	[A] Negative Reactions to Jury Duty	287
	[B] Jury Bashing	291
	[C] Jury Service Reluctance	295

Chapter 10

VOIR DIRE TECHNIQUES 299

§ 10.01	Preparing for Voir Dire	301
	[A] Choosing the Attorney to Conduct Voir Dire	301
	[B] Observing the Time and Place for Voir Dire	302
	[C] Questioning Jurors in Groups or Individually	303
	[D] Selecting Topics and Issues That Should Be Covered in Voir Dire	304
	[1] Outlining the Topics to Be Covered	304
	[2] Selecting Voir Dire Topics	310
§ 10.02	Developing Rapport With the Panel	313
	[A] Making a Good First Impression	314

	[B] Maintaining Proximity	316
	[C] Talking to Witnesses	316
§ 10.03	Conducting Voir Dire	317
	[A] Determining the Extent of Questioning	318
	[B] Determining the Depth of Questioning	323
	[C] Explaining Questions	325
	[D] Avoiding Unnecessary Questions	325
	[E] Avoiding Embarrassing Questions	326
	[F] Avoiding Boring Questions	327
	[G] Avoiding the Words “Bias” and “Prejudice”	327
	[H] Handling Sensitive Topics	328
	[I] Avoiding Provocation from Responses	329
	[J] Handling the Sympathy Issue	331
§ 10.04	Communicating with the Jury	331
	[A] Avoiding Complex Language	332
	[B] Using Inclusive Rather Than Exclusive Phrases	335
	[C] Tailoring Vocabulary to the Audience	337
	[D] Disclosing Weaknesses	338
	[E] Explaining the Limits of Rapport	339

Chapter 11

SUPPLEMENTAL JUROR QUESTIONNAIRES 341

§ 11.01	Purpose of the Supplemental Juror Questionnaire	343
	[A] Introduction	343
	[B] Benefits of the Use of the Supplemental Juror Questionnaire	344
	[C] Increasing Likelihood of Self-Disclosure	344
	[D] Exploring Potentially Prejudicial Facts	345
	[E] Avoiding the Confrontational Aspect of Jury Selection	346
	[F] Promoting a Sense of Personal Involvement	346
	[G] Promoting a Greater Sense of Responsibility	346
	[H] Awareness of the Risk of Perjury	347
	[I] Follow-up Questions	347
	[J] Expediting Voir Dire	348
	[K] Authority and Procedure for Use of the Supplemental Juror Questionnaire	348
§ 11.02	Use of Supplemental Juror Questionnaires	349
	[A] Types of Cases in Which Supplemental Juror Questionnaires Should Be Used	349
	[1] Highly Publicized Cases	350

CONTENTS

	[2] Cases Involving Parties with High Name Recognition	351
	[3] Cases Where Jurors Are Likely to Have Direct Contact with a Party	355
	[4] Where Personal Experience Influences Case Issues	357
	[5] Cases Involving Issues About Which Most Jurors Hold Strong Opinions	359
	[B] Using the Supplemental Juror Questionnaires Effectively	360
§ 11.03	Design and Implementation of the Supplemental Juror Questionnaire	362
	[A] Design the Questionnaire	362
	[B] Alert Other Parties About SJQ	363
	[C] Exchange Questionnaire Formats	364
	[D] Reach Agreement with All Parties	364
	[E] File Motions with the Court	364
	[F] The Hearing	365
	[G] Cost Considerations	365
	[H] Finalize Choice of Juror Contact Method	366
	[I] Duplication of Finished Questionnaire	366
	[J] Access to Questionnaires	367
	[K] Evaluation by the Attorney	367
§ 11.04	Concerns Regarding the Use of the Supplemental Juror Questionnaire	368
	[A] Inclusion of Irrelevant Questions	368
	[B] Inclusion of Prejudicial Information or Conditioning Language	368
§ 11.05	Sample Supplemental Juror Questionnaires	375

PART IV NONVERBAL COMMUNICATION 389

Chapter 12

NONVERBAL COMMUNICATION IN GENERAL 391

§ 12.01	Introduction	393
§ 12.02	Significance of Nonverbal Behaviors for Self-Presentation ..	394
§ 12.03	Misconceptions About Nonverbal Communication	398
	[A] Nonverbal Communication vs. Body Language	399
	[B] Interpreting Nonverbal Communication Is Not Mind Reading	399
[C]	Nonverbal Communication and Verbal Communication	400

§ 12.04	Basic Characteristics of Nonverbal Communication	402
§ 12.05	Interpreting Nonverbal Communication	403
§ 12.06	Relating Nonverbal Communication to Verbal Communication	406
	[A] Nonverbal Communication as a Substitute for Verbal Communication	406
	[B] Nonverbal Communication as a Complement to Verbal Communication	407
	[C] Nonverbal Communication as a Regulator of Verbal Communication	408
§ 12.07	A Preview of Nonverbal Communication and Jurors	408
	[A] Nonverbal Communication and Self-Presentation	409
	[B] Nonverbal Communication and Impression Formation	409
	[C] Nonverbal Communication and Social Influence	410
	[D] Nonverbal Communication and Deception	410

Chapter 13

NONVERBAL COMMUNICATION: APPEARANCE 413

§ 13.01	Introduction	415
§ 13.02	The Power of Attractiveness	415
§ 13.03	Physical Characteristics	418
	[A] Hair	418
	[B] Cosmetics	419
§ 13.04	Clothing and Accessories	420
	[A] Clothing and Accessories as Indicative of Role	421
	[B] Clothing and Accessories as Indicative of Age	422
	[C] Clothing and Accessories as Indicative of Personality	422
	[D] Color Choice	424
	[E] Impact on the Jury of Clothing and Accessories	425
	[F] Assessing Juror Dress	426
	[G] Choosing Court Attire for Women Attorneys	433

Chapter 14

NONVERBAL COMMUNICATION: VOICE 443

§ 14.01	Introduction	445
§ 14.02	Vocal Cues in General	445
	[A] Revealing Speaker Origins	446
	[B] Revealing Emotions Through Speech	448
	[C] The Sound of Attractiveness	450
§ 14.03	Determining Credibility from Vocal Cues	452
	[A] Cues That Negate Credibility	453

CONTENTS

	[B] Application at Trial	457
§ 14.04	Sending and Identifying Emotions in Vocal Communications: Practice	458

Chapter 15

NONVERBAL COMMUNICATION: MOVEMENT 461

§ 15.01	Introduction	463
§ 15.02	Facial Expression	463
§ 15.03	Juror Movement and Posture in the Courtroom	466
	[A] Sitting on the Edge of a Chair	468
	[B] Sitting Up Straight in a Chair	468
	[C] Sitting Leaners	472
	[D] Sitting with Feet on the Ground	480
	[E] Carried Items	483
	[F] Seated Listening Position	488
§ 15.04	Gestures	488
	[A] Illustrators, Adaptors, and Regulators	490
	[B] Cultural Influence	490
§ 15.05	The Walk	491
§ 15.06	Eye Contact	492
	[A] Eye Contact in the Jury Box	492
	[B] Gaze Awareness	492
§ 15.07	Smiles	494
§ 15.08	Physical Space	496
	[A] Cross-Cultural Uses of Space and Touch	497
§ 15.09	Deception Cues and Their Hierarchy	500
§ 15.10	Concluding Remarks on Nonverbal Communication	504

Chapter 16

DECEPTION AND NONVERBAL COMMUNICATION 507

§ 16.01	Introduction	509
§ 16.02	Detecting Deception	510
	[A] Assumptions About Detecting Deception	510
	[B] Problems in Detecting Deception	512
	[1] Ambiguity in Cues	514
	[2] Cultural Differences	515
	[3] Global Impressions	517
	[4] Facial Bias in Looking for Cues	518
	[5] Knowledge of Stereotypes	518
§ 16.03	Interpersonal Deception Theory	519
	[A] Suspicion	519