8.3 Jury Selection

A. Importance of Diverse Juries

Researcher Samuel R. Sommers has examined the differences between racially diverse and all-White juries, and has concluded that "racial diversity in the jury alters deliberations . . . in a way that most judges and lawyers would consider desirable." Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)).

One study concluded that more diverse juries:

- deliberate longer;
- focus more on the evidence;
- make fewer inaccurate statements;
- make fewer uncorrected statements; and
- discuss race-related topics at greater length.

Id. Additionally, "[s]imply by knowing that they would be serving on diverse juries . . . White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty." *Id.* The Sommers study suggests that selecting a diverse jury may be the most effective way to minimize the impact of racial bias in jury deliberations.

There may be a greater risk of explicit biases in jury deliberations when juries are not diverse, as illustrated by the following letter from a White juror to the judge who presided over a trial involving a civil rights complaint filed by Black plaintiffs:

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). Had just one African-American been sitting in that room, the content of discussion would have been quite different. And had the case been more balanced—one that hinged on fine distinction or subtle nuances
>
> —a more diverse jury might have made a material difference in the outcome.
>
> I pass these thoughts onto you in the hope that the jury system can some day be improved.

Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror).

B. Orientation Sessions before Jury Service

Because juror bias jeopardizes a defendant's constitutional right to a fair trial, many scholars and practitioners have considered possible steps before jury service to address potential juror bias. One proposal is to conduct orientation sessions for potential jurors to educate them about implicit bias and the importance of rendering verdicts free from bias. *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012). *See also* JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS, NATIONAL CENTER FOR STATE COURTS 4–5 (National Center for State Courts 2009) (collecting evidence that "implicit biases are malleable and can be changed"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012). Attorneys may suggest incorporating implicit bias training into juror orientation sessions to the county's Jury Commission, Judicial Committee, or Chief Resident Superior Court Judge.

C. Why Ask Questions about Race during Voir Dire

People generally avoid discussing the subject of race with strangers. Reasons for this may include general discomfort with the subject; fear of being labeled biased; fear of offending others; concern that expression of one's views may provoke hostility, defensiveness, or anger; perception that race is a historical phenomenon that is not relevant to today's society; or a belief that "color-blindness" is a preferred approach and requires avoiding discussions of race. *See, e.g.*, Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57.

Despite these challenges, there are a number of reasons why it is important for defense attorneys to address the subject of race during voir dire:

- Discussing the subject allows attorneys to "discover [jurors' views on race], and how strongly they are held, and how they may impact [the] verdict." *Id.*
- Forthright exchanges about race during voir dire enhance the defense attorney's ability "to intelligently exercise preemptory challenges and challenges for cause." *Id.*
- Attorneys who do not engage in a frank discussion of racial attitudes may be more likely to rely on their own "generalized stereotypes" of the jurors and "make assumptions based on jurors' race." Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012) (also observing that if criminal defense attorneys use a "process of elimination based on stereotypes, jurors will know it").
- A growing body of evidence indicates that when issues of race are brought to the forefront of a discussion or "made salient," individuals tend to think more critically about the issues, and the influence of stereotypes and implicit biases on decision-making recedes. For this reason, having an open and honest conversation about race

during voir dire may enable jurors to avoid reliance on stereotypes during trial and in deliberations. NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS; *see also* Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (voir dire regarding racial bias appeared to diminish racial bias from assessments of guilt).

- Discussing race during voir dire allows defenders to explore whether individuals are comfortable discussing issues of race and to consider striking "jurors who ignored the issue or who asserted that race did not matter." Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1526 (2013) (quoting L. Song Richardson, Professor of Law, Univ. of Iowa Coll. Of Law); *see also* Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, THE CHAMPION, July 2013, at 46, 50 (suggesting that "[d]uring voir dire defense counsel should work to make jurors aware of the problem of race bias and identify those jurors who appreciate its influence").

Case study: Discussing race during voir dire. In the case study below, an Assistant Public Defender in North Carolina reflects on the experience of discussing race with jurors during voir dire:

In 2013, I represented a client charged with Driving While Impaired and Possession of a Stolen Firearm. After I received discovery in the case, I reviewed the DRE (drug recognition expert) paperwork. In that paperwork I noticed that under the section for the race of the suspect, the DRE expert wrote "mulatto," a dated and derogatory term for a person of mixed Black and White ancestry. At that moment, I realized that I would need to explore the officer's use of this term on cross to impeach his credibility.

I also realized that because I would be exploring race issues as a part of my impeachment of the DRE expert, I would also need to talk about race during jury selection. My goal was two-fold: first, to learn if any of the prospective jurors were racially biased, and second, to educate the jurors why I was raising this issue during my cross-examination. Although I was apprehensive about talking about race during jury selection, I knew that if I did not talk about it then my client would be even more detrimentally impacted.

When it was time to begin talking about race during jury selection, I introduced the topic in terms of how we see or hear about race issues in society. I kept a very calm, affirming, and open demeanor in order to project that it was okay to share their views in this very public forum and no one would judge them for doing so. I started by saying something akin to "Sometimes in our society we've seen circumstances where someone might have been treated badly or just differently because of their race." Then, I asked an open-ended question, such as, "Tell me about the most serious time you saw, or just knew about, someone being treated differently or badly because of their race." To my surprise, one juror raised her hand and volunteered a response about how society treats people differently because their race. I noted which other jurors were listening and responding with their body language about what this juror was sharing. I followed up by asking those jurors questions like "Juror B, what do you think about what Juror A just shared?" "Do you agree that people can be treated differently because of their race?" "How do you feel about that?" I kept my questions as open as possible to keep the jurors talking. Also, I followed their lead in talking about race in terms of

societal expectations because I felt that I was able to learn their views that way without making them too uncomfortable. I sensed that they were a little nervous at first but the more naturally and comfortably I spoke about race, the easier it became for them to discuss the issues they encountered in the media and even in their own neighborhoods.

To my relief, I didn't have anyone say that race issues don't exist, or that we live in a post-racism society. Thus, I did not end up using the responses I heard to make a challenge for cause or a peremptory strike. But the discussion we had during jury selection was important. It made the jurors start thinking about race and disparate treatment, which prepared them for when I cross-examined the DRE expert.

As for the cross-examination, I ended up addressing the mulatto issue last to make the most of its impact. In the end, the officer admitted that he was not trained or instructed to use that term by his office. Although my client was convicted of the Possession of a Stolen Firearm, he was acquitted of the DWI.

D. Purpose of Voir Dire

North Carolina appellate courts recognize that jury voir dire serves two basic purposes: 1) helping counsel determine whether a basis for a challenge for cause exists, and 2) assisting counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."). The N.C. Supreme Court has stated that the purpose of voir dire examination and the exercise of challenges, both peremptory and for cause, "is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Conner*, 335 N.C. 618, 629 (1994).

Practice note: A proposed voir dire question is legitimate if the question is necessary to determine whether a juror is excludable for cause or to assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to one or both of the purposes of voir dire.

E. Law Governing Voir Dire Questions about Race

Generally. Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to voir dire jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992) (holding that capital defendant constitutionally entitled to ask specific "life qualifying" questions to the jury); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence

cannot be fulfilled."). *But cf. Mu'Min v. Virginia*, 500 U.S. 415, 425 (1991) (emphasizing extent of trial judge's discretion in controlling voir dire and holding that voir dire questions about the content of pretrial publicity to which jurors might have been exposed are not constitutionally required).

North Carolina statutes likewise give the parties the right to "personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge." G.S. 15A-1214(c); *see also* G.S. 15A-1212(9) recognizing right to challenge for cause an individual juror who is unable to render a fair and impartial verdict). For a further discussion of voir dire, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.3 (Voir Dire) (2d ed. 2012).

Voir dire about race. A defendant has a constitutional right to ask questions about race on voir dire in certain circumstances. In *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court held that a Black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. In *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), the Court held that the Due Process Clause does not create a general right in non-capital cases to voir dire jurors about racial prejudice, but such questions are constitutionally protected when cases involve "special factors," such as those presented in *Ham*. In *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), the Court held that trial courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is charged with a violent crime and the defendant and victim are of different racial or ethnic groups. *See also Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion) (defendants in capital cases involving interracial crime have a right under the Eighth Amendment to voir dire jurors about racial biases).

In other cases, courts have held that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge. *See State v. Robinson,* 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed the defendant to ask questions of prospective White jurors about their associations with Black people; trial judge did not err in sustaining prosecutor's objection to other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?"). Undue restriction of the right to voir dire is error. *See State v. Conner*, 335 N.C. 618, 629 (1994) (holding that pretrial order limiting right to voir dire to questions not asked by court was error).

The N.C. Supreme Court has recognized that voir dire questions aimed at ensuring that "racially biased jurors [will] not be seated on the jury" are proper. *State v. Williams*, 339 N.C. 1, 18 (1994). In *Williams*, a capital case involving a Black defendant and a White victim, the court found no error when, during jury selection, the prosecutor asked whether the jurors could "put the issue of race completely out of [their minds]." The court's

conclusion that "[t]he mere mention of race in a trial such as this is not evidence of racial animus" may provide support for a defendant's effort to explore the question of racial bias during jury selection. *Id.*

Defenders should be prepared to show how questions concerning racial attitudes are relevant to the case, the defendant's theory of defense, and the purposes of voir dire, by raising considerations such as the following:

- Is your client charged with an interracial crime of violence? If so, you have a constitutionally protected right to inquire into racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981).
- Do you intend to demonstrate that your client was subjected to unconstitutional selective enforcement or selective prosecution on account of his or her race or ethnicity? If so, you have a constitutionally protected right to inquire into racial bias. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973).
- Does your theory of defense involve consideration of racial issues, such as cross-racial misidentification, racial epithets, or racial biases held by a witness for the prosecution? If so, you may have a constitutionally protected right to inquire into racial bias. *See Ristaino*, 424 U.S. 589, 597.
- If the case does not involve one of the above grounds specifically giving a defendant the right to inquire into racial bias, argue that your inquiry is nevertheless necessary given the constitutional and statutory purposes of voir dire.

When your case is not one with unique racial dimensions, you may want to highlight empirical findings suggesting that "juror racial bias is most likely to occur in run-of-the-mill trials without blatantly racial issues." Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006).

Practice note: If the inquiry is particularly sensitive, counsel may request individual voir dire. A sample motion can be found on the Office of Indigent Defense Services website, http://www.ncids.org. *See* Motion for Individual Voir Dire on Sensitive Subjects in the Motions Bank, Non Capital (select "Training and Resources").

F. Voir Dire Preparation, Techniques, and Sample Questions

Know your judge. Before voir dire begins, determine the practices of the judge presiding over the trial. Does he or she typically allow for questions about racial attitudes and racial bias when not constitutionally required? Generally, how extensive is the questioning the judge allows about race? How has the judge responded to motions for individual voir dire on sensitive topics in previous cases? *See supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge.

Recognize the role that bias may play in a juror's evaluation of the case. One experienced attorney summarized the body of research on juror prejudice in the following manner:

- People who come to jury duty bring with them prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- Jurors are individuals. There is little correlation between the stereotypical aspects of a juror's makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have biases or preconceived notions in an individual case.
- The prejudices and ideas jurors bring to court affect the way they decide cases even if they honestly believe they will be fair and can set preconceived notions aside.
- Jurors may decide cases based on their biases and preconceived notions regardless of what the judge may instruct them.
- Rehabilitation and curative instructions are not necessarily effective.
- Jurors may have made up their minds about the defendant's guilt before they hear any evidence.

Ira Mickenberg, Voir Dire and Jury Selection 2 (training material presented at 2011 North Carolina Defender Trial School).

Formulate voir dire questions ahead of time. Exploring racial attitudes often requires moving outside of your comfort zone. Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647 (2004). If you intend to ask questions regarding racial attitudes, develop your questions ahead of time and consider practicing them with others to ensure that they are unlikely to evoke defensive responses, that you are comfortable asking them, and that you're prepared to respond to the answers you receive. You will not be able to use the same questions in every case; your voir dire should be "tailored to your factual theory of defense in each individual case." Ira Mickenberg, Voir Dire and Jury Selection 6 (training material presented at 2011 North Carolina Defender Trial School). Sample questions can be found below under "Sample Questions."

Create conditions for jurors to speak openly about race. Discussing the subject of race will not help you identify juror bias unless you are able to elicit open responses from potential jurors. Consider beginning the conversation by explaining why you need to address the subject and acknowledging that it can be a difficult or uncomfortable topic to discuss. It is generally not effective to jump into a conversation about race by asking potential jurors if they harbor racial prejudice. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013). This approach may provoke defensiveness, seem patronizing or insulting, and reveal little about the jurors' views.

One trial attorney suggests that a productive approach may be to inform jurors about the concept of implicit bias and then solicit their views on it. Jonathan A. Rapping, *Implicitly*

Unjust: How Defenders Can Affect Systemic Racist Assumptions, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1032–35. For example, the attorney might say, "Some researchers have found that people have implicit biases, which are stereotypes that people are not aware of that can influence their thoughts and behavior. For example, an employer might pass over a Black applicant for a job based on lack of relevant experience and consider a White applicant with a similar experience level, even though that employer does not consciously believe in discriminating against people based on their race. While research suggests that implicit biases arise from the brain's natural tendency to associate categories, the concern is that they may result in unequal treatment when they go unexamined." Then, the attorney can follow up to determine the jurors' reactions:

> You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I'd like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making.

Id. at 1032.

Consider sharing an example about recognizing biases to jumpstart the discussion. One method for starting a conversation about race is to share a brief example about a judgment shaped by a racial stereotype. For example, some defense attorneys share and discuss the famous Jesse Jackson admission that "there is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery. Then look around and see somebody white and feel relieved." Bob Herbert, *In America; A Sea of Change on Crime*, N.Y.TIMES, Dec. 12, 1993 (quoting Jackson). Criminal defense attorney Jeff Robinson sometimes talks with potential jurors about his assuming that a "black kid with cornrows" blasting rap music and driving a new BMW must be a drug dealer before catching himself and recognizing that his assumption was based on a racial stereotype. Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1551 (2013); *see also* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

Such examples illustrate that people of all races and occupations possess implicit biases, "diffuse[] the emotional content of the race discussion," give prospective jurors "permission to admit their own [biased] thinking," and may help to begin a conversation in which potential jurors are comfortable discussing racial bias. James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 23. Sharing an example about your own bias shows that you are not asking jurors to do anything that you are not willing to do yourself. Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School). Of course, attorneys should avoid expressions of overt racism, which are inappropriate and may constitute ineffective assistance of counsel. *See State v. Davis*, 872 So. 2d 250 (Fla. 2004) (holding that defense attorney was ineffective

when he made explicit expressions of racial prejudice in an effort to bring jurors' latent biases out into the open); *see infra* § 8.4C, Improper References to Race by the Defense.

Avoid expressing judgments. Generally speaking, if a juror reveals something personal or potentially embarrassing, a good strategy is to acknowledge how difficult it must have been to share that information and thank the juror for his or her honesty. Ira Mickenberg, Voir Dire and Jury Selection (training material presented at 2011 North Carolina Defender Trial School). This response may encourage other potential jurors to share their views openly. Defense counsel might follow up by saying, "I appreciate that Mrs. Jones was willing to share [sensitive topic or viewpoint]. Has anyone else had a similar experience/Does anyone else have an opinion on this topic?"

When a juror reveals information suggestive of racial bias, the attorney's instinct may be to change the subject, recharacterize the response to something more palatable, try to help the juror overcome his bias, or avoid the juror's statement altogether. These responses are typically aimed at putting everyone at ease and ensuring that the other panelists are not influenced by the biased statement. This intuitive response may be counterproductive. *Id.* A better strategy is to restate the juror's statement and ask an open-ended question to learn more about the juror's opinion. The additional exchange with the juror may provide a basis for a challenge for cause or, at least, additional information to evaluate the use of a peremptory challenge. *Id.* at 14–15 (discussing how to establish basis for challenge for cause).

Criminal defense attorney Jeff Robinson offers his insights into effective responses to admissions of racial bias:

> Now if someone makes a racist statement during jury selection, I say "Thank you very much for your comment! You have a First Amendment right to express your views openly! We all have those rights and should feel free to state what we think. And besides, I kind of think that view is not so unusual. Does anyone else have similar views?" Then, I see what other jury pool members have to say. It is strange, but by rewarding the worst possible answer you can imagine, I am trying to get other people in the pool to reveal themselves as people who hold like-minded racial views. My goal is to create an atmosphere where people can admit to their racially tinged thoughts. I want to create an environment where people feel free to say what they really are thinking.
>
> Even if I cannot get the person excluded, it is still good because they have now "outed" themselves to the rest of the jury. I can ask all the other jurors later, "What are you going to do if you notice that some of the arguments in the jury room are being influenced by racism?" That person has outed themselves, and their credibility with everyone may be compromised.

Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1549 (2013) (quoting from telephone interview with Jeff Robinson).

Focus questions on past, analogous behavior. Many attorneys have concluded that "the best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations." *See, e.g.*, Ira Mickenberg, Voir Dire and Jury Selection 6 (training material presented at 2011 North Carolina Defender Trial School). When asked to share opinions on sensitive topics, "jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer—even if that answer is false." *Id.* at 3. When asked to predict how they will behave in hypothetical situations, "jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong." *Id.* The influence of implicit bias may make it more difficult for individuals to predict their own future behavior.

Sample questions. Some questions that may be useful in eliciting views and reactions about past experiences involving race are identified below. For a further discussion of how to construct such questions, see Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).

- "Tell us about the most serious incident you [or someone close to you] ever saw where someone was treated badly because of their race." *Id.* at 11.
- "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your [race]." *Id.*
- "Tell us about the most significant interaction you have ever had with a person of a different race." *Id.*
- "Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their [race] and turned out to be wrong." *Id.*
- Tell us about the most diverse environment you have ever worked in.
- Tell us about the most diverse neighborhood you have ever lived in.
- Tell us about the most memorable story you have heard, either in the news or from a friend or family member, of a White person experiencing discrimination on the basis of his or her race.
- Tell us about the last time you heard other people express racially prejudiced beliefs or opinions. How did you respond?

Another voir dire technique for encouraging potential jurors to express themselves is the "show of hands technique" recommended by jury selection expert Robert Hirschhorn. Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57, 60. This technique allows attorneys to identify jurors to

follow up with on opinions expressed by raised or unraised hands. Some yes-or-no questions about race that may elicit useful responses with this technique include:

- Is racism against Black people a thing of the past?
- Do affirmative action programs discriminate against Whites?
- Do Black people commit more crimes per capita than Whites?
- Have any of you ever seen an example of racism?

Id. at 60–61. You will need to proceed slowly with this technique, ideally with the assistance of a fast note-taker, in order to capture responses.

Questionnaires. In cases involving particularly sensitive race issues, Robert Hirschhorn suggests petitioning the court for use of a questionnaire. Potential jurors may be more willing to provide honest but potentially embarrassing responses to questions about race in writing. *Id.* at 61. In one mock jury simulation, those who completed a questionnaire that prompted potential jurors to consider their own racial attitudes were less likely to find the defendant guilty than those who completed a pretrial juror questionnaire that did not address any issues of race. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006). Sample questions for such a questionnaire may be found on pages 61–62 of Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57.

G. Role of Client in Devising Voir Dire Strategy

Where the defendant and defense attorney reach an absolute impasse about how to conduct jury selection, the defendant's wishes control unless they are unlawful. *State v. Ali*, 329 N.C. 394, 404 (1991) (noting principal-agent nature of the attorney-client relationship). In *State v. Williams*, 191 N.C. App. 96, 104–05 (2008), the North Carolina Court of Appeals held that, even if there was an absolute impasse as to jury selection tactics, defense counsel could not defer to the defendant's wishes to engage in racially discriminatory jury selection where the defendant did not want White people on his jury.

Practice note: Before voir dire, make sure to discuss the purposes of voir dire with your client and incorporate the client's input into your voir dire strategy. Especially when you plan to address sensitive issues such as race or ethnicity during voir dire, it is important for the client to understand the subjects you plan to discuss with potential jurors and why you intend to discuss them. Pretrial discussions with your client allow you to respond to client concerns, devise a strategy that reflects your client's objectives, and avoid catching your client off guard if discussions during voir dire become challenging or sensitive. *See generally* John Pray & Byron Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School's Remington Center*, 75 MISS. L.J. 795, 815–16 (2006) (discussing "client-centered" approach to advocacy in which "communication with, and input from, the client are

essential to achieve optimal results and client satisfaction"); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) (describing a "client-centered practice" as one which takes seriously client input and the principle of client decision-making).