Jury-Selection Issues that May Arise in the Trial of a Complex Civil Case

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I. Introduction. This paper addresses select issues that may arise in the context of jury selection in a complex civil case. It is not intended to serve as a primer on the basic aspects of jury selection. For excellent texts on jury selection in the criminal context, see:

a. JULIE RAMSEUR LEWIS & JOHN RUBIN, 2 NORTH CAROLINA DEFENDER MANUAL §§ 25.1 to .5, at 25-1 to -41 (2d ed. 2012), http://defendermanuals.sog.unc.edu/trial/25-selection-jury.

b. JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 79–103 (3d ed. 2013).

c. Robert L. Farb, UNC Sch. of Gov't, *Jury Selection*, *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (2015), http://benchbook.sog.unc.edu/criminal/jury-selection-0.

II. General Principles.

a. The North Carolina Constitution guarantees a party the right to voir dire. N.C. CONST. art. I, §§ 24, 25; *id.* art. IV, § 13.

b. The trial judge has wide discretion in matters of jury selection, and has the objective to achieve a fair selection process without prejudice to the parties. *See, e.g.*, *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979) ("It is well settled in North Carolina that the trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion.").

c. There are many issues that may arise for which there is no guiding case law. This paper may raise such issues without providing case support. Some or all of these issues may be addressed in the panel discussion.

III. Jury Selection, the Trial Process, and the Public's Right of Access. Jury selection is part of the trial process that is subject to the public's right of access to the courts.

a. There is a right of public access to trial proceedings. *See Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508–10 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). In North Carolina, there are constitutional provisions, statutes, court rules, and developed case law that provide for open courts and public access to trial proceedings. *See, e.g.*, N.C. CONST. art. I, § 18 ("All courts shall be open . . . ."); N.C. GEN. STAT. § 1-72.1 (2015) (allowing any person who claims a right of access to a civil proceeding to file a motion to access without having to intervene in the case); *Virmani v. Presbyterian Health Servs.*

Corp., 350 N.C. 449, 476–77, 515 S.E.2d 675, 693 (1999) (holding that Article 1, Section 18 of the North Carolina Constitution guarantees the public a qualified right of access to civil court proceedings). For a summary of the law in this area, see Michael Crowell, UNC Sch. of Gov't, *Closing Court Proceedings*, *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (2012), http://benchbook.sog.unc.edu/sites/benchbook.sog.unc.edu/files/pdf/Closing%20proceedings.pdf.

b. Nevertheless, there may be a reservoir of discretion to protect a particular juror's identity. Various articles have identified and discussed the constitutional right of public access to trial proceedings and the competing need to protect jurors' identities. For a discussion of these competing concerns and recommendations for honoring juror privacy in the trial process, see David S. Willis, Note, *Juror Privacy: The Compromise Between Judicial Discretion and the First Amendment*, 37 SUFFOLK U. L. REV. 1195 (2004), and Paula L. Hannaford, *Safeguarding Juror Privacy*, 85 JUDICATURE 18 (2001).

Examples of statutory provisions designed to protect an individual's identity include the Jury Selection and Service Act, 28 U.S.C. § 1863(b)(7) (2012), the Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. pts. 160, 164(A), (E), and the North Carolina Identity Theft Protection Act, N.C. GEN. STAT. §§ 75-62 to -66 (2015). In North Carolina, grand-jury proceedings are closed to the public. N.C. GEN. STAT. § 15A-623(e) (2015).

There are often questions surrounding the use of social media to research background information on jurors, which implicates concerns of juror privacy. A formal opinion by the American Bar Association addresses this ambiguity by providing that, while an attorney may use social media to research a juror or prospective juror, the attorney must refrain from sending the juror or prospective juror a friend or access request, because this is considered a "communication" with the juror or prospective juror. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

IV. Jury Verdict of Fewer Than Twelve and Majority-Verdict Stipulations.

a. Under Rule 48 of the North Carolina Rules of Civil Procedure, parties may agree to be bound by (1) a verdict of fewer than twelve jurors, or (2) a majority of a given number of jurors. N.C. GEN. STAT. § 1A-1, Rule 48 (2015).

b. One North Carolina case has interpreted this rule. In *United States Industries, Inc. v. Tharpe*, the North Carolina Court of Appeals held that the trial court did not err by accepting less than a unanimous verdict (eleven to one) where the parties agreed to take a verdict by nine or more jurors, even when the agreement between the parties occurred during jury deliberations. 47 N.C. App. 754, 764–65, 268 S.E.2d 824, 831 (1980).

c. It is important to note that there is a difference between a unanimous verdict of fewer than twelve jurors and a majority verdict. Even where there are fewer than

twelve jurors, the language indicates that if parties agree to be bound by less than a unanimous vote, at a minimum, the vote must be by a majority of a given number of jurors.

d. Judges must recognize that there is practical significance to when the issue is raised. While the language of Rule 48 does not impose time constraints on when the parties must agree, and *United States Industries, Inc. v. Tharpe* recognizes that the parties may agree at any time during the proceeding, in practice, it is better to obtain a stipulation before the issue arises.

V. Use of Juror Questionnaires.

a. There is little North Carolina case law on the use of juror questionnaires. Though some case law has addressed this topic, it has been in the criminal rather than the civil context. *See State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 409 (1997) (stating that a juror's failure to complete a jury questionnaire was a valid reason for making a peremptory challenge); *State v. Lyons*, 340 N.C. 646, 667, 459 S.E.2d 770, 781 (1995) (holding that the defendant's right to due process had not been violated by the trial court denying the defendant's motion to request the use of jury questionnaires); *State v. Robinson*, 330 N.C. 1, 19, 409 S.E.2d 288, 298 (1991) (determining that failure to disclose a criminal conviction and connections to a witness in the case on a juror questionnaire are valid and nonracial reasons for making a peremptory challenge to potential jurors).

b. A 1995 North Carolina State Bar ethics opinion states that a court, but not the counsel for either party, may send out jury questionnaires in civil trials without violating ethics rules prohibiting direct extrajudicial contact between counsel and prospective jurors. N.C. State Bar, Formal Ethics Op. RPC 214 (1995), 1995 WL 853886.

c. While North Carolina case law does not address whether the First Amendment's right of access attaches to jury questionnaires, various other jurisdictions have addressed this issue, finding that questionnaires are equivalent to an in-court examination and thus are publicly available, including to the press. *See In re Jury Questionnaires*, 37 A.3d 879, 885–86 (D.C. Ct. App. 2012) ("We can think of no principled reason to distinguish written questions from oral questions for purposes of the First Amendment right of public access. Jury questionnaires merely facilitate and streamline *voir dire*; their use does not constitute a separate process."); *United States v. McDade*, 929 F. Supp. 815, 817 n.4 (E.D. Pa. 1996) (finding that the holding in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), extends to all voir dire questioning, regardless of whether it is written or oral); *In re Wash. Post*, Misc. No. 92-301 (RCL), Crim. Nos. 91-0521 (RCL), 92-0215 (RCL), 1992 WL 233354, at *4 (D.D.C. July 23, 1992) (presuming public access to jury questionnaires, but permitting redactions of personal information deemed inappropriate for public disclosure); *Copley Press, Inc. v. Superior Court*, 278 Cal. Rptr. 443, 451 (Ct. App. 1991) ("The fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import."); *Forum Commc'ns Co. v. Paulson*, 752 N.W.2d 177, 185 (N.D. 2008)

(holding that jury questionnaires "serve[] as an alternative to oral disclosure of the same information in open court and [are], therefore, synonymous with, and a part of, voir dire"); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188 (Ohio 2002) ("Because the purpose behind juror questionnaires is merely to expedite the examination of prospective jurors, it follows that such questionnaires are part of the voir dire process.").

d. **Note**: Ex parte contact with a prospective jury panel may constitute jury tampering, punishable as criminal obstruction of justice. N.C. GEN. STAT. § 14-225.2 (2015).

VI. Early Jury Instructions.

a. There is certainly interaction between jury selection and pattern jury instructions. For example, in some cases, there may be no pattern jury instruction on an issue to be submitted to the jury. In this situation, a judge should consider beginning the charge-conference process even before the start of the trial proceedings. Subsequently, the judge may have multiple conferences leading to the final charge conference. These same considerations may dictate early emphasis on selecting the jury issues that will be submitted.

b. There is a large body of literature embracing and advocating for the use of preliminary legal instructions to the entire jury venire before beginning voir dire. This practice helps jurors deal with the complexity of the legal issues before them, giving them a better and more informed understanding of the substantive law throughout the trial. For sources that discuss the impact of preliminary substantive jury instructions, see:

   i. GREGORY E. MIZE ET AL., NAT'L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), http://www.ncscjurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx.

   ii. Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 457–59 (2013).

   iii. 2 NJP LITIG. CONSULTING, JURYWORK: SYSTEMATIC TECHNIQUES § 16:28 (Elissa Krauss & Sonia Chopra, eds., 2015-2016 ed. 2015).

VII. Challenges.

a. *Peremptory challenges*. The number of peremptory challenges in a civil case is governed by statute:

> The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties,

> or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court.

N.C. GEN. STAT. § 9-19 (2015).

Further, adding challenges depends on findings that the defendants are antagonistic. Under section 9-20, where there are antagonistic interests between the defendants, the judge may, in his or her discretion, "apportion among the defendants the challenges now allowed by law, or the judge may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest." *Id.* § 9-20(a). However, when a judge, in his discretion, allows an increased number of challenges for either party, the total may "not . . . exceed the total number given to the other side." *Id.* § 9-20(c).

In *Shuford ex rel. Shuford v. McIntosh*, the Court of Appeals stated that the trial court had no authority to allow each defendant eight peremptory challenges, because courts may only either apportion eight peremptory challenges between the defendants or increase peremptory challenges of each defendant up to six. 104 N.C. App. 201, 204, 408 S.E.2d 747, 749 (1991). However, the Court of Appeals held that the trial court's error was not reversible error per se. *Id.*

b. *Order of examination and use of challenges*.

   i. In a civil case, the order of examination and exercise of challenges is largely a matter of the trial judge's discretion. The default process for voir dire in civil cases is typically a "round robin" type of examination of the prospective jurors. First, the plaintiff's counsel examines and exercises challenges until a panel of twelve is acceptable to the plaintiff. The plaintiff then passes the entire panel of prospective jurors to the defense.

   Defendant's counsel then examines those prospective jurors and exercises challenges until an entire panel of twelve is passed back to the plaintiff. The plaintiff is then allowed to examine and challenge only those jurors who were not among the panel that the plaintiff initially passed to the defense. This back-and-forth process continues until all parties are satisfied with the panel of twelve.

   Practical questions may arise as to the order of examination and timing of exercising challenges when there are multiple defendants. For example, one procedure would be for each defendant to examine and challenge before the next defendant examines. Another procedure would be for all defendants to examine the panel before any challenge is made, followed by the defendants making challenges collectively. These questions typically are in the discretion of the trial judge.

ii. Courts must be aware that this can raise practical problems regarding how defendants exercise peremptory challenges. Because of the method by which challenges are allotted, judges must consider the following issues:

- In a case with multiple defendants, how many challenges does the first examining defendant exercise?
- How can defendants exercise challenges collectively without appearing to collude?
- Do these issues suggest that challenges should be made at the bench rather than at the counsel table?

c. *Challenges for cause*. A question that superior court judges should consider is whether prejudice can be avoided by preemptively excusing a juror for cause without being asked to do so.

There are occasions where a judge may be expected to take action *ex mero motu*. While case law generally deals with arguments to the jury, North Carolina cases also demonstrate that these issues can, and do, arise during jury selection. *See State v. Bell*, 338 N.C. 363, 376, 450 S.E.2d 710, 717 (1994) (holding that identifying the victim's family members to determine whether prospective jury members knew the family did not require *ex mero motu* intervention by the trial judge).

d. *Subject areas that may be off limits*. There are no clear or absolute guidelines in the case law on what is or is not proper subject matter for questioning purposes. There are, however, specific issues that may arise. These include:

i. *Racial attitudes*. The North Carolina Supreme Court has recognized that peremptory challenges in civil cases must be race-neutral. *See Jackson v. Hous. Auth. of High Point*, 321 N.C. 584, 585, 364 S.E.2d 416, 416 (1988). *Batson* challenges are beyond the scope of this paper.

ii. *Other social attitudes, such as homosexuality*. *See State v. Knight*, 340 N.C. 531, 557–58, 459 S.E.2d 481, 497–98 (1995) (holding, in the criminal context, that questions relating to homosexuality, but not questions relating to HIV status, were relevant in a case involving violence against homosexuals).

iii. Judges should be aware that there are split decisions in other jurisdictions on questions involving attitudes toward tort reform. *Compare Anderson v. Dixon*, 334 F. Supp. 2d 928, 929–30 (S.D. Miss. 2004) (holding that a plaintiff was allowed to question the jury about potential bias regarding tort reform), *with English v. Suzuki Motor Co.*, Nos. 92-CV-195-G, 95-4177, 1997 WL 428565, at *4 (10th Cir. July 30, 1997) (holding that the district court did not abuse its discretion by refusing to inquire about juror attitudes toward tort reform during voir dire).

e. *Individual voir dire*. There is the possibility that an issue in a civil case could lead to a request for individual voir dire. Because this point is not explicitly addressed in the North Carolina General Statutes, it is within the judge's discretion. This practice is sometimes followed in criminal proceedings. *See, e.g.*, *State v. Anderson*, 355 N.C. 136, 147, 558 S.E.2d 87, 95 (2002) ("[W]hether to allow individual *voir dire* . . . is a decision squarely within the discretion of the trial court . . . ."). The authors are unaware of any instance where this has been allowed in a civil proceeding.

f. *Reconstructing the record when proceedings at issue were not recorded*. Generally, jury selection is not recorded if a party does not ask for full recordation. Section 15A-1241, though intended to address criminal trials in superior court, provides that jury selection in noncapital cases is not required to be recorded, unless upon motion of any party or on the judge's own motion. N.C. GEN. STAT. § 15A-1241 (2015)

   Reconstructing the record can be a difficult task. Three steps, however, should be followed when reconstructing the record. First, the court's recollection of events should be recited. Second, at this point, the parties should be given an opportunity to add events or facts that were not included in the court's recitation of events. Third, the court should secure the parties' agreement. If the parties cannot reach an agreement, however, the court should record the parties' specific objection(s) to the record.