

OCTOBER 2008

Defense Counsel Journal

Vol. 75 • No. 4 • Pages 298-418

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Picking Juries: Questionnaires and Beyond

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A prior version of this article was presented at the Medical Liability Committee Meeting during the IADC 2008 annual meeting at The Greenbrier, White Sulphur Springs, West Virginia, where Messrs. Hurney and Sellers spoke on jury selection. The laws of Alabama and West Virginia are featured in this article because that is where the authors practice.

SELECTING a fair jury continues to be a sometimes daunting task for defense counsel. A Harris Poll, released January 21, 2008, contains some interesting findings about jury duty:

One of the civil duties many people dread, or try to get out of, is jury duty. And many do seem to get out of it – while two-thirds (65%) of Americans have been called to serve jury duty, two-thirds of that (68%) actually attended, leaving one-third (32%) who did not. Of those who have attended jury duty, just over half (55%) have actually served on a jury. Bringing this back to the population as a whole, a plurality of Americans (44%) has attended jury duty and one-quarter (24%) has actually sat on a jury.¹

The article discussing the Harris Poll notes, “the reverse can also be said – three-quarters of Americans have never served on a jury and over half have never even attended jury duty. Unfortunately, looking at the numbers this way clearly shows a civic duty that many may be ignoring.”

¹ *Just Under Three in Five Americans Believe Juries Can Be Fair and Impartial All or Most of the Time*, HARRIS POLL, Jan. 21, 2008, available at www.harrisinteractive.com/harris_poll/index.asp?PID=861.



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Thus, in picking juries, we certainly face folks who do not want to be there, and search for a way off the jury panel.

Against this backdrop, *voir dire* presents an important and challenging task for every defense lawyer as we attempt to determine which jurors are possibly biased against our clients.² Some courts allow full *voir dire* by counsel, some by the court, and

² *See, e.g., W. VA. CODE § 56-6-12 (1923)* (“Either party in any action or suit may, and the Court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or . . . has any interest in the cause, or is sensible of any bias or prejudice therein”)

some do both.³ We defense lawyers are barraged with information about how to pick juries, to perform *voir dire* effectively, and recognize the biased juror. As we perform the important task of selecting the jury, questionnaires specific to the case are increasingly becoming a part of the process. Typically, questionnaires are drafted by both sides and submitted by agreement. These questionnaires are particularly prevalent in medical liability cases, where issues related to jurors' experiences as patients or knowledge of the health care providers involved and tort reform are often subjects that bear inquiry. While questionnaires provide important information and allow jurors to perhaps answer some of the more personal questions in a private setting, they are no substitute for *voir dire*. Regardless, they are a valuable tool in attempting to seat an unbiased jury.

I. Use of Questionnaires: General

Jury consultants generally counsel in favor of the use of jury questionnaires. One consultant advises, however, that "there are a number of instances where jury questionnaires may be harmful in trying to get a jury that will be most receptive. For instance, few attorneys, in their eagerness to

³ For example, in both West Virginia and Alabama state courts, *voir dire* varies from court to court. Most judges perform the basic *voir dire*—determining residence, absence of felony conviction and attempts to get on the panel—and then allow inquiry by counsel. Rule 47 of the W. Va. R. Civ. P. governs the procedural aspects of *voir dire*, and states "(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper." Rule 47(a) of the Fed. R. Civ. P. permits the court to put all questions to the prospective jurors without allowing the attorneys to ask questions directly.

have a jury questionnaire, stop to think why their opponents are equally eager to have one."⁴ "While a questionnaire may offer the opportunity to ask questions that would never be posed in open court, there is a danger when it becomes a substitute for posing questions in open court. Often the judge will permit less attorney-conducted *voir dire* because of the use of the questionnaire. A questionnaire can never give the full flavor of the intensity of a juror's feelings about an issue, the salience of the issue to the juror, and his or her knowledge about it."⁵

The necessity of good *voir dire* following questionnaires is addressed in a New York Times article discussing a jury questionnaire used in a terrorism trial: "[W]hile the questionnaires were obviously intended to help both sides in the case categorize the jurors according to several broad themes, they also had the fascinating effect of taking a sociological snapshot of eighteen ordinary citizens at a time when steel barriers were being erected to protect the federal courthouse from a potential terrorist assault." Moreover, "[b]y combining the information obtained from Prospective Juror Questionnaires with in-court observation of jurors' behavior during oral *voir dire*, attorneys can make far more accurate evaluations of prospective jurors. We have been startled by the accuracy of our predictions when both sources of information are combined. Questionnaires are a valuable tool, allowing the attorney to make more astute challenge decisions while saving valuable court time."⁶

In general, whether to allow the use of questionnaires is within the sound discretion of the trial court. "The means and methods

⁴ *When – and When Not – To Use a Jury Questionnaire*, DECISION QUEST, www.decisionquest.com/litigation_library.php question news ID=237 (last visited Aug. 27, 2008).

⁵ *Id.*

⁶ Susan E. Jones, *Selecting Better Juries: The Prospective Juror Questionnaire*, JURY RESEARCH INSTITUTE, www.jri-inc.com/article9.htm (last visited Aug. 24, 2008).

that the trial judge uses to accomplish [the purposes of *voir dire*] are within his discretion.”⁷ However, a trial court “may abuse its discretion if it so limits the *voir dire* that the litigants are unable to determine whether the jurors are statutorily qualified or free from bias.”⁸ Moreover, “[t]he process to select jurors should endeavor to select jurors who are not only free from prejudice, but who are also free from the suspicion of prejudice.”⁹ Many courts use a general questionnaire for the entire venire panel,¹⁰ and will, on motion or agreement of counsel, also submit questionnaires that are tailored to the particular case.¹¹

Usually, however, questionnaires tailored to the particular case are used to hone in on issues and answers that merit further inquiry and to “develop information in the record regarding the presence or absence of any pertinent bias . . . and raise challenges accordingly.”¹² Occasionally,

challenges for cause are made on the basis of unsworn juror questionnaire answers. A difficult issue is raised when the court or counsel attempts to strike a prospective juror “for cause” on their unsworn questionnaire answers, with no follow up inquiry on *voir dire*. Few states have directly addressed the issue, and federal law deals only indirectly with the issue under the Jury Selection and Service Act of 1968.¹³

Under the Jury Selection and Service Act of 1968,¹⁴ the court “may excuse a potential juror (1) upon showing of undue hardship or extreme inconvenience, or (2) if the potential juror may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings.”¹⁵ Federal courts have held the dismissal of prospective jurors based on jury questionnaire answers is governed by the Act.¹⁶

State courts have varied tests for the disqualification of jurors. For example,

⁷ Michael ex rel. Michael v. Sabado, 453 S.E.2d 419, 426 (W. Va. 1994).

⁸ *Id.* at 427 (citing State v. Toney, 301 S.E.2d 815 (W. Va. 1983)).

⁹ State v. Finley, 355 S.E.2d 47, 50 (W. Va. 1987).

¹⁰ Wisconsin, (<http://www.wicourts.gov/services/juror/online.htm>), and Minnesota (<http://www.mn.courts.gov/district/4/?page=754>) trial courts use online questionnaires for the initial screening of jurors.

¹¹ For a great variety of sample jury questionnaires, see DELIBERATIONS, http://jurylaw.typepad.com/deliberations/sample_juror_questionnair.html (last visited Aug. 27, 2008).

¹² State v. La Mere, 112 P.3d 1005, 1012 (Mont. 2005); see also People v. Robinson, 124 P.3d 363, 381 (Cal. 2005) (concluding jury questionnaire and follow-up *voir dire* questions provided adequate basis upon which parties could exercise cause and peremptory challenges); Montana v. LaMere, 112 P.3d 1005, 1011 (Mont. 2005) (holding counsel was obligated to pursue information discovered in answers to jury questionnaire through *voir dire* questioning to determine presence of bias); Gary R. Giewat, *Systematic Jury Selection and the Supplemental Juror Questionnaire as a Means for Maximizing Voir Dire Effectiveness*, 34 WESTCHESTER B.J. 49 (2007); Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 15 (2007).

¹³ 28 U.S.C. §§ 1861 (1968).

¹⁴ 28 U.S.C. §§ 1861, *et seq.* (1968)

¹⁵ United States v. Paradies, 98 F.3d 1266, 1277 (11th Cir. 1996). 28 U.S.C. § 1866(c) (1978) provides in pertinent part:

[A]ny person summoned for jury service may be (1) excused by the court . . . upon a showing of undue hardship or extreme inconvenience, . . . or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

¹⁶ See United States v. Chanthadara, 230 F.3d 1237, 1268 (10th Cir. 2000); United States v. Contreras, 108 F.3d 1255, 1269-70 (10th Cir. 1997); Paradies, 98 F.3d at 1277-81; United States v. North, 910 F.2d 843, 909-10 (D.C. Cir.), *withdrawn and superseded in part on other grounds*, 920 F.2d 940 (1990).

West Virginia Code § 56-6-12 (1923) provides for questioning of jurors to determine “whether he is a qualified juror, or . . . has any interest in the cause, or is sensible of any bias or prejudice therein[.]” Put another way, “the test of a qualified juror is whether a juror can render a verdict based on the evidence, without bias or prejudice, according to the instructions of the court.”¹⁷ Any doubt regarding a juror’s impartiality should be resolved in favor of the party seeking to strike for cause.¹⁸ Some courts do not allow jurors who make a clear statement of bias to be “rehabilitated” by general questions about fairness.¹⁹

These general principles are well developed in case law addressing particular situations. Jurors have been held disqualified for having an interest in the outcome of the litigation;²⁰ for having a substantial family relationship-based connection with a party to a lawsuit;²¹ for an attorney-client relationship with an attorney;²² for a patient-physician relationship with a party; for employment by a party to the litigation;²³ and for false answers to questions.²⁴

II. Use of Questionnaires: Criminal Cases

Several decisions address the use of questionnaires as the basis for excusal prior

to *voir dire* in criminal cases, differentiating between capital and non-capital cases. These cases are instructive for civil litigators as they demonstrate the inquiry courts have undertaken in examining the usefulness of questionnaires.

The Tenth Circuit, Eleventh Circuit, and the District of Columbia allow pre-*voir dire* excusal of jurors in non-capital cases based on jury questionnaire answers alone. In *United States v. Chanthadara*,²⁵ the court held that excusal before *voir dire* based solely on juror questionnaire answers is sanctioned in non-capital cases; however, the court refused to address the issue of whether the rule applies in capital cases.²⁶ In *United States v. Paradies*,²⁷ the court upheld the trial court’s excusal of over seventy potential jurors based solely on jury questionnaire answers because there was no substantial violation of the Jury Selection and Service Act in excluding those jurors.²⁸

Excusal of jurors based solely on juror questionnaire answers in capital cases, however, is more controversial and complex. This issue was initially addressed indirectly by the Supreme Court in *Witherspoon v. Illinois*,²⁹ and was later clarified in *Wainwright v. Witt*.³⁰ In *Witherspoon*, the Court dealt with the issue of when prospective jurors could properly be excluded for cause in capital cases based on the juror’s opinion of the death penalty.³¹ The Court held that prospective jurors in capital cases could not be properly excused for cause if they merely “voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”³² However, the Court used footnotes to express that prospective jurors

¹⁷ *Davis v. Wang*, 400 S.E.2d 230, 233 (W. Va. 1990), *overruled on other grounds by* *Pleasants v. Alliance Corp.*, 543 S.E.2d 320 (W. Va. 2000).

¹⁸ *Rine v. Irisari*, 420 S.E.2d 541 (W. Va. 1992).

¹⁹ *See O’Dell v. Miller*, 565 S.E.2d 407 (W. Va. 2002).

²⁰ *Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663 (W. Va. 2001).

²¹ *State v. Archer*, 289 S.E.2d 178 (W. Va. 1982).

²² *O’Dell v. Miller*, 565 S.E.2d 407 (W. Va. 2002).

²³ *Rine*, 420 S.E.2d 541.

²⁴ In *Roberts v. Tejada*, 814 So.2d 334 (Fla. 2002), two jurors falsely denied prior litigation. After a defense verdict, plaintiff performed an investigation of the jury pool (using Auto Trak) and based on the results, amended a post trial motion based on the denials of prior litigation.

²⁵ 230 F.3d 1237, 1268 (10th Cir. 2000).

²⁶ *See also Contreras*, 108 F.3d at 1269-70 (same).

²⁷ 98 F.3d at (11th Cir. 1996).

²⁸ *See also North*, 910 F.2d at 909-10 (upholds excusal of jurors before *voir dire* based solely on juror questionnaires).

²⁹ 391 U.S. 510, 518-23 (1968).

³⁰ 469 U.S. 412, 416-35 (1985).

³¹ 391 U.S. at 510.

³² *Id.* at 522.

could be dismissed for cause in capital cases if they made “unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.”³³ After confusion in *Witherspoon*’s application, *Wainwright* later modified the *Witherspoon* standard.³⁴ In *Wainwright*, the Court held that a person’s opposition to the death penalty need not be “automatic” or proved with “unmistakable clarity,” but rather a prospective juror may be excused if his views “would prevent or substantially impair the performance of his duties as a juror in accordance with the instructions and oath.”³⁵ Importantly, the Court also noted the significance of the trial judge’s impressions, based upon seeing and hearing the juror’s response to questions during *voir dire*.³⁶ Thus, it seems unlikely that a juror could be dismissed for cause in a capital case based solely on his answers to a jury questionnaire.

Several state courts have also addressed the issue of whether prospective jurors can be dismissed for cause prior to *voir dire* based on jury questionnaire answers alone in death penalty cases. In *State v. Anderson*,³⁷ applying the standards set forth in *Witherspoon* and *Wainwright*, the court concluded that dismissal of jurors who expressed objections to the death penalty on their questionnaires were improperly dismissed because of the possibility of rehabilitation upon *voir dire*.³⁸ However,

the court also found it is not error “to exclude prospective jurors for cause when the answers to written questionnaire reveal some disqualification not susceptible to rehabilitation, such as relationship to case or party.”³⁹

The California Supreme Court held “a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law.”⁴⁰ In *People v. Avila*, the court held the jury questionnaire answer alone was sufficient to dismiss a juror for cause where juror had indicated that she could not set aside her personal feelings about the death penalty, could not follow the law, and would automatically vote against the death penalty in every case.⁴¹ The court pointed out that the answer was “sufficiently unambiguous to allow the court to identify disqualifying biases on the basis of their written responses alone.”⁴² However, in *People v. Stewart*, the Supreme Court of California held the “cold record” of five prospective jurors’ answers to jury questionnaires was insufficient to support an assessment of whether the jurors’ views would substantially impair the performance of their duties as jurors; thus, dismissal of the jurors for cause based on their answers to the jury questionnaire alone was error.⁴³

³³ *Id.* at 523 n.21; *see also id.* at 515 n.9.

³⁴ *See Wainwright*, 469 U.S. at 416-35.

³⁵ 469 U.S. at 424. A later case has clarified that in order to comply with the *Wainwright* and *Witherspoon* cases, for prospective jurors to be dismissed for cause in capital cases, the juror must “unequivocally express an inability to follow the law and the judge’s instructions.” *Gray v. Mississippi*, 481 U.S. 648, 663 (1987).

³⁶ *Id.*

³⁷ 4 P.3d 369, 373 (Ariz. 2000).

³⁸ *Id.* at 377-78.

³⁹ *Id.* at 379 (citing *State v. Jones*, 4 P.3d 345, 358 (Ariz. 2000) (upholding dismissal of thirty jurors based solely on answers to written questionnaire when both prosecution and defense agreed to exclusion)).

⁴⁰ *People v. Avila*, 133 P.3d 1076, 1105 (Cal. 2006) (citing *Lockhart v. McCree*, 476 U.S. 162, 176 (1986)).

⁴¹ *Avila*, 133 P.3d at 1105-06.

⁴² *Id.*; *see also People v. McDermott*, 51 P.3d 874 (Cal. 2002) (upholding dismissal of jurors for cause in capital case where jurors made statements in juror questionnaires that would disqualify them from serving as jurors because views would “substantially impair the performance of their duties as jurors”).

⁴³ 93 P.3d 271, 290 (Cal. 2004).

New Jersey, North Dakota and Texas also apparently allow the trial court to excuse prospective jurors for cause in capital cases based solely on written responses to jury questionnaires.⁴⁴

Questioning can be useful in determining whether jurors can meet statutory requirements of being able to read and write. In *Gilkey v. State of Texas*,⁴⁵ the defendant challenged his conviction based on the fact that one member of the jury could not read or write sufficiently to qualify for jury duty. The juror in question testified he had been in the United States for fifteen years and completed the 11th grade. A friend helped him fill out the juror questionnaire and he did not understand some parts. The trial court ruled the juror was not qualified because he “did not have a sufficient command of the English language.” Finding that “excusing a venire person for inability to read and write was a matter within the discretion of the trial court. . . .” the Appeals Court found that even if the trial court erred in the decision, the defendant did not demonstrate it affected substantial rights. Erroneous excuse of a potential juror for illiteracy does not rise to a Constitutional dimension.

In criminal cases, then, the issue of whether a prospective juror can be challenged and removed “for cause” based on unsworn juror questionnaire answers

⁴⁴ See *New Jersey v. Koedatich*, 548 A.2d 939, 967-68 (N.J. 1988) (upholding trial court’s dismissal for cause any prospective juror who indicated in their jury questionnaire that they had knowledge of defendant’s prior murder conviction or pending charges in case, or had formed opinion as to defendant’s guilt or innocence); *Garcia v. North Dakota*, 678 N.W.2d 568, 572-73 (N.D. 2004) (noting trial court successfully dismissed prospective jurors based solely on their responses to jury questionnaires); *Bobo v. Texas*, No. 2-02-371-CR, 2004 WL 541380 (Tex. App. Mar. 18, 2004) (noting party would have been entitled to challenge for cause to remove jury member who demonstrated automatic disposition toward bias in jury questionnaire).

⁴⁵ No. 03-98-00467-CR., 1999 WL 440621, at *1-2 (Tex. App. 1999).

alone is raised primarily in capital murder cases. In capital murder cases the use of questionnaires in the striking of jurors is governed by the Supreme Court’s analysis in *Witherspoon v. Illinois* and *Wainwright v. Witt*, which allow a prospective juror to be removed for cause based on juror questionnaire answers alone only when certain stringent criteria are met. In general, case law supports the dismissal of jurors for cause based on their answers to jury questionnaires only in specific instances, such as where the juror knows a party in the litigation or is unambiguously biased in some other way.

III. Use of Questionnaires: Civil Cases

Opinions addressing the use of juror questionnaires alone to strike jurors for cause in civil cases are less prevalent, perhaps because the issues are not as significant or polarizing. Nevertheless, there are some civil cases that address the issue of questionnaires. In this regard, counsel may base preemptory strikes in civil actions on information obtained from jury questionnaires as long as the information is racially neutral.⁴⁶ Thus, information such as employer and familial make-up are viable subjects for preemptory strikes.

In *Foster v. Spartanburg Hospital System*,⁴⁷ defense counsel attempted to strike a juror for stating he was a democrat on his jury questionnaire, arguing “a Democrat is more inclined than a Republican or some other party affiliate to favor ‘the little person.’” Finding that “[s]uch a sweeping generalization about members of an entire political party is not a reasonable . . . explanation, but is mere speculation,” the Court did not grant the defense’s request to strike the juror.

⁴⁶ *Brown v. Egleston Children’s Hosp.*, 564 S.E.2d 810, 813 (Ga. Ct. App. 2002).

⁴⁷ 442 S.E.2d 624, 626 (S.C. Ct. App. 1994).

It was also error to fail to strike Mr. Hillberry for cause because he was not rehabilitated from his statement that his beliefs regarding damages would possibly come into play during deliberations. Based upon his responses during *voir dire*, he remained equivocal about his impartiality. As a result of the court's failure to strike either of these jurors for cause, plaintiff was forced to use peremptory challenges and then had to accept Ms. Wilson, an objectionable juror, because he had exhausted his peremptory challenges. This court has consistently held that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges."⁴⁸

In *Frasier v. Busbee*,⁴⁹ a juror, who later became the jury foreperson, knowingly answered a jury questionnaire incorrectly in an attempt to be excused from jury duty. Following an unfavorable verdict, plaintiff's counsel sought a retrial on the ground that the foreperson's communications had resulted in a tainted jury. The Court found the juror's election to foreperson to be proof that she was considered responsible. In addition, the Court stated "[c]ounsel cannot play the old game of failing to request that a juror be removed for cause for the purpose of ambushing the court with a motion such as this should there be an adverse verdict."

Courts in civil cases have considered responses to questionnaires in deciding whether to strike jurors for cause. For

example, in *Delfan v. Cromer*,⁵⁰ the jury foreperson's failure to disclose his involvement in nine prior civil cases and in one prior criminal case in accordance with the questionnaire was considered grounds for a new trial.

In a medical malpractice case, *Hinkle v. Cleveland Clinic Found.*, the plaintiff's counsel asserted the trial court erred in refusing to strike two jurors—a doctor and a lawyer—after the jurors admitted to a professional relationship with, and a bias in favor of the Clinic in their jury questionnaires.⁵¹ Stating that "[t]rial courts have discretion in determining a juror's ability to be impartial," the Appellate Court affirmed the lower court's holding that the jurors had been rehabilitated, as both jurors later testified that they could be fair to both parties.⁵² Thus, the court ruled they were not subject to dismissal for cause.⁵³

In *Erlandson v. Payne*,⁵⁴ a juror falsely answered a question regarding physical abuse in her home after she mistakenly classified her ex-husband's act of slapping her son to be disciplinary in action rather than abusive. Thus, the judge did not see the juror's misrepresentation to be grounds for dismissal with cause because the juror believed that she had answered all of the questions fairly and accurately at the time the questionnaire was filled out.⁵⁵

Once again stressing the discretion of the trial court, the Appellate Court in *Excel Corp. v. Apodaca*,⁵⁶ held that a juror who admitted to being biased in his jury questionnaire was not subject to dismissal for cause because he too had been rehabilitated.

⁴⁸ *Rodriguez v. Lagomasino*, 972 So. 2d 1050, 1052-53 (Fla. Dist. Ct. App. 2008) (citing *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504, 506 (Fla. Dist. Ct. App. 1994); *Diaz v. State*, 608 So. 2d 888, 890 (Fla. Dist. Ct. App. 1992); *Jefferson v. State*, 489 So. 2d 211 (Fla. Dist. Ct. App. 1986); *Anderson v. State*, 463 So. 2d 276 (Fla. Dist. Ct. App. 1984)).

⁴⁹ 32 Phila. Co. Rptr. 208, 218 (Pa. Com. Pl. 1996).

⁵⁰ 967 So. 2d 384, 385 (Fla. Dist. Ct. App. 2007).

⁵¹ 823 N.E.2d 945, 952 (Ohio Ct. App. 2004) (quoting *State v. Nields*, 752 N.E.2d 859, 881 (Ohio 2001)).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ No. 97-35883, 1998 WL 536377, at *5 (9th Cir. 1998).

⁵⁵ *Id.* at *7.

⁵⁶ 51 S.W.3d 686, 693 (Tex. App. 2001).

Likewise, in *Caraway v. Gronwaldt*, an independent insurance agent who divulged in a jury questionnaire that he did business with AIG, a defendant in the case, was held to be rehabilitated and, thus not subject to dismissal for error, after he testified that he could be fair and impartial.⁵⁷

tool for uncovering information, particularly when the subject to be addressed is personal and potentially embarrassing to members of the panel.

IV. Commentary

As these cases demonstrate, questionnaires are a useful tool to identify answers to questions that can form the basis for disqualification or peremptory challenge, whether standing alone, or in combination with further questioning on *voir dire*. Certainly, questionnaires can be a double-edged sword, as some information gleaned may suggest a juror has attitudes more favorable to the defense. Overall, it appears the use of questionnaires can be a valuable part of the process of *voir dire* in identifying jurors with attitudes unfavorable to the defense. Although questionnaires may provide plaintiff's counsel with reason to strike a favorable defense juror, these authors strongly believe that the benefits of questionnaires outweigh this risk. Indeed, the risk of producing responses that may lead to the loss of a favorable defense juror is a reality of virtually every question asked on oral *voir dire*.

Although all trial attorneys are fearful of losing good defense jurors, that fear pales in comparison to the dread of placing the "stealth" plaintiff's juror in the box. Consequently, our default position in the realm of jury selection is that more information about prospective jurors, both good and bad, is always better than less information. Overall, it appears the use of questionnaires can be a valuable part of the process of *voir dire* in identifying jurors with attitudes unfavorable to the defense. The juror questionnaire is certainly not a panacea for all the woes associated with jury selection, but it is very often a useful

⁵⁷ No. 12-03-00371-CV, 2005 WL 425249, at *3-4 (Tex. App. 2005).