Over the past 100 years, state and federal court systems have struggled with the question of how to go about ensuring parties a fair trial without subjecting jury panels to inappropriate questions that unnecessarily invade a juror's privacy or try to induce a juror to adhere in advance to one side of the case. The truth is that many of the tactics used by some trial attorneys in voir dire to curry favor with jurors or to investigate jurors' backgrounds are considered by many trial judges and trial advocacy experts to be useless. Many of these tactics evidence a lack of understanding about how jurors make decisions. Unfortunately, in response to these tactics, many trial judges have chosen to severely restrict voir dire to the point that often little meaningful information about inappropriate juror biases can be detected.

Recently, however, as trial attorneys have begun to utilize more artful methods of interviewing jurors in voir dire, trial judges have in response relaxed the rules of procedure to allow appropriate questions that afford careful inquiry into a prospective juror's mind relating to the specific issues in a case. In the process, court systems have instituted guidelines for permitting jurors to be asked case-specific questions about their attitudes, life experiences, values, beliefs, and demographic influences. Recognizing that some of the questions relating to specific jurors and specific issues might seem invasive, courts have allowed jurors to respond to written questions that afford more privacy than is available during oral voir dire.

A review of the most recently recommended guidelines established by committees of the American Bar Association and local and state bar associations indicates that more open voir dire processes where juror attitudes and life experiences can be freely discussed orally or in writing appear to be developing. At the same time, however, courts appear to be more insistent that trial attorneys use the court's and the prospective jurors' time wisely to ask intelligent and thought-provoking questions in appropriate ways.

§ 10.03 | The Importance of Jury Selection in the Persuasion Process

In a realistic sense, when we engage in voir dire we are trying to seat the most receptive audience for our case by identifying (and disqualifying) jurors who are predisposed against us. At the same time, we are also trying to use this precious time to begin the persuasion process for our case. The opposing trial
team is doing the same thing. We know from many scientific studies and from experience that jurors start making up their minds about the case very early in the trial process—which begins in voir dire. And as our parents have told us, “You never get a second chance to make a first impression.”

Like most trial counsel, this writer has been involved in many cases where it was clear that the seeds for victory or failure were planted during voir dire. One case involved a business dispute between a wealthy investor in a gas well-drilling partnership who alleged that the gas exploration company had not drilled as many wells as it had orally promised. During discovery it was revealed that the investor had secretly tape-recorded the negotiations before the agreement was signed. In the taped conversations, the executives at the exploration company expressed their desire to drill more wells although they alleged in their answer to the suit that they had not “exactly” promised to do so.

The jury panel consisted of forty-six citizens, none of whom had any connections with the oil or gas industry. During voir dire the plaintiff’s able attorney raised every issue in the case except for the tape recording. The jury panel as a whole did not seem interested in making a wealthy man even wealthier, but they also did not seem to have any concern for big oil and gas exploration companies. One of the first issues raised by the defense attorney was the issue of secret tape recordings. He was legitimately concerned about the effects of those recorded statements on his defense. However, in helping the defending trial team to develop their most persuasive case, we had already determined through prior jury research that jurors would likely be more incensed about the character of a man who secretly taped conversations than the benign statements that were actually recorded.

As we had forecast, the jury panel contained some people who felt very strongly about the issue and were quite vocal against the plaintiff. Even more interesting, however, was the fact that the two or three most vocal defendants’ jurors would otherwise have been great jurors for the plaintiff. Unfortunately, the plaintiff had no choice but to disqualify them, thus depleting badly needed peremptory strikes.

A secret tape recording is an example of an issue that would certainly receive a lot of attention during trial, but it is also an appropriate issue to raise in voir dire. The contents of the recordings and the manner in which they were

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1 The plaintiff’s complaint had survived an attempt to dismiss based on the defendant’s purported defense that any promises violated the statute of frauds.
made are the kinds of issues that are likely to provoke strong reactions that might indicate inappropriate biases in a jury. At the same time, however, issues such as secret tape recordings also help to generate themes about parties and their behavior.

There are several important lessons to be learned from this example of how items of evidence can help to foster themes that become part of the persuasion process for any opposing party. First, every important issue that might affect juror biases should be raised in voir dire in order to gauge juror reactions. Second, when you interview jurors in voir dire, the themes of your case should be revealed to test their power with the actual jury panel. Sometimes we learn that our themes must be revised in order to make our story more persuasive. One of the blessings of voir dire is that it occurs early in the case, before jurors have learned enough about the case to begin to form solid opinions. There is usually enough time to make necessary revisions to a case approach if we respond quickly and decisively to juror feedback during voir dire. Third, advance jury research to test the issues and preliminary themes for trial can help prevent nasty surprises, like the ones experienced by the plaintiff in our example.

§ 10.04 | Purposes and Goals of Voir Dire

Voir dire is undoubtedly the most fragile part of a trial presentation. At that point, the characteristics of the potential jury and how each juror will be best persuaded are unknown, except for the valuable information obtained during advance scientific juror research. Truly scientific research tries to measure the breadth and depth of reactions of likely jurors in a case and can help a great deal in the preparation process so that there should be very few, if any, surprises in jury selection or later in trial. Testing the case prior to trial can provide warning about likely juror attitudes and relevant life experiences. An ideal juror profile can provide a standard against which to measure actual jurors. An experienced trial lawyer will often even rehearse voir dire with a representative group from the actual juror pool, as you might do in a scientific jury research study. There is no substitute for being open-minded and comfortable when you interview jurors during jury selection, and such a rehearsal can be very enlightening.