Proven Jury Arguments for Breach of Contract Cases

Juror biases, juror questions for counsel, thematic options, most important witnesses, arguing damages, and recommended voir dire

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Chapter: Breach of Contract Litigation

Breach of contract cases may well involve paper (to which jurors pay close attention), but the bigger part of the case for them typically centers on the relationships between the parties. For jurors, these cases are far less about breach of contract and far more about breach of trust.

I. Jury Preconceptions in Breach of Contract Litigation

§x:xx Key Juror Biases in Breach of Contract Cases

Regardless of the venue where a breach of contract case is seated, jurors share in common many biases in this type of litigation. These biases have been borne out through post-trial interviews with actual jurors in breach of contract cases, in privately-funded mock trial research, and through a review of the academic literature.

Juror Bias One:  *If it isn’t in writing, the plaintiff is in trouble.* Cases abound where the plaintiff alleges breach based on the verbal context surrounding written contract language. However, when a written contract exists in some form, jurors tend to fault the plaintiff for having failed to get *more* in writing before entering the agreement.

Juror Bias Two: *Even when breach of contract cases involve a little guy versus a big company, jurors still focus on the*
sophistication of both parties. Most jurors assume a company comes to the bargaining table with greater sophistication than an individual. However, two things affect plaintiffs’ seemingly clear-cut chances to prevail in a David and Goliath fight. First, if jurors conclude that David is sophisticated, they will escalate their expectations of the plaintiff to have acted in a more informed manner. Second, our research has found that because so much anti-corporate bias permeates present-day society, jurors expect the plaintiff to take more responsibility and to act with greater caution in dealing with the company, rather than trusting that terms will be correctly interpreted after the fact.1

Juror Bias Three:  

Jurors make sense of what they believe happened in a case by finding a coherent story to make sense of the evidence they find to be most important.2 If you do not provide enough of a coherent or compelling story, jurors will create one for you (or for your opponent, depending on which evidence they attach themselves to). Certain jurors will use deliberations as a forum for “reenacting” the story of what happened, either through examples from their own lives or through piecing together the incomplete facts of the case in a way potentially unintended by either party.

Juror Bias Four:  

Since ambiguous language in a contract is often the cornerstone of the dispute, jurors frequently look at other parts of the contract to make sense of the disputed terms. Given that tendency, jurors often resent counsel who try to focus their attention exclusively upon the language in dispute. Many want the opportunity to review the larger contract to put the more specific language in context. Some will use contract language where neither side focused on to make sense of the case.

Juror Bias Five:  

Jurors’ own practices in reading contracts translate directly to their views of the contract in dispute. Our private research has found that jurors who read contracts word for word in their own lives tend to favor the defense. Jurors who skim contracts for meaning or who habitually sign contracts without reading them tend to favor plaintiffs in these kinds of disputes. The logic behind this pattern rests with the
fact that detail-oriented jurors are less comfortable accepting subjective interpretations of concrete language. Jurors who skim contracts or who sign contracts without reading them often look more for the spirit in which the contract terms were reached, holding the plaintiff to less of a burden to have negotiated language for every contingency.

Juror Bias Six: *Jurors typically rely first on their own common sense view of language before turning to the paid experts’ interpretations.* The jury is comprised of contract experts with varying levels of experience. Virtually every juror has signed a contract, ranging from a DVD rental agreement to a sophisticated business transaction. Contract jurors’ deliberations tend to focus on their common sense interpretations of the language. They then tend to match the fact witnesses’ and experts’ conclusions to their own.

Juror Bias Seven: *When no written contract exists and breach of oral contract is asserted, jurors are keenly interested in third-party accounts of the intent of the contract, given the self-serving motives of the parties.* Eyewitnesses in breach of contract cases are especially persuasive when they give detailed testimony about what they heard in contract negotiations. Irrespective of litigation type, eyewitness testimony is typically quite powerful with jurors. Many jurors are prone to finding eyewitness testimony to be more accurate than it actually is (even when evidence exists to undermine that accuracy). That propensity to place great weight on eyewitness accounts largely stems from two factors jurors have relayed to us in post-verdict interviews. First, jurors are hungry to hear the account of the misconduct from a neutral party – much like a tie-breaker. Second, they want to be able to merge a contemporaneous account with an after-the-fact reconstruction.

Juror Bias Eight: *Jurors can be influenced by simple word choices within oral argument or witness testimony.* Jurors take notice of the language counsel and witnesses use when speaking. The more tentative or equivocal the language, the more jurors doubt the credibility of the speaker. The more powerful and definitive the language, the more jurors believe the presenter.
§x:xx Jurors’ Key Questions in Breach of Contract Cases

Once jurors start hearing about the case, they tend to have repetitive questions that are critical for counsel to answer. Of course, in many instances, the answers to those questions are inadmissible. Despite that fact, if these questions never get satisfactorily answered during trial, jurors have been known to send the question to the judge for clarification during deliberations and/or to fill in the gaps on their own – even if the issue was ruled inadmissible.

Jury Question: How did the two parties first meet? What led the parties to enter contract discussions in the first place?

Jury Question: Do earlier drafts of the contract exist to help demonstrate the evolving logic of the parties in reaching the ultimate contract terms?

Jury Question: Did either party have the option to include more specific contract terminology? If so, why did that party/those parties fail to add clarifying language or additional terms?

Jury Question: Did either party enter into prior similar written agreements with others?

Jury Question: Did the parties have prior agreements with one another, either verbally or in writing?

Jury Question: What kind of educational or training background do the parties have that would position them to know something about entering agreements with companies?

Jury Question: What is the industry standard for use of contracts in this situation?

Jury Question: Are there parts of the contract that contradict other parts?

Jury Question: How much time did the parties spend negotiating the contract terms? Who was involved in the negotiations?
Jury Question: To what extent did either party employ an attorney during the contract negotiations?

Jury Question: Which side initiated the first contract draft? Upon what did the party base that first draft?

Jury Question: Were any individuals (other than the disputing parties) privy to the details of the contract negotiations?

Jury Question: Were any individuals (other than the disputing parties) privy to the details of the contract dispute?

Jury Question: What story do internal e-mails or documents tell to bolster the parties’ claims about the intent of the contract or the method of negotiation?

Jury Question: What verbal exchanges occurred during contract negotiations regarding the intent of the contract or contingencies if the contract terms were not met?

Jury Question: What has the interpersonal relationship been like between the parties? To what degree has that relationship contributed to the dispute at hand?

Jury Question: What respective power did the parties have in negotiating the terms of the contract?

Jury Question: What options did either party have to avoid entering an agreement at all and to instead enter an agreement with someone else?

Jury Question: When did the relationship between the two parties first start to sour? Did a turning point occur where one or both parties decided the relationship was no longer salvageable?

Jury Question: How, if at all, did the parties try to work out their dispute prior to entering into litigation?

Jury Question: Aside from money, what does the claimant hope to gain from the litigation?

II. Case Fact Pattern: CompuGo v SoftThinx
The remainder of this chapter will draw from the following (fictitious) fact pattern.

Two companies – CompuGo and SoftThinx -- enter a business agreement involving high-quality color photocopy services. The contract terms address costs involved with the yearly number of copies that might be purchased. In addition to its existing “preferred provider” arrangement, CompuGo provides photocopies at a substantial (retroactive) discount when SoftThinx’s annual demand “exceeds approximately 500,000 copies a year.” The parties stipulate to the fact that they inserted the word “approximately” after much debate, to allow a little “give” if the copies totaled slightly less than 500,000.

In Year One of the contract, SoftThinx falls short of the 500,000 copies, buying 481,000 instead. At that point, CompuGo writes SoftThinx a memo stating that they do not technically consider a shortage of 19,000 copies to be small enough to fit within the window of “approximately 500,000.” Still, CompuGo extends them the deep discount they would have earned had they bought 500,000 copies.

In Year Two, SoftThinx again falls short of the 500,000 copies, this time buying 487,500. However, SoftThinx argues that it would have achieved in excess of 500,000 in Year Two if not for the fact that CompuGo had to refer out a rush job of SoftThinx’s annual report to another provider late in the year. CompuGo arranged for the outsourcing, but SoftThinx paid that second provider directly for the annual report copies. (The contract terms addressed the fact that CompuGo might occasionally have to refer work out, but did not address volume discount contingencies or credit for such an occurrence.) In addition, SoftThinx argues that CompuGo’s forgiveness of its 500,000 copy requirement in Year One set the precedent that SoftThinx could have a similar window of relief if it fell short in Year Two. CompuGo argues that its verbal discussions during initial contract negotiations focused on the idea that no more than “a few thousand copies shy of 500,000” would be forgiven for the discount. They defend their forgiveness of SoftThinx’s shortfall in Year One as an exception, not a precedent.

After CompuGo invoices SoftThinx at the end of the year without any discount, SoftThinx decides to pay its last invoice in Year Two at the rate by which it would have been charged had it retroactively received the discount for the year’s copies. CompuGo sues SoftThinx for what it says it is owed.

III. Opening Statements

§x:xx Persuasive Elements in Plaintiff’s Breach of Contract Case

During your oral argument, make strategic use of the questions typically on jurors’ minds in breach of contract cases (see §x:xx).
1. Most jurors’ first wish will be to see the contract. However, that desire does not mean you should start your argument with paper. Consider how much context is first necessary to explain the intent of the contract. Introduce the contract in the story once jurors have enough background to like your client and to believe the plaintiff was reasonable in its contract negotiations. Accomplishing that task takes more than a cursory, topical introduction to the parties at the beginning of your opening (as so many openings default to doing).

2. The tougher audience on your jury – defense-oriented jurors – will scrutinize the contract language. Those jurors will want to hear you explain why your interpretation of the contract language is more logical than the defendant’s. Focus on the contract language and its interpretation, relying on the “common sense” interpretation of the terms before turning to a legal interpretation.

3. Your “ally audience” on the jury – plaintiff-oriented jurors -- will want to know more about the evolving relationship between the parties. They will be especially interested in understanding how the parties emotionally reacted to certain events or conversations. Jurors tend to trust a party’s reactions more than his cerebral explanations of the events.

4. Avoid the temptation to start your argument by immediately placing blame on the defendant. Jurors can resist being persuaded by later arguments if they feel turned off to your first attack. Social niceties toward the opposing party (where possible) go a long way with jurors.

5. Focus first on your client’s enthusiasm about entering the contract. Jurors need to experience the contrast between the plaintiff’s sincere energy and the demise of the relationship due to the defendant’s failings.
6. Determine through whose “primary eyes” you will tell the story. Will it be through the plaintiff? Through a strong eyewitness who can serve as an independent third party? Through the defendant? Start your story from this person’s vantage point. Often, litigators default to having the head of the company take that role, even if he had little to do with direct negotiations. Doing so is a mistake. True, jurors want and need to hear from the top dog, but it is better to start with and showcase the witness with the most intimate knowledge of the contract negotiations.

7. Tell your story in the present tense. For the greatest persuasive impact, get jurors to picture the events as they unfold by telling the story as if it is just now occurring. (See the case fact pattern, above, as an example of story telling in the present tense.)

8. Determine where the story begins. It may not always make sense to tell the story from a chronological standpoint. For example, it might start with plaintiff’s kind exception at the end of Year One to contrast with defendant’s abuse of the exception by turning it into precedent at the end of Year Two. It is better for plaintiff to take this challenge on right away rather than leaving it for the defense to exploit.

9. Admit “safe fault” on the part of the plaintiff if you feel you have a low chance of being found at zero-percent fault. “Safe fault” is an admission of a small error that falls short of admitting liability. (Sometimes mock trial research is necessary to determine if your threshold for “safe fault” mirrors that of jurors.) For example, you might admit that making the exception in Year One contributed to defendant’s abuse of the contract (but an agreement is still an agreement and defendants owe in full). Of course, some risk exists in using this approach, most notably if plaintiff’s counsel admits that CompuGo told SoftThinx that it would only use the contract as a guidepost rather than a “hard and fast” standard for minimum
purchases. However, we have frequently found that counsel’s brief admission of some fault persuades jurors that the plaintiff is being reasonable in its case. Jurors tend to be suspicious of a party that represents itself as completely blameless.

10. Always time your case “zingers” to emphasize the defendant’s fault. In this case, assume the CEO of the defendant, SoftThinx, verbally told CompuGo during contract negotiations (and as verified by an eyewitness) that she interpreted approximately to be within a “few hundred to a thousand” copies of 500,000. Jurors are often persuaded by the unexpected. If you emphasize this important information too early or too frequently, it will lose its persuasive impact.

11. Pepper rhetorical questions throughout your argument. Doing so will challenge the jury to stay engaged since you are asking them to mentally address your questions as you stand before them. Additionally, it is likely that conclusions jurors draw on their own are stronger than ones you draw for them. Rhetorical questions allow them to get there ahead of you – even if only by a matter of seconds if you then answer the question in your oral argument. Such rhetorical questions might include:

   **Question:** Would it not seem that CompuGo’s warning at the end of Year One would be a heads-up to SoftThinx that they got a nice deal, but not a contractual change?

   **Question:** What should we make of the fact that SoftThinx’s CEO admitted she understood “approximately” to mean “within a few hundred to a thousand” copies of 500,000?

§x:xx Persuasive Elements in Defendant’s Breach of Contract Case
It is wise to start thinking about approaches to your case through the initial filter of jurors’ priorities in breach of contract cases. See §x:xx, Key Jury Biases in Breach of Contract Cases; §x:xx Jurors’ Key Questions in Breach of Contract Cases.

1. As the defendant, you need to determine how you want to either acknowledge or ignore the oral argument immediately preceding yours. Generally speaking, you should avoid two extremes – either completely ignoring what jurors just heard from the plaintiff or spending too much initial time reacting to the plaintiff’s arguments in a defensive, shotgun manner. Your first minutes in oral argument are critical in establishing your credibility with the jury and in setting the tone of your approach to the case. Jurors will be most watchful of you in those early moments of oral argument.

Consider two fundamental options that depend fully on the strength of your case juxtaposed against the strength of plaintiff’s case.

- If plaintiff’s case is not very strong on its face and you have a proactive story to tell, focus first on what the defense did well in the case events. You have more luxury of time to embed your defenses to plaintiff’s charges within the body of your own story. Importantly, pro-plaintiff jurors will be watchful of how “high road” and ethical you are as the defendant’s representative. By setting an early tone of a positive defense, you will likely score points with these jurors.

- If you have strong concerns that plaintiff’s counsel scored serious points in his argument, you will need to address those key points early in your oral remarks. Why? Because until you refute them, your tougher audience – pro-plaintiff jurors – are likely to be suspicious of you and your case. You will get their attention if you persuasively address their concerns from the outset. In this instance, consider an
approach that begins with:

*Sounds pretty bad, doesn’t it? If the remarks plaintiff’s counsel made to you just now represented the full story in this case, even I would be inclined to vote plaintiff’s way. Let me spend the next few moments telling you more of the events that occurred here...*

By acknowledging jurors’ likely emotions, you will open them to hearing more of your story than if you ignore the blows plaintiff’s counsel dealt your case.

2. Determine through whose “primary eyes” you will tell the story. Will it be through your client’s eyes? Through a strong eyewitness who can serve as an independent third party? Through the plaintiff? Start your story through this person’s vantage point. With this fact pattern, for example, you might be tempted to present the CEO of SoftThinx first, but only do so if the CEO was central to the contract negotiations. In contract disputes, jurors are focused on hearing as soon as possible from the key decision-makers in the contract discussions.

3. Like the plaintiff, tell your story in the present tense. For the greatest persuasive impact, get jurors to picture the events as they unfold by telling the story as if it is just now occurring. See the case fact pattern (§x:xx) as an example of story telling in the present tense.

4. Determine where the story begins. From a defense perspective in this breach of contract case, it may make sense to tell the story starting at the end of Year One. Explain retrospectively how the allowance in Year One set the precedent for Year Two in clarifying the language. You might even grant that the contract language was a little gray up until Year One’s conclusion, but crystal-clear from that point forward. This trial would not
have been a necessary measure for clarifying the language had the Year One experience not occurred.

5. Watch the language you adopt. For example, the word “exception” is the plaintiff’s word. The plaintiff, CompuGo, wants jurors to think of the Year One behavior as a one-time exception, and the Year Two behavior as aberrant. Your word is “precedent.” Year One served as a clarifying precedent for years to follow.

6. The behavior of the parties typically wins out over the words they speak and the testimony witnesses give. Refer to the testimony of witnesses who can attest to the casual behavior of both parties during the two-year life of the contract when it came to enforcing the terms. Were there other parts of the contract (other than the 500,000 copy requirement) that prove a pattern of bending or ignoring the contract terms?

7. Take the high road in castigating the plaintiff. Don’t make the plaintiff a bad guy and thereby force the jury to take sides if they don’t have to. Let the plaintiff be merely mistaken. Assume jurors like the plaintiff when you stand up to make your oral remarks. Treat the plaintiff them with respect in your argument, but clearly explain where they failed to exercise their options.

8. Consider some safe admission of error as long as you stop short of granting liability. You will ensure greater credibility with the jury if you take more of a reasoned, “gray” approach, rather than a completely blameless “black and white” approach. It would likely be safe in this case to admit that you should have pushed for a more concrete definition of the word “approximately.” However, reiterate the fact that CompuGo’s behavior at the conclusion of Year One clarified the language in spades.
9. Always time your case “zingers” to emphasize the surprising things plaintiff’s counsel may have withheld in his opening. (If plaintiff’s counsel is smart, he will have disclosed those weaknesses in his argument. However, cases abound wherein key weaknesses are shrouded or buried.) In this case, assume the plaintiff sent you an e-mail at the conclusion of Year One saying they were more than happy to extend the discount and were “more than happy to be flexible like that for such a reliable client…” Consider waiting to disclose this information until the end of your opening.

10. Even though this case is a civil one, jurors always contemplate both parties’ motives to behave as they did. Jurors will need to understand what was behind the parties’ actions. They will impugn motives themselves if you fail to provide them. If one or more of the parties’ motives were unusual (and if it helps make your case), give special attention to those motives. As noted above, jurors are often persuaded by the unexpected, but make the unexpected point sparingly. If you emphasize the information too early or too frequently, it will lose some of its persuasive impact.

11. Pepper rhetorical questions throughout your argument. Doing so will challenge the jury to stay engaged since you are asking them to mentally address your questions as you stand before them. Additionally, it is likely that conclusions jurors draw on their own are stronger than ones you draw for them. Rhetorical questions allow them to get there ahead of you – even if only by a matter of seconds if you then answer the question in your oral argument. One such rhetorical question might be: 

*Question: When words are gray (the meaning of a “few thousand,”) wouldn’t it make sense to look at behavior (the Year One discount) to determine where the black resides?*
Question: Doesn’t it make sense to expect CompuGo to behave reasonably when a shortfall was largely its responsibility, as it was with the annual report?

12. Using great care in timing and degree of emphasis, consider introducing jurors to the emotions the chief representative for SoftThinx experienced during the frustrations of Year Two and immediately thereafter. Why introduce jurors to the defendant’s emotional pain at all? If he is a credible witness on his own behalf, pro-plaintiff jurors will need to hear the emotion in your case to counterbalance the plaintiff’s. For example, ask your key business witness how much the events affected him personally. Counsel in business cases often makes the classic error of presenting a more intellectual case, devoid of the shadings of human emotion that plaintiff’s jurors need to hear. Again, the degree of emphasis is critical here. If you overdo it, you could alienate jurors who want to hear about the evidence and the more analytical parts of the case above all else.

IV. Case Theme

§x:xx Governing Principles

The “ground floor” formula for a persuasive case theme always integrates two critical “common denominator” concepts. These concepts transcend type of litigation and apply to both the plaintiff and the defense.

First, always aim your theme toward the tougher audience on the jury. With rare exception, at least two audiences exist in every civil jury – pro-plaintiff jurors and pro-defense jurors (with self-proclaimed undecided jurors typically having at least a slight leaning). Trial attorneys often make the error of designing a theme around the way they see their own case, rather than around how the more skeptical audience on the jury might see it.
Second, in every case, jurors assess all parties’ power and choices to use that power. A theme that capitalizes on that reality can be highly persuasive since it likely reflects the thinking of many on the jury.

The defining sentence or sentences that encompass your case theme should be a “teaser” that piques the curiosity of the jury. The first 60 to 180 seconds of your opening should serve as your “silver bullet” that encapsulates your case and introduces your case theme.

§x:xx Plaintiff’s Thematic Options

For plaintiff’s counsel, pro-plaintiff jurors are far less likely to need a “killer theme” to reinforce how they already feel about the plaintiff and the evidence. Rather, you need to reach pro-defense jurors, especially in jurisdictions where the jury is required to reach a unanimous decision.

In breach of contract cases, pro-defense jurors tend to rely heavily on written language and industry standards. They tend to scrutinize the plaintiff’s actions through a very high standard of care based on the power and choices available to him or her, both during negotiations and during the life of the contract. Their primary filter is one of high personal responsibility. As a result, plaintiff’s theme should level the playing field by focusing on law, power, and personal responsibility.

Plaintiff’s Thematic Option One

One theme for this case might be:

*If SoftThinx believes it has the right to ignore the contract terms, it has another thing coming.*

Immediately preceding introduction of the theme, plaintiff’s counsel might use the following Silver Bullet or brief encapsulation of the plaintiff’s position:

*We value SoftThinx as an important part of our business. For that reason, we entered a contract to make sure our communication was clear and*
flexible. Too many business relationships turn sour because of unclear terms. This contract is one we both spent time creating. It’s clear and its terms are fair. We even bent over backward in making a rare exception for this valued client in our first year together when they fell shy of their required commitment. But in Year Two, SoftThinx fell short of its contractual commitment again. We delivered on our end of the bargain and SoftThinx fell short on its. And, now, unfortunately, SoftThinx has arbitrarily decided to seriously underpay for services we provided.

If SoftThinx believes it has the right to ignore the contract terms, it has another thing coming.

Plaintiff’s Thematic Option Two

The following theme focuses more on what the plaintiff, CompuGo, did well in its business dealings in comparison to what the defendant, SoftThinx, did poorly. Note that the theme mentions nothing about a contract. Breach of contract cases are ultimately about relationships and performance, not paper, and your theme should reflect that reality if, as plaintiff, you feel you have a problem with your contract language. Otherwise, pro-defense jurors will still need a constant focus on the written wording.

Consistent follow-through was CompuGo’s business mode. Consistent inconsistency was SoftThinx’s.

And the Silver Bullet:

The key to good business is to make good on your word and to over-deliver. CompuGo believed in doing both whenever possible. CompuGo followed through on that belief by going above and beyond its contract requirements with SoftThinx. It wasn’t required to, but it chose to do so for good business in its first year with them. But when there’s any doubt about something gray in the relationship, the important guidepost is the contract. CompuGo followed the contract in its second year with SoftThinx too. SoftThinx never has met the contract terms and CompuGo had to call a stop to its behavior in the second year of their relationship.

Consistent follow through was CompuGo’s business mode. Consistent inconsistency was SoftThinx’s.

§x:xx Defendant’s Thematic Options
As discussed above (see §x:xx, Governing Principles), the “ground floor” formula for a persuasive case theme always integrates two critical “common denominator” concepts:

**First,** always aim your theme toward the tougher audience on the jury. As defense counsel, you need to try harder to reach and persuade pro-plaintiff jurors. To reach pro-plaintiff jurors, it is critical that you defend your client’s actions by appealing to the jury’s sense of fairness and ethics. It is more powerful to assert that the defendant did the right thing, rather than simply the legal thing (although defending the legalities is critical as well).

**Second,** in every case, jurors assess all parties’ power and choices to use that power. A theme that capitalizes on that reality can be highly persuasive since it likely reflects the thinking of many on the jury.

**Defendant’s Thematic Option One**

When defending breach of contract cases, choose a theme that emphasizes (1) what the defendant tried to do well (without admitting liability) and (2) the inevitability of subsequent changes to the parties’ relationship post-contract.

*Actions speak louder than words – especially when the actions are specific and the words are not.*

Focus on the contract language for your defense-oriented jurors and on the parties’ actions for your plaintiff-oriented jurors:

*It happens. At the time of entering an agreement, everyone does their best to dot the “i”s and cross the “t”s. But despite everyone’s best efforts, there are typically parts of the contract where someone’s writing was a little blurry. So what do you do? You look to the subsequent actions of the parties to see how their behavior defines the terms of the agreement. And why do you do that?*
Because actions speak louder than words – especially when the actions are specific and the words are not.

**Defendant’s Thematic Option Two**

The following theme focuses more on the contract itself -- something pro-plaintiff jurors are likely to do in this case -- and points to the fact that the contract between CompuGo and SoftThinx was a living, breathing document, made even more dynamic by CompuGo’s changes to it:

*The obvious road signs in Year One charted the course for future travel between the parties.*

The following Silver Bullet sets this sentence in important context:

*When you sit down to reach an agreement, you do so based on everyone’s idea of the business relationship. When you stand up from the table, you start the walk that defines its ever-changing reality. The business relationship rarely stays on the path you both envisioned when you sat at the table. It has its own twists and turns, detours and offroading. The relationship defines the circumstances of the agreement and the road construction that follows.*

*In this case, the obvious road signs in Year One charted the course for future travel between the parties.*

**V. Jury Analogies**

**§x:xx Governing Principles**

The right jury analogy can be critical to a case. While jurors will learn from the basic facts, the proper analogy can teach them in a way the basic facts do not. A well chosen analogy can be used in your opening and closing, and with your key witnesses.
Choose an analogy that is relevant to the case and that applies to various stages of the case. The best analogy applies to both liability and damages. On occasion, however, you will need to apply different analogies to each of those stages. Even if the analogy feels a little “hokey,” consider it worth the risk. Jurors tend to adopt and respond to analogies that stick with them.

Caution: Opposing counsel can play with your words too.

Given that analogies are “plays on words,” it is highly important that you choose the proper analogy. The wrong analogy becomes a play on words that your opponent gets to play “keep away” with if he so chooses. Ensure that you have examined the analogy from every possible angle to determine whether opposing counsel can exploit it to the point of ineffectiveness.

§x:xx Plaintiff’s Jury Analogies

The following analogy creates an image that likely will appeal to typical pro-defense jurors:

The defendant’s argument that we should be held to behavior that extends beyond the contract from last year is like saying your favorite football team can only be considered to have won if it beats the current team by 10 points since that’s what it did in the game before.

Another plaintiff’s analogy might be:

Calling an exception to a contract a “standard” is like your kids saying their new bedtime is 30 minutes later because you allowed them to stay up late one night.

§x:xx Defendant’s Jury Analogies

Defendant’s Thematic Option One (see §x:xx) sets the stage well for an analogy.
In a world where people focus too rigidly on dotting the “i”s and crossing the "t”s, it was nice to go into business with a company who favored minding its “p”s and “q”s in an evolving vendor-client relationship. This analogy scores points by complimenting the opposing party and serves to make SoftThinx look like it is transcending the conflict altogether. If delivered with sincerity, it can be quite effective.

Thematic Option Two for the defense (see §x:xx) embeds its own analogy into the case presentation. To further the second thematic analogy, consider the following:

*The road signs at the end of Year One charted the course for both parties to take in Year Two.*

VI. Witnesses of Greatest Importance to Jurors

§x:xx Jurors’ Priorities For the Plaintiff

The witnesses listed below are the witnesses that *jurors* are most likely to be interested in seeing. This list may well exclude important witnesses for plaintiff’s counsel to call to put critical evidence into the record. It is not intended to be an exhaustive list.

When you determine witness order, mirror the order of your story in your opening.

*Avoid the classic temptation of putting witnesses on in liability/damages order unless doing so fits your story order.*

**Plaintiff’s Liability Witnesses**

- CompuGo’s President
- CompuGo witness who talked with SoftThinx about the exception made in Year One
- Eyewitness who observed an exchange between CompuGo and SoftThinx clarifying the contract language to CompuGo’s benefit

**Plaintiff’s Damages Witnesses**
• CompuGo’s Accountant

§x:xx Jurors’ Priorities For the Defense

One challenge the defense faces when the time comes to put on its evidence is potential juror fatigue. The newness of the juror’s job has worn off, and the midpoint of the trial marks the point at which the jury begins to complain about unnecessary repetitiveness in the evidence. Defense counsel should be sensitive to this complaint and use judicious economy in calling corroborating witnesses. Additionally, be alert to your tougher audience – plaintiff-oriented jurors -- when choosing expert witnesses and when determining the most persuasive witness order.

As the defense, it does not automatically make sense to call your witnesses in story order. If you feel the plaintiff has made a weak case, story order makes sense. If, however, the plaintiff has dealt your case a serious blow, it may be worthwhile to call early the witness who best defends your weaker points. Our private jury research has found this to be an important strategy at times, even though it disrupts story order.

Defendant’s Liability Witnesses

• SoftThinx decision-maker and negotiator on the initial contract who can speak to the contract terms and to the changes that occurred at the end of Year One.
• Witness who observed numerous casual exceptions being made to the contract terms between CompuGo and SoftThinx.
• Witness who can testify to the fact that SoftThinx continued to be a “reliable client” in Year Two just as it was in Year One. (This testimony is important because it demonstrates SoftThinx’s consistency of behavior based on CompuGo’s statement that it was willing to be flexible with such a “reliable client.”)

Defendant’s Damages Witnesses

Under this scenario, it is unlikely that the defense would want to put on a damages witness because an alternative damages scenario seems unlikely. It would be better in
this case to cross-examine the plaintiff’s damages expert to mitigate damages. Having said that, in cases where larger damages numbers are at stake, it makes sound sense for the defense to call its own damages expert to argue an alternative damages figure. Research has found this to be an effective strategy. See Chapter 1, Juror Decision-Making, §x:xx ________.

VII. Demonstrative Evidence Checklist

§x:xx Plaintiff’s Demonstrative Exhibit Checklist

<table>
<thead>
<tr>
<th>Demonstrative</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Key contract language</td>
<td>To demonstrate that plaintiff is willing to embrace the contract language and interpret it in a manner most persuasive to its case</td>
</tr>
<tr>
<td>b. Contrast graphic comparing actual contract language with fictitious language the defense wishes could be there, titled “How the Contract Would Have to Read for SoftThinx to Be Correct”</td>
<td>To point out the absurdity of defendant’s position by demonstrating that the language would have to have been written differently for them to prevail</td>
</tr>
<tr>
<td>c. “Relationship Timeline”</td>
<td>Jurors will want to understand the timeframe for (and content of) talks and meetings between the parties. It behooves CompuGo to extend the discussion beyond the written language.</td>
</tr>
<tr>
<td>d. Visual depiction of “CompuGo’s Follow Through”</td>
<td>Remind jurors that there was more to this business relationship than the shortfall/discount dispute. CompuGo did a lot of work throughout the years for SoftThinx. Using icons, show a demonstrative of the volume of copies, man hours, materials and equipment CompuGo employed to</td>
</tr>
</tbody>
</table>
meet its contractual commitment to SoftThinx.

e. Damages chart  
Jurors rely heavily on a summary of figures that delineate damages. This chart typically is one of the most often requested demonstratives during deliberations.

§x:xx Defendant’s Demonstrative Evidence Checklist

<table>
<thead>
<tr>
<th>Demonstrative</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Visual depiction of dollars paid by SoftThinx to CompuGo</td>
<td>Help jurors focus on the monetary benefit CompuGo has received from SoftThinx over the past two years</td>
</tr>
<tr>
<td>b. Summary of contract iterations</td>
<td>Show jurors the point at which the word “approximately” was added in front of “500,000 copies” to make it clear that the term was important to the deal.</td>
</tr>
<tr>
<td>c. Checklist of both parties’ mutual responsibilities</td>
<td>Jurors are likely to be impressed if they see the defense taking the position that both parties had to take great care in this situation. This checklist should show plaintiff lacking.</td>
</tr>
<tr>
<td>d. Summary chart of changes to the parties’ relationship over time</td>
<td>Use a timeline, but not the traditional horizontal line format. Instead, create something that looks a bit more like a board game, with winding pathways every time an “off road” decision is made between the parties that stray from the more strict contract terms.</td>
</tr>
<tr>
<td>e. Running tab of dollars earned over time</td>
<td>If impressive, show a running tab of the amount of money CompuGo has already earned from SoftThinx over the relevant time period</td>
</tr>
</tbody>
</table>
VIII. Arguing Damages

§x:xx Arguing Damages from Plaintiff’s Perspective

When arguing damages as plaintiff’s counsel in breach of contract litigation, consider the following rules of thumb:

- Research confirms the fact that a high damages demand makes the plaintiff look greedy. In spite of that, a higher damages demand also increases the likelihood of a higher damages award.\(^8\)

- Know that jurors are likely to use your damages number(s) as an upper limit starting point.\(^9\) They often negotiate down from that number during deliberations. In addition, even when instructed not to do so, jurors frequently average or compromise damages as a group in an effort to reach consensus. In light of that fact, you might be tempted to increase your request for damages. Be careful. If your demand exceeds the “high” range and tends toward the exorbitant, jurors could become suspicious about the legitimacy of the entire case.\(^10\)

- Jurors like clear formulas for damages. They dislike dealing with the extremes of (1) being given a total amount of damages without understanding the calculations driving to that final number and (2) being told to “follow their instincts,” even when the demand is for noneconomic damages.

In the case example, SoftThinx fell short of its contractual obligation by 12,500 copies. Jurors will appreciate seeing the math that pulls you to a final damages figure. Demonstratively, show jurors that CompuGo is owed 12,500 copies, at 40¢ a copy, totaling $5,000 in economic damages. ***Check this against the demonstrative and get the money up there.***

§x:xx Arguing Damages from the Defense Perspective
When do you? When you feel your liability case is weak, follow your instinct to argue alternative damages. The “anchoring bias” theory supports the conclusion that factfinders (including jurors and judges) may decrease damages if they hear a lower, alternative damages figure. In this case, if the plaintiff is asking a great deal more in damages than the amount SoftThinx would have owed absent a discount in Year Two, point to the plaintiff’s greediness and disproportionate demands. You might address this inequity by saying:

*Fairness is worth your consideration during deliberations, including when you think about damages. Knowing you will be thorough in your assessment of the claims in this case, you will likely find yourself discussing damages as well, whether you feel the plaintiff is entitled to them or not. Let me ask you to consider fair proportions in this case. CompuGo feels it deserves a lot of money. The reality of the money in this case, if they were right (and that’s a big if) would be much lower. Let’s look at the real values in this case.*

IX. Jury Selection

A. Governing Principles

§x:xx Apply Three-Step Formula

Even though it does not need to be, jury selection tends to be one of the most daunting phases of trial for counsel for at least one of three reasons. First, it is often difficult to know where to start in determining which criteria will illuminate bias against one’s case. Second, once those criteria are identified, how does one know which questions will evoke the most meaningful, honest responses? Third, it is not always clear what one should do with jurors’ answers in narrowing the list of peremptory strikes in court, especially when counsel is increasingly time-pressured to pose questions and exercise strikes in many federal and state courts.

So, where to start? The answer, as with many things, is to apply a systematic formula. Your formula should encompass moving from initially creating “high risk juror” criteria to finally exercising intelligent strikes. That formula involves three key steps:
**Step One:** Design a profile of jurors’ attitudes, experiences, and demographic characteristics that are likely to prove most risky to you in representing your client. *See §x:xx, Plaintiff’s High-Risk Juror Profile Elements; §x:xx, Defendant’s High-Risk Juror Profile Elements.*

**Step Two:** Choose the key attitudes and experiences that you most want to identify through your questions (and that you are most likely to be allowed to ask by the court through either a written questionnaire or oral *voir dire*). Even if you find yourself in a court where you are only allowed to submit questions to the judge for him to ask orally, it is critical that you go through these first steps to ensure you are choosing your few questions wisely. The format of these questions will vary quite a bit from questions you design to ask on your own.

**Step Three:** Design questions that ensure the most comprehensive responses both across your group and by individual jurors via a balance of group questions and individual follow-up questions (even in a time-pressured situation). As you design the group/individual questions, bear in mind a two-pronged goal. First, the aim of the group questions is to broadly identify prospective jurors who hold attitudes harmful to your case. Second, the objective of the individual follow-up questions is to get the prospective jurors to speak your themes.12 *See §x:xx, Plaintiff’s Oral Voir Dire – Breach of Contract; §x:xx, Defendant’s Oral Voir Dire – Breach of Contract.*
Craft Oral Voir Dire Questions Using Lisko’s “Triple-Layer” Structure

Many treatises on effective jury selection recommend either an approach whereby you ask questions to the entire group or a method of asking questions to individuals. Using an “either/or” approach is a bad idea because it limits the quality of information you collect, especially if you are time-limited in asking questions. The following triple-layer structure combines group and individual questions to achieve two important goals. First, the group-individual combination ensures you collect everyone’s general response to the attitudinal question. Second, the group-individual combination allows the venire to feel engaged given the variety of approaches to questioning.

You will know you have been successful in applying this formula if you accomplish three things:

1. The tone of oral voir dire was informal and conversational.\textsuperscript{13}
2. The format feels like you ran a focus group.
3. Importantly, the prospective jurors spent more time talking than you did.

Layer One: “Warm Up” Question to Preview or Transition to the Topic

This first layer is intended as an orientation question to ensure the venire understands the topic you are about to cover. It may be asked of the group or an individual. It is not technically intended to collect meaningful information (and should therefore be limited to one or two quick questions).

“Are you all familiar with the \textit{general topic area} that has been in the news lately? (group question)

OR

“Ms. Brown, let me ask you – Have you had the chance to catch the \textit{general topic area} on the news lately? (individual question)
§x:xx.2 Layer Two: Group Questions with Two “Clear Contrast” Choices

You must take great care in designing the group question to ensure that the choices you offer are distinct enough to enable the group to see a clear difference between the options. You also want to design the contrast wording to allow you to identify a “strikable minority” of jurors. To do so, you may need to use more extreme language to polarize the options like, “How many of you strongly feel…” or “How many of you would rarely if ever….”

If at all possible, run an informal mock voir dire with jury-comparable participants to test the quality of your question wording. You want to ensure your options are clearly worded, especially because hearing a question is a very different process from reading one. It takes practice to design questions that make sense to the listener versus to a reader. (The purpose of the mock voir dire would not be to collect attitudinal information stemming from participants’ responses. The session is typically conducted with too small a group to be reliable in that regard.)

“When it comes to [issue], some people tend to feel ‘X’, while others generally feel ‘Y’.

By a show of hands, how many of you tend to feel ‘X’? [Introduce anti-plaintiff option.]

How many of you generally feel ‘Y’? [Introduce pro-plaintiff option.]”

§x:xx.3 Layer Three: Individual Thematic Question that Invites Thematic Response

In Layer Three, you ask an individual juror a thematic question that invites a thematic response. Assume, for example, that you represent the plaintiff. In Layer Two, above, you posed the more pro-plaintiff option last. Doing so enables you to smoothly follow up with individual questions to the venire concerning that option. You do not want to ask follow-up questions to those who expressed pro-defense sentiments unless you believe you have the ability to set up a challenge for cause. Instead, spend the
individual follow-up time getting a few jurors to voice your pro-plaintiff themes. Do not be concerned about the fact that doing so will illuminate a potential strike to the defense. The pro-plaintiff jurors will have been identified by the end of *voir dire* anyway. You can take advantage of getting defense strikes to educate the rest of the panel on your themes before they are excused.

“Ms. Smith, I noticed that you raised your hand that you generally feel “Y”. Can you tell me a little about that?

“Mr. Jones, what do you think about what Ms. Smith just said?”

Likewise, if you represent the defendant, do not ask follow-up questions of those jurors who express pro-plaintiff themes. Instead, use your Level Three follow-up questions to help pro-defense jurors voice your themes. *See generally §x:xx, Defendant’s Oral Voir Dire Questions – Breach of Contract.*

**In Practice: Keeping track of it all**

Ideally, you should have a second person at counsel table (co-counsel, legal assistant, client, or trial consultant) to keep track of prospective jurors’ hand votes and responses. Absent that, simply explain to jurors that you will need a few seconds to note their responses on your paper. Jurors are typically quite willing to accommodate that need.

**Caution: Adjust for judge’s rules and preferences**

This triple-layer approach to voir dire questioning has proven highly successful in numerous jurisdictions. If, however, you have an extremely strict judge who does not allow attitudinal questions, you may have to adjust your questions to be more benign.

B. Jury Selection for the Plaintiff

1. Design Jury Profile
§x:xx Governing Principles

In this age of rushed to little oral *voir dire* time, your profile should focus primarily on anti-plaintiff *attitudes* that prospective jurors hold. At best, jurors’ demographic criteria often provide only vague, superficial information. The obvious question then becomes, how do you identify the most meaningful criteria? If you have been fortunate enough to conduct a mock trial or focus group research in your case, you should have a narrower idea of the more important attitudes that generally correlate\(^{14}\) with pro-defense leanings.

The profile below delineates (in order of importance) categories that encompass attitudes, life experiences, and demographics that are most likely to be a source of bias against the plaintiff. Written and oral *voir dire* questions should illuminate the key biases below. Many jurors will be able to speak candidly about their attitudinal biases. Others will not. By asking open-ended questions that invite narrative responses, you can listen for clues regarding their biases. Additionally, if a juror exhibits numerous patterns of anti-plaintiff life experiences, you *may* be able to conclude he is a likely strike. Be careful in placing great weight on the demographic characteristics listed below. Extensive research regarding a link between attitudes, demographics and damages awards rightly concludes that demographic characteristics are poor predictors of the awards, whereas attitudes are slightly stronger predictors (and never as strong a predictor as the evidence).\(^{15}\)

In jurisdictions where attorney-conducted *voir dire* is greatly limited, focus on gleaning responses covered in the first categories. In isolation, no single point on this profile may warrant exercising a strike; multiple characteristics in a single juror, however, are a strong indicator of a necessary strike.

The juror profile specific to this fact pattern is tricky for both parties because different types of jurors are risky depending on the different phases of the life of the contract. (For example, in the plaintiff’s high-risk juror profile, see “Contract Rigid in Making Exceptions” juxtaposed against “Contract Relaxed in Post-Exception Phase.” See the
same juxtaposition in the defendant’s high-risk juror profile, §x:xx.) As a result, you will need to determine which phase of the contract dominates jurors’ focus more during deliberations. Then, you should rely more heavily on the risky juror characteristics for the plaintiff for that phase.

**In Practice:** Mock research can be particularly helpful with contradictory profile elements.

When a profile rightly yields two contradictory jury mindsets for the same party, such as this one does, mock research is an immensely valuable remedy for determining which mindset should carry your focus during jury selection and the rest of trial.

§x:xx Plaintiff’s High-Risk Juror Profile Elements

**Contract - Rigid in Making Exceptions**

Risky jurors for the plaintiff are those who severely judge that party for ever having agreed to deviate from the contract terms in Year One.

- Believes deviating from a business contract to make exceptions hurts the parties’ business relationship in the long run
- Has never deviated from a business contract to make exceptions
- Generally reads contracts word for word rather than skimming them for meaning
- Believes contracts and the law are more important than ethics and fairness
- Believes more in the phrase “business is business” than “business should be fair”
- Describes self as a parent who incorporated a more authoritarian style (“Do what I say because I’m the parent.”) with consistent follow through on discipline
- Describes self as politically conservative regarding social issues

**Contract - Relaxed in Post-Exception Phase**

Once the contract is signed and the parties’ behavior contradicts the originally signed contract, certain jurors find that behavior to trump the written contract terms.

- Believes exceptions in business constitute legitimate precedent for future expectations
- Feels behavior subsequent to signing the contract should trump the written language
- Feels too much emphasis is placed on contracts once signed and filed away in a drawer
- Uses value-laden language, like, “I feel that…,” “I sense that...,” “It is not fair that...,” “It is not right that...”
• Feels that in business a company should put its customers’ financial interests ahead of its own (Subscribes to the adage, “The customer is always right.”)
• Believes verbal conversations that contradict or update written contract language supersede the written terms (even without a written amendment to the contract)
• Has personally benefited from business exceptions
• Believes volume discounters make ample money even with some shortfall
• Has had good experiences with important personal relationships that have been significantly altered from the original understanding of the commitment
• Believes people see divorce as more of a tragic option than it needs to be

ANTI-LITIGATION
Irrespective of the type of litigation, these jurors come into the jury selection process with a generally hostile attitude toward parties who bring lawsuits.

• Believes plaintiffs bring suits out of greed, rather than out of a sense of justice
• Believes monetary awards do little good for anyone
• Strongly supports tort reform in the United States
• Believes he has had reason to sue in the past but never would have filed a complaint
• Is in a “malpractice risk” profession: physician, attorney, corporate executive
• Has been sued before
• Has religious/moral objections to civil lawsuits
• Has an extra-heightened sense of personal responsibility and cannot envision any circumstances under which one person should be held responsible for the bad acts of another
• Has high internal “locus of control” (tends to believe most events that occur are within own internal control)
• Majored in or specialized in hard sciences (engineering, mathematics, physical sciences)
• Is employed in a highly analytical profession (accountant, auditor, statistician)
• Status inconsistent (combination of low education level and high status occupation)
• Highly educated (college and beyond)
• Higher income

JURY EXPERT
The qualities of these jurors mark them as likely leaders on the jury in breach of contract cases. These jurors may automatically be more outspoken in deliberations because they believe they have a baseline of understanding issues that others on the jury do not. Their peer jurors may also put pressure on them to take the lead in opining on certain issues relevant to their experience. While certain jury expert characteristics,
below, *might* be good for the plaintiff, it is important to be certain their pro-plaintiff attributes outweigh their pro-defense propensities before leaving them on the jury.

- Is experienced in contract negotiation, administration, and/or enforcement
- Has hired a vendor to provide services
- Has been a vendor for client companies
- Is experienced in marital or relationship counseling

2. **Craft Oral Voir Dire Questions**

**§x:xx Uncover Key Attitudes Using Lisko’s Triple-Layer Structure**

The following questions aim to identify key *attitudes* contained within your high risk profile (§x:xx). You will typically unearth many (but not all) risky *life experiences* and *demographics* from listening to jurors’ rationales for their attitudes, by observing certain qualities in jurors, or by reviewing basic information the court provides you immediately preceding jury selection. The questions below represent the maximum you could optimally cover in a shorter time period using the Triple-Layer Structure (§x:xx).

**§x:xx Plaintiff’s Ten-Minute *Voir Dire* – Breach of Contract**

**RIGID IN MAKING EXCEPTIONS IN ANY AGREEMENT**

*Layer One: (Warm-Up Question)*

I’m wondering if anyone here has ever entered an agreement of any kind and ended up later making an exception to one of the terms of the agreement.

    Mr. Jones, how did that experience go? You don’t owe me any details. I’m just wondering if it was a good move to make the exception or a bad one.

Anyone else?

    And how was that experience for you?

*Layer Two: (Group Bias Question)*

Let me pose that question to the group. I’m going to ask for your feelings regarding two statements. Some people feel that making exceptions to an agreement can create more bad than good for the parties involved. Others think making exceptions to an agreement can lead to more good than bad in the long run.
By a show of hands, how many of you think that making exceptions to an agreement can create more bad than good for the parties involved?

And how many of you feel making exceptions can create more good than bad in the long run?

**Layer Three: (Individual Thematic Question)**

[Remember how the Lisko Method works. Above, you posed the pro-plaintiff option last. Now, use that question as a means to smoothly follow up with pro-plaintiff jurors and allow these individuals to voice your themes to the panel. See generally §x:xx.]

Mr. Black, you responded that you feel making exceptions can create more good than bad. Why do you feel that way?

Mr. White, what are your thoughts about that?

**Contract Rigid in Making Exceptions in Business Agreements**

**Layer One: (Warm-Up Question)**

Okay. Now I want to narrow the type of agreement to a business contract and see if that makes a difference to you.

Has anyone here ever entered a written business agreement and ended up later making an exception to one of the terms of the agreement?

Ms. Benson, how did that experience go? Again, you don’t owe me any details. I’m just wondering if it was a good move to make the exception or a bad one.

Anyone else?

And how was that experience for you?

**Layer Two: (Group Bias Question)**

Okay. Same question to the group. I’m going to ask for your feelings regarding two statements. Some people feel that making exceptions to a written business agreement can create more bad than good for the parties involved. Others think making exceptions to a written business agreement can lead to more good than bad in the long run.

By a show of hands, how many of you think that making exceptions to a business agreement can create more bad than good for the parties involved?
And how many of you feel making exceptions can create more good than bad in the long run?

**Layer Three: (Individual Thematic Question)**

Mr. Green, you responded that you feel making exceptions can create more good than bad. Why do you feel that way?

Mr. Smith, what are your thoughts about that?

**Contract-Relaxed in Post-Exception Phase**

**Layer One: (Warm-Up Question)**

Okay. Now, assume someone makes an exception in a business situation and the exception works to the client’s benefit.

Ms. Norris, do you think that means the terms of the ongoing business agreement have been changed in some way?

**Layer Two: (Group Bias Question)**

Okay. Same question to the group. I’m going to ask for your feelings regarding two statements. Some people feel that making an exception in business sets a precedent for making that exception again. Others feel the exception sets no such standard.

Again, by a show of hands, how many of you think that making an exception with a client in business sets a precedent for making that exception again in the future?

And how many of you feel the first exception sets no such standard?

**Layer Three: (Individual Thematic Question)**

Ms. Denver, you responded that making an exception once sets no standard to make an exception in the future. Why do you feel that way?

Mr. Short, what are your thoughts about that?

**Anti-Litigation**

**Layer One: (Warm-Up Question)**
Now, as you know, I represent the plaintiff in this case. My client is going to ask you to award him money damages if you find the defendant to be at fault for the breach of contract.

Mr. Kay, what are your thoughts about people who sue for money damages?

Layer Two: (Group Bias Question)

Now, let me broaden that question out to all of you. Let me again give you two options and ask which one reflects more of what you feel. Some people believe lawsuits do very little good in business disputes. Others think there are many cases where lawsuits are important when someone has been monetarily injured in a business dispute.

By a show of hands, how many of you believe lawsuits do very little good?

Now, how many of you believe there are many cases where lawsuits are important?

Layer Three: (Individual Thematic Question)

Ms. Norton, under what circumstances do you think lawsuits for breach of contract cases are important?

Back to Layer Two: (Group Bias Question to Identify Cause Challenge)

Is there anyone here who is opposed to civil lawsuits no matter what the circumstances?

Ms. Gable, you raised your hand. In what way would your feelings about civil lawsuits affect your ability to give my client a fair chance in this case?

Back to Layer Two: (Group Experience Question to Identify Cause Challenge)

By a quick show of hands, is there anyone here who believes they had reason to sue in the past but decided against bringing the lawsuit?

As a result of that experience, how many of you feel you would have a difficult time giving my client a fair chance in this case?

§x:xx Oral Voir Dire Questions for Plaintiff’s Counsel to Avoid
Just to complicate the formula, the fact that a quality appears on your juror profile does not automatically mean it should be translated into a question. First consider whether posing the question helps you or the defense more. Questions that help the defense more include ones that illuminate a “strikable minority” for them. A question like that identifies too many prospective jurors with a given bad attitude for you to strike. For example, consider the following popular plaintiff’s question that can actually work against you as the plaintiff.

Question: How many of you think there are too many lawsuits these days?

Pitfall: Most prospective jurors raise their hands in agreement with this statement. You can never strike all of them. Those who don’t raise their hands and think we have a good enough balance (or need more litigation) are going to be in the pro-plaintiff minority and will therefore be strikable by the other side. It is far better to let these jurors hide on your jury than be exposed to the other side.

Question: How many of you have been hurt by a contract deal that went south?

Pitfall: I find that few in the venire have had a) contract deals that b) went south. As a result, you once again identify these jurors to the defense and put them within striking distance since there are so few of them.

C. Jury Selection for the Defendant

The defense should follow the same three-step formula for jury selection as the plaintiff: (1) design a high-risk juror profile; (2) choose key attitudes and experiences to identify through your questions; and (3) craft your questions using Lisko’s Triple-Layer structure to ensure the most comprehensive responses both across your group and by individual jurors.
1. Design Jury Profile

§x:xx Governing Principles

In this age of rushed to little oral *voir dire* time, your profile should focus primarily on anti-defendant *attitudes* that prospective jurors hold. At best, jurors’ demographic criteria often provide only vague information anyway.

The profile below delineates (in order of importance) categories that encompass attitudes, life experiences, and demographics that are most likely to be a source of bias against the defense in breach of contract cases. Written and oral *voir dire* questions should illuminate the key biases below. In jurisdictions where attorney-conducted *voir dire* is greatly limited, focus on gleaning responses covered in the first categories. In isolation, no single point on this profile may warrant exercising a strike; multiple characteristics in a single juror, however, are a strong indicator of a necessary strike.

The juror profile specific to this fact pattern is tricky for both parties because different types of jurors are risky depending on the different phases of the life of the contract. (For example, in the defendant’s high risk juror profile, see “Contract Relaxed in Making Exceptions” juxtaposed against “Contract Rigid in Post-Exceptions Phase.”) As a result, you will need to determine which phase of the contract dominates jurors’ focus more during deliberations. Then, you should rely more heavily on the risky juror characteristics for your party for that phase.

*In Practice:* When a profile rightly yields two contradictory jury mindsets for the same party such as this one, mock research is an immensely valuable remedy for determining which mindset should carry your focus during jury selection and the rest of trial.

§x:xx Defendant’s High-Risk Juror Profile Elements

**Contract Relaxed in Making Exceptions**
This juror is more likely to conclude that CompuGo was a good guy for making the Year One exception for SoftThinx.

- Believes it makes good business sense to make exceptions to a contract that benefits the client
- Generally skims a contract for meaning rather than reading it word for word
- Prefers to enter business relationships on a handshake rather than through a written drafting phase
- Believes clients often try to milk their vendors for every last nickel or service
- Knows someone who has been taken advantage of in a business deal by a client or company
- Believes kind excess makes good business sense
- Has been a vendor for client companies

**Contract Rigid in Post-Exception Phase**

This type of juror requires strict adherence to the written language of the contract in spite of prior exceptions made.

- Believes post-commitment exceptions create *no* expectation for future behavior
- Believes written contract terms always trump verbal remarks
- Believes behavior (subsequent to signing the contract) that varies from the contract changes nothing in the contract
- Believes payment defines the parties to an agreement (referring to plaintiff’s argument that outsourcing doesn’t count towards defendants total volume commitment)
- Describes self as having a strong moral marker for not breaking commitments
- Believes divorce is a moral atrocity
- Has been in a long term marriage
- Has been a long term employee for the same employer
- Describes self as being more socially conservative
- Analytical personality
- Has linguistic training
- Has technical writing training
- Has accounting experience
- Has legal training

**Litigation Tolerant**

Certain jurors are more likely to find a lawsuit to be acceptable. Their characteristics are below.

- Would be willing to sue if felt negligence had occurred against him
- Has sued in the past
- Prior workers compensation claimant
- Staunch labor union member/supporter
- Welfare recipient
- Blue collar worker
- Status inconsistent (Over educated *and* underemployed but not by choice)
- Lower income
- Lesser educated

**Jury Expert**

The qualities of these jurors mark them as likely leaders on the jury. (This list also intentionally mirrors the list of jury experts the plaintiff shares in common with the defense.) These jurors may automatically be more outspoken in deliberations because they believe they have a baseline of understanding issues that others on the jury do not. Their peer jurors may also put pressure on them to take the lead in opining on certain issues relevant to their experience. While certain jury expert characteristics, below, *might* be good for the defense, it is important to be certain their pro-defense attributes outweigh their pro-plaintiff propensities before leaving them on the jury.

- Is experienced in contract negotiation, administration, and/or enforcement
- Has hired a vendor to provide services
- Has been a vendor for client companies
- Is experienced in marital or relationship counseling

2. **Craft Oral *Voir Dire* Questions**

§x:xx *Uncover Key Attitudes Using Lisko’s Triple Layer Structure*

The defense should follow the same Triple-Layer Structure for formulating questions as the plaintiff. *See §x:xx.* The triple-layer structure combines group and individual
questions to achieve two important goals. First, the group-individual combination ensures you collect everyone’s general response to the attitudinal question. Second, the group-individual combination allows the venire to feel engaged given the variety of approaches to questioning.

The following questions aim to identify key attitudes contained within your high risk profile (§x:xx). You will typically unearth many (but not all) risky life experiences and demographics: from listening to jurors’ rationales for their attitudes, by observing certain qualities on jurors, or by reviewing basic information the court provides you immediately preceding jury selection. The questions below represent the maximum you could optimally cover in a shorter time limit.

As the defendant, you have the luxury of (hopefully) knowing a fair amount about prospective jurors’ biases once plaintiff’s counsel sits down. The sample voir dire below must be viewed flexibly in case one of those areas has been adequately voir dired before you even stand up to speak with jurors. Do not repeat territory that has already been adequately explored. Jurors are likely to question your listening skills.

§x:xx Defendant’s Ten-Minute Oral Voir Dire -- Breach of Contract

Litigation Tolerant

Layer Two: (Group Bias Question)

I’d like to start by talking with you about lawsuits in general. I want to pose two scenarios here. Some people believe the system of using lawsuits in a business dispute between two businesses is critical. Others believe this litigation system is out of control and is not so necessary.

How many of you tend to believe the system of using lawsuits to solve disputes between two businesses is critical?

How many of you believe this system is out of control and is not so necessary?

[Note how the Lisko Method is applied here and in the following sets of questions: Above, in Layer Two, you posed the pro-defendant option last. Below, in Layer Three, you use that question as a means to smoothly follow up with pro-]
defense jurors and allow these individuals to voice your themes to the panel. See generally §x:xx.

**Layer Three: (Individual Thematic Question)**

Ms. Jefferson, you raised your hand that you thought this system is not so necessary. Can you tell me a little about your feelings?

Mr. Adams, what are your thoughts?

**Contract Relaxed in Making Exceptions**

**Layer One: (Warm-Up Question)**

Now, you all know from the judge’s brief description of this case that we’re here over a dispute involving a contract. How many of you have entered a contract for either personal or professional reasons in the past?

Okay, for those of you who raised your hands, how many of you were in a position where someone connected to the contract – either you or someone else – wanted to make an exception to the contract?

Mr. Smith, can you tell me whether or not the exception in your case was granted? Why or why not?

**Layer Two: (Group Bias Question)**

Now let me ask the group a question. Let’s assume the contract is for providing some kind of service in business. Some people feel that once you sign a contract, that’s it. The parties should follow the contract and make no exceptions. Others feel the contract serves as a good guidepost but that it is fine to make exceptions to it.

How many of you would agree with the first option, that exceptions shouldn’t be made to a written contract?

How many of you tend to agree with the second option, that making exceptions to a contract is fine?

**Layer Three: (Individual Thematic Question)**

Mr. Johnson, you raised your hand that you thought exceptions shouldn’t be made to the contract. Why do you feel that way?

Ms. Zion, what are your thoughts?
**CONTRACT RIGID IN POST-EXCEPTION PHASE**

*Layer One: (Warm-Up Question)*

Let’s move to another issue. I’m sure we’re all familiar with the existence of written contracts in business. Some companies place more emphasis on the contract terms than others. Some feel contracts should be adhered to pretty strictly. Others tend to let the evolving relationship between the parties define the parties’ agreement even in light of an existing written contract.

Ms. Jones, I see you work in business. What type of business person do you think you’d be – one who places more emphasis on the contract terms or one who lets the evolving relationship between the parties define the agreement?

Why do you think so?

*Layer Two: (Group Bias Question)*

Now let me ask the group and, this time, I’ll repeat the two options. Some people feel it makes more sense for companies to adhere strictly to the written contract terms between the parties. Others tend to think it is better that the evolving relationship between the parties defines the agreement.

How many of you would agree with the first option, that it is better that it makes more sense for companies to adhere strictly to the written contract terms between the parties?

How many of you tend to agree with the second option, that it is better that the evolving relationship between the parties defines the agreement?

*Layer Three: (Individual Thematic Question)*

Ms. Turtlebaum, why do you think it makes more sense for the companies to let the evolving relationship between the parties define the agreement?

§x:xx Oral Voir Dire Questions for Defendant to Avoid

Just to complicate the formula, the fact that a quality appears on your juror profile does not automatically mean it should be translated into a question. First consider whether posing the question helps you or the plaintiff more. Questions that help the plaintiff more include ones that illuminate a “strikable minority” for them. A question like that
identifies too many prospective jurors with a given bad attitude for you to strike. For example, consider the following popular defense question that can actually work against you as the defendant.

**Question:** How many of you think people need to take more responsibility for their actions?

**Pitfall:** Most prospective jurors raise their hands in agreement with this statement. You can never strike all of them. Those who don’t raise their hands and think we have a good enough balance (or need more litigation) are going to be in the pro-defense minority and will therefore be strikable by the other side. It is far better to let these jurors hide on your jury than be exposed to the other side.

**Question:** How many of you tend to read a contract word-for-word rather than just skimming for meaning?

**Pitfall:** Our research finds that jurors who read contracts word-for-word tend to start out favoring the defense in breach of contract cases. It may be comforting to know you have some jurors like that for your case. However, there exist few jurors who will say they read contract word-for-word. The fewer the jurors, the easier it is for the plaintiff to reach that small group with its peremptory challenges. It is far better to let those jurors hide and luck out into having them survive jury selection than it is to “out” them for target practice from the plaintiff’s table.

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In post-trial interviews, jurors most frequently complain that attorneys put on too many witnesses who say the same thing. At a minimum, jurors often forget who some of the witnesses are. At its worst, jurors feel insulted or even angry that counsel wastes their time with unnecessary repetition.


