JURY SELECTION IN A CRIMINAL CASE

NYSBA YOUNG LAWYER'S SECTION - TRIAL ACADEMY

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1. *Statutes that control jury selection:*
   CPL 270.05 - 270.30 FELONIES
   CPL 360.05 - 360.35 MISDEMEANORS
   (procedures are the same except for number of peremptory challenges)

2. *Challenges for Cause - unlimited. CPL 270.20 - must have a reason.*

   Peremptory Challenge - no reason CPL 270.25 - limited number A felony 20; B or C felony 15; all other felonies 10; Misdemeanors 3.

3. *BATSON 476 US 79 AND KERN 75 NY2D. 638 (1990)*

   BATSON - PROSECUTION CAN NOT EXCLUDE JURORS IN A DISCRIMINATORY MANOR BASED UPON RACE, ETHNICITY, GENDER AND RELIGION.

   KERN - APPLIED BATSON TO DEFENSE COUNSEL

4. *New York has a three step process to determine whether a Batson violation has occurred.*

   (A) *Movant has the burden to make a prima facie showing that adversary has exercised peremptory challenges against a certain prospective juror(s) based solely on their membership in a cognizable class.*

   (B) *If Court rules that a prima facie showing of the use of peremptory challenges in a discriminatory manner has been established, then the burden shifts to the non-moving party to proffer "neutral" reasons for the exercise of the peremptory challenge(s) in question.*

   (C) *If race neutral reasons are offered, then the movant must argue that the reasons offered are pretextual. Then Court must decide if the proffered reason were pretextual and that the challenge(s) were exercised in a discriminatory manner.*

   (D) *Remedy is to seat the improperly challenged jury.*

   (E) *Important to keep notes as to race, gender ethnicity so that a valid record can be made.*

   (F) *In your materials is Point II of a brief I filed on a Batson issue.*

5. *Judge controls voir dire in a criminal case. All judges have there own "rules" and procedures.*
    1. *Some ask lots of questions.*
    2. *Some ask few questions.*
    3. *Some use questionnaires.*
    4. *Some limit time/some do not.*
       See cases in materials. Limits must be "reasonable" Steward - Jean restrictions imposed must afford defense counsel a fair opportunity to question prospective jurors about relevant matters.
    5. *Some fill box each round/ some only replace excused jurors.*

6. *Voir dire is your first and only opportunity to have a conversation with a prospective jurors.*

7. *Not cross examination. You want the jurors to speak and express their opinions so you can get an idea of how they think about the important issues in your case. Example: Can you be fair? Yes - what do you know about your self that makes you say that? Would you want someone with your state of mind to be a juror on a friend's case - Why?*

8. *Listen to questions by Judge and ADA. More importantly listen to answers.*

9. *Develop a relationship with jurors. Command courtroom.*

10. Did you ever have an experience with a law enforcement officer? Tell us about it? How did you feel about that experience? (Can use any type of person and situation that fits case)

11. Federal criminal jury selection totally different.

Rule 24 of the Federal Rules of Criminal Procedure. Normally voir dire is conducted in front of a Magistrate Judge. Judge asks all questions. Suggested questions can be submitted. Rarely will Judge permit attorneys to ask questions.

Government 6 Defense 10. Exercised alternatively.

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VOIR DIRE AND JURY SELECTION

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LOOKING FOR A DIFFERENT, MORE EFFECTIVE WAY OF CHOOSING A JURY

For more than twenty years, I have been privileged to teach public defenders all over the country. And it pains me to conclude that when it comes to jury selection, almost all of us are doing a lousy job.

What passes for good voir dire is often glibness and a personal style that is comfortable with talking to strangers. The lawyer looks good and feels good but ends up knowing very little that is useful about the jurors.

More typically, voir dire is awkward, and consists of bland questions that tell us virtually nothing about how receptive a juror will be to our theory of defense, or whether the juror harbors some prejudice or belief that will make him deadly to our client.

We ask lots of leading questions about reasonable doubt, or presumption of innocence, or juror unanimity, or self defense, or witness truth-telling. Then when a juror responds positively to one of these questions, we convince ourselves that we have successfully "educated" the juror about our defense or about a principle of law. In reality, the juror is just giving us what she knows we want to hear, and we don't know anything about her.

Because the questions we are comfortable with asking elicit responses that don't help us evaluate the juror, we fall back on stereotypes (race, gender, age, ethnicity, class, employment, hobbies, reading material) to decide which jurors to keep and which to challenge. Or even worse, we go with our "gut feeling" about whether we like the juror or the juror likes us.

And then we are surprised when what seemed like a good jury convicts our client.

This short treatise, and the seminar it is meant to supplement, are a first effort at finding a more effective way of selecting jurors. It draws on:

- Scientific research done over the last decade or two about juror behavior and attitudes.

- Excellent work done by defenders in Colorado in devising a new and very effective method for voir dire in both capital and non-capital cases.

- Some very creative work done by defense lawyers all over the country.

- My own observations of too many trial transcripts from too many jurisdictions, in which good lawyers delude themselves into thinking that a comfortable voir dire has been an effective voir dire.

I. SOME BASIC THINGS ABOUT VOIR DIRE – WHY JURY SELECTION IS HARD. WHY WE FAIL.

A. It is suicidal to just "take the first twelve." It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity, or class.

Every study ever done of jurors and their behavior tells us several things:

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

For this reason it is absolutely essential that we do a thorough and meaningful voir dire – not to convince jurors to abandon their biases, but to find out what those biases are and get rid of the jurors who hold them.

The lawyer who waives voir dire, or just asks some perfunctory, meaningless questions, or relies on stereotypes or "gut feelings" to choose jurors is not doing his or her job.

B. Traditional voir dire is structured in a way that makes it very hard to disclose a juror's preconceived notions

The very nature of jury selection forces potential jurors into an artificial setting that is itself an impediment to obtaining honest and meaningful answers to typical voir dire questions. Here is how the voir dire process usually looks from the jurors' perspective:

1. When asked questions about the criminal justice system, prospective jurors know what

the “right,” or expected answer is. Sometimes they know this from watching television. Sometimes the trial judge has given them preliminary instructions that contain the “right” answers to voir dire questions. Sometimes the questions are couched in terms of “can you follow the judge’s instructions,” which tells the jurors that answering “no” means that they are defying the judge. Jurors will almost always give the “right” answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers.

EX: Q: The judge has told you that my client has a right to testify if he wishes and a right not to testify if he so wishes. Can you follow those instructions and not hold it against my client if he chooses not to testify?

A: Yes.

While it would be nice to believe that the juror’s answer is true, there is just no way of knowing. The judge has already told the juror what the “correct” answer is, and the way we phrased our question has reinforced that knowledge. All the juror’s answer tells us is that he or she knows what we want to hear.

2. Jurors view the judge as a very powerful authority figure. If the judge suggests the answer she would like to hear, most jurors will give that answer.

EX: Q: Despite your belief that anyone who doesn’t testify must be hiding something, can you follow the judge’s instructions and not take any negative inferences if the defendant does not take the stand?

A: Yes.

The juror may be trying his best to be honest, but does anyone really believe this answer?

3. When asked questions about opinions they might be embarrassed to reveal in public (such as questions about racial bias or sex), jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer – even if that answer is false.

4. When asked about how they would behave in future situations, jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong.

EX: Q: If you are chosen for this jury, and after taking a first vote you find that the vote is 11-1 and you are the lone holdout, would you change your vote simply because the others all agree that you are wrong?

A: No.

We all know that this juror’s response is not a lie – the juror may actually believe that he

or she would be able to hold out (or at least would like to believe it). On the other hand, we also know there is nothing in the juror's response that should make us believe he or she actually has the courage to hold out as a minority of one.

C. The judge usually doesn't make it any easier

1. Judges frequently restrict the time for voir dire. Often this is a result of cynicism – their experience tells them that most voir dire is meaningless, so why not cut it short and get on with the trial?

2. Judges almost always want to prevent defense counsel from using voir dire as a means of indoctrinating jurors about the facts of the case or about their theory of defense. And the law says they are allowed to limit us this way.

D. And we often engage in self-defeating behavior by choosing comfort and safety over effectiveness

1. Voir dire is the only place in the trial where we have virtually no control over what happens. Jurors can say anything in response to our questions. We are afraid of "bad" answers to voir dire questions that might taint the rest of the pool or expose weaknesses in our case. We are afraid of the judge cutting us off and making us look bad in front of the jury. We are afraid of saying something that might alienate a juror or even the entire pool of jurors.

2. If a juror gives a "bad" answer we rush to correct or rehabilitate him to make sure the rest of the panel is not infected by the bias.

3. As a result of these fears, we often ask bland meaningless questions that we know the judge will allow and that we know the jurors will give bland, non-threatening answers to.

4. We then fall back on stereotypes of race, age, gender, ethnicity, employment, education, and class to decide who to challenge. Or worse, we persuade ourselves that our "gut feelings" about whether we like a juror or whether the juror likes us are an intelligent basis for exercising our challenges.

Given all these obstacles to effective jury selection, how can we start figuring out how to do it better? My suggestion is to start with some of the things social scientists and students of human behavior have taught us about jurors.

II. THE PRIME DIRECTIVE: VOIR DIRE'S MOST IMPORTANT BEHAVIORAL PRINCIPLE

It is impossible to "educate" or talk a complete stranger out of a strongly held belief in the time available for voir dire.

Think about this for a moment. Everyone in the courtroom tells the juror what the "right" answers are to voir dire questions. Everyone tries hard to lead the juror into giving the "right" answer. And if the juror is honest enough to admit to a bias or preconceived notion about the case, everyone tries to rehabilitate him until he says he can follow the correct path (the judge's instructions, the Constitution, the law). And if we are honest with ourselves, everyone knows this is pure garbage.

Assume a juror says that she would give police testimony more weight than civilian testimony. The judge or a lawyer then "rehabilitates" her by getting her to say she can follow instructions and give testimony equal weight. When this happens, even an honest juror will deliberate, convince herself that she is truly weighing all testimony, and then reach the conclusion that the police were telling the truth. The initial bias, which the juror acknowledged and tried hard to tell us about, determines the outcome every time. It is part of the juror's personality, a product of her upbringing, education, and daily life. And no matter how good a lawyer you are, you can't talk her out of it.

Imagine, though, what would happen if we gave up on the idea of "educating" the juror, or "rehabilitating" her – If we admitted to ourselves that it is impossible to get that juror beyond her bias. We would then be able to completely refocus the goal of our voir dire:

III. THE ONLY PURPOSE OF VOIR DIRE

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

When a juror tells us something bad, there are only two things we should do:

- Believe them
- Get rid of them

This leads us to the most important revision we must make in our approach to voir dire:

We Are Not Selecting Jurors – We Are De-Selecting Jurors

The purpose of voir dire is not to "establish a rapport," or "educate them about our defense," or "enlighten them about the presumption of innocence or reasonable doubt." It is not to figure out whether we like them or they like us. To repeat:

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

Once we accept that the only purpose of voir dire is to get rid of impaired jurors, we have a clear path to figuring out what questions to ask and how to ask them. The only reason to ask a question on voir dire is to give the juror a chance to reveal a reason for us to challenge him. These reasons fall into two categories:

- The juror is unable or unwilling to accept our theory of defense in this case.
- The juror has some bias that impairs his or her ability to sit on any criminal case.

This leads us to two more principles of human behavior that will guide us in asking the right questions on voir dire:

The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.

The more removed a question is from a person's normal, everyday experience, the more likely the person will give an aspirational answer rather than an honest one. Factual questions about personal experiences get factual answers. Theoretical questions about how they will behave in hypothetical courtroom situations get aspirational answers.

A. ***Stop talking and listen*** – the goal of voir dire is to get the juror talking and to listen to his or her answers. You should not be doing most of the talking. You should start by asking open-ended, non-leading questions. Leading questions will get the juror to verbally agree with you but won't let you learn anything about the juror. Voir dire is not cross-examination.

B. Let the jurors do most of the talking. Your job is to listen to them.

C. ***You can't do the same voir dire in every case***

1. Your voir dire must be tailored to your factual theory of defense in each individual case.

2. You must devise questions that will help you understand how each juror will respond to your theory of defense. This means asking questions about how the juror has responded in the

past when faced with an analogous situation.

D. Our tactics should not be aimed at asking the jurors how they would behave if certain situations come up during the trial or during deliberations. That kind of question only gets aspirational answers (how the juror hopes he would behave) or false answers (how the juror would like us to think he would behave). They tell us nothing about how the juror will actually behave. They also invite the judge to shut us down.

E. Out tactics should be aimed at asking jurors about how they behaved in the past when faced with situations analogous to the situation we are dealing with at trial.

1. It is essential that our questions not be about the same situation the juror is going to be considering at trial or about a crime or criminal justice situation – such questions only get aspirational answers.

2. Instead the question should be about an analogous, non-law related situation the juror was actually in. And we must be careful to ask about events that are really analogous to the issues we are interested in learning about.

EX: Your theory of defense is that the police planted evidence to frame your client because the investigating officer is a racist and your client is black. (Remember OJ?)

a. Asking jurors, "are you a racist?" or "do you think it is possible that the police would frame someone because of his race?" will get you nowhere. Most jurors will say "I am not a racist," and "Of course it's possible the police are lying. Anything is possible. I will keep an open mind." And you will have no way of knowing what they are actually thinking.

b. You have a much better chance of learning something useful about the juror by asking an analogous question about the juror's experience with racial bias.

EX: Asking the juror to, "tell us about the most serious incident you ever saw where someone was treated badly because of their race" will help you learn a lot about whether that juror is willing to believe your theory of defense. If the juror tells you about an incident, you will be able to gauge her response and decide how a similar response would affect her view of your case. If the juror says she has never seen such an incident, you have also learned a lot about her view of race.

F. You must consider and treat every prospective juror as a unique individual. It is your job on voir dire to find out about that unique person.

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

1. What do you really need a juror to believe or understand in order to win the case?

2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need a juror to understand about your case or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.

2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen, such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.

2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.

3. Situations they know of where an adult convinced a kid to do something she probably knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they or someone close to them had any personal experience with sexual abuse.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for

seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. "That you or someone close to you saw"
2. "That happened to you or someone you know"
3. "That you or a friend or relative experienced"

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. "Tell us about the worst situation you've ever seen where someone involved in a divorce went way over the line in trying to hurt their ex."

2. "Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn't have done."

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren't offended.

A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.

B. Explain to them why you have to ask about the subject.

C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror's willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:

1. Keep your story short.

2. Make sure your story is exactly relevant to the point of the voir dire.
3. Keep your story short.

D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don't make this stuff up in the middle of voir dire.

E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, "how did that make you feel."

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

1. "Tell us about the most serious incident you ever saw where someone was treated badly because of their race."

2. "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. "Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk."

2. "Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic."

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as

identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.
- If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

A. How To "Run to the Bummer"

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that . . . ."

   a. Use the juror's exact language
   b. Don't paraphrase
   c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

   "Tell me more about that"
   "What experiences have you had that make you believe that?"
   "Can you explain that a little more?"

   No leading questions at this point.

3. Normalize the impairment

   a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
   b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

   a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (i.e., what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”

POINT II

THE TRIAL COURT ERRED WHEN IT ACCEPTED THE PROSECUTOR'S PRETEXTUAL REASONS FOR CHALLENGING TWO AFRICAN-AMERICAN FEMALE JURY PANELISTS AND THE ERROR VIOLATED THE EQUAL PROTECTION CLAUSE AND DEPRIVED THE APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

During the first round of jury selection, defense counsel challenged the prosecutor's use of peremptory challenges and claimed that he had engaged in a pattern of striking African-American female jury panelists. In support of this challenge, he noted that of the six peremptory challenges the prosecutor had exercised during that round, three were directed at the only three African-American females who had been questioned individually. After finding that a *prima facie* case of racial discrimination against African-American females had been established, the trial court directed the prosecutor to provide race-neutral explanations for his challenges. After hearing the prosecutor's explanations, the trial court ruled that one of his explanations was pretextual and ordered that juror seated. However, the trial court accepted the prosecutor's explanations for striking the other two jury panelists and ruled that those challenges would be permitted to stand. This ruling was erroneous and violated the Equal Protection Clause and the appellant's right to a fair trial. The appellant's conviction should therefore be reversed and a new trial ordered.

It is well settled that a prosecutor's exercise of peremptory challenges based on race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as Section 11 of article I of the New York State Constitution. *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Bolling*, 79 N.Y.2d 317 (1992). The rule prohibiting such discrimination is necessary not only to protect the equal protection right of the defendant, but also to protect the interests of the excluded jurors and the community at large. *People v. Kern*, 75 N.Y.2d 638 (1990). As the Supreme Court made clear, "[r]acial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial .... A person's race simply is unrelated to his fitness as a juror". *Batson, supra* at 87. *See also People v. Allen*, 86 N.Y.2d 101, 108 (1995) (noting that jury service is "a fundamental means of participating in government").

When a *Batson* challenge is made, the moving party has the initial burden of establishing that the other party is using peremptory challenges to remove a cognizable class of jurors, and that facts and other relevant circumstances support a finding that the use of such challenges has excluded potential jurors because of their race. *Id.* at 96; *People v. Childress*, 81 N.Y.2d 263, 266 (1993). Proof sufficient to

make a *prima facie* showing of discrimination shifts the burden of going forward to the other party, triggering the second step of the *Batson* protocol which requires the proponent of the strike to provide explanations that are not related to race. *People v. Hernandez*, 75 N.Y.2d 350, 355 (1990). At this stage, the explanation offered by the proponent of the strike need not rise to the level needed to sustain a cause challenge. *People v. Allen*, 86 N.Y.2d at 109. Indeed, the explanation need not be persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). In short, at the second step of the *Batson* protocol, the proponent of the strike satisfies his duty to provide a race-neutral explanation by providing reasons that are facially permissible. *People v. Smocum*, 99 N.Y.2d 418, 422 (2003). Finally, at the third step of the *Batson* protocol, the trial court must determine whether the explanations offered are pretextual or legitimate. *People v. Payne*, 88 N.Y.2d 172, 181 (1996).

Because a finding of pretext depends heavily on a trial court's observations of demeanor and other intangible factors, a reviewing court should ordinarily accord great deference to such a finding. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). However, as this Court has stated, "It would not, in our view, be acceptable for this Court to invoke the rule providing for deference to the trial court in matters of credibility in order to rubber stamp every determination relating to the legitimacy of a peremptory challenge. Such an approach would, in the long run, make

claims of *Batson* error impervious to appellate review. *People v. Richie*, 217 A.D.2d 84, 88 (2d Dept. 1995). Accordingly, this Court has not hesitated to overturn a trial court's third-step pretext or legitimacy finding when it is not supported by the record. *People v. Bell*, 126 A.D.3d 718, 719 (2d Dept. 2015); *People v. Gooding*, 10 A.D.3d 454, 455 (2d Dept. 2004); *People v. Pierrot*, 289 A.D.2d 511, 512 (2d Dept. 2001); *People v. Ying*, 236 A.D.2d 630, 631 (2d Dept. 1997).

In determining whether an explanation for a peremptory challenge is pretextual or legitimate, a trial court may consider whether the proponent of the strike has challenged members of a protected group who, because of their background or experience, might otherwise be expected to be favorably disposed to the party exercising such challenges. *People v. Scott*, 70 N.Y.2d 420, 425 (1987). The trial court should also consider whether the particular reason for the challenge was applied to only one group of prospective jurors and not to others. *People v. Richie*, 217 A.D.2d at 89. Based on the foregoing standards, the trial court erred when it determined that the prosecutor's explanations for striking panelists Honore and Robinson were non-pretextual.

When directed to explain why he had challenged Honore, the prosecutor initially stated that he believed that she "didn't seem like she wants to be here" and

that when another panelist, Ms. Young[5], had been excused because she couldn't provide her assurance that she could be fair, Honore supposedly whispered to another panelist "that's a good way to get off jury service" (87). The prosecutor added that he was not satisfied with how Honore had analyzed his hypothetical question regarding constructive possession, the same explanation he subsequently offered for striking Robinson (88). These explanations were clearly pretextual.

In the first place, until the prosecutor mentioned the comment that Honore supposedly whispered, there was no record that such a comment had ever occurred. Moreover, even if such a comment had been uttered, while it may have indicated Honore's opinion about fellow panelist Young, it certainly did not indicate that Honore didn't want to serve as a juror, as the prosecutor asserted. Nor can it be concluded that the prosecutor's alleged concerns about Honore's and Robinson's responses to his hypothetical questions regarding constructive possession were legitimate. The record discloses that after the prosecutor placed a pen on a table, he questioned Honore as follows:

> MR. SELKOWE: Honor. Ms. Honor, whose pen would you say that is?
>
> PROSPECTIVE JUROR: I can't tell because it's on the

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[5]It appears that the panelist referred to as Ms. Young was actually named Chi Ying Yung (13).

> table. It could be anyone else to be sitting there.
>
> MR. SELKOWE: Did you just see me with it though?
>
> PROSPECTIVE JUROR: I mean, yeah, earlier.
>
> MR. SELKOWE: Okay. But now that it sits there do you – do you still say I don't know whose pen it could be?
>
> PROSPECTIVE JUROR: Because, I mean, it could be yours. It could be somebody else, you know.

(55).

The prosecutor's hypothetical question regarding the pen on the table was fairly misleading if it was actually calculated to ferret out jurors who couldn't accept the principle of constructive possession. The question "whose pen would you say that is" may have been understood by Honore as a question as to whether or not the prosecutor owned the pen, not whether he had possessed it. As such, her answers could not be construed as a rejection of the principle of constructive possession.

The same is true of Robinson's responses. The record reflects that when the prosecutor questioned Robinson about another panelist's purse that was lying on the floor, the following exchange occurred:

> MR. SELKOWE: Okay. Ms. – Ms. Robinson, do you feel the same way or do you think that's her purse because of --
>
> PROSPECTIVE JUROR: Unless she says the purse belongs to her, then I would believe it's her purse, but if

> she just get up it could be the next person who put the purse there.
>
> MR. SELKOWE: But there is no next person. The seat is empty. She got up and ran out. Whose purse is this? You would say it's the lady who just ran out; right?
>
> PROSPECTIVE JUROR: I would say it might be the lady who just ran out.
>
> MR. SELKOWE: But you couldn't say for sure?
>
> PROSPECTIVE JUROR: No.

(61).

Like the exchange with Honore, in questioning Robinson about a purse left on the floor, the prosecutor did not specify whether he was asking if the purse to which he was referring was owned or possessed by the other juror, a rather significant difference. In fact, in the hypothetical questions he posed to Robinson, the prosecutor did not indicate whether the juror who had left the purse on the floor was earlier seen holding it, an important omission. In any event, given the limits of the prosecutor's questions, it could not be concluded that Robinson's answers suggested that she was incapable of accepting the principle of constructive possession.

Moreover, the prosecutor's alleged concern about Honore's and Robinson's answers to his hypothetical questions were not uniformly applied. The record discloses that the prosecutor posed the same hypothetical question regarding

his pen to panelist Nataliya Voicu, a white female. Voicu initially agreed that the pen was his, but then qualified her answer and stated, "Well, you could have borrowed it from somebody else. It could have been somebody .... you could have borrowed it from somebody else. I don't know" (58-59). Similarly, when the prosecutor asked panelist Todd Cinetti, a white male, whether a purse that another panelist had placed on the floor belonged to that panelist even though she was not holding it, Cinetti responded, "A pen and a pocketbook and a house, you know? Bad example, you know what I mean? Pen. All right. It's your pen. You have it in your hand. Okay. Who cares whose it is? You had it. It's your pen for now. Right. You put it down, it's not your pen anymore" (59).

In light of the prosecutor's supposed concern with the ability of African-American panelists Honore's and Robinson's ability to accept the principle of constructive possession, it would have been natural to expect that he would have had the same concern with white panelists Voicu and Cinetti, both of whom expressed the same reservations as Honore and Robinson in response to his hypothetical questions. But the record reflects that the prosecutor did not exercise peremptory challenges against Voicu and Cinetti and both were selected and served as jurors (82). Given the prosecutor's reasons for striking Honore and Robinson, and the fact that he should have had an equal or even stronger reason for striking Voicu and Cinetti, it is fair to

conclude that his explanations for striking Honore and Robinson were pretextual and that the trial court erred when it accepted his explanations as legitimate. *People v.Bell*, 126 A.D.3d at 719; *People v. Dalhouse*, 240 A.D.2d 420, 421 (2d Dept. 1997); *People v. Stiff*, 206 A.D.2d 235, 241 (2d Dept. 1994).

In sum, a thorough review of the record discloses that the prosecutor's explanations for exercising peremptory challenges against African-American female jury panelists Honore and Robinson were just as pretextual as his explanation for striking African-American juror Simon. The trial court's acceptance of those explanations violated the appellant's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 11 of article I of the New York State Constitution, and deprived him of his right to a fair trial. The appellant's conviction should therefore be reversed and a new trial ordered.

Jury *Voir Dire* in Criminal Cases

By Phylis Skloot Bamberger

Voir dire questioning is a process for eliciting, within legally mandated boundaries, information relevant to prospective jurors' qualifications for service. New York law allows lawyers to question each prospective juror about his or her qualifications for service on a particular trial. It is, after all, the well-prepared lawyer who best knows the issues in a case and who is able to fashion an inquiry that is most likely to reveal a potential juror's bias or inability to meet the obligations of judging the evidence and applying the law.

The importance of the *voir dire* in criminal trials has turned it into a virtual battleground between judge and lawyer. If counsel asks questions that are repetitive, improper in form, or that encourage the prospective juror to form an opinion in the case, counsel will provoke adverse rulings from the judge. A tug of war develops, which breeds distrust, so that the judge may preclude even proper questions. The trial is likely, but unnecessarily, off on the wrong foot. This unfortunate state of affairs can be resolved, however, by re-examining the purpose of *voir dire*.

The Purpose of *Voir Dire*

The New York State Court of Appeals and the United States Supreme Court both have made clear that the *voir dire* is essential to the selection of a fair and impartial jury. The *voir dire* discloses prospective jurors who are unable to fulfill the obligations of a juror or who are not capable of undertaking an impartial evaluation of the evidence and application of the relevant legal rules. Such disclosure leads to excusal of jurors for cause. It also enables counsel to exercise peremptory challenges appropriately.

> *Voir dire* provides a means of discovering actual or implied bias and a firmer basis [than stereotyping] upon which the parties may exercise their peremptory challenges intelligently.[1]

Thus, the *voir dire* is the mechanism for carrying out the due process mandate that the fact-finder be fair.[2]

The Respective Roles of Judge and Lawyer

Criminal Procedure Law § 270.15(1)(c) (CPL) and the case law prescribe the roles of the lawyers and the judge in the conduct of the *voir dire*. The lawyers are given "a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications." The role of the court is to prevent "questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law," and "if necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter."

Thus, counsel's opportunity to examine a prospective juror extends to questions that are relevant to the case and not repetitious of inquiries already made.[3] The *voir dire* is to be used to learn about a prospective juror's qualifications; it is not to be used as a mini-trial, an opportunity to persuade jurors to a litigant's point of view, or as a dress rehearsal of the trial.[4]

The judge's traditional role in the *voir dire* is to set out the relevant legal principles. Further, to prevent irrelevant and repetitious questioning by attorneys, the judge has the discretion to preclude, or limit the scope of, counsel's questioning,[5] and the authority to conduct the

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questioning of the prospective jurors. Indeed, the court may ask each prospective juror to complete a questionnaire covering any "fact relevant to his or her service on the jury."

After identifying the attorneys and the parties, and outlining the nature of the case, the court is required to "put to the members of the panel . . . questions affecting their qualifications to serve as jurors in the action." These questions are asked of the prospective jurors as a group or individually. The court may have the jurors answer by raising their hands or speaking individually. The court may interrupt during attorneys' examination to prevent repetitious and irrelevant questions. When the lawyers have completed their questioning, the court may ask such further questions as it deems proper regarding prospective jurors' qualifications.

The trial judge sets the boundaries of the inquiry. Noting that this is "an area of the law which does not lend itself to the formulation of precise standards," the Court of Appeals has said that the trial judge "has broad discretion to control and restrict the scope of the *voir dire* examination."[6]

Areas for Examination

Both the nature of the case and the characteristics of the jurors determine what information is relevant to selection of a jury and therefore what questions are permissible. In all cases, each prospective juror must be qualified to serve and legally suitable for service. Each juror must be fair and unbiased, able to render an impartial verdict in accord with the evidence and applicable law, and capable of performing the functions required of a juror.[7] Here are some areas for inquiry aimed at establishing jurors' qualifications to serve in criminal trials.

1. *Statutory requirements for jury service.* Judiciary Law § 510 lists the qualifications for service. Jurors must be American citizens and residents of the county to which they have been summoned. They must not be convicted of a felony. They must be at least 18 years old and able to understand and communicate in English.[8]

2. *Statutory requirements to sit on a particular case.* CPL § 270.20(1)(c) lists the social or familial relationships between the prospective juror and trial participants which require that a prospective juror be excused.

3. *Ability to fulfill the duties of a juror.* The duties of a juror include: attending court at the prescribed hours, listening to the evidence, evaluating evidence fairly in accordance with the instructions, deliberating, and making efforts to arrive at a decision. Knowing whether these obligations can be fulfilled requires information about: a prospective juror's physical or mental circumstances and how those circumstances might be accommodated; family or employment obligations that cannot be avoided; economic hardship due to jury service; ability to deliberate with other jurors and to judge the credibility of witnesses;[9] and assurance that the juror's ability to make a decision is not prevented by religious belief or some other tenet.

4. *Personal information about the juror.* CPL § 270.20(1)(a) requires examination of the prospective juror's state of mind to determine if the juror can render an impartial verdict. Among the relevant subjects are marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests. Other areas might be relevant depending on the circumstances and issues in a particular case.

> A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.

5. *Views about issues related to the case and witnesses who may be called to testify.* Here, too, state of mind is important. For example, views concerning police witnesses, child witnesses, witnesses with prior convictions, accomplice witnesses, child abuse issues, scientific evidence (or the absence thereof), eye-witness identification, or evidence of confessions may be relevant to a juror's qualifications. The circumstances of the case may determine other areas of questioning.

6. *Professional expertise.* If a prospective juror has professional expertise about a material issue in a case, the judge must ask if the prospective juror can deliberate without using personal professional knowledge to assess the evidence and without communicating his or her knowledge as if it were evidence to other members of the jury.

A prospective juror who cannot follow the rule not to disclose expert information to other jurors should be excused.[10] The judge must also question a prospective juror who has professional information about whether that juror can decide the case based on the evidence and disregard any opinion held as a result of personal professional information. A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.[11]

7. *Race and ethnic issues.* Questioning prospective jurors about racial or ethnic bias is constitutionally required if counsel so requests and "special circumstances" making the issue part of the case are present. For example, where the defendant was a civil rights worker, examination about racial bias was required.[12] In other cases, a sensitive probe of racial or ethnic issues should be granted if counsel requests it.[13]

8. *Juror's ability to follow applicable legal principles.* Lawyers cannot ask the prospective jurors about their knowledge of principles of law. This has been the rule in New York for over a century.[14] *People v. Boulware* included prospective jurors' attitudes toward the law among areas that could not be the subject of counsel's inquiries:

> Although counsel has a right to inquire as to the qualifications of the veniremen and their prejudices so as to provide a foundation for a challenge for cause or a peremptory challenge, it is well settled that it is simply not the province of counsel to question prospective jurors as to their attitudes or knowledge of matters of law. Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad.[15]

The Court added a wrinkle, however, when it said that it was permissible to ask if a prospective juror would have "any difficulty following the instructions of the court" and whether the juror would obey the court's instructions. Inevitably, questions exploring a juror's ability, or lack thereof, to follow instructions, explore the juror's attitude toward the law. Attitudes that may prevent the prospective juror from following the judge's instructions are relevant to the ability to be fair and unbiased. For example, some prospective jurors in narcotics cases have objected to classification of certain narcotics activities as crimes and the practice of using undercover officers or informers. Or, sometimes a prospective juror objects to the defendant's exercising his right not to testify, believing that an accused should offer an explanation.

Notwithstanding authority disallowing questions about attitude toward the law,[16] some questioning about legal principles is permitted. For example, the Fourth Department has held that it was error to deny the defense attorney the opportunity to question jurors on their ability to follow the *Molineaux* rule;[17] that it is permissible to ask jurors about the legal issue of eyewitness identification;[18] that questions about the burden of proof are proper (by implication);[19] and that it is proper to ask prospective jurors whether their associations with police officers would affect their ability to be fair.[20] The First Department has approved giving the defense the opportunity to ask if the jury could follow the instruction not to draw an adverse inference if the defendant did not testify[21] and has also allowed counsel to inquire about prospective jurors' views of the defendant's absence from the trial.[22] Both the First and Fourth Departments have allowed inquiries as to whether the juror could fairly evaluate the testimony of witnesses who have prior convictions.[23]

Even where questions about a prospective juror's attitude toward the law are not permitted, the trial judge, at the request of counsel, can give instructions on relevant legal principles before or during the *voir dire*.[24] The attorney can then properly ask if the panel members can follow the rule.[25] Such follow-up inquiries may disclose jurors' attitudes toward the law. Recent cases requiring unequivocal statements of impartiality, which include the ability to follow the law, make such a procedure not only proper but advisable.[26]

Questioning That Is Improper

Immaterial Questions

Whether a particular question in a specific case is material or immaterial is determined by the nature of the case and the prospective jurors. What is material in one case might not be so in another case. The First Department has held that open-ended questions about prospective jurors' familiarity with drug trafficking and law enforcement are not permitted, even in drug cases.[27] Nor are open-ended invitations to relate anecdotes and factual information permitted[28] or questions seeking commitments based on hypotheticals.[29] Where an issue was removed from a case or a legal ruling prevented the jury from learning certain information, so that the jurors were not aware of the issue or information, made *voir dire* on those points unnecessary.[30]

Repetitive Questions

The judge determines whether counsel's questions are repetitive based on the questions that have already been asked and the information already elicited.[31]

The judge may interview a prospective juror at any time during the *voir dire* and can use a written questionnaire to gather information. All information disclosed by the judge's questioning is available to counsel. Counsel must take that information into consideration to avoid repetitious questioning. The judge's questions or instructions may be sufficient to justify limiting or precluding questions by counsel.[32] Follow-up questions designed to explore a prospective juror's responses or views will be more successful – both in passing muster with the judge and in supplying information – than questions that elicit answers already given to earlier questions.

Judicial efforts to curb counsel's repetitious questioning have resulted in the imposition of time limits on counsel's *voir dire*. Fifteen minutes for each lawyer has been held appropriate, although the judge may extend the time.[33]

Conclusion

The judge and the lawyers have the same interests in the *voir dire* questioning: to disclose a prospective juror's

bias and partiality, his or her inability to serve because of reasons personal to the juror, or the presence of statutory exclusions. The Court of Appeals has made clear that a prospective juror who cannot unequivocally declare lack of bias must be excused. Trial judges do not want problems based on a juror's hidden bias or inability to fulfill the obligations of a juror, which might result in long interruptions in the trial, substitutions of jurors, and possibly a mistrial. They do not want post-conviction and post-judgment motions or reversals on appeal based on conduct of jurors who should have been excused.

To accomplish the goals of *voir dire* and to persuade the court that a longer than usual time should be allotted for attorney *voir dire*, lawyers can do two things. First, they must be fully prepared with thorough knowledge of the case before jury selection begins. Second, they must frame questions likely to obtain information relevant to the case and to the goals of *voir dire*. Questions designed to obtain new and relevant information are likely to be allowed by the judge. The procedure for eliciting information from prospective jurors can and should be a joint venture between counsel and the judge.

A prospective juror who cannot unequivocally declare lack of bias must be excused.

Judges are well-advised to hold a pre-*voir dire* conference, where well-prepared lawyers can suggest questions to include in the judge's oral or written questions and can argue why their requested questions should be included. At this point there is no limitation based on repetitious questioning or time constraints – relevance is the sole test.

An objection by an adversary to a question's inclusion can be countered with a request for additional discovery in order to strengthen the argument in favor of asking the question. Alternatively, the pre-*voir dire* conference can lead to an agreement between the parties that a particular subject will not be raised at trial. When the judge includes counsel's requested comments or questions in the charge or questions, some of counsel's allotted time can be saved for use in follow-up questioning.

Counsel can also seek the judge's aid in questioning about principles of law. Counsel is prohibited from stating the legal principles in questions or asking jurors about their knowledge of the law. It may not be permissible to ask if a juror agrees with a rule. Counsel can, however, ask the judge to state the relevant legal principle for the jury panel and can then inquire if panel members can follow the law. In response to such questions jurors frequently disclose that they cannot follow the law because they do not agree with the law or cannot understand it.

The importance of the *voir dire* necessarily brings about disputes about how it should be conducted. For example, the time allotted to counsel is often a subject of contention. The use of hypotheticals and references to specific anticipated evidence is subject to adverse judicial rulings. Examination about relevant legal principles is often foreclosed.

Revising the approach to the questioning will enable counsel to ask the questions relevant to uncovering bias or inability to fulfill the function of a juror. Careful preparation is of course the essence of representation, and it is crucial for asking the right questions about the prospective juror's personal lives and beliefs. With careful preparation and well-thought-out questions, the judge and the lawyer can cooperate in exploring bias and each prospective juror's ability to fulfill the role of a sworn juror. ■

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1. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143–44 (1994).

2. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986); *People v. Johnson*, 94 N.Y.2d 600, 610–11, 709 N.Y.S.2d 134 (2000); *People v. Blyden*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982); *People v. Branch*, 46 N.Y.2d 645, 652, 415 N.Y.S.2d 985 (1979); *People v. Boulware*, 29 N.Y.2d 135, 139–40, 324 N.Y.S.2d 30 (1971), *cert. denied*, 405 U.S. 995 (1972).

3. *Boulware*, 29 N.Y.2d at 139–40; *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001); *People v. Porter*, 226 A.D.2d 275, 641 N.Y.S.2d 283 (1st Dep't 1996); *People v. Rampersant*, 182 A.D.2d 373, 581 N.Y.S.2d 784 (1st Dep't 1992).

4. *People v. Corbett*, 68 A.D.2d 772, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980).

5. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118 (4th Dep't), *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 10 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003) (reasonable limits imposed on questions concerning eye-witness identification); *People v. Diaz*, 258 A.D.2d 356, 685 N.Y.S.2d 667 (1st Dep't), *leave denied*, 93 N.Y.2d 969, 695 N.Y.S.2d 55 (1999) (precluded questions about evidence that the prosecutor had not yet decided to use); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998) (curtailed questions about the defendant's right not to testify); *People v. Rodriguez*, 240 A.D.2d 683, 659 N.Y.S.2d 495 (2d Dep't), *leave denied*, 90 N.Y.2d 909, 663 N.Y.S.2d 521 (1997) (precluded questions about self defense).

6. *Boulware*, 29 N.Y.2d at 139–40; *see Carter*, 285 A.D.2d 384; *Byrd*, 284 A.D.2d 201.

7. CPL §§ 270.15(1), 270.20(1)(b).

8. Persons who have received a certificate of Good Conduct or a Certificate of Relief from Civil Disabilities that includes jury service are qualified to serve.

9. *People v. Mendoza*, 191 A.D.2d 648, 595 N.Y.S.2d 113 (2d Dep't), *leave denied*, 81 N.Y.2d 1017, 600 N.Y.S.2d 205 (1993).

10. *People v. Maragh*, 94 N.Y.2d 569, 708 N.Y.S.2d 44 (2000).

11. *People v. Arnold*, 96 N.Y.2d 358, 365–66, 729 N.Y.S.2d 51 (2001).

12. *Ham v. S.C.*, 409 U.S. 524 (1973).

13. *People v. Rubicco*, 34 N.Y.2d 841, 359 N.Y.S.2d 62 (1974) (denial of a request by an Italian defendant to question about ethnic prejudice was an error in the exercise of discretion); *People v. Blyden*, 79 A.D.2d 192, 436 N.Y.S.2d 492 (4th Dep't 1981), *rev'd*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982) (where defendant, victim and witnesses were all African American, it was error not to excuse a prospective juror who did not state he would be fair despite his adverse view of minorities).

14. *People v. Conklin*, 175 N.Y. 333, 341, 67 N.E. 624 (1903).

15. *Boulware*, 29 N.Y.2d at 141 (internal marks and citations omitted).

16. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118, *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 9 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003); *People v. Coleman*, 262 A.D.2d 219, 692 N.Y.S.2d 352 (1st Dep't), *leave denied*, 94 N.Y.2d 798, 700 N.Y.S.2d 431 (1999); *People v. Swift*, 260 A.D.2d 157, 687 N.Y.S.2d 363 (1st Dep't), *leave denied*, 93 N.Y.2d 930, 693 N.Y.S.2d 513 (1999). *See also People v. Glover*, 206 A.D.2d 826, 616 N.Y.S.2d 128 (4th Dep't), *leave denied*, 84 N.Y.2d 935, 621 N.Y.S.2d 532 (table), (1994) (counsel cannot ask about the juror's understanding of the presumption of innocence); *People v. Corbett*, 68 A.D.2d 772, 778–79, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980). In 1985, when the Legislature amended CPL § 270.15 to add subsection (1)(c), the Assembly memorandum stated that the amendment was intended to save time and authorized "the Court *not* [to] permit . . . questions relating to a juror's knowledge of or attitude regarding rules of law such as the presumption of innocence, burden of proof, reasonable doubt, etc" (emphasis added). The Practice Commentary to CPL § 270.15 states that the statute was intended to codify the case law. Preiser, Practice Commentary, McKinney's Cons. Laws of NY Book 11A, Criminal Procedure Law § 270.15 at 275–76 (2002).

17. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (4th Dep't 2005).

18. *Martinez*, 298 A.D.2d 897.

19. *People v. Horning*, 284 A.D.2d 916, 728 N.Y.S.2d 319 (4th Dep't 2001), *leave denied*, 97 N.Y.2d 705, 739 N.Y.S.2d 106 (2002).

20. *People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855, 661 N.Y.S.2d 181 (1997).

21. *People v. Maldonado*, 271 A.D.2d 328, 706 N.Y.S.2d 876 (1st Dep't), *leave denied*, 95 N.Y.2d 867, 715 N.Y.S.2d 222 (2000); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1996).

22. *People v. Castro*, 295 A.D.2d 219, 743 N.Y.S.2d 714 (1st Dep't), *leave denied*, 98 N.Y.2d 729, 749 N.Y.S.2d 479 (2002).

23. *People v. Evans*, 242 A.D.2d 948, 662 N.Y.S.2d 651 (4th Dep't), *leave denied*, 91 N.Y.2d 834, 667 N.Y.S.2d 687 (1997); *Porter*, 226 A.D.2d 276.

24. The idea of charging on the elements of the crime during the *voir dire* is coming into its own. *See People v. Andrews*, 2006 WL 1544053 (2d Dep't 2006) (pre-*voir dire* instruction on elements of the crime is not error); *People v. Miller*, 30 A.D.3d 444, 815 N.Y.S.2d 827 (2d Dep't 2006) (instruction during *voir dire* about acting in concert is proper. The defense, having consented to the giving of the charge, made no objection to its contents).

25. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (2005).

26. *See People v. Chambers*, 97 N.Y.2d 417, 740 N.Y.S.2d 291 (2002); *People v. Bludson*, 97 N.Y.2d 644, 736 N.Y.S.2d 289 (2001).

27. *People v. Green*, 3 A.D.3d 428, 770 N.Y.S.2d 621 (1st Dep't), *leave denied*, 2 N.Y.3d 800 781 N.Y.S.2d 299 (2004); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001).

28. *Byrd*, 284 A.D.2d 201; *see People v. Salley*, 25 A.D.3d 473, 808 N.Y.S.2d 664 (1st Dep't 2006).

29. *Salley*, 25 A.D.3d 473; *People v. Jackson*, 306 A.D.2d 910, 762 N.Y.S.2d 462 (4th Dep't), *leave denied*, 100 N.Y.2d 595, 766 N.Y.S.2d 170 (2003); *People v. Woolridge*, 272 A.D.2d 242, 707 N.Y.S.2d 634 (1st Dep't 2000); *People v. Davis*, 248 A.D.2d 281, 670 N.Y.S.2d 76 (1st Dep't), *leave denied*, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998).

30. *People v. Stanard*, 42 N.Y.2d 74, 396 N.Y.S.2d 825, *cert. denied*, 434 U.S. 986 (1977).

31. *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001).

32. *People v. Dinkins*, 278 A.D.2d 43, 717 N.Y.S.2d 167 (1st Dep't 2000), *leave denied*, 96 N.Y.2d 828, 729 N.Y.S.2d 448 (2001); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998); *People v. Garrow*, 151 A.D.2d 877, 542 N.Y.S.2d 849 (3d Dep't), *leave denied*, 74 N.Y.2d 948, 550 N.Y.S.2d 282 (1989); *see People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855 (1997), *cert. denied sub nom. Bennett v. N.Y.*, 524 U.S. 918 (1998); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1st Dep't 1996).

33. *People v. Jean*, 75 N.Y.2d 744, 551 N.Y.S.2d 889 (1989).