Jury Selection

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JURY SELECTION/VOIR DIRE OUTLINE

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VOIR DIRE literally translated means, to "See and to Tell." This will be your first and best opportunity to have a direct conversation and open discourse with your prospective jurors. Don't let this opportunity be wasted. Be prepared and confident when addressing your panel. Have an idea of what type of juror you are looking for before you get to court. Knowing the facts of your case is not enough, you also need to know who your client is, where they come from, and the impression they will make when they take the witness stand. The general rule is to select jurors who are similarly situated to your client, if possible. Jurors can be easily convinced of your arguments if they can relate to your clients' condition or circumstance.

SUMMONING THE JURY

It is the duty of the court to impanel a fair and impartial jury. When a jury is needed the court shall summon the panel, a group of citizens from which the jury in a specific trial will be chosen. The court will not sustain a challenge to the jury pool unless there has been a radical departure from the statutory scheme, fraud or bad faith is shown.

PRE-VOIR DIRE

The concept of a pre-voir dire stage of the proceeding, while not statutorily enunciated, is clearly a recognized part of the jury selection process. A determination that a prospective juror should be discharged during pre-voir dire screening because of physical impairments, family obligations, juror convenience, or work commitments is a matter within the sole discretion of the court. Thus, though a defendant has a right to a

particular jury chosen, according to law in whose selection he or she has had a voice, that right is subject to the broad discretion of the trial court to examine and excuse prospective jurors before voir dire and to prevent a time-consuming phase of a jury trial from becoming unduly protracted. Prospective jurors who have been sworn to answer questions truthfully, but have not been individually questioned by counsel or selected and sworn as trial jurors can be dismissed by the trial court sua sponte without the exercise of a challenge. The dismissal of jurors in the pre-voir dire phase of trial does not impinge on either party's rights and is warranted out of concern for the burden on jurors.

Thus, it is error for a court to refuse to swear a panel of prospective jurors prior to the beginning of voir dire and the initial screening of the jurors, regarding their knowledge of the case, familiarity with the parties and attorneys, potential witnesses, and their ability to impartially serve on the jury.

QUALIFICATIONS OF PROSPECTIVE JURORS

In order to qualify as a juror, a person must:

- be a citizen of the United States and a resident of the County;
- be not less than 18 years of age;
- not have been convicted of a felony;
- be able to understand and communicate in the English language.

A deaf prospective juror who communicates in signed English is qualified for jury service. Also, a person with significant visual impairment may also serve on a jury.

WHO MAY BE A JUROR?

All litigants in the courts of the state entitled to a trial by jury must have the right to a jury selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes. All eligible citizens must have the opportunity to serve on juries in the courts of the state and will have an obligation to serve when summoned for that purpose unless excused.

The Commissioner of Jurors must cause the names of prospective jurors to be selected at random from the voter registration lists, as well as other available lists of the residents of the county as the Chief Administrator of the Courts must specify. Such lists include utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, persons receiving state unemployment benefits, and persons who have volunteered to serve as jurors by filing with the Commissioner their names and places of residence. The Commissioner of Jurors must select the names of prospective jurors or cause them to be selected at random from the sources provided by such provision. The selection may be accomplished by mechanical means or by any other method designed to implement the purposes of the article regarding the selection of jurors.

NUMBER OF JURORS IN A CIVIL CASE

Generally, a total of eight jurors including two alternates shall be selected in a civil case. The court may permit a greater number of alternates if a lengthy trial is expected, or for any appropriate reason. Counsel may consent to the use of "non-designated" alternate jurors in which event no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates.

ALTERNATE JURORS

Whether or not alternate jurors are impaneled is within the trial judge's discretion. Alternate jurors shall be drawn in the same manner as regular jurors, have the same qualifications, and be subject to the same examination and challenges for cause.

Alternate jurors are chosen after the regular panel is completed. They are chosen in the same manner as the main panel and one additional peremptory challenge is

allowed for each two alternate jurors. Such peremptory challenges for alternate jurors cannot be used to strike regular jurors.

An alternate juror shall replace a regular juror who, prior to the time the jury retires to consider its verdict, becomes unable or disqualified to perform its duties. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict. It is within the trial court's discretion to dismiss a juror for cause and replace that juror with an alternate.

VOIR DIRE

Once the panel is established and the prospective jurors are summoned, the court should establish that the prospective jurors are competent. The court has discretion to question the jury pool or to allow the parties or their attorneys to question the prospective jurors regarding their qualifications. The parties have a right to question the prospective jurors with reference to challenges for cause and peremptory challenges in addition to the court's inquiry into the qualifications. The method and control of the voir dire exam is within the discretion of the court. The judge will normally question the panel regarding the general qualifications and allow the attorneys to question the panel regarding challenges for cause and peremptory challenges. The court's discretion is, however, not unlimited, and if clear prejudice is found on appeal an abuse of discretion may be grounds for reversal. Objections to voir dire not made at trial will be deemed waived for purposes of appeal.

Individual jurors may be examined regarding answers given to the general questions or for other good cause as allowed by the court. Questions on voir dire are prepared to elicit information upon which to base a decision to challenge the prospective juror for cause or to exercise a peremptory challenge.

A party may inquire into whether or not the prospective juror would be opposed to awarding punitive damages in a negligence action if the court instructed them that punitive damages might be considered.

During voir dire any reference to insurance should be made with caution. Generally, any reference made to the fact that the defendant is covered by insurance

may result in a mistrial. An attorney, however, may determine whether a prospective juror works for an insurance company doing business with the defendant, such questions should be confined to those necessary to qualify the juror on the particular facts of the case. An attorney should pose questions so as not to bring the subject of insurance before the jury. One method approved by the courts allows the attorney to inquire into a juror's business and upon responses that a juror works for an insurance company the attorney may inquire further. If an improper question is posed, and is not objected to at that time, such objection may be considered waived if the court gives proper jury instructions.

METHOD OF JURY SELECTION

All prospective jurors shall complete a background questionnaire supplied by the court in a form approved by the Chief Administrator. Prior to the commencement of jury selection, completed questionnaires shall be made available to counsel. Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy. With Court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case.

Counsel must select prospective jurors in accordance with the general principles applicable to jury selection and using the method designated by the judge. The methods that may be used are:

(1) "**White's method**," as set forth by Part 202 of the Uniform Civil Rules of the Supreme Court and County Court Section 202.33. Conduct of the Voir Dire;

> (1) Prior to the identification of the prospective jurors to be seated in the jury box, counsel shall ask questions generally to all of the jurors in the room to determine whether any prospective juror in the room has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(2) After general questions have been asked to the group of prospective jurors, jury selection shall continue in rounds, with each round to consist of the following: (1) seating prospective jurors in the jury box; (2) questioning of seated prospective jurors; and (3) removal of seated prospective jurors upon exercise of challenges. Jurors removed for cause shall immediately be replaced during each round. The first round shall begin initially with the seating of six prospective jurors (where undesignated alternates are used, additional prospective jurors equal to the number of alternate jurors shall be seated as well).

(3) In each round, the questioning of the seated prospective jurors shall be conducted first by counsel for the plaintiff, followed by counsel for the remaining parties in the order in which their names appear in the caption. Counsel may be permitted to ask follow-up questions. Within each round, challenges for cause shall be exercised by any party prior to the exercise of peremptory challenges and as soon as the reason therefore becomes apparent. Upon replacement of a prospective juror removed for cause, questioning shall revert to the plaintiff.

(4) Following questioning and the exercise of challenges for cause, peremptory challenges shall be exercised one at a time and alternately as follows: In the first round, in caption order, each attorney shall exercise one peremptory challenge by removing a prospective juror's name from a "board" passed back and forth between or among counsel. An attorney alternatively may waive the making of a peremptory challenge. An attorney may exercise a second, single peremptory challenge within the round only after all other attorneys have either exercised or waived their first peremptory challenges. The board shall continue to circulate among the attorneys until no other peremptory challenges are exercised. An attorney who waives a challenge may not thereafter exercise a peremptory challenge within the round, but may exercise remaining peremptory challenges in subsequent rounds. The counsel last able to exercise a peremptory challenge in a round is not confined to the exercise of a single challenge but may then exercise one or more peremptory challenges.

(5) In subsequent rounds, the first exercise of peremptory challenges shall alternate from side to side. Where a side consists of multiple parties, commencement of the exercise of peremptory challenges in subsequent rounds shall rotate among the parties within the side. In each such round, before the board is to be passed to the other side, the board must be passed to all remaining parties within the side, in caption order, starting from the first party in the rotation for that round.

(6) At the end of each round, those seated jurors who remain unchallenged shall be sworn and removed from the room. The challenged jurors shall be replaced, and a new round shall commence.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Designated alternate jurors shall be selected in the same manner as described above, with the order of exercise of

peremptory challenges continuing as the next round following the last completed round of challenges to regular jurors. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

(2) "**Struck method**," as set forth by Part 202 of the Uniform Civil Rules of the Supreme Court and County Court Section 202.33. Conduct of the Voir Dire;

(1) Unless otherwise ordered by the Court, selection of jurors shall be made from an initial panel of 25 prospective jurors, who shall be seated randomly and who shall maintain the order of seating throughout the voir dire. If fewer prospective jurors are needed due to the use of designated alternate jurors or for any other reason, the size of the panel may be decreased.

(2) Counsel first shall ask questions generally to the prospective jurors as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(3) After the general questioning has been completed, in an action with one plaintiff and one defendant, counsel for the plaintiff initially shall question the prospective jurors, followed by questioning by defendant's counsel. Counsel may be permitted to ask follow-up questions. In cases with multiple parties, questioning shall be undertaken by counsel in the order in which the parties' names appear in the caption. A challenge for cause may be made by counsel to any party as soon as the reason therefore becomes apparent. At the end of the period, all challenges for cause to any prospective juror on the panel must have been exercised by respective counsel.

(4) After challenges for cause are exercised, the number of prospective jurors remaining shall be counted. If that number is less than the total number of jurors to be selected (including alternates, where non-designated alternates are being used) plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties (such sum shall be referred to as the "jury panel number"), additional prospective jurors shall be added until the number of prospective jurors not subject to challenge for cause equals or exceeds the jury panel number. Counsel for each party then shall question each replacement juror pursuant to the procedure set forth in paragraph (3).

(5) After all prospective jurors in the panel have been questioned, and all challenges for cause have been made, counsel for each party, one at a time beginning with counsel for the plaintiff, shall then exercise allowable peremptory challenges by alternately striking a single juror's name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with

> multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties' names appear in the caption, unless following that order would, in the opinion of the court, unduly favor a side. In that event, the court, after consulting with the parties, shall specify the order in which the peremptory challenges shall be exercised in a manner that shall balance the interests of the parties. An attorney who waives a challenge may not thereafter exercise a peremptory challenge. Any Batson or other objections shall be resolved by the court before any of the struck jurors are dismissed.
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> (6) After all peremptory challenges have been made, the trial jurors (including alternates when non-designated alternates are used) then shall be selected in the order in which they have been seated from those prospective jurors remaining on the panel.
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> (7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Counsel shall select designated alternates in the same manner set forth in these rules, but with an initial panel of not more than 10 prospective alternates unless otherwise directed by the court. The jury panel number for designated alternate jurors shall be equal to the number of alternates plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

(3) "Strike and Replace method," in districts where the specifics of that method have been submitted to the Chief Administrator by the Administrative Judge and approved by the Chief Administrator for that district. The strike-and-replace method must be approved only in those districts where the Chief Administrator, in his or her discretion, has determined that experience with the method in the district has resulted in an efficient and orderly selection process; or

(4) other methods that may be submitted to the Chief Administrator for use on an experimental basis by the appropriate Administrative Judge and approved by the Chief Administrator.

The trial judge must direct the method of jury selection that will be used for the voir dire from among such methods.

CHALLENGES FOR CAUSE

A judge has an absolute duty to see that the jury selected is fair and impartial. A juror may be removed for cause if a challenge against him exists which would likely

affect his competency at trial. A juror's ability to be fair and impartial is impaired if, because of his or her relationship to one of the parties, occupation, past experiences, or any other reason, the juror would normally lean in favor of one party. To strike for cause there must be a clear showing that a juror would not be able to follow the court's instruction. When there are circumstances raising some question regarding a prospective juror's qualifications, and such prospective juror assures the court that the circumstances in question will not affect his or her judgment, the prospective juror's promise is entitled to considerable deference.

PEREMPTORY CHALLENGES

After both parties have had an opportunity to challenge for cause, the court must permit them to peremptorily challenge any remaining prospective juror, and such juror must be excluded from service. Counsel shall exercise peremptory challenges outside of the presence of the panel of prospective jurors. The plaintiff must exercise his peremptory challenges first and may not, after the defendant has exercised his or her peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box.

A peremptory challenge is an objection to a prospective juror for which no reason need be given. Upon any peremptory challenge, the court must exclude the person challenged from service. Peremptory challenges are not required by the United States Constitution. Thus, without more, the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury.

The sole purpose of peremptory challenges is to permit litigants to assist the government in the selection of an impartial jury. Thus, it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.

Caution**:** A sworn juror may be challenged only for cause and not peremptorily. If a district court's ruling on a peremptory challenge results in the seating of a juror who should have been dismissed for cause, reversal is required. However, a defendant's exercise of peremptory challenges is not denied or impaired when the defendant

chooses to use a peremptory challenge to remove a juror who should have been excused for cause. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

CPLR § 4109, dealing with peremptory challenges, indicates, "the plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant an equal number of additional challenges to both sides as may be appropriate. In any case where a side has two or more parties, the court, in its discretion, may allocate that side's combined total of peremptory challenges among those parties in such manner as may be appropriate."

The peremptory challenge also bolsters confidence in the system for the parties, those to whom such confidence matters most. The mere appearance of impartiality created by the peremptory challenge process can reassure parties of a trial's integrity. Additionally, the process of weeding out bias in the jury may impress on the remaining jurors their duty to remain impartial.

PREPARATION

The key to any voir dire is preparation. The lawyer should be intimately familiar with the facts and issues in the case. Prior to the trial, a lawyer should develop themes to proceed along and present during the case. Themes for the case should be based on the facts and personalities of that specific case and present an easily understood and believable view of the facts to the jury. Once the themes of the case are identified, this will aid the lawyer in determining which type of jurors would be best suited for his or her case. Several different themes should be explored and developed, however. Many times the jury that is empaneled will be quite different from the jury the lawyer was

trying to seat, and it may be necessary to change the emphasis of the lawyer's presentation to appeal to the jurors selected.

MAKING JURORS FEEL AT EASE

One should remember that all people are prejudiced, and it is the lawyer's job to discover the prejudices of the prospective jurors. Determining such prejudices in a courtroom setting is a difficult task. The courtroom is an intimidating place for most people. The trial will be many people's first exposure to the court system, and most prospective jurors will be apprehensive about what is going to happen. An anxious juror will not open up to an attorney. In order to perform a productive voir dire, the lawyer's first job should be to put the jury at ease.

A lawyer should take the time in the beginning of jury selection to explain the procedures and functions of the court, the lawyers, and the jury itself. A lawyer should also explain the reason for the questions which must be asked in voir dire. It should be clear to the jury that the lawyer is not asking questions for personal curiosity or trying to pry into a prospective juror's private life unnecessarily. The function of voir dire is to determine if there is anything in a person's background which could affect that person's fairness in the case. The lawyer is trying to confirm that each person selected could consider the evidence presented, and set aside any prejudices to render a verdict based only on the evidence. The purpose and necessity of objections should also be explained to the jurors. Once the prospective jurors understand what will happen and why, they will be less anxious and more willing to listen.

CREATE A RELATIONSHIP WITH THE JURY

When conducting the voir dire, the lawyer should take every opportunity to personalize the client and himself or herself. Use the client's first name when referring to him or her. If the client is a corporation, personalize the representative, allow the jury to form a relationship with him or her. The atmosphere should be somewhat informal allowing the lawyer to create a relationship between the client and the jury and also between the lawyer and the jury. One must be careful, however, not to over-dramatize

the informality. The manner of the lawyer should be matter-of-fact so that the jury does not consciously realize that the lawyer is working to create a relationship with the jury.

The lawyer may reveal something about himself or herself when first addressing the jury. Such a disclosure may facilitate the relationship with the jury and let them know that disclosures of a personal nature are expected and acceptable during the voir dire. The lawyer provides a model for the potential jurors. If the lawyer does not appear interested or open, the jurors will respond in the same manner. Also, if a potential juror reveals an interest or a circumstance, which the lawyer shares, the lawyer should not hesitate to mention this. Any identification between the lawyer and potential jurors serves to build the rapport between the two.

Empathy with the jurors' situation is also necessary to develop a relationship. The lawyer should emphasize the special job of a jury and let the potential jurors know that the lawyer understands that their lives have been interrupted. Most people have a negative impression of lawyers in general, and are anxious to have such an idea confirmed. When questioning the jury the lawyer should be open and willing to listen without judging. It may be beneficial to memorize the names and occupations of the potential jurors, if possible. Although some consider memorizing the names of potential jurors to be a contrived ploy, it is an early sign to the potential jurors that the lawyer has worked hard and is prepared for the case. Also, calling people by their name will appeal to their ego and communicate a sense of friendliness.

ESTABLISH CREDIBILITY

In the initial stage of voir dire, a lawyer should also strive to establish credibility with the jury panel. The lawyer should not try to put the jury in awe of his or her abilities. If the prospective jury perceives the lawyer as clever and brilliant, this may alienate some, and they may develop sympathy for the other side. A lawyer may consider cultivating the image of the underdog and ask for the jurors' help in overcoming the clever, opposite counsel. However, any appearance of unfairness to the opposite counsel should be avoided. The lawyer should be polite and courteous at all times.

Preparation and an intimate working knowledge of the case are the keys to establishing credibility. Potential jurors will be able to tell if the lawyer is operating without sufficient knowledge of the case. Also, preparation will allow the lawyer to stand confident before the court and the potential jurors. Even if a totally unexpected event takes place, the lawyer should handle it with an air of confidence and ease. A lawyer's own insecurity or lack of ease can be a fatal blow to credibility with potential jurors.

The lawyer should incorporate the above suggestions into his or her own personal style. It will usually be apparent when a lawyer is affecting a characteristic for the jury's benefit. Most people are unable to consistently and believably maintain an uncomfortable style. Part of the jury's credibility assessment will be whether or not the lawyer seems authentic and honest. If the jury does not believe that the lawyer is authentic, much of the lawyer's credibility is lost.

DECLARE WEAKNESSES

The lawyer should also declare any weaknesses in the case or in the client's character during voir dire. This conveys sincerity and softens the impact of the information when presented by opposite counsel. Such a disclosure may also assist the lawyer in picking the jury. If the client is a corporation, which has been the subject of negative publicity, or an individual which has been convicted of a felony, the attorney will want to address such issues and make the jurors commit to deciding the case fairly despite such weaknesses. Hiding the weaknesses during jury selection only allows the opposite counsel to bring them out during trial, when such revelations can be much more damaging to the case and to the credibility of the lawyer.

TYPES OF QUESTIONS

The attorney should make it clear that he or she cares about the client and is interested in each juror individually. Voir dire allows jurors to express their attitudes and thoughts on issues. Voir dire is the only opportunity for the jurors to express their opinions, except when they render the verdict. Open-ended questions allow jurors to

tell the lawyer about their experiences and background. Many will consider it flattering when an attorney takes a personal interest in their opinions and experiences. Closed questions, however, may be useful when the questions are directed at the entire panel to seek out specific opinions or when attempting to pin a juror down on an issue.

Unnecessary or embarrassing questions should be avoided whenever possible. If an embarrassing question is necessary it should always be prefaced with an explanation regarding why such information is needed. The lawyers should avoid words like bias, prejudice or prejudgment when questioning the jury panel. Such words have a negative connotation and will usually draw an automatic negative response. The attorneys should not use complex language, and any legal terms should be defined.

Many times a lawyer will be able to identify a potential juror with strong opinions against the client's position. If the lawyer questions the potential juror in an attempt to have the juror disqualified, many fear that the opinions would influence the rest of the panel. The influence, however, would be much greater if that person is left on the panel and takes part in rendering the verdict. Allowing the potential juror to voice his or her opinions may result in a dismissal for cause, thus preserving a peremptory challenge. Also, the lawyer may be able to defuse potentially dangerous ideas or opinions, which could otherwise influence other potential jurors.

The plaintiff's lawyer should also anticipate opposite counsel's questions when developing the voir dire questions. If defense counsel's question can be predicted, the plaintiff may be able to mitigate the input somewhat. For example, in a case with a large corporation as a defendant, defendant's counsel may elicit commitments from the panel that they will not decide the case based on sympathy. A plaintiff may defuse this somewhat by asking if the prospective jurors understand that the purpose of putting on evidence is to develop the facts of the case and not to create sympathy.

During the questioning the lawyer may determine that it would be beneficial to have one of the jurors serve as foreperson of the jury. The lawyer may consider directing subtle questions at such a juror to bring out the leadership qualities of the juror.

When phrasing the questions for voir dire the lawyer should avoid the use of overbroad statements. For example, if a lawyer represents an insurance company in a case involving the refusal of benefits and asks the panel if they feel that insurance companies sometimes deny valid claims, most of the panel will raise their hands. Those that do not respond are jurors who would favor the lawyer's position. The lawyer has now identified his or her strongest jurors for the other side to strike. A more effective course would be to narrow the question, replacing "sometimes" with "always" or "routinely." Narrow phrasing may identify jurors who would be dangerous to your case without revealing your strongest jurors.

RELUCTANT OR SHY MEMBERS OF THE PANEL

Often a potential juror will be reluctant to answer questions with more than yes or no answers. This may happen despite a lawyer's best attempts to create a friendly conversational atmosphere. In order to put such people at ease a lawyer should demonstrate empathy with the person's situation and show genuine interest in the person's answers. After putting the person at ease start out with easy questions, like questions about his or her employment and hometown. Once the person starts talking carefully return to the opinion questions.

DIFFICULT MEMBERS OF THE PANEL

Another problem may occur if a person is openly hostile or defensive to the lawyer's questions. In such a situation it is very easy to get into argument with the potential juror and become frustrated. Both responses can be deadly injuries to the lawyer's credibility. Never argue with a member of the jury panel. Always be polite and courteous. Showing anger or insecurity will only diminish the lawyer in the minds of the other potential jurors. If a person presents an openly hostile attitude the lawyer must deal with it at that time. Avoiding a hostile member of the panel will also cause a loss of credibility. The lawyer should politely, yet firmly, inquire into the reason for the potential juror's hostility and allow the juror to talk. Many times the judge will dismiss

such a juror for cause and the lawyer may gain credibility by tactfully handling a situation.

FAVORABLE MEMBERS OF THE PANEL

Many lawyers will avoid questioning a favorable member of the panel hoping that the opposite counsel will overlook the juror when making peremptory strikes. Such a ploy may work in certain circumstances. Often it is obvious to all sides when a person holds opinions favorable to one side, and a peremptory challenge of such a person is almost guaranteed. When such a situation arises the lawyer must accept that such a juror will be dismissed. The lawyer, however, may still want to give the juror an opportunity to voice his or her opinions as to why someone should favor the lawyer's position.

DISQUALIFYING A POTENTIAL JUROR

If the questions reveal a prejudice held by a potential juror the lawyer should attempt to make the potential juror disqualify himself or herself. In order for such a potential juror to be dismissed for cause the lawyer must extract a statement from the potential juror affirming that he or she could not set aside his or her prejudice and give fair consideration to the evidence.

A sympathetic approach to the potential juror is usually the most successful in acquiring a disqualifying statement. Such a statement is difficult to acquire and must be coaxed out of a juror. Questions should be phrased regarding the jurors "beliefs" and "opinions." The juror must admit that it would take more evidence than that required by the law in order for the juror to find against his or her prejudice.

If a potential juror does not believe that punitive damages or damages for pain and suffering should be awarded, the plaintiff's attorney would want to have the person removed. An attempt to have the person disqualify himself or herself as a juror may be conducted as follows:

Q. As a juror, you understand that you are obligated to follow the law as instructed by the judge?

Q. Many people, including myself, disagree with different aspects of the law, and don't you agree that it would be difficult for someone who strongly disagrees with a point of law to render a verdict based on that law?

Q. It is fair to the parties in this action for them to know that each juror will discharge their duties in accordance with the law, based on the evidence presented. Don't you agree?

Q. You understand, don't you, that my client, Izveri Painful, is asking for monetary compensation (punitive damages) for the injuries he received?

Q. Mr. Painful is entitled to know that you will apply the law in this case objectively, even if you disagree with the law. That is fair isn't it?

Q. Part of the damages includes pain and suffering (punitive damages), and as a juror you would be responsible for awarding such damages. If you feel it would be difficult for you to consider these damages as a valid part of the claim, that is perfectly understandable, but Mr. Painful is entitled to a jury that can apply the law as instructed by the judge. Do you think that your feelings toward this type of damages would make it difficult for you to accept the law regarding such damages?

Q. It would probably have to be an exceptional case for you to consider awarding such damages wouldn't it?

Another situation where an attorney may attempt to disqualify a potential juror occurs when the client is a defendant in a case where the plaintiff's situation could invoke the sympathy of a potential juror who has experienced similar circumstances. An attempt to disqualify such a person may be conducted as follows:

Q. I understand that because of your experiences you may have sympathy for the plaintiff's situation. That is certainly understandable, but you understand, don't you, that a juror must not let sympathy interfere with his or her decision in the case?

Q. We all feel some sympathy for the plaintiff because he was injured, but if that were allowed to influence the decision, then my client would not be getting a fair trial, would he?

Q. Don't you agree that my client is entitled to have the case decided on the facts of the case?

Q. If you felt that your previous experiences or any natural sympathy you feel toward the plaintiff would influence your decision as a juror, you would tell us, wouldn't you?

Q. Do you feel that due to your previous experience and any natural sympathy that it would be difficult for you to decide this case, based only on the facts?

The lawyer should tread lightly when pursuing the disqualification of a potential juror. If the prospective juror states firmly that he or she can be fair, further questioning may alienate that prospective juror and others. If the juror will not disqualify himself or herself, make the juror commit to setting aside prejudices and deciding the case fairly. Also make such a juror promise not to influence other jurors regarding such a prejudice. The lawyer may want to add that if someone else attempts to influence the juror regarding such prejudice, the juror will recognize such an attempt and disregard it.

SEEKING COMMITMENTS FROM JURORS

During voir dire, the lawyer will also want to have the jurors commit to following the law and awarding the client a judgment if the client's case is proven. Such a commitment may be inquired into when questioning the panel generally, but it is more effective when an affirmative promise is extracted from an individual juror. The plaintiff's lawyer may also inquire as to whether or not a prospective juror would award a large verdict if the evidence substantiated a large verdict. Many people feel that it is unethical for someone to collect a large amount of punitive damages in a case.

As noted above, if such a prospective juror will admit that he or she could not award money damages if the case is proven, the judge may dismiss that prospective juror for cause. Even if the judge will not dismiss the prospective juror, a peremptory strike may be appropriate. If counsel does not wish to use a peremptory challenge, then the potential juror must commit to set aside his or her prejudices and decide the case fairly.

Defense counsel, especially those representing large or wealthy defendants, may seek a commitment that any award will be based only on the facts, and comparative wealth will not be considered. Pursuing such a commitment, however, should be

carefully considered and formulated. It is possible that such a line of questioning could emphasize the wealth of the defendant in the jurors' minds rather than minimize that factor.

CATCHALL QUESTIONS

At the end of the voir dire a lawyer should always indicate that he is about to finish and ask the panel if there is anything that has not been mentioned which could affect a juror's ability to be fair and impartial. No matter how complete the voir dire someone may hold information back waiting for the lawyers to ask specifically about such information. If the lawyer makes it clear that voir dire is almost complete a general open-ended question gives a prospective juror an opportunity to reveal any information that they may have withheld.

ANTICIPATING JURORS' REACTIONS

Predicting others' behavior is always an uncertain business, but there are general principles which a lawyer may rely on. It has been suggested that the facts of the case are the most important predictors of a jury's decision. The next variable considered is the credibility of the witnesses, then the effectiveness of the lawyers, and finally the jury's own internal factors. The attorney must work with the facts and present them in an effective clear manner to the jury. The lawyer should also attempt to personalize the client and his or her witness and begin to build up their credibility in jury selection. The effectiveness of the lawyer will depend on the considerations mentioned above. The lawyer may be able to manipulate the last factor by selecting jurors during voir dire that will be open to the client's case.

Generally, a lawyer should look for characteristics which allow a prospective juror to identify with the client. People will naturally favor a side if they can imagine themselves in the same position. However, if a prospective juror identifies with the client through a shared occupation, through race or ethnic background, or some other factor obvious to the other jurors, it may not be wise to pick that juror. Such a person may normally be an excellent juror for the client, but if that person is the only one

sharing that characteristic with the client, he or she will be self-conscious of the similarity. Such a juror may actually lean towards the other side in an effort to illustrate his fairness and impartiality.

If a person was previously a party to a lawsuit, that person will most likely favor that same side of the case. In a personal injury case, a person who was previously injured will require some probing. If the person did not employ a lawyer and settled the case satisfactorily with the insurance company, that person may be more favorable for the defense. Also, if the person was unable to collect due to a lack of insurance, this may favor the defense. If the person hired a lawyer to pursue the claim, that person would probably favor the plaintiff. A person who has been a defendant in a lawsuit will generally be a defendant's juror, but proper investigation into the circumstances should always be explored.

Another factor to consider is gender. In certain cases a person may favor another of the same gender if the injury is one which may be unique to people of that gender. Examples of such a case would be sexual harassment charges made against men wherein other men may be more sympathetic toward the defendant than women. Also, women may favor a woman who has been the victim of a defective birth control device. Generally, however, it appears that men and women both tend to be less forgiving toward those of the same gender rather than someone of the opposite gender.

NONVERBARL COMMUNICATION

A key to determining the attitudes and beliefs of potential jurors is nonverbal behavior. Many times a juror's underlying feelings are communicated more clearly though his or her facial expressions or movements rather than his or her verbal answers. Also, a person's dress and carriage can assist an attorney in identifying background similarities between the juror and the client. Frequent eye contact and affirmative nods or smiles tend to reveal a juror's disposition toward a certain side.

There are many different nonverbal signals which could reveal a potential juror's attitudes. The following is a list of some nonverbal cues which may be revealing:

(1) eye contact;

(2) facial expressions;

(3) posture;

(4) gestures;

(5) speech;

(6) dress and accessories (e.g. briefcases, purses, books, etc.).

GROUP DYNAMICS OF THE JURY

Although much focus is placed on an individual juror's beliefs and opinions, the jury should also be viewed as a whole. The jury may be considered as a group of people engaged in a multi-party negotiation. Keeping this view in mind, a lawyer should exercise challenges based on how a potential juror would affect jury functioning along with the potential juror's background and opinions. Categorizing jurors may help a lawyer predict how a juror will affect the group dynamics of the jury. Four categories may be used to classify potential jurors' personalities:

(1) **Leaders** exert the most control over the other jurors. Leaders are usually talkative, sociable and initiate interaction with others.

(2) **Followers** are usually submissive and support members of the jury that appeal to them. Followers may be easily influenced, lack assertive and verbal skills, and respond with short answers.

(3) **Negotiators** seek compromise and the maintenance of order. They act as arbitrators and attempt to resolve conflicts. They may see both sides of an issue and seek a compromise based on others' feelings rather than their own view of the facts.

(4) **Resisters** will not change their views once they have formulated an opinion. They are rigid people who are often outspoken and develop opinions quickly. They are articulate and do not waffle in their opinions.

GRADING SYSTEM

It is a good idea to develop some type of system for ranking or grading potential jurors. Such systems vary from lawyer to lawyer. Some use plus and minus signs; some use numbers or letters to indicate a potential juror's attitudes. Such a system is

important to provide a shorthand method for recording impressions of the potential jurors. When evaluating the members of the panel the following factors should be considered:

(1) physical appearance;

(2) economic status;

(3) similar experiences;

(4) attitudes expressed;

(5) leadership qualities.

COURTROOM/JURY CONSULTANTS

In the last decade trial lawyers across America have found it very useful to retain the expertise of courtroom consultants. More often than not consultants are psychologists or sociologists who have expertise in linguistics and have had extensive research and experience in the judicial process. Consultants offer services ranging from conducting mock trials to countywide surveys based upon potential jury voir dire. Experience in jury trials will often allow attorneys to develop skills to determine the feelings and responses of potential jurors simply by the body language demonstrated during voir dire. Consultants, however, often sit anonymously in the courtroom during jury selection in order to view juror responses. The consultant's views can be immensely valuable in choosing those persons who are best suited for the case.

When preparing a case lawyers usually become so immersed in the facts and their arguments that it is difficult to maintain objectivity. Such a response is normal because the more people are exposed to information the more likely they are to believe it is true. Trial consultants can provide an objective viewpoint to develop strategy and evaluate reactions of potential jurors.

Many consultants observe that they are often brought into the case too late. Consultants may work best when retained six months before trial in order to evaluate the strength of a case. One type of case that consultants believe will benefit least from research is one where everything rests on a party's credibility. A consultant in that case,

however, may still be valuable to assist the attorney when choosing a jury which may believe the party's story.

A consultant is usually helpful, but the relative cost of a consultant, when compared to the damages involved, should be kept in mind by the lawyer. A convenient rule of thumb is that a consultant may not be justified if the damages involved are less than $500,000. Other factors, however, may justify the use of a consultant. The case may be the first of many similar cases against a defendant, and a victory for the plaintiff could set a precedent. Another case which may justify the use of a consultant would be one which involved a party whose reputation would be greatly affected by the outcome of the case.

CONCLUSION

Many times the best tool in jury selection is the lawyer's intuition combined with thoughtful case-specific questions posed to the jury panel. Such questions are the result of careful preparation by the lawyer. The lawyer should look at the facts and personalities involved in the case and develop a "theme" which the lawyer will use to present the case. The lawyer should then develop a profile of the "ideal juror" for that case. Once the previously mentioned projects are completed it should be apparent which factors will be important in the jury selection process and these factors should be used to develop the questions for voir dire.