1. JURY SELECTION

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By Ben Rubinowitz and Evan Torgan

_____It has been said that the purpose of jury selection is to select a "fair and impartial" jury. While on an intellectual level this may be true, to the experienced trial lawyer nothing could be further from the truth. The goal of jury selection, simply put, is to get a jury who will render a verdict in favor of your client. For decades, indeed centuries, lawyers have been trying to master the art of jury selection - - not for the purpose of obtaining a fair and impartial jury but to win their case. While there is no "one size fits all" method to get a jury to vote in your favor, there are certain approaches that will increase the odds of obtaining a favorable outcome.

The first step in obtaining the desired result is to have a firm understanding of the types of challenges available to excuse potential jurors from the main panel. Generally speaking, there are two types of challenges available to the trial lawyer: challenges for cause and peremptory challenges.

CHALLENGES FOR CAUSE

Challenges for cause have been given different names over the years. Lawyers have referred to these challenges as challenges to the "favor," principal challenges and cause challenges. They all, however, are brought for the same reason: The juror is incompetent to sit as a matter of law. With this type of challenge, a specific reason must be given to the Court as to why the juror should be disqualified. In the event the potential juror states unequivocally "I can't

be fair in this case," the cause challenge is obvious. Less obvious, however, is where the answer is not nearly as clear.

Imagine the scenario in which a potential juror is asked the following question:

Q: Based on what you've heard so far about the case could you be fair?

A: I *think* I can.

The astute lawyer will recognize the "doubt" word immediately and explore this answer in more detail.

Q: I noticed you used the word "think" - - that you thought you could be fair. What do you mean?

A: I've heard about this case and I probably have a negative impression of (one side).

Q: Are you willing to put aside that impression and give both sides a fair trial based on the evidence in this Courtroom and nothing else?

A: I think I can.

Needless to say, these answers are troublesome. But do these answers amount to a challenge for cause? The New York Court of Appeals has provided guidance on the very issue. In People v. Johnson, et al,[1] the highest court in our state made clear that where potential jurors reveal knowledge or opinions reflecting a state of mind likely to preclude impartial service, they must give an "unequivocal assurance" that they can set aside any bias and render an impartial verdict based on the evidence and the evidence alone. The Court went on to explain that when a prospective juror expresses partiality towards one side and cannot unequivocally promise to set aside the bias, that juror should be removed for cause.

Consider a second scenario in which a case is brought where one side will be challenging the credibility of a police officer. During jury selection the following questions were asked:

Q: Do you believe that a police officer is more believable than a civilian?

A: Not necessarily.

Q: Could you fairly evaluate the testimony of a police officer?

A: I *guess* so.

[1] People v. Johnson, 94 N.Y.2d 600, 709 NYS2d 134 (2000)

Q: Would you tend to favor a police officer's testimony more than a civilian's testimony?

A: I would.

Q: You would?

A: Yes.

Once again, the Court of Appeals in Johnson made clear that the prospective juror should be dismissed for cause if there appears to be any possibility that the juror's impressions might influence his verdict. Put another way, the juror must give an unequivocal assurance that he can put aside his bias and render an impartial verdict based on the evidence or that juror should be excused.

The lesson to be learned from the Court of Appeals is clear. Unless the juror can give an unequivocal assurance that he can set aside any bias and render an impartial verdict based only on the evidence, the juror should be disqualified for cause.

A type of cause challenge that is less frequently used but must be given consideration is what is known as a challenge to the array. A challenge to the array is a challenge to the entire panel based either on some irregularity in the process of summoning the jury or on some

irreparable event that took place while selecting the jury. The irreparable event might be where a potential juror blurts out something that is so prejudicial that a cautionary jury instruction by the Court will not cure the prejudicial effect of the statement:

Q: Have you heard anything about this case?

A: I know your client was convicted of drunk driving once before.

No matter what cautionary instruction is given, there is no way to "unring" the bell. Here, a challenge to the entire array might be the appropriate remedy.

Because civil jury selection is often conducted outside the presence of a judge it is essential to write down the prospective juror's answers verbatim to properly inform the Court of the events that transpired. Challenges for cause are the responsibility of the lawyer whose client has been hurt by the juror's response. Generally, the rule is that all challenges must be made before the jury is sworn. Be aware that there is a prevailing rule that any reversible error by the Court in failing to sustain a challenge for cause is waived if a lawyer proceeds to trial without using all of his peremptory challenges.

PEREMPTORY CHALLENGES

Technically, a peremptory challenge gives a lawyer the right to have a prospective juror excused without explanation. Pursuant to CPLR §4109, in civil trials in New York each side has

a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. While the trial court has the discretion to grant additional challenges equally to each side, the number of challenges is still limited. It is for this reason that one of the main goals of jury selection, regardless of sides, is the preservation of peremptory challenges. If the trial lawyer can turn a peremptory challenge into a challenge for cause he has dramatically increased the odds of obtaining a favorable result for his client by obtaining more favorable jurors.

Imagine a similar scenario to that discussed above in which police officer's credibility is a major issue in the case. During the course of questioning you learn that the prospective juror's father is a police officer and, not surprisingly, you want this juror off the panel. Here, the real art of advocacy comes into play. Too often, lawyers ask leading questions and dig themselves into a hole.

Q: Do you believe that police officers are more credible or believable than other witnesses?

A: No.

Q: Would you tend to favor a police officer's testimony?

A: No.

By leading, the lawyer has made sure he will have to exercise a peremptory challenge. He has, in short, obtained an unequivocal assurance by that prospective juror that this fact will not influence his verdict. However, if the lawyer had explored this area by asking open-ended questions first and then using leading questions, he might be in a much different position.

Q: Tell us about your relationship with your Dad.

A: He's a wonderful man. I love him but he is getting older like everyone.

Q: I bet he's given you a lot of guidance throughout the years hasn't he?

A: He sure has. I've learned more from him than anyone.

Q: How does he like his job?

A: He loves his job and he loves the people he works with.

Now you must lead and ask careful, probing questions designed to achieve your goal:

Q: Based on your sense of fairness, knowing the love you have for your Dad and the love he has for those he works with, don't you think you might tend to favor a police witness?

A: I might.

Q: And knowing that you might do that, wouldn't you agree, in fairness, that you might be leaning in favor of the police during the trial.

A: Yes, I might.

With these answers, you now have an argument that the juror should be excused for cause thereby preserving a peremptory challenge.

BATSON

In the event that your adversary is excusing jurors based on race or gender you should always be mindful of Batson and it progeny. In Batson v. Kentucky (476 US 79) the Supreme Court held that under the equal protection clause of the fourteenth amendment, a prosecutor may not use a peremptory challenge to exclude a juror because of that juror's race. Since its initial holding in Batson the Supreme Court expanded the holding to civil cases as well as criminal cases (Edmonson v. Leesville Concrete Co, 500 U.S. 614) and expanded the protection to other groups besides race such as gender (JEB v. Alabama, 511 US 127).

If one side makes a primae facie showing that the other exercised a peremptory challenge based on race (or gender or age) then the side exercising the challenge must provide a race-neutral explanation for that challenge. To satisfy the burden of a race-neutral explanation, it is incumbent on the lawyer opposing the challenge to identify a legitimate reason that is related to

the particular case to be tried and sufficiently persuasive to rebut a primae facie showing of a discriminatory practice. The reasons cannot be generalized statements but must have race-neutral relevance to the juror being questioned (Batson at 98).

Consider the following example: Suppose you represent an African-American who was severely injured in a boating accident. During jury selection your adversary excuses the only African-American sitting as a prospective juror. You oppose your adversary's peremptory challenge based on Batson. In response, your adversary states as a race-neutral explanation that: The juror is retired; that her child works in law enforcement; and that she likes to shop. Here, the reasons stated might well be viewed as a sham or a hidden pretext for intentional racial discrimination. Other examples of insufficient reasons indicative of purposeful discrimination include:

- that the answers given by the minority juror did not differ from the other jurors answers
- that the explanation for the challenge was too vague and general
- that the attorney asked no questions on jury selection that would indicate a good faith interest in the juror's attitudes
- that the attorney asked questions of the minority juror that were not asked of other jurors
- that the reason stated for excusal of the minority juror are unrelated to the case

If, however, a race-neutral explanation is indeed offered then the burden shifts to the opponent of the strike to prove purposeful discrimination.

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Plaintiff's Perspective:
Preparing to Try a Case in a Hostile Environment

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Introduction:

Cynicism is alive and well in the public's perception of the legal system. More particularly the lawyers and the "clients" using the system. It fashionable to engage in lawyer bashing; to discuss the latest newspaper article where a stubbed toe equals a million dollars. Distaste and disdain are the norm. But all in all it is our own fault these images are allowed to exist. We, as lawyers, glamorize our brethren engaging in questionable tactics in sensational cases. We are publicity hungry. We are putting forth the wrong foot. We are sending the wrong message. We are our own worst enemy. And the public knows it.

In light of the hostile environment the plaintiff has an additional burden to bear. The burden of credibility. The burden of proof is NOT to be confused with the burden of credibility. Many a lawyer has told a similar story; that in court all "legal" burdens were met. All T's crossed and all I's dotted. All the facts went in - uncontroverted; and the jury comes back with a defendant's verdict. Upon questioning, the jurors all say the same thing. "We think the plaintiff was lying." When confronted with the reality that NONE OF THE FACTS WERE CONTROVERED - the jury's answer is the same, the plaintiff's story was made up - we just don't believe it.

The way to attack the cynicism is simple. The issue of credibility MUST be addressed with the jury. The issue of credibility MUST be addressed in your trial and in your case preparation. The issue of credibility must be the central theme of your case.

Jury Selection

Your own credibility is always an issue and beginning with jury selection must be a central theme. The reasoning is that the case may eventually end up as a battle of the "versions" and anything that you as the trial lawyer can do to tip the balance in your favor should be done. Once credibility is established the entire flow of the trial is easier to maintain. The content of your presentation and your witness' testimony will not sway the jury if the jury doesn't believe it or the jury feels that their are ulterior motives for testifying. Tell the jury "things they may not expect to hear". Tell the jury you expect them to be cynical - try to diffuse there negativity. Explain to them that you do not want the benefit of the doubt; however, they should not impose upon you the detriment of the doubt.

During jury selection, it is imperative that all possible problems in your case be presented and discussed so that the jury does not hear about your weaknesses for the first time at the time of trial. Anything that may reflect on the credibility of the witnesses must be brought to the attention of the jury before the trial begins or before your adversary informs them. Don't sugarcoat any aspect of the case. If your client is not an angel make sure you tell this to the jury, (e.g., he/she was a drug addict, convict, etc.). Remember the truth is strength and you should always deal from strength. By acknowledging the negative you desensitize the jury to these aspects of the case. You level the playing field.

Most importantly - ask the jury not to waste your time. If they have an agenda; admit it. If they have a problem; admit it. In return, promise not to waste their time and keep to that promise.

Opening

At all times during the trial, you must convey honesty to the jury. You must be yourself. Don't act. Don't overindulge. If the jury feels that you are putting on a show that is out of character/personality, they are given very little reason to continue to believe you and to trust you. Remember the jury has already been exposed to you during the selection process. You must continue to convey the same personality and image exhibited during jury selection. That does not mean you cannot be grandiose or subtle or passive, etc. It does mean that if you have shown a certain side of your personality or character you must continue to exhibit a similar nature.

The jury is entitled, at this stage of the trial, to become part of the procedure. They are going to judge the facts of the case. They have sat through days of doing nothing but waiting. They have been through a relatively boring selection process, a pre-trial charge by the judge, and are, or should be excited. It is imperative that you, as the first speaker the jurors hear, don't disappoint them. That first impression will last, so make it a good one. Start to tell the story, immediately - get to the point.

Review the elements of a prima facie case. Make sure you address each element at opening. Refer to any pattern jury instructions for catch phrases and word style, (a must for every attorney who wishes to try cases). That way, when the jury receives the judge's instructions they will have heard these words before. The jury will have been conditioned to relate the charge to the plaintiff's case. They will think how smart you are that you knew what the judge was going to say.

An opening statement is a conflict of goals. You must effectively present all aspects of your case but you must be short enough to hold the jury's attention. You must deal with archaic

language (legalese) but still speak the common language. You cannot just "hit" on every issue, but explain, persuade and conclude on pertinent points.

Refer to the evidence that will be presented. Tell the jury what they will see and hear. If you take away elements of surprise by addressing the negative aspects of the case - adverse witness - harmful medical reports, statements - you will be able to minimize the impact. If you show the jury that you are aware of the negative they will downplay it or, at the very least, expect you to counter it. The jury will want to see how you handle adversity but will not focus on the negative if your job is done correctly.

Explain to the jury what you will show but do not begin with "The proof will show". Instead of stating "The proof will show that the defendant ran the stop sign" it is much more effective to state "The defendant ran a stop sign." This sentence structure conveys a much stronger image and you will be speaking plain English. If counsel for the defendant objects to this statement two things will occur. The first being that the defendant's counsel will appear to be an obstructionist and second the defendant's counsel has already begun to be "defensive". You've already begun to swing the pendulum to you side. You can "correct" the objection by simply stating, "Your honor, the facts will prove the defendant ran the stop sign." Your response will indicate that you will not be argumentative; that you were not flustered by the interruption, and since the judge will allow you to continue with your opening essentially unchanged, you will appear to be more composed - more lawyerly. Perception will be in your favor. As a practical matter, as a less experienced attorney it will be better to have written notes to which you can refer in the event of an objection, so that you know where to return after the ruling by keeping a finger on the area which you were addressing.

Do not read a prepared script. You must be able to tailor the opening to the feedback you are receiving. If the jury or the judge are showing signs of impatience then it is important to adjust accordingly. Therefore a more effective presentation would be one in which you can recite "from your heart". Try to explain how you feel about the case and why you feel that way. Try to keep your notes to a loose outline. It is imperative that you are able to react to stimuli. You cannot just plow ahead without seeing or hearing or observing what is going on around you. The only effective way to adequately adapt your opening is to know the *concepts*. In other words you must know *WHY* you want to say something and not just *How* you are going to say something.

Unfortunately, our culture loves stimuli. Due to shows like "The Practice" and "Boston Legal," public perception of what happens in the courtroom is not based on reality. Jurors expect a sound and light show. If possible, pre-mark the exhibits. If the exhibits can be used to supplement your opening by all means refer to them. DO NOT rely on them to provide substance to your opening, but instead use them to underline the points you are trying to make. As an example, simply show a picture of a cracked sidewalk while you are stating how the area was in disrepair, but don't explain too much about the picture. Let the jurors form their own opinions. Leave the picture up and continue with your opening. Contrast this with referring to the picture and spending time explaining what the picture is supposed to represent. As with a children's book, it is the words that explain what is going on - to be reinforced by the picture. The picture is not primary in the book, the story is. When used properly a picture will supplement and form an impression in the minds of the jurors that will be combined with your words and not replace them. If possible, try to pre-mark the exhibits so they will be available for use at your opening.

Your job is to tell the jury why you are there - so make sure you know why you're there - What's the theme? Let them learn why they are in the courtroom. Let them know why your client is in the courtroom. Let them know why you are in the courtroom. Explain who the parties are. Explain who your client was, who your client is now and, depending on the type of trial (full, bifurcated), who your client will be in the future. Explain why your client is in this position. Explain why the defendants are responsible. Most importantly, explain to the jury what you want them to do and give them reasons to do it.

Trial

How to Effectively Present the Client's Claims

A client who does not know anything or who comes across as a complainer or appears unsympathetic truly turns a jury off. Think of your own everyday experiences. Do you want to be around such a person? Do you like such a person?

Therefore it is much more effective to get such a person on and off the stand as quickly as possible. However before being able to do this, the groundwork has to be established during jury selection. Appear to limit the issues in the case - keep it simple. If you are able to get your witnesses and the defense witness "to appear to agree with you" it makes your case seem that much stronger - avoid the theatrics of cross examination if at all possible. The foundation is going to be laid to indicate to the jury that there are no differing opinions concerning the same case from the plaintiff's prospective.

The proper questions have to be asked of the plaintiff on direct examination to allow this jury to adopt the plaintiff. It is easy to show what has happened in the past. Tell the jury what's going to happen in language they will understand. Common language has to be established.

Catch phrases (check the jury instructions) must be repeated. If possible, explain the terms "reasonably prudent person" by giving specific examples - a "reasonably prudent person" would not leave an exposed hole, etc." during opening to familiarize the jury to the law and let the jury understand what to look for..

Practical Suggestions

- If you cannot articulate a reason for the question being asked, either on direct or cross then don't ask the question.
- Meet with the client before trial, not the night before trial. Clients often complaint about having no time, so often they say, "I'll meet you in the evening before court." Do not allow that.
- Pro or novice - Testifying can be a frightening experience for a witness not used to it. Your preparation has to be very thorough. Explain direct examination, cross examination, terminology, demonstrative evidence, etc.

The client/witness must testify as to the following:

1. Conditions;
2. Notice, prior and/or actual;
3. Accident details and
4. Causation (It is imperative that the client understand what caused her to fall - if this element has to be proven through other witnesses the case will become much more complicated).

If the cross-examination is weak, do not engage in re-direct with the expert. If the cross-examination is strong only engage in cross-examination if you can rehabilitate the expert. Under

no circumstances should questions be asked unless a known provable point can be elicited. Never ask questions for the sake of asking questions.

Remember. Keep it simple.

How to Cross-Examine Lay Witnesses

Introduction

Every aspect of a trial is crucial, but it can be fairly said that cross-examination of your adversary's witnesses is often the most crucial aspect of a civil trial. Counsel's failure to effectively challenge an opponent's witnesses will most certainly be noted by the (television-conditioned) jury and, in most instances, cannot help but have a detrimental effect on your client's case. Conversely, effective cross-examination engenders positive jury support for your client's cause. Now, the fantasy of every trial lawyer is the occasion when the lay witness is so devastated by the probing, incisive questions that he pulls out his handkerchief wipes his sweaty brow, and cries out "Enough, enough. I'm sorry, it's all my fault." Perhaps the fantasy is sometimes achieved, but in most everyday trials the reality is otherwise. Thus, the goal of our presentation: How is an effective cross-examination conducted of the lay witness? First, understand this: there is no mystery, no "hocus pocus", to an effective cross-examination of the lay witness. Like any other aspect of a successful trial, successful cross-examination of the lay witness is the product of thorough preliminary work and informed, intelligent choices at trial. Second, successful cross-examination does require counsel to possess one crucial talent: the ability to listen - both to your opponent's direct and to the answers you elicit on cross. That said, the usual cross-examination sequence is simply stated: obtain favorable admissions (where available), and then follow-up with a discrediting cross and impeachment. Further, before we

give practical tips, it is important to understand that there is more than one way to cross-examine the witness. Either the witness herself can be attacked, her story can be attacked, or both the story and the person can be attacked. One example of a collateral attack is demonstrating the witness' bias. Another weakness would be lack of qualifications, for example, showing that the police officer came upon the scene after the vehicles were moved and the participants were removed from the scene. In any event, technique in cross-examination is, essentially, something that can be learned but not necessarily taught. By this we mean you really have to go out and try cases, case after case, examine witness after witness, in order to learn your own technique - what works best for you. However, to the extent that we may offer you a guide to conventional strategy and to appropriate (or effective) courtroom conduct, at least based on our own experiences, we offer the following.

Developing A Technique

Be Prepared: Before trial even starts you should have a good idea of at least three things:

(1) how your adversary will likely defend the case;

(2) who will be his likely witnesses; and

(3) the theme for your case.

Given this, you should know in advance what you generally expect to achieve when cross-examining such witnesses. For example, you know as a result of your examination before trial of the defendant that the police blotter witness is the defendant's uncle (or co-worker or friend); you know that the investigating police officer did not arrive at the accident site until fifteen minutes after the accident; or, you know that he checked and then prepared a "city involved" form in

addition to “independently investigating the accident”; or that the fellow-tenant, an adverse notice witness, has known the landlord for the forty years he has lived there, or has repeatedly complained to the landlord about your client's barking dog, piano playing, etc.; or you know that the witness has been employed by the defendant for twenty-five years. In short, *do your homework.*

Understand Who The Witness Is

Often, attacking a witness' story, and how you attack a witness' story requires not just homework but also elements of psychology and a feeling of who the witness is. Put another way, what impression does the witness project. Is he cocky?; a wise guy?; does the jury like him?; does he come across as timid or vague?; etc. Tailor your approach accordingly.

Did This Witness Hurt You And If So How Much:

Make a determination as to how harmful a witness has been. If a witness has been especially harmful, would it be a good idea to have a recess before beginning cross? Your request for a brief recess could be phrased in the form of needing a moment to review the police officer’s memo book and reports for example. A word of caution: not all witnesses require a recess before beginning cross. Often times, the most devastating witness should be attacked immediately. Further, if the witness you expected to be devastating, was not, then question quickly and got them out of the court room before your adversary realizes the errors and omissions. The point is this: *Do not conduct a lengthy cross-examination if it is not going to help you.*

Courtroom Demeanor

When a witness has said something that angers you, (i.e. a lie) do not get up immediately with a flush in your cheeks and decide you're going to rip him apart. By the same token, if things are going well, don't strut in front of the jury with a smirk on your face, or wink to the gallery or whisper to your adversary that the case is over. At all times, be gracious and professional while the witness is still on the stand, unless of course you are one of those rare lawyers who has the personality to get away with "showboating." Conversely, if the answers are devastating, please do not compound adversity by sagging in body or in mind. On the other hand, if an answer is beneficial to your cause, do not ask the same question again in a different form, for the next answer may surprise you. Trust the jury, they are trying to do a good job and they heard the answers.

Control The Witness

Use short, close-ended questions on cross. Never, ever ask "why?". If the witness is not answering the question directly, there are certain techniques you can utilize. For example, clarify the rules for the witness prior to the start of testimony, "Mr. Jones, I'm going to be asking you a series of questions concerning what you told Mrs. Lynch. Please listen to my questions and if you can, please answer yes or no. If you cannot answer that way, please let me know and I'll rephrase the question." Another way of dealing with a rambling witness, rather than moving to strike the answer as unresponsive, a motion which the judge may deny, is to ask the witness directly, "Now, Mr. Jones, can you answer my question please?"

Keep The Jury Interested: It is generally thought to be error to jump from topic to topic in

cross-examination. It would be of greater benefit to the jury if one subject is exhausted before moving onto another topic. If there is difficulty in developing a smooth style in cross-examination it would be helpful to have prepared a written outline of the proposed cross-examination, *but do not read the questions to the jury*. Additionally, a good working knowledge of the proposed jury instructions is invaluable.

Don't Talk "Lawyerese"

As in any part of the trial, the question propounded on cross-examination should be in lay language. It is not appropriate to ask, "Did you look at the cars subsequent to the impact?" it is infinitely more effective to ask, "Did you look at the cars after they hit?" Language, if it is to be used effectively, must be familiar and readily comprehensible to the listener and the jury.

Things To Do; Things To Avoid

Avoid:

- Open-ended questions;
- "Why?" questions;
- Talking "down" to the jury;
- Trick questions (e.g. the proverbial "when did you stop beating your wife"; remember the jury is smarter than you are);
- Arguing with the witness;
- Bolstering the witness' previous, harmful testimony;
- The obvious question (which your opponent has hoped you would ask and thus make the case for him);

- The unnecessary question; and
- Allowing the witness to cross-examine you.

Things to accomplish include insuring that the witness understands your questions:

* Insuring that the desired answers are comprehensible to the jury (in order to avoid 'talking down" to the jury, express your own confusion at the witness' answer);
* Requiring the witness to distinguish between fact, assumption and opinion in his testimony;
* Controlling the pace of the cross-examination; and hitting all the points you have chosen to hit.

General Strategic Principles

General strategic principles include: have predetermined goals, elicit favorable information before attacking the witness, set your priorities according to the rules of primacy and recency, always end on a high note, keep the witness off-balance, control the examination, never ask "why", never ask the unnecessary question, never begin a crucial subject before a trial break, quit while you are ahead, etc. In this respect, strategy is a product of your goals, goals which are derived from your pretrial preparation and your theory of the case. Once you have determined what you wish to establish through cross of the defendant's witness, the case's circumstances and facts will necessarily work to guide counsel's choices and thus shape strategy.

Choosing A Strategy

Counsel's pretrial preparation and your theory of the case will invariably dictate areas of fruitful cross-examination. Where several areas present themselves, counsel must engage in a cost analysis. Which areas should be deemed the most telling or most likely to yield favorable results? These areas must be determined and a coherent strategy developed beforehand. Thus, counsel should predetermine the three or four crucial points he wishes to highlight, eschewing a "buckshot" approach as essentially counter-productive. Remember, the K.I.S.S. principle is always in effect (i.e., Keep It Simple, Stupid).

If, and this is a big if, counsel has chosen to elicit favorable information from his opponent's witness, such information should be elicited as soon as possible during the cross, before counsel attacks the witness' credibility or ability to observe. There are two reasons for this: 1) the witness will surely be more defensive and less willing to agree with any question after he has been attacked or impeached, and 2) the jury will note your inconsistency in attempting to rely on information supplied by a witness that you have just exposed as a fraud. Once whatever favorable or necessary information has been elicited, counsel should move in quickly to damage the witness in some way or another. After all, the witness has been called by your opponent, presumably he has somehow helped your opponent's case. Consequently, let the jury know, as soon as is practicable, that the witness or his testimony are in fact flawed. Further, by hurting the witness early on, counsel is able to firmly establish control over the cross-examination and thus throw the witness off-balance. Similarly, issues of bias or interest should be brought out as early as possible, let the jury know that the witness has an interest in the events or parties at trial or has

some other ax to grind.

If you are pursuing an indirect attack on the witness, counsel should "sneak-up" to the clincher question: stalk the witness. The purpose of the indirect attack is to catch the witness off-guard. Telegraphing your ultimate destination may well prove fatal to an indirect attack. Thus, counsel should begin with a series of innocuous questions, generally eliciting affirmative answers, which set the witness up for the questions which actually make counsel's desired point. Impeachment material should be handled in a similar fashion. You want to surprise the witness, as much as possible, with the impeaching material. Again, you want to sneak up on the witness, cut off avenues of escape (or explanation) in the process, before confronting him with inconsistent statements or reasons for bias or prejudice. The trap sprung, counsel is then best advised to leave the witness twisting in the wind until redirect. Other strategic decisions are often best left to the counsel's direction as governed by the circumstances of the case. In short, the key to successful strategy is anticipating its need and analyzing its risks-benefits beforehand.

What is the purpose of the cross-examination - Summary

If you have chosen to elicit favorable information from the witness you should make your points as soon as possible. It is not good practice to attempt to get the witness to agree with you *after* you have attacked the witness's credibility -- the witness would be on the defensive and it would be harder to elicit positive information; additionally, the jury may pick up that you are attempting to use information from a witness whose credibility you have just attacked.

If you are attempting to impeach the witness or are pursuing an indirect attack on the witness then do not approach the witness from the front. You must catch the witness off guard. You must ask questions that will not indicate your true purpose - questions that will meet with an

affirmative response from the witness. Then pounce upon the witness - attack his inconsistent statements and conclusions. Once your point is made, end your cross. Do not allow the witness to rehabilitate himself during your cross.

Remember, there is no tried and true method of cross-examination. The method of interrogation is left to your discretion. You must consider the risks and weigh the risks against the possible benefits. Your decisions should be based upon the specific issues involved in your case and it is these issues which will dictate the approach you will take during the course of the trial.

Checklist

1. Establish what you seek to gain through your cross-examination before you begin.
2. Be decisive, confident and concise.
3. Talk in everyday words. Avoid words that only lawyers use.
4. Learn when it is acceptable to use what, when, how, why and where.
5. If the witness has hurt your case with her testimony, do not have it repeated on cross.
6. The jury decides the case, not you. Consequently, keep your ego in check during cross (and throughout the trial as well). The jury will let your know if you've done a great job.
7. Control the witness.
8. Do not argue with the witness.
9. Do not agree with the witness. The jury has been conditioned by 'LA Law". They expect certain things from you. Don't let them down.
10. Do not smirk or gloat.
11. Should you ask a question if you do not know what the answer will be - maybe.
12. If you have even a shadow of doubt, do not ask that last question. Even if you love that last answer, one question too many is going to hurt.

Proving and Defending Damages: Use of Expert Witnesses

Is there a single most effective method of maximizing damages in a personal injury case? The obvious answer - of course not. Therefore, the question arises, is there a consensus that certain techniques should be used to try and influence the jury on behalf of your clients? The obvious answer - of course.

The proper use of experts and their testimony will increase your chances of success at trial. Expert testimony will have a great bearing on the ultimate outcome. Preparation of the experts will determine how persuasive their testimony will be and will also be extremely helpful when you have to cross examine the expert of your adversary.

The foundation for the above must be established during voir dire. Your own credibility is always an issue and beginning with jury selection must be kept in mind. The reasoning is that the case may eventually end up as a battle of the experts and anything that you as the trial lawyer can do to gain the confidence of the jury should be done. Once credibility is established the entire flow of the trial is easier to maintain. The content of your presentation and the testimony of your expert will not sway the jury if the jury doesn't believe the attorney or feels that the expert will say anything for anybody as long as he is being paid.

The Plaintiff's Expert

General Considerations

Pretrial practice

Your medical expert is usually your plaintiff's treating physician. Obtain narratives and exchange them timely. As an aside, it is important to make sure your doctor's narrative report makes mention of all the diagnostic tests performed on the plaintiff and that the films/findings were reviewed for the purposes of treatment and diagnosis. The failure to mention the diagnostic tests may preclude your expert from testifying about the procedures performed upon the patient.

Note of Issue

Before filing a note of issue it is imperative that the plaintiff return to the treating physician for an updated narrative report. Review the narrative and make sure damages are covered in the bill of particulars. The narrative report should also be checked against the plaintiff's deposition to insure that the damages and injuries are covered. It is also good practice to compare the defendant's report against your pleadings and narratives to avoid any surprises. If the injuries are not fully covered in the bill of particulars, you must serve an amended bill of particulars. This may be done one time prior to filing your note of issue without court approval.

Voir Dire

During jury selection, it is imperative that you present all possible problems in your case so that the jury does not hear about your weaknesses for the first time at the time of trial, or from

your adversary. If your expert has testified an inordinate amount of times indicate that to the jury. If your expert is an expert in a "wide variety" of related subjects note same to the jury. If your expert has published flyers and/or materials and marketed same to attorneys make sure that is brought to the jury's attention. It is important to desensitize the jury to any negative aspects of your case. Anything that may reflect on the credibility of the expert must be brought to the attention of the jury before the trial begins or before your adversary informs them.

Good strategy also suggests that the plaintiff be examined by the expert as close to trial as possible, in order to illustrate that the facts and opinions the expert will be testifying to, will not be stale and subject to damaging cross-examination.

Pre-trial

Make an appointment to visit with your expert prior to the court appearance. Do not attempt to prepare the expert on the fly. You, as the trial attorney, must make a determination at this time, at least as to the parameters of ability the expert presents. How far can you go with this witness? Has he/she testified before? Under what circumstances? It is imperative that you ask the expert what he feels will be the theme of the case. Discuss causation, diagnosis and prognosis. Calculate past and future specials. See what the expert is comfortable saying. Remember, if your client is a white collar worker chances are that an arm/leg injury will not keep him out of work indefinitely. On the contrary, if your client is a blue-collar worker with a limited education - the prognosis for a return to work would much more guarded. Prepare your expert for issues that will come up on cross examination. Explain to the expert that he is only to answer the question that is asked on cross-examination. Under no circumstances is the expert to give the reason for an answer or an explanation for an answer unless the question posed requires that

information. A Yes or No question gets a Yes or No answer. The expert is not to fight with the opposing attorney and is to be respectful at all times.

Trial

Issue 1: How to Effectively Present the Client's Injuries.

A client who constantly and continually complains about the amount of pain he or she is in, truly turns a jury off. Think of your own everyday experiences. Do you want to be around such a person? Do you like such a person?

Therefore it is much more effective to discuss disability with your expert as opposed to pain. However before being able to do this, the groundwork has to be established during jury selection. The foundation is going to be laid to indicate to the jury that there are differing opinions concerning the same injury from highly qualified doctors. From the plaintiff's prospective it is helpful to explain that the defendant's expert has been specifically retained to examine and testify at trial concerning the injury to the plaintiff.

Issue 2: How Do You Establish Disability?

Simply put, what can't the plaintiff do now that he or she was able to do before the accident and why? What is the significance of the injuries to the client's life? This can't be done strictly through the doctor. The proper questions have to be asked of the plaintiff on direct examination to allow this jury to adopt the plaintiff. You will find that more experienced trial practitioners will often prove damages through lay witnesses, such as family members or co-workers.

Issue 3: What does the future hold?

It is easy to show what has happened in the past. It is more difficult to illustrate what is going to happen in the future and what it will cost. Please tell the jury what the future holds in language they will understand. Common language has to be established with the doctor. Explain the term "with a reasonable degree of medical certainty". Explain the need to establish "future damages". Doctors often are afraid to predict what the future holds in regards to prognosis and therefore can be shaken in cross.

Practical Suggestions

- If you cannot articulate a reason for the question being asked, either on direct or cross then don't ask the question.
- Meet with the expert before trial, not the night before trial. Doctors have no time, so often they say, "I'll meet you in the morning before court." Do not allow that. Make an appointment as if you were a patient needing his/her time.
- Pro or novice - Testifying can be a frightening experience for a doctor not used to it. Your preparation has to be very thorough. Explain direct examination, cross examination, terminology, demonstrative evidence, etc.
- Get the doctor off the stand and onto his or her feet. Let the doctor lecture to the jury, next to the blackboard. It harkens back to school when the jurors were students and listened to the teacher.
- Get the doctor's curriculum vitae and discuss that with him/her in advance. Do not accept any concession concerning qualifications. It is not just a mere recitation, but a statement of the qualifications and practical experience - jurors usually do not know what "fellow" means, etc. Jurors are impressed when credentials are explained.

- Explain to the doctor the concepts of "reasonable degree of medical certainty", "reasonable degree of medical probability", "permanency", etc. These terms may be foreign to a physician not experienced in being a witness.
- Illustrations and diagrams are invaluable. Use demonstrative evidence wherever possible.

The doctor must testify as to the following:

1. Qualifications;
2. History;
3. Condition upon first presentation of the patient;
4. Injuries;
5. Causation of injuries - Hypothetical if warranted;
6. Diagnosis - tests criteria for confirming diagnosis;
7. Prognosis and/or how it changed during course of treatment; and
8. Specials - Past and future.

If the cross-examination is weak, do not engage in re-direct with the expert. If the cross-examination is strong only engage in cross-examination if you can rehabilitate the expert. Under no circumstances should questions be asked unless a known provable point can be elicited. Never ask questions for the sake of asking questions.

Preparation for cross-examination of adversary's expert

A very effective way to attack the defendant's expert is through his credibility. The point should already have been made to the jury that the defendant's expert has provided no treatment to the plaintiff. The expert was retained solely to examine the plaintiff and give an opinion as to injuries sustained/causation/permanency. It is from this perspective that you must focus your attack. In order to effectively cross-exam the defendant's expert it is imperative that you do your homework on the expert. Do not limit your cross-examination solely to the expert's involvement in your case. Obtain information on a variety of matters the expert has testified in order to gain an inference that the expert testifies "all the time".

Call a verdict reporting service for a list of trials the expert has appeared in. Call the attorneys on that case and try to obtain the minutes of the prior trial testimony of that expert, in order to find inconsistencies. It is good practice to purchase the trial testimony of ALL experts who testified at the trial. As an aside it is also beneficial to keep extra copies of all prior narrative reports for use during cross examination. Over the years your expert's file will become quite useful to you.

Other areas of cross-examination center on the amount of time the expert took in examining the plaintiff. Someone from your office MUST attend the examination of your client conducted by the doctor retained by the defendant. Take detailed notes of the tests performed by the doctor and the plaintiff's response. In addition, note the start and ending time of the intake and of the actual physical examination. All these facts will come into play when attacking the credibility of the expert regarding the examination performed.

Choosing a strategy

What is the purpose of the cross-examination

While cross examining the expert you should make your points as soon as possible. It is not good practice to attempt to get the expert to agree with you *after* you have attacked the expert's credibility -- the expert would be on the defensive and it would be harder to elicit positive information. Additionally, the jury may pick up that you are attempting to use information from a witness whose credibility you have just attacked.

If you are attempting to impeach the witness or are pursuing an indirect attack on the witness you must be subtle. You must catch the witness off guard. You must ask questions that will not indicate your true purpose - questions that will meet with an affirmative response from the witness. Then pounce upon the expert - attack his inconsistent statements and conclusions. Once your point is made, end your cross. Do not allow the expert to rehabilitate himself during your cross.

Remember, there is no tried and true method of cross-examination. The method of interrogation is left to your discretion. You must consider the risks and weigh the risks against the possible benefits. Your decisions should be based upon the specific issues involved in your case and it is these issues which will dictate the approach you will take during the course of the trial.

Summations

An effective summation revisits the course and the theme of your trial presentation. As plaintiff's counsel you are given the upper hand by speaking to the jury last. You form the last impression of the case; you tell the last story. You can address issues raised by the opposing

party - with no further rebuttal. You must convey to the jury why you were there, who you are, who your client is, and most importantly why they should be on your side.

My purpose is not to explain the concepts of psychology, etc. My purpose is to share with you my experiences in the courtroom, my observations of other attorneys and to provide a practical guideline upon which to build.

Technique

At all times during the trial you must convey honesty to the jury. You must be yourself. Don't act. Don't overindulge. If the jury feels that you are putting on a show that is out of character/personality, they are given very little reason to continue to believe you and to trust you. Remember the jury has already been exposed to you during the selection process. You must continue to convey the same personality and image exhibited during jury selection. That does not mean you cannot be grandiose or subtle or passive, etc. It does mean that if you have shown a certain side of your personality or character you must continue to exhibit a similar nature.

The jury, at this stage of the trial, has already become part of the procedure. They are going to judge the facts of the case. They have sat through days of doing nothing but waiting. They have been through a relatively boring selection process, a pre-trial charge by the judge, days of testimony; they are ready to deliberate, or should be excited to. It is imperative that you, as the last speaker the jurors hear, don't disappoint them. This is the last time a party will address them, the last impression, so make it a good one. Start to tell the story, immediately - get to the point.

Review the elements of a prima facie case. Make sure you revisit your opening and opposing counsel's opening - address inconsistent statements of your adversary - statements not

proved. Refer to the Pattern Jury Instructions for catch phrases and word style, (a must for every attorney who wishes to try cases). That way, when the jury receives the judge's instructions they will have heard these words before. The jury will have been conditioned to relate the charge to the plaintiff's case. They will think how smart you are that you knew what the judge was going to say.

Like an opening statement, a summation is a conflict of goals. You must effectively present all aspects of your case but you must be brief enough to hold the jury's attention. You must deal with archaic language (legalese) but still speak the common language. You cannot just "hit" on every issue, but explain, persuade and conclude on pertinent points.

Don't sugar coat any aspect of the case. If your client is not an angel make sure you tell this to the jury, (e.g., he/she was a drug addict, convict, etc.). Remember the truth is strength and you should always deal from strength. By acknowledging the negative you desensitize the jury to these aspects of the case. You level the playing field.

Refer to the evidence that was presented. Tell the jury what was said, but remind them that it is their recollection that counts. Make sure you have addressed the negative aspects of the case - adverse witness - harmful medical reports, statements - you will be able to minimize the impact. If you show the jury that you are aware of the negative they will downplay it or, at the very least, expect you to counter it. The jury will want to see how you handle adversity but will not focus on the negative if your job is done correctly.

Explain to the jury what they were "shown" but remember to state is succinctly. Short sentence structure conveys a much stronger image and you will be speaking plain English. Do not read a prepared script. You must be able to tailor the summation to the feedback you are receiving. If the jury or the judge are showing signs of impatience then it is important to adjust

accordingly. Therefore a more effective presentation would be one in which you can recite "from your heart". Try to explain how you feel about the case and why you feel that way. Try to keep your notes to a loose outline. It is imperative that you are able to react to stimuli. You cannot just plow ahead without seeing or hearing or observing what is going on around you. The only effective way to adequately adapt your summation is to know the *concepts*. In other words you must know *WHY* you want to say something and not just *How* you are going to say something.

Our culture loves stimuli. Due to shows like the Practice and Law and Order, public perception of what happens in the courtroom is not based on reality. Jurors expect a sound and light show. If the exhibits can be used to supplement your summation by all means refer to them. DO NOT rely on them to provide substance to your summation, but instead use them to underline the points you are trying to make. As an example, simply show a picture of a cracked sidewalk while you are stating how the area was in disrepair, but don't explain too much about the picture. Let the jurors form their own opinions. Leave the photo in view of the jury and continue with your summation. Contrast this with referring to the picture and spending time explaining what the picture is supposed to represent. As with a children's book, it is the words that explain what is going on - to be reinforced by the picture. The picture is not primary in the book, the story is. When used properly a photo will supplement and form an impression in the minds of the jurors that will be combined with your words and not replace them.

Explain who your client was, who your client is now and, depending on the type of trial (full, bi-furcated), who your client will be in the future. Explain why your client is in this position. Explain why the defendants are responsible. Most importantly, explain to the jury what you want them to do and give them reasons to do it. Review the verdict sheet with the jury

and explain to them what they should find and why they should find for your client on each question.

If damages are to be considered by the jury, lead them to your monetary demand. You can't do all the math for them but explain the process. Show them the easy figures first - the expenses - past and future. Then explain how much you are seeking for *past pain and suffering* explain the number in such a way that they jury will apply your calculations to future pain and suffering. Assume for argument sake that it took five years for your case to come to trial and your client has a 30 year life expectancy - if the condition of your client is stable in that the past disability will be similar in nature to the future disability - present your case to the jury as follows, "We seek $60,000 for past pain and suffering due to (decreased ability to earn, activities cannot engage in , etc.), and for future pain and suffering the sum of $360,000…" First you have conditioned the jury that we are seeking $1,000.00 per month/ $12,000.00 per year, because they will do the math $60,000/5 years. You have shown the jury the work and have given them a chance to finish the math - also even though the numbers seem high - the way it was presented to the jury shows that the numbers are not out of line - Doesn't it seem more fair to claim we only seek "$1,000 per month" rather than the sum of $420,000. Obviously you adjust your numbers according to your disability. And remember to explain to the jury that you are not seeking a reward - explain to them that no one would make a deal to get money if they have to spend the rest of their life in pain - your client is there to seek compensation for a wrong that was committed.

Practical Suggestions

- Practice in front of friends, office staff and family members - they will usually be your most supportive and most honest critics.

- Don’t imitate someone. Borrow ideas but your manner must be your own.
- Start positive - Don’t waste valuable time.
- Stress the positive and acknowledge the negative.
- Never say something that was not proved.
- Don’t argue your point.
- Don’t be an obstructionist during your opponent’s summation.
- Be Clear on what you want and why the client deserves it.
- Always refer to the parties by name as opposed to designation – i.e. plaintiff.
- Move back and forth rather than side to side. That way you are always in the jury’s field of view.
- Always be respectful to the Court and your adversaries.
- If analogies are appropriate then use them.
- Be true to yourself.

Conclusion

There are no magic tricks, no sleight of hand, to a successful presentation. As with most of the trial and tribulations of our life, nothing beats hard work and preparation. For a trial to be successful, know your case, know the *whys* and the *hows* of your case, know the law and know yourself. Above all, don’t bore the jury.

VOIR DIRE - JURY SELECTIONS

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VOIR DIRE - JURY SELECTION

I. INTRODUCTION

Often times you hear attorneys say that perhaps civil litigation would be best served if we allowed a computer to pick the perspective jurors. Others have made the statement we would be best served to take the first six that are placed in the jury box.

These positions do not reflect the realities of the 21st Century because with each throw of the dice the stakes have gone higher and higher. The common goal of counsel for the plaintiff and defendant is to eliminate jurors who have a prejudice and bias against their client's position. But here the similarity in goals stops. To cavalierly handle jury selection is "Russian Roulette." The selection of jurors should be an integral part of the trial of a civil case. From a defense perspective, it is important to utilize the jury to minimize damage awards. The converse is true from the plaintiff s perspective. Many cases are won or lost at the selection stage.

One of my partners, Neil A. Goldberg in an article entitled "Courting the Jury to Reduce Damage," November 1989 For the Defense noted:

> Defense counsel should strive, at every phase of the trial, to create an image of himself that the jury will respect and trust, as well as feel very warm and comfortable toward counsel. The goal is for the jurors to identify themselves with the defense attorney; if successful, the jury will eventually look upon counsel as the 'seventh juror.'

Plaintiff s counsel should seek the same identity to achieve liability and maximize the verdict.

The first step in the process is to attempt to impanel an unbiased and intelligent jury that will impartially decide the case. This is achieved through effective questioning tailored to your particular case. Questions should not be asked routinely, but should be

tailored to reflect the personality of the case, the client the attorneys involved and the judge. Before setting foot in the jury selection room, you must think through each of the questions that you will ask (See Section V(A) below).

II. STATUTORY SCHEME

The Seventh Amendment of the United States Constitution guarantees a fair trial by an impartial jury. The right to a jury trial in the State of New York is conferred by Article 1, Section 2 of the New York State Constitution. This right is implemented by New York Civil Practice Law and Rules §§ 41 01-4110 which regulate the examination of perspective jurors. While CPLR 41 07 provides that upon application of any party a judge can be present, in actuality, depending upon the jurisdiction, State Court jury selection is often done without participation by a judge. A judge, however, is generally available to answer any questions that arise during the process and at any time during the process one can request judicial presence. In addition, while the parties to an action have the right to be present during jury selection, such is usually not done. Again counsel has the choice to invite his client, however, some times the physical limitations of the jury selection room prevents this from happening.

lll. WHO ARE "THESE" JURORS?

New York Judiciary Law § 510 sets forth the basic qualifications of a perspective jury.

Each juror must be:

1. Citizen of the United States and a resident of the country.
2. Not less than 18 years of age.
3. Never been convicted of a felony.
4. Be able to understand and communicate the English language.

Before being repealed effective January 1, 1996, the Judiciary Law § 511 specifically disqualified certain types of individuals from jury duty:

1. Those in active armed services.
2. Elected government officials.
3. Heads of governmental departments, public authorities, state commissions and boards.
4. Federal judges and magistrates and those judges governed by the uniform court system.

Such is no longer the case.

Further, certain individuals, prior to the repeal of Section 512 which was effective January 1, 1996, were entitled to an exemption under Section 512:

1. Clergy.
2. Health care professionals.
3. Practicing attorneys.
4. Police.
5. Fire personnel.
6. Sole practitioners and/or managers of businesses with less than three employees.
7. Persons 70 years old.
8. Persons residing with and responsible for the primary care of children 16 years of age and younger.
9. Prosthetists, orthotists, and physical therapists.

The Chief Judge has stated the basic objectives of jury reform to be these: "jury pools that are truly representative of the community; a system that operates effectively; and jury service that is a positive experience for the half-million citizens summoned each year." Judith S. Kaye, The State of the Judiciary 2 (1998).

Taking all the foregoing into consideration - - who will compose the potential panel of jurors that you will select from? Will that panel be composed of six of your clients' peers? Hardly not! Will that panel be composed of individuals with the best experience level and intellect to decide the issues? Hardly not! Will that panel be composed of the "ideal" profile of the type of individual you would describe that would best decide your case? Hardly not! Why? You will soon realize once you begin practicing law that you will receive numerous calls from clients asking how they can avoid jury duty. See New York Judiciary Law § 517 for excuses and postponements. This is not healthy because many of the people that seek exemption are the type that meet the "profile" of the juror that you might want for your case. While traditional, the jury has been comprised of the young, the elderly, the unemployed and those from the lower socio- economic levels, under the recent amendments to the Judiciary Law, the profile of the jury can dramatically change.

IV. PRELIMINARY PROCEDURE

Depending on the jurisdiction, prior to the actual selection of the jury panel, counsel for the parties will generally provide the trial judge or judge supervising litigation with a profile of the case. This can be provided either by a written paragraph briefly describing the case or by filling out a form. Just prior to jury selection, the judge will provide the jury with the following information:

1. Introduction of counsel.
2. Brief statement of the case.
3. Preliminary questions about the jurors' ability to serve (i.e. time constraints, prejudicial ideas, disagreement with the process).

The obvious purpose of this process is to streamline and limit the time for jury selection.

Once the preliminary comments are provided, again depending upon the jurisdiction, the judge may or may not remain in the jury selection room. In those jurisdictions where the judge does not remain, the judge will still be available to discuss

questions or challenges that counsel may have. You should also be aware that in some jurisdictions, the court, prior to allowing counsel the opportunity to question the prospective panel, will specifically limit the length of the selection process by specifying the amount of time that counsel has to do actual questioning.

V. QUESTIONING - THE PANEL

Each juror is required to complete a "Civil Void Dire Questionnaire". As noted in the preamble on the questionnaire:

YOU HAVE BEEN SELECTED TO SERVE AS A PROSPECTIVE JUROR IN A CIVIL CASE. THIS QUESTIONNAIRE IS DESIGNED TO ASSIST COUNSEL AND TIE COURT IN SELECTING FAIR AND IMPARTIAL JURORS. PLEASE ANSWER ALL OF THE FOLLOWING QUESTIONS ON THE FORM; HOWEVER, IF THERE IS INFORMATION THAT YOU WOULD PREFER TO KEEP CONFIDENTIAL, INDICATE ON THIS FORM THOSE QUESTIONS AS TO WHICH YOU WOULD LIKE TO SPEAK PRIVATELY TO THE ATTORNEYS OR JUDGE. THE QUESTIONNAIRE IS IN FOUR PARTS. PLEASE PRINT FIRMLY. THANK YOU FOR YOUR COOPERATION.

Thomas F. Liotti and Ann H. Cole wrote a recent article entitled "Voir Dire: Making the Most of 15 Minutes" appearing in the September 20, 2000 New York Law Journal. This article provides a good overview for issues to consider when picking a jury.

While the stated purpose is to assist counsel and the court in the selection process, it is by design also intended to limit the number of questions asked by counsel and therefore, limit the time for questioning. The fact that the court now requires prospective jurors to fill out this questionnaire does not eliminate the need to make a critical assessment of the jury. This assessment must begin from the first moment you lay eyes on the panel. Throughout the selection process the body language of each of the jurors is important. Equally as critical and important is the questioning of the panel. During the process, your body language is important. Further, even though counsel has been provided with the Civil Voir Dire questions, the need to tailor questions in your particular case in a form that the jury can understand is not eliminated. Counsel should read the

questionnaire carefully and develop specific questions that elicit information elaborating on the areas covered by the questionnaire. Both your demeanor and questions must exhibit confidence and lay the groundwork for your client's position. The focus of the plaintiff's questions will clearly be different than that of the defendants.

A. Plaintiff's Questions

Q - Juror number one, may l have your full name -
Q - Where do you live?
Q - What is your place of employment?
Q - How long has that been your business?
Q - In what line of business is the X Company?
Q - In what capacity are you employed?
Q - How long have you been employed by the X Company?
Q - Married?
Family?
What is your wife's name, please?
Is she employed outside of the home?
What firm?
In what capacity?
How long?

For Women Jurors

Q - May f have your full name please?
Q - less that Miss, Mrs. or Ms.?
Q - Where do you live Mrs. ____?
Q- Children?
Q - What is your husband's first name?
Q - What is his business, please?
Q - With what firm is he connected?
Q - In what capacity?

Q - Where is the firm located?

Q - How long has he been connected with the firm?

Q - In what line of business is the firm? (The husband's employment record should be covered.)

Q - Mr. _____, do you know any of the parties involved in this case?

Q - Do you know any of the attorneys or law firms?

Q - Have you ever heard of this case?

Q - Has any one attempted to discuss it in your presence?

Q - Have you ever been involved in a similar lawsuit?

Q - Is there anything about the nature of this case or about the parties involved that would prevent you from deciding tins case?

Q - Mr. _____, have you had any experiences we should know about that would prevent you from deciding this case?

Q - Have you ever served as a juror before?

Q - Did anything occur during the trial of that case that would tend to influence you for or against either party in this case?

Q - Mr. _____, you understand that each case must be decided upon its own facts and according to law?

Q - Have you any problems with the rules of law which were given to you in the previous case?

Q - Mr. _____, you are familiar with the rules that govern the trial of cases and that they were all explained to you?

Q - If we prove our case as required by law, you won't hesitate to return a verdict in our favor will you?

Q - Will you follow and apply the law to this case as the court instructs you, particularly as to the degree of proof?

Q · Mr. _____, as you know, the plaintiff must prove his case by a preponderance of evidence, which merely means that we must prove our case by a greater weight of the evidence.

Note: At this juncture you will tailor specific questions to the facts of your case.

Q - Do you have any problems with the law which permits a person to sue for reasonable compensation or damages for injuries and losses sustained through the negligence of another?

Q - Mr. _____, if we prove our case will you hesitate to do yam duty as a juror by bringing in a verdict in our favor for whatever compensation or damages the evidence shows this man is entitled to?

Q - And you will return such a verdict in my client's if the evidence shows that we are entitled to -damages in a substantial amount, is that correct?

Q - Do you know of any reason that I have not asked you about why you could not be a fair and impartial juror for both sides in this case?

Q - You understand, of course, that both counsel for the defendant and I are seeking impartial jurors to decide this case?

Q - Can you be one of those? Thank you.

B. <u>Defendant's Questions</u>

Q - Do you know either the plaintiff or his attorneys?

Q - Do you have any feelings against my client just because he has been sued in this case?

Q - Do you have any opinion that this defendant is the sole and only cause of this accident?

Q - Do you have any prejudice against a man because of the rules who is forced to come to court to defend himself?

Q - Mr. _____, do you feel as you sit here that just because my client has been sued in this cake that he/she is liable?

Q - Understand, Mr. _____, that unless the plaintiff offers sufficient evidence to show that he is entitled to recover, you will not return a verdict in his favor.

Q - Do you understand that Mr. _____ will require the plaintiff prove his case by a preponderance of the evidence.

Q - If the plaintiff fails to prove his case by a preponderance of the evidence will you return a verdict of no cause of action?

Q - If the evidence should show that the plaintiff was injured through his own negligence, will you follow the instructions of the court as to the law of governing such situations?

Q - And you will apply that law as instructions?

Q - You will make the plaintiff prove everything that the law requires him to prove?

Q - Mr. _____, you understand that it is not the duty of the defendant to prove that he/she are not liable in this case, but that it is the plaintiff s duty to prove liability?

Q - Will you make the plaintiff meet the burden of proof?

Q - Will you follow the law as instructed regardless of any feeling of sympathy you might have for either side?

Q - Mr. _____, you understand that sympathy has no place in the trial of a case, do you not?

Q - It is natural for all of us to have a foe ling of sympathy for anyone who has been injured, but you would not decide the case solely upon sympathy would you?

Note: At this juncture you will tailor specific questions to the facts of your case.

Q - Will you consider any and all defenses that the court permits us to offer?

Q - Have you ever been involved in any type of accident case before? (If answer is yes, have him tell all about it.)

Q - Have you ever been hurt in such an accident? (Get details.)

Q - Has any member of your family or close friend ever been so involved or injured? (Get details.)

Q - Have you ever started an action against anyone for damages arising out of an accident?

Q - Have you ever made a claim against anyone for damages arising out of an accident?

Q - Will you give both sides a fair and impartial trial? ls this true even though the plaintiff is an individual and defendant is a corporation?

Q - You understand that a corporation is made up of a number of people operating a business?

Q - Will you require the plaintiff to prove its case just as if the defendant was one of our people?

Q - Would you require less proof against us because we are a corporation?

Q - Will you follow the law as instructed to you by the court?

Q - If you find that we are not liable, you will not consider plaintiff's injuries or other damages?

Q - Mr. _____, you are not going to leave all of your experiences in life outside of the jury room when deciding this case?

Q - You will consider all of the evidence in this case in the light of your past experience?

Q - Do you feel that you can give both sides a fair and impartial trial and render a just verdict between us?

Q - Thank you, Mr. _____.

VI. "DISCHARGED OR EXCUSED"

The jury in a civil case will be composed of those individuals who are qualified and not exempt as well as those which have not been "discharged or excused." (CPLR § 4105). A juror can be discharged or excused by: stipulation, or by one of the attorneys exercising a "challenge for cause" or a "peremptory challenge."

A. For Cause. A "challenge for cause" is presented to the court and the court will decide whether to excuse the juror (CPLR § 4108). Such a challenge can, under CPLR § 4110, be asserted if the juror is:

1. An employee or stockholder of a corporate party.
2. A person having designated status or in any matter interested in an insurance company (personal injury or property damage.)
3. Related within the sixth degree by consanguinity or affinity to a party.

In addition to these statutorial prescribed reasons, a perspective juror can be challenged if the questioning of that juror demonstrates that he or she could not be impartial or disagrees with the judicial system or scheme and cannot put sympathy aside. The reasons for a challenge for cause are very important and therefore, complete notes should be kept during the questioning.

B. Peremptory Challenges. Each, side under CPLR § 41 09 is given three peremptory challenges plus one such challenge for each alternate juror. These numbers can be altered by the court in multiple party cases. Prior to entering the juror room, counsel should iron out any such number problems.

Up until recently, it was generally believed that attorneys in civil cases had free rein on the use of peremptory challenges and could excuse a juror for any reason whatsoever without judicial scrutiny. However, in light of the United States Supreme Court's rulings in Batson v. Kentucky, 476 U.S. 79 (1986) (a criminal case) and Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077 (1991) (a civil case) the arbitrary use of peremptory challenges is no longer available. In Edmonson, the court held that using peremptory challenges to exclude jurors based on their race violated the equal protection rights of the jurors that were excused. See also, Powers v. Ohio, 111 S. Ct. 1364 (1991); Hernandez v. New York, 112. S. Ct. 1859 (1 991); Ford v. Georgia, 111. S. Ct. 850 (1991).

VII. THE MECHANICS

The following are some of the basic mechanics of the process:

1. Plaintiff’s counsel in the order named in the pleadings questions all potential panel members (for example, the first six).
2. Defense counsel in the order sued next question ail potential members one after the other.
3. There are three rounds of questioning.
4. At any time during the questioning process, the attorneys can stipulate to discharge or excuse a juror.

5. Challenges for cause are next considered. Counsel can agree or disagree. If there is a disagreement, the court will rule on the challenge. Plaintiff exercises challenge, if any, first followed by the defense.
6. Peremptory challenges are used or lost. For example, if you have been allowed three peremptory challenges you must use one in each round. You cannot save the challenges from round to round. Plaintiff s counsel exercises challenge followed by defense counsel.

Whatever the mechanics, it is the actual questioning and the attorney's demeanor that is ultimately important.

VIII. SOME PRACTICAL TIPS

1. Create a theme that you will utilize throughout the case – first anointing it during the selection of the jurors.
2. State your client's position and case clearly and concisely. Understanding is important.
3. Let the juror know your client. Your client should be John or Mary -- not Mr. Smith or Mrs. Jones.
4. Establish your credibility and trust. Don't overstate your case.
5. Outline your questions just as you will ask them.
6. Address the jurors by their first name or last name if important.
7. Identify with the juror.
8. See if the juror meets the profile you have designed.
9. Make sure a juror wants to serve.
10. Use a style during jury selection that you are comfortable with.
11. Define your role for the jury. Let them know what your questioning is trying to achieve.
12. Use your imagination. If a juror favors your position, let him or her educate the other jurors. Ask favorable questions.
13. Have eye contact with each juror.
14. Be comfortable with the ones selected.

IX. POST-TRIAL CONTACT

Win, lose or draw, it is human nature to want to know what went on in the wind of the jury, both individually and collectively, in arriving at its verdict. Those that lose perhaps are most eager to determine what went wrong. In an article written by Joel Cohen entitled "Post- Trial Juror Interviews: What are the Restrictions on Counsel?" appearing in the August 16, 1994 New York Law Journal discusses this very issue and notes:

There is no rule in New York Courts, federal or state, as to whether a lawyer may interview jurors post trial. There is only a strong preference on the part of the Second Circuit that the court and all counsel be notified in the event such interviews are to take place.

Cases cited in that article for consideration were United States v. Ianniello, 866 F.2d 540 (2d Cir. 1989); United States v. Salerno, 974 F.2d 231 (2d Cir. 1991) and United States v. Di Nanoli, 8 P.3d 909 C2d Cir. 1993). Se also, United States v. Brasco, 516 F.2d 816 (2d Cir. 1975); cert. denied, 423 U.S. 860 (1975); United States v. Moten, 582 F.2d 654 (2d Cir. 1978) and ABA's Model Code of Professional Responsibility, DR 7-108.

As these cases demonstrate, nationally there are policies that deter jury impeachment and they have successfully limited the ability of attorneys and litigants to interview jurors. However, the modern day media has succeeded in accessing jurors that have presided over higher profile cases. High profile cases, of course, generally abide by rules that are unlike most trial situations. For example, the jurors in the recent Martha Stewart case have even conducted their own press conferences. Furthermore, the increase of cameras in the courtroom has given the public more access to jurors and their thought processes during the trial.

X. CONCLUSION

The selection of the jury should be perceived as the final step of the actual trial in which counsel for the plaintiff can focus on the potential verdict and counsel for the defense should seek to avoid excessive verdicts. The development of a psychological bond is critically important from both sides from a potential verdict perspective and should start when the jurors first step into the selection room. Counsel should not ignore,

however, the frame of the description of the action that is provided to the court prior to jury selection and read by the judge as part of the selection process.
As noted by two of my partners:

"Defense counsel creates the image that he is a credible leader to whom the six jurors should look for assistance and guidance in their attempt to fulfill their responsibility to render a fair, impartial and reasonable verdict.”

Neil A. Goldberg and Cheryl A. Possenti, "The Seventh Juror Marches On: Mitigating Damages in the Personal Injury Case."

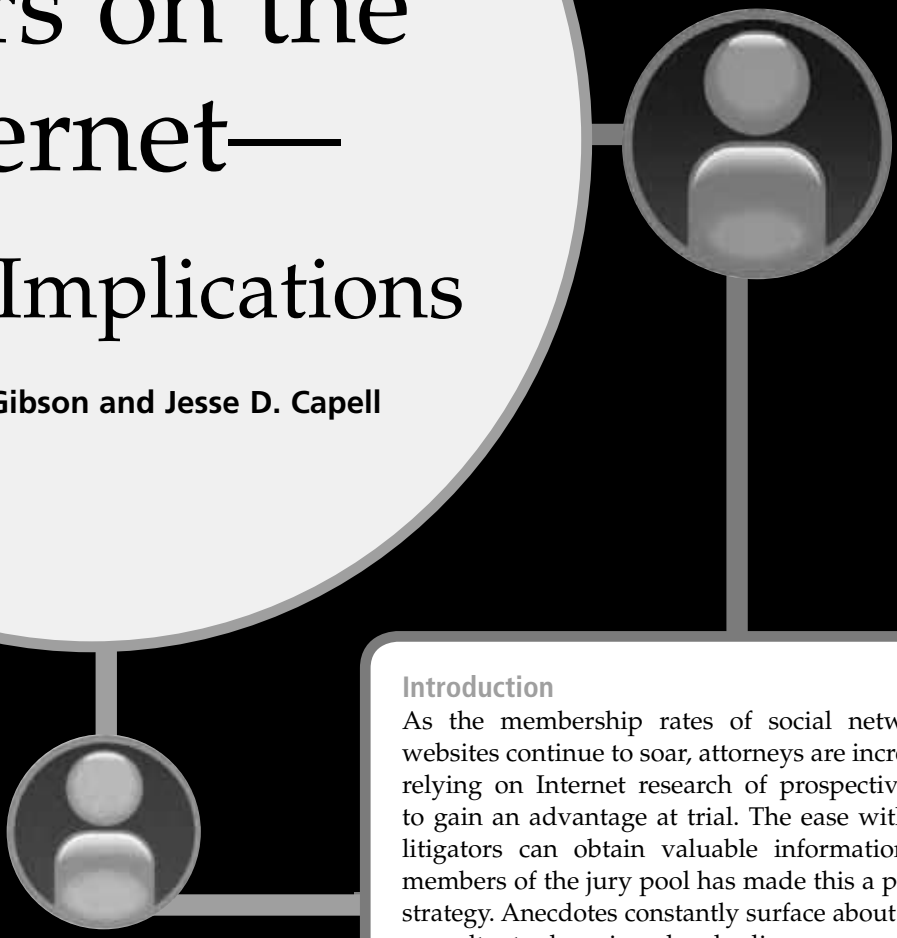
The theme created during jury selection should be carried by counsel to the closing statements.

For further current amplification of the Jury Selection topic, see the article, JURY NULLIFICATION, Proposals for Reducing the Impact of External Circumstances Upon Civil Verdicts, published in the January 2005 edition of the New York State Bar Journal. The article is authored by Michael A. Haskel, a litigator in Mineola, New York.

Researching Jurors on the Internet—

Ethical Implications

By Robert B. Gibson and Jesse D. Capell



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Introduction

As the membership rates of social networking[1] websites continue to soar, attorneys are increasingly relying on Internet research of prospective jurors to gain an advantage at trial. The ease with which litigators can obtain valuable information about members of the jury pool has made this a prevalent strategy. Anecdotes constantly surface about the trial consultant who miraculously discovers prospective jurors' hidden biases through their online activity. Pre-trial Internet research is becoming so much the standard that the New York City Bar Association (NYCBA) recently suggested that a trial attorney's failure to thoroughly investigate prospective jurors might be an abdication of the attorney's professional duty.[2]

But there is an apparent conundrum: while litigators may be blameworthy for neglecting to conduct Internet research on prospective jurors, attorneys may also be guilty of an ethical violation for performing that very act. In June, the NYCBA issued Formal Opinion 2012-2, a comprehensive report on the ethical implications for lawyers who research jurors on the Internet. Formal Opinion 2012-2 states that attorneys might be in violation of the New York Rules of Professional Conduct if

they contact a prospective juror through a social media site – even if the contact was unintentional. According to the NYCBA, if a social media site automatically notifies a juror when another person has viewed the juror's profile page, a lawyer "communicates" with a juror simply by looking at the juror's publicly available profile. Formal Opinion 2012-2 emphasizes that attorneys must educate themselves about how social media websites work before they use them.

At first glance, these ethical views may seem hard to reconcile. On one hand, an attorney could be liable for forgoing Internet background checks. On the other, an attorney may be culpable just by looking at a juror's publicly available social media profile page. But these guidelines are not in conflict. By compelling attorneys to learn how various social media sites operate, the NYCBA is empowering attorneys to become experts in this field. If lawyers are armed with knowledge about how these websites function, they can perform precise research that comports with their ethical obligations.

While litigators may be blameworthy for neglecting to conduct Internet research on prospective jurors, attorneys may also be guilty of an ethical violation for performing that very act.

Internet Research of Jurors

The number of individuals with online profiles is growing exponentially. One recent survey estimates that 35% of adults and 60% of people under the age of 30 now belong to a social media networking site.[3] Given those figures, trial lawyers are using websites like Google, Facebook, and Twitter to learn as much as possible about the character traits of prospective jurors.[4] With the assistance of an associate or a paralegal, litigators can conduct real-time background searches on a multitude of potential jurors.

The primary purpose of performing Internet background research is to enable trial attorneys to weed out biased jurors during the *voir dire* process.[5] Litigators can use peremptory challenges – limited objections that a lawyer may use to strike a prospective juror – if attorneys discover evidence that a potential juror will be prejudiced against their clients.[6]

The benefits of Internet background research can be substantial.[7] Historically, trial lawyers have depended on confidential juror questionnaires to obtain background information about prospective jurors, but lawyers have criticized the paucity of information contained in juror questionnaires.[8] Now, through the Internet, trial attorneys can obtain information about prospective jurors that would otherwise not be disclosed during *voir dire*, such as the juror's political beliefs and economic philosophies.[9] Litigators can also use the Internet to identify jurors who may be receptive to their clients' claims or jurors who seem likely to disregard the rule of law.

For instance, a trial consultant in a products liability case learned that a potential juror had posted on Facebook "that one of her heroes was Erin Brockovich, the crusading paralegal known for her work for plaintiffs in environmental cases."[10] In a lawsuit involving patent rights, a trial consultant for the plaintiff discovered that a prospective juror had previously blogged about the unfairness of copyright infringement, and he sought to keep this juror on the panel.[11] And in a somewhat eccentric example, a potential juror in a personal injury case was rejected because she had blogged about her extensive attempts to contact extraterrestrials.[12]

The benefits of pre-trial Internet research were starkly realized in a recent products liability trial in Fort Lauderdale, Florida. The plaintiff claimed that he was injured after he was forced to clean a machine in a confined space. Before examining prospective jurors, the plaintiff's attorney began researching them on social networking sites. During the course of her research, the attorney learned that one of the potential jurors belonged to a support group for claustrophobics. She selected this juror for the panel, and the juror ultimately served as the foreman. The result: a verdict in favor of the plaintiff.[13]

Furthermore, Internet background searches are extremely efficient. Compared with traditional forms of investigative research, attorneys and their staff members can sift through vast amounts of information on the Internet in a relatively short amount of time.[14] Attorneys inside a courtroom can email the names of prospective jurors to associates or paralegals, who can then plug these names into various search engines or social media websites. Electronic data on social media websites can be retrieved within seconds, and the trial lawyer can receive the background information before making a decision about whether to strike the prospective juror.[15]

Social media websites may also be used by attorneys to verify the accuracy of statements made by prospective jurors during *voir dire*. Depending on the jurisdiction, *voir dire* can be a frenetic process, and it may not be possible to scrutinize the background information of each juror. In *Dellinger*,[16] a criminal fraud trial, a juror denied during *voir dire* that she had a social relationship with the defendant. After the jury rendered a guilty verdict against the defendant, the defendant disclosed that he

had received a message from the juror before the trial through a social networking site. In the message, the juror sympathized with the defendant's plight and said they would "Talk Soon!" The Supreme Court of Appeals of West Virginia ultimately held that the trial court abused its discretion in failing to order a new trial.

The efficacy of researching potential jurors on the Internet is leading some commentators to suggest that trial attorneys may be obligated to perform this service.[17] Indeed, the NYCBA observed that clients have begun to assume that their attorneys will conduct Internet background searches of jurors and that "standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[18] One recent scholarly essay proffers that it may even be malpractice for a trial attorney not to perform this research.[19]

To be sure, the New York Rules of Professional Conduct (NYRPC) do not provide any indication about whether pre-trial Internet research is required. Two rules in the NYRPC, however, bear on this issue. Rule 1.1 provides that "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." And Rule 1.3(a) states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[20] So, for the time being, it seems safe to assume that trial attorneys are not invariably required to perform this service. But it may not be long before that changes.

And while pre-trial Internet research may eventually be an obligatory ethical duty, the NYCBA's Formal Opinion 2012-2 indicates that when engaging in this conduct, attorneys must be mindful of their ethical responsibilities.

Ethical Rules About Researching Jurors Electronically

Until recently, the ethical rules for lawyers who conduct Internet research on potential jurors in New York State were not explicit. The NYRPC provides only that "a lawyer shall not communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case."[21] In 2011, the New York County Lawyers' Association Committee on Professional Ethics issued an interpretation of Rule 3.5(a)(4).[22] The Committee determined that it is ethical and proper under Rule 3.5(a)(4) for an attorney to "undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send Tweets to jurors or otherwise contact them."[23] Still, the precise meaning of "contact" and "communicate" in this context had not yet been defined.

In June, however, the NYCBA released its groundbreaking ethical opinion on using social media and related technology for pre-trial research. In it, the NYCBA attempted to clarify the meaning of "communication" within the context of Rule 3.5(a)(4). While the NYCBA does not have the authority for policing ethical violations in New York State, formal ethical opinions from the NYCBA definitely hold sway. In discerning the meaning "communication," the NYCBA referenced several sources: *Black's Law Dictionary* (9th Ed.), *The Oxford English Dictionary*, and Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York. Ultimately, it determined that it is irrelevant whether an individual intends to communicate with another person; communication is accomplished when knowledge or information is transmitted from one person to another. The focal point is on the recipient of the communication, not on the communicator.[24]

The NYCBA recognizes that some social media services automatically notify users when their profiles have been viewed. For example, members of LinkedIn, a highly popular professional networking site, receive a message when other LinkedIn members have viewed their profiles. Other social networking services that offer this feature include Bebo and Tagged.[25] The NYCBA concludes that

> [a] request or notification transmitted through a social media service may constitute a communication even

> if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.
>
> …
>
> The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent.[26]

Still, the NYCBA did not decide that an inadvertent or unintentional communication necessarily constitutes an ethical violation – only that it may. The NYRPC may ultimately need to weigh in on this subject.

The NYCBA repeatedly states that attorneys who engage in electronic background searches of jurors should study the functionality of the websites they use. If an attorney is unable to grasp how the social media service works, the NYCBA urges the attorney to proceed with caution and be aware that he or she may be at risk of violating the ethical rules.[27]

Before you conduct any research on a social media site you must confirm that the site does not notify other users when their profiles have been viewed.

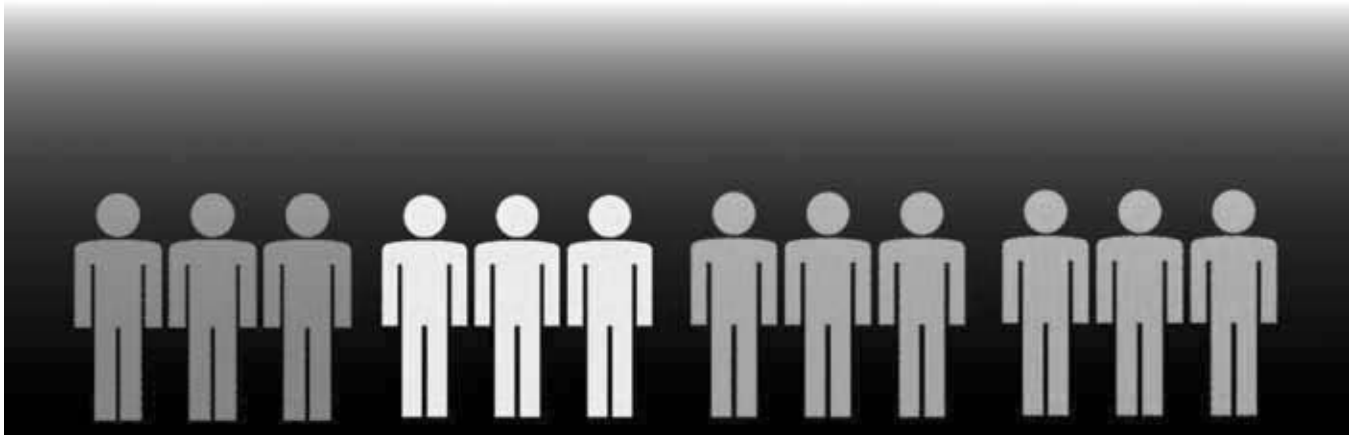
Reconciling the Two Views

While one may initially believe that Formal Opinion 2012-2 creates an ethical dilemma, the fallacy of this assessment becomes evident upon closer inspection. Formal Opinion 2012-2 simply advises attorneys of the following: (1) you may – if not now, at some time in the future – be obligated to perform Internet research of prospective jurors; (2) you can view the publicly available electronic profiles of prospective jurors as long as you do not contact or communicate with the juror in any fashion; and (3) before you conduct any research on a social media site you must first examine how the site works, understand its privacy policies, and confirm that the site does not notify other users when their profiles have been viewed.[28]

If, for example, an attorney planned to use Facebook to research prospective jurors, the attorney would need to visit the Facebook's Help Center at http://www.facebook.com/help/?ref=ts. The Help Center is a user-friendly resource providing an abundance of basic information about Facebook. It contains a glossary of commonly used terms; debunks certain myths; and describes various features, services, and applications offered by the service. Most important, the Help Center provides a comprehensive explanation of Facebook's privacy policies, and it clearly delineates Facebook's policy about tracking who views your profile:

> Facebook does not provide a functionality that enables you to track who is viewing your profile (timeline), or parts of your profile (timeline), such as your photos. Third party applications also cannot provide this functionality. Applications that claim to give you this ability will be removed from Facebook for violating policy.[29]

Similarly, LinkedIn users can access the LinkedIn Learning Center, which contains detailed information about how the site works. LinkedIn further offers a function called "Answers" in which a user can ask questions about a variety of topics, including questions about various features offered through LinkedIn. The answers are provided by other users. A simple inquiry about whether users have the ability to track who views their profile yields an overwhelming number of responses that yes, indeed, you can (although users' ability to ascertain the identity of people who have viewed their profiles varies based on the type of LinkedIn account they have).



Twitter requires users to subscribe to another user's Twitter account, which has been found to be a blatant act of communication – and therefore it is a prohibited form of juror research. Still, if Twitter users have a public account, it is possible to access their Twitter accounts through a Google search without notifying the users that one has viewed their profile.

The more an attorney understands about a social media website, the more equipped the attorney will be to take advantage of all of the website's search capabilities. For example, the Facebook Help Center provides a cogent description of the Facebook Search function, explaining how users can filter their searches, search public information, or search for two things at the same time.

Conclusion

Pre-trial Internet research of prospective jurors is becoming an integral component of the trial preparation process. Trial attorneys would be well advised to apply this practice whenever possible because it may increase the likelihood of a favorable outcome. But before undertaking this research, attorneys must be familiar with the local ethical rules governing this practice. They must also determine whether jurors will receive a notification from the website if another user views their profiles. Fortunately, the leading social media websites provide user-friendly support software that allows trial attorneys to discern this information with relative ease. Given the role of social media in our society, investing the time to understand how these websites function is a worthwhile endeavor. ■

1. Social media is defined as "[w]eb sites and other online means of communication that are used by large groups of people to share information and to develop social and professional contacts: Many businesses are utilizing social media to generate sales." *See* Dictionary.com. http://dictionary.reference.com/browse/social+media?s=t (Mar. 5, 2012).

2. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2.

3. Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 Kan. L. Rev. 611, 612 n.5 (2012).

4. Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, Reuters Legal (Feb. 17, 2011).

5. Potential jurors are generally selected through a system of examination, known as *voir dire*, during which attorneys for each party can object to a juror.

6. Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. Rev. Disc. 28, 34–35 (2011).

7. *See* Beth Germano, *Social Media Changing the Way Juries Are Picked*, CBS Boston (Nov. 15, 2010), http://boston.cbslocal.com/2010/11/15/social-media-changing-the-way-juries-are-picked (medical malpractice attorney in Boston claims that social media research of prospective jurors has been revolutionary).

8. *Id.*

9. *See* Hoffmeister, *Applying Rules of Discovery supra* note 6, pp. 32–33.

10. Grow, *Internet v. Courts supra* note 4.

11. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times (Sept. 29, 2008), http://articles.latimes.com/2008/sep/29/nation/na-jury29.

12. *Id.*

13. Hoffmeister, *Investigating Jurors supra* note 3, pp. 612, 626.

14. *Id.* at 630.

15. *See* Hoffmeister, *Applying Rules of Discovery supra* note 6, pp. 33–34.

16. *See State v. Dellinger*, 696 S.E.2d 38, 40 (W. Va. 2010) (per curiam).

17. Hoffmeister, *Investigating Jurors*, *supra* note 3, p. 630.

18. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 I.

19. Hoffmeister, *Investigating Jurors*, *supra* note 3, p. 631.

20. *See* Rules 1.1, 1.3(a) of the NYPRC.

21. *See* Rule 3.5(a)(4) of the NYRPC.

22. NYCLA Comm. on Prof'l Ethics, Formal Opinion 743 (May 18, 2011).

23. *Id*. Indeed, although the New York Appellate Division has not directly addressed this question, a New Jersey Appellate Division decision is consistent with the New York County Lawyers' Association's position. In *Carino v. Muenzen*, 2010 N.J. Super. Unpub. LEXIS 2154, at *10 (Aug. 30, 2010), a medical malpractice case, the trial court ruled that a plaintiff's attorney could not use the Internet to obtain information about prospective jurors during jury selection because the plaintiff's attorney had failed to give advance notice to defense counsel that he would be conducting such research. The jury ultimately awarded the defendant a defense verdict, and the plaintiff appealed. On appeal, the Appellate Division determined that trial judge acted unreasonably. *Id.* at 26. The Appellate Division explained:

> In making his ruling, the trial judge cited no authority for his requirement that trial counsel must notify an adversary and the court in advance of using Internet access during jury selection or any other part of the trial. The issue is not addressed in the Rules of Court.

Id. The Appellate Division, however, determined that the plaintiff did not demonstrate that he suffered any prejudice as a result of the trial court's error, and the defense verdict was affirmed. *Id.* at 27.

24. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.2.

25. Bebo, launched in 2005, is a social media site where users can post blogs, pictures, music, videos, and questionnaires. www.bebo.com. Tagged is a "social discovery site" that enables members to browse the profiles of other members, play games, and share tags and virtual gifts. www.tagged.com.

26. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.2–3.

27. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.3.

28. NYCBA Comm. on Ethics Formal Opinion 2012-2 is extremely thorough. It also provides that an attorney may not engage in deception or misrepresentation in researching jurors on social media websites and discusses an attorney's obligation to reveal improper juror conduct to the court.

29. *See* http://www.facebook.com/help/?page=11603751514719 (Aug. 4, 2012).