— CHAPTER FOURTEEN —
Jury Selection

I. INTRODUCTION

Jury selection is one of the least uniform aspects of trial advocacy. The procedures used to select and qualify jurors differ widely from jurisdiction to jurisdiction. In some courts the attorneys are little more than observers, while in others they are given wide latitude to question the panel of potential jurors. The trend for many years, however, has been to restrict, if not eliminate, attorney participation. While this is most often done in the name of efficiency, it is also a response to perceived abuses. Many lawyers have seen jury selection as an opportunity to begin arguing the case, or even to introduce evidence surreptitiously. Others have engaged in all manner of obsequious behavior aimed at currying favor with the jurors. In consequence, the heyday of attorney-conducted jury selection now seems past. In some highly publicized trials the process may still occasionally consume weeks or months, but the reality is that jury selection has been de-emphasized in many parts of the country. It is likely that this will continue to be the case.

In truth, it was never really possible to "select" a jury. Even in the most lenient jurisdictions the best that counsel could generally accomplish was to de-select or disqualify a certain number of potential jurors. Today, the goals of jury selection can probably be summarized as: (1) eliminating jurors who are biased or disposed against your case; (2) gathering information about the eventual jurors in order to present your case effectively; and (3) beginning to introduce yourself, your client, and certain key concepts to the jury.

As restricted as jury selection may have become, however, it does remain the one aspect of the trial when counsel can interact with and obtain direct feedback from the jury. At all other moments in the trial one can only observe and infer the jurors' reactions. During jury selection, even when it is conducted solely by the court, it is possible to

learn directly from the jurors themselves. If this precious opportunity is to be preserved, lawyers must use it wisely and fairly.

II. MECHANICS OF JURY SELECTION

A. Terminology

Jury selection is markedly different from other aspects of the trial and has developed a lexicon of its own.

The "venire" or venire panel is the group of citizens from which juries are to be chosen. The venire, also called the jury pool, is typically assembled from lists of registered voters, licensed drivers, or other adults. Jurisdictions vary widely as to an individual's term of service on the venire. Some courts utilize a "one day or one trial" system in which potential jurors are released after one day unless they are seated on a jury. The more traditional approach, still employed by many courts, is to require potential jurors to be available for a set period of time, ranging from a week to a month.

"Voir dire"[1] is the process of questioning venire members, by either the court or the attorneys (or both) in order to select those who will serve on a jury.

In the course of voir dire counsel may seek to disqualify potential jurors. This is done by making a "challenge." A "challenge for cause" is an objection to the venire member's qualifications to sit on the jury either because she does not meet certain statutory requirements or because she has revealed significant bias or prejudice in the course of questioning. A challenge for cause must be ruled upon by the court and may be objected to by opposing counsel. There is no limit on the number of potential jurors who may be challenged for cause.

"Peremptory challenges," sometimes known as strikes, may be exercised without cause. The parties are typically allowed to excuse a certain number of potential jurors without stating their reasons. Except in the case of apparent racial or other discriminatory motivation, peremptory challenges must be allowed. The number of peremptory challenges available to each party is determined by statute or court rule.

In most states there are statutory "exemptions" that allow individuals to decline jury service. Traditionally, many occupational groups were exempt, including lawyers, physicians, dentists, clergy, and even embalmers. In many states most of these automatic

1. Juror voir dire should not be confused with witness voir dire as described in Chapter Nine, Section II (C)(1)(d), *supra* at p. 276.

exemptions have been eliminated. Note that an exemption does not disqualify a person from serving on a jury, but only allows her the privilege of opting out. Even in the absence of an exemption, venire members can request to be excused from service on the basis of hardship.

There are also minimal statutory "qualifications" for jury service. While these differ from state to state, they typically include the ability to understand English, as well as an age requirement. Convicted felons are also frequently disqualified from jury service.

B. Questioning Formats

The voir dire of potential jurors may be conducted by the judge, the attorneys, or both. As noted above, the right of counsel to participate in jury voir dire has been greatly limited in many jurisdictions. Nonetheless, some state systems still permit wide-ranging attorney voir dire. In a few jurisdictions the judge is not even present for the questioning of potential jurors unless one of the parties so requests.

In a large number of federal courts the current practice is for the judge to conduct the entire voir dire, allowing counsel only to submit written questions which the court may use or discard. This model saves time and avoids abuses, but it is subject to the criticism that a judge's questions will necessarily be fairly superficial. The judge, after all, cannot possibly know as much about a case as the attorneys and is unlikely to be attuned to all of the possibilities for uncovering subtle prejudices.

Finally, a growing number of courts have adopted a mixed approach in which the judge conducts the primary voir dire but where the attorneys are allowed to ask supplemental questions. This format attempts to accommodate both the court's need for efficiency and counsel's interest in participating in the voir dire.

C. Timing and Order of Voir Dire

The timing and exercise of challenges is determined in large part by the format for questioning the venire members.

1. Preliminary Statements

In all three questioning formats it is typical for the judge to make a preliminary statement to the entire venire panel, describing the voir dire process, the nature of the case, and the issues involved, and perhaps introducing the parties and their attorneys. In systems where attorney questioning is permitted, the lawyers may also be

allowed to make preliminary remarks, or at least to introduce themselves and their clients if the judge has not already done so.

2. Size of the Venire Panel

The number of venire members brought to the courtroom should exceed the total needed for the jury as well as the total number of peremptory challenges available to all of the parties. Assume, for example, that our fire engine case is to be tried by a jury of six, with two alternates, and that the local rules of court allow three peremptory challenges for each party. Thus, the minimum size for the venire would be fourteen. It is possible, however, that some venire members will be challenged for cause; others may request to be excused for reasons of hardship or personal convenience. Consequently, it is likely that the voir dire will begin with a panel of at least twenty or twenty-four. In controversial or highly publicized cases, the initial panel may need to be much larger.

3. Questions to the Entire Panel

Many courts begin the voir dire with a series of inquiries to the entire venire panel. These questions typically require only "yes" or "no" responses and seek to develop information relevant to the particular case. Some judges have a standard set of questions, but most will also accept suggestions from counsel.

Venire members are asked to raise their hands if the answer to any question is "yes." Are you related to any of the attorneys or parties?[2] Do you or members of your immediate family work in the aerospace industry? Have you ever been the victim of a crime? Have you ever been asked to co-sign for a loan? Venire members who raise their hands may be asked follow-up questions by the court. In jurisdictions where the attorneys participate, the follow-up questions may come during the lawyers' voir dire.

The court may also ask the entire panel whether anyone requests to be excused by reason of hardship or whether any of the potential jurors falls under a statutory exemption.

Jury questionnaires may also be used to direct questions to the entire venire panel. In a large number of jurisdictions every venire member is asked to fill out a card providing information such as address, occupation, age, marital status, and the like. In some courts the attorneys are also allowed to fashion a more detailed questionnaire containing questions relating to the specific trial. Such questionnaires

2. The court, of course, will name the attorneys and parties, perhaps also asking them to stand at this point. In addition, the court may also ask whether any of the potential jurors are related to certain named witnesses.

are subject to court approval and are most likely to be used in particularly complex cases.

4. Questions to Individual Jurors

The questioning of individual jurors, either by the court or by counsel, may follow several models.

The jurors may be questioned one by one with the exercise of challenges following immediately. In extremely sensitive or highly publicized cases such questioning may take place in the judge's chambers.

It is more common for the venire to be questioned in groups. Frequently, twelve prospective jurors are seated in the jury box for voir dire. Sometimes smaller groups of four or six are questioned at one time.

5. Exercising Challenges

The timing for the exercise of challenges is governed by the approach used for questioning the venire members. When jurors are questioned singly, as noted above, challenges (either peremptory or for cause) are usually expected to follow immediately.

A variety of challenge sequences can be used when potential jurors are questioned as a group.

One approach is to question the venire in groups of four. Once the questioning is finished, either by the court or by the attorneys, counsel is first asked whether there are any challenges for cause.[3] The plaintiff (or prosecutor) is usually asked to make her challenges first. Defense counsel may object to the challenge and may also ask to conduct additional voir dire aimed at demonstrating that the juror can be fair. The judge will rule, either excusing or retaining the juror. Then the procedure is reversed, with the defense challenging and the plaintiff being given the opportunity to object.

If a challenge for cause is allowed, the excused juror will be replaced by another member of the pool who will then be questioned in like fashion.

Once all challenges for cause have been ruled upon, the attorneys will then have the opportunity to exercise peremptory challenges. Again, the plaintiff and defendant will alternate. Unlike challenges for cause, there are no objections to peremptory challenges other than

3. In some jurisdictions the plaintiff questions the jurors and must then present any challenges for cause, followed by the defendant's questions and challenges. In other jurisdictions both parties complete their questioning before either is given an opportunity to raise challenges.

on the basis of unlawful discrimination.[4] Excused jurors will be replaced from the pool, and the new jurors will then be questioned. This process continues until there are no further challenges and the applicable number of jurors has been seated.[5] The questioning will then begin again with another group of four. Variations on this approach are also used with groups of six or twelve.

Most lawyers prefer to make their challenges at a sidebar conference in order to avoid offending the remaining members of the panel. If the judge requires challenges to be announced in open court this should be done as politely as possible. Peremptory challenges can be made quite obliquely: "Your Honor, we request that Mr. Roth be thanked for his time and excused from further service." Challenges for cause will require more explanation, but they should still be courteous.

Note that courts vary as to the finality of an attorney's statement that she does not wish to exercise a challenge. In some jurisdictions counsel must present a challenge at the earliest possible time; otherwise it is waived forever. In other courts it may be permissible to "re-invade" the panel, usually because opposing counsel subsequently exercised a challenge. Following this approach, if plaintiff's counsel "passes" a group of jurors she may only challenge one later if defense counsel has challenged a member of the same group.

An alternative approach, widely used in federal courts, is the "strike" system. Under this method the entire venire panel is questioned before any challenges are heard. The attorneys and the judge then meet out of the presence of the venire. The court first hears challenges for cause. Once these are decided, the attorneys take turns stating their peremptory challenges. The first twelve (or six) unchallenged panel members will constitute the jury. The necessary number of alternates will be selected in the same fashion. In some jurisdictions the attorneys will simultaneously submit written strikes, rather than alternating..

6. Preserving Error

What happens when the court erroneously denies a challenge for cause? In most jurisdictions the denial of a challenge for cause cannot be the basis of an appeal unless the challenging party has exhausted its peremptory challenges.

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4. Concerning the impermissible use of peremptory challenges, see Section V C, *infra* at p. 550.

5. Depending upon the jurisdiction, jurors who are not challenged are referred to as having been seated, accepted, or "passed."

III. PLANNING AND CONDUCTING VOIR DIRE

In systems where lawyer participation is permitted, voir dire must be planned as carefully as any other aspect of the trial. Your areas of inquiry must be designed to obtain the maximum amount of useful information without overstepping the boundaries set by the court.

Bear in mind that a successful voir dire will accomplish at least three goals. First, it will allow you to uncover grounds to challenge jurors for cause. Second, it will provide you with enough information to make wise use of your peremptory challenges.

Finally, a well-conducted voir dire will give you a basis for adapting your trial strategy so as best to appeal to the jurors in the case. For example, suppose that voir dire in the fire truck case disclosed that one of the jurors had worked her way through college as an electrical inspector. While this information is unlikely to cause either party to want to challenge her, it does suggest that she will probably be receptive to arguments based on precision or safety standards. Thus, the plaintiff might want to use an analogy in her final argument to the effect that the defendant "broke the rules" when he failed to have his brakes repaired.

A. Permissible Inquiries

It is almost always permissible to question potential jurors on their backgrounds, work histories, and life experiences. In this vein, it is common to ask jurors about their past involvement with the legal system; their membership in civic, political, social, religious, and other organizations; their hobbies, reading interests, and other pastimes; their families and education; their business experience; and other similar topics.

It is also permissible to inquire as to the jurors' knowledge of or relationship to the parties, lawyers, and witnesses involved in the case. It is fair to ask about family relationships, friendships, business arrangements, debtor-creditor relationships, professional acquaintances, employment, or investment relationships.

Many courts likewise allow counsel to ask jurors about their attitudes and possible preconceptions or prejudices concerning legal and factual issues in the case. Thus, assuming relevance to the case, jurors can be questioned about their attitudes toward issues such as capital punishment, welfare, seat belt laws, or medical treatment. It is expected, for example, that defense counsel in criminal cases will ask potential jurors whether they understand the concepts of the

presumption of innocence and proof beyond a reasonable doubt. Most courts draw the line, however, when purported questions about jurors' attitudes spill over into indoctrination or argument.[6]

Finally, it is almost always proper to inquire into an individual's exposure to pretrial publicity.

B. Question Form

Most authorities suggest that voir dire questions be asked in very open, non-leading form. Suggestive questions circumscribe the potential juror's answer and are therefore unlikely to result in much usable information. Open questions, on the other hand, have the potential to open a window on the juror's outlook or point of view. Consider the following examples. First, a suggestive question:

COUNSEL: Do you get the local newspaper?

JUROR: Yes, I read it every morning.

Now an open question:

COUNSEL: What magazines or newspapers do you read?

JUROR: I get the morning paper, and I also subscribe to *Motor Sport*, *Car and Driver*, and *Automotive News*.

By the same token, narrow questions are unlikely to uncover much about a potential juror's true attitudes. Consider these scenarios:

COUNSEL: Are you prejudiced against people who receive public assistance?

JUROR: No, I'm not prejudiced against anybody.

As opposed to:

COUNSEL: What do you think about public assistance?

JUROR: I suppose that it's necessary, but an awful lot of people get it just because it's easier than working.

Another reason to avoid leading questions is that they are almost certain to make the venire members uncomfortable. No one likes to be cross examined. And no matter how gentle we think we are, leading questions will probably feel like cross examination to potential jurors.

6. *See* Section V B, *infra* at p. 548.

C. Stereotypes and Generalizations

The early literature on jury selection was typified by its reliance on ethnic, class, and racial stereotypes. North Europeans were considered to be conservative and prosecution-oriented in criminal cases. Latins and Mediterraneans were thought to be emotional and therefore sympathetic to plaintiffs in personal injury cases.

Most of this thinking has long since been abandoned. Virtually all modern research indicates that there is far more diversity within ethnic groups than there is between groups and that ethnicity is a poor predictor of complex attitudes.

This is not to say, however, that characteristics such as race, class, or gender are entirely irrelevant to jury selection. Recall from the discussion of opening statements that every advocate seeks to have the jury create a mental image that is helpful to her case.[7] That task is made far easier when at least some of the jurors have had personal experiences similar to those that counsel wishes to evoke.

A fact of contemporary life is that group identity can often be used as a proxy for certain life experiences. One obvious example is discrimination. While most Americans will say that they object to discrimination, members of minorities are far more likely to have seen or felt it directly. Thus, a lawyer whose case depends upon proof of discrimination will no doubt want minorities on the jury. This is not because minorities are inherently generous or sympathetic, but rather because it is more likely that they will comprehend the proof.

The use of group identification as a proxy for experience is not limited to minority groups. Union members, for example, will be more likely to understand concepts such as going on strike or the importance of paying dues, should those issues be relevant to a trial. Older people may have more experience with certain types of medical treatment; parents can be expected to have more relevant knowledge in cases involving children.

Closely related is a concept that might be called "affinity selection." Much psychological research suggests that jurors will be more likely to credit the testimony of persons who are like themselves. Following this theory, lawyers will want to seek to impanel jurors who most resemble their clients and principal witnesses. To the extent possible, counsel would also want to exclude jurors who might be the counterparts of the opposing party or significant adverse witnesses.

7. *See* Chapter Twelve, Section I A, *supra* at p. 411.

Tactical advantages notwithstanding, it is improper to use peremptory challenges to exclude minorities from juries.[8]

D. Juror Profiles

Jury selection often calls for snap decision making, requiring counsel to exercise (or waive) peremptory challenges on short notice with far less than perfect information. In jurisdictions where the judge conducts all or most of the voir dire, counsel may be left with dozens of unanswered questions, yet will still have to decide whether or not to strike a particular juror. Even in courts that allow wide-scale lawyer questioning, the exercise of peremptory challenges will still call for large amounts of intuition, guesswork, and seat-of-the-pants reckoning.

Faced with a daunting task under even the best of circumstances, many lawyers develop "juror profiles" to aid their decision making. This process involves creating a list of attributes that you would want in your "perfect juror." To do this, one must consider both the facts and circumstances of the case and the characteristics of your client and principal witnesses. For example, the facts of our accident case suggest that the plaintiff's perfect juror might be someone whose work requires careful attention to rules, as well as someone who has experienced and overcome physical injuries. Recall also that one of plaintiff's key witnesses will be Lieutenant Karen Dunn, who will testify to fire department procedures. The plaintiff will therefore want jurors who will identify with Lieutenant Dunn and who may resent an aggressive cross examination of her; perhaps relatives of firefighters or women who have succeeded in traditionally male occupations.

In addition to profiling the preferred juror it is also necessary to imagine a "nightmare juror," the one whom you absolutely must avoid. For our intersection plaintiff, the juror from hell would probably be young, male, self-reliant, a lover of fast cars, and a successful entrepreneur. Such a juror would be inclined to identify with the defendant and to be skeptical of the plaintiff's damage claims.

Both lists will go on and on. And, of course, no single juror will ever combine all of the desired traits and experiences. Most real people will possess both positive and negative characteristics, sometimes abundant quantities of each. Thus, the profiles will always necessarily involve some degree of rank ordering. Should the plaintiff strike a young, male entrepreneur—who also happens to be the brother of a female firefighter?

8. *See* Section V C, *infra* at p. 550.

Jury consultants (see below) often prepare extensive "scoring" systems that assign positive and negative point values to each listed characteristic. In that manner, the profiles become virtual equations: plug in the values, try to keep the high scorers, and strike the low ones. When well-devised through sophisticated survey instruments and demographic data, these systems may be quite accurate. Otherwise, they may amount to little more than intuition painted by numbers.

In the absence of a qualified and proficient consultant, then, lawyers may best use profiling as a sort of shorthand, keeping ready track of important information until the time comes to reach a decision. In doing so, it is important to keep in mind that every human being is a multifaceted individual. Even the best, most rigorous attitudinal survey can only tell you what a specific person is *likely* to think; no profile can tell you how an actual individual will actually react to actual evidence and argument. Thus, it is entirely possible that an entrepreneurial race car driver might turn out to be the plaintiff's best juror or that a feminist firefighter might end up being her worst.

In short, jury selection is ultimately an exercise in interpretation. A well-conceived profile can be a useful template, but not a substitute for judgment.

E. Jury Consultants

It is now possible to retain a consultant to assist with jury selection. There is a broad range of available services. Some consultants are professional psychologists who will sit at counsel table during voir dire in order to assess the venire members' responses and body language. Others are social scientists who will conduct surveys to determine the ideal juror profile. Some will assemble "shadow juries" or focus groups for pretrial preparation so that various arguments can be tried out on demographically representative samples.

Whatever their specialty, jury consultants are usually expensive. As a consequence they are generally used only in big-budget cases.

IV. VOIR DIRE STRATEGIES

Whether voir dire will be restricted or extensive, its value can always be maximized through careful planning. The first step is to understand your own goals. The selection process can be used to educate yourself about the jury panel, to develop (or counteract) challenges for cause, to test the panel's reactions to aspects of the case, to obtain

commitments to fair treatment, and to begin the process of developing rapport with the jury.

Each goal carries its own implications for the conduct of voir dire.

A. Gathering Information

The legal justification for voir dire is to allow counsel to obtain information about the venire panel so that a fair jury may ultimately be seated. In an age of cynicism many advocates will announce that they really want an unfair jury—one that is biased in their favor and against their opponents. Be that as it may, the process itself is truly more designed to eliminate bias than it is to perpetuate it. The calculation is simple. With relatively few peremptory challenges at your disposal, you cannot hope to determine which jurors will serve in your case. The best you can do is to choose several who will not sit.

Your first goal, therefore, should be to assure your client a fair trial by identifying those potential jurors who, for whatever reason, cannot be objective about your client's case.

1. Identifying Bias and Preconceptions

Most people want to be fair. Most people think they are fair. Nonetheless, each of us views new data in light of our prior life's experiences. The sum of those experiences may exert an enormous influence over how new facts will be understood or perceived.

For example, one issue in our intersection case is whether the fire truck was sounding its siren immediately prior to the accident. Since departmental regulations required the use of the siren, it would be difficult to convince, say, a military officer that the regulation was not followed on the date in question. Thus, a soldier with command responsibility would be a "biased" juror in the sense of coming to the case with a settled preconception about the likelihood of certain events. On the other hand, a different member of the venire panel might once have worked in an environment where "rules were made to be broken." Quite apart from any conscious favoritism, that juror would have an entirely different outlook on the question of the siren's use.

Discovering a juror's set of preconceptions is a subtle and difficult task requiring delicate probing of the person's lifestyle, relationships, education, and personal history. Most important, you have to know what you are looking for. What sort of information will help you decide whether to keep or strike an individual juror? The facts you need will almost always be case-specific, turning on considerations of

evidence, inference, and personality. As always, a good way to start thinking is by considering your theory and theme.

In the fire engine case, one component of the plaintiff's theory is that the defendant was late for an important business meeting, and, because he was distracted, he failed to notice that traffic had stopped for a fire truck. The plaintiff, therefore, will want jurors who are receptive to this theory. She will look for jurors who are especially responsible, punctual, careful. She will want to excuse jurors who are casual, absent-minded, or more easygoing about their obligations. Of course, this information cannot be gathered directly. Imagine an interchange like this:

QUESTION: Are you a responsible person?

ANSWER: Why, no I am not.

Obviously that will never happen. People universally think of themselves as responsible, and those who do not are unlikely to admit it. To obtain reliable information counsel will have to consider the elements of responsibility and then look for indicators. Obvious questions would go into the potential juror's educational and work history. Additional inquiries (with some follow-up) might include:

QUESTION: Have you ever been in a position where you supervised other people? Tell me about it.

QUESTION: Have you ever been in a situation where you had to depend on someone else to get something done? To be on time? How did they handle it? How did you?

QUESTION: Deadlines make a lot of people nervous; how do you feel about them?

QUESTION: Do you wear a watch? Do you carry a pocket calendar?

Some of these questions are trivial, but a resourceful advocate will easily be able to come up with more and better keys to the potential juror's thoughts and attitudes.

2. Identifying Affinity

Many psychological studies have shown that jurors are more likely to believe witnesses whom they like or with whom they have something in common. While this affinity link can usually be overcome, it is obviously preferable to begin the trial with an advantage in this area. Some aspects of affinity are apparent, such as age or

gender. Other aspects are readily available, such as occupation, marital status, education, or address. Still other possibilities require more in-depth probing.

Consider all of the characteristics of your client and major witnesses. Which of these will become known to the jury? Is your client a parent? A jogger? A gourmet cook? A self-made professional? Also consider your client's overt personality traits. Is he aloof and short-spoken? Shy? Humorous? Go through the same analysis for the opposing parties and their major witnesses. While you would not want to dismiss a juror simply because he and the opposing party share the same hobby, the information might be helpful in deciding borderline cases. If you are down to your last challenge, and you truly can't decide which of two jurors to strike, why take a chance on the one who belongs to the same alumni association as the other side's most important witness.

Finally, remember that affinities can be transferred. The defendant in the fire truck case would not want to see a firefighter on the jury. Nor would he want the spouse, parent, sibling, best friend, sweetheart, or next-door neighbor of a firefighter. Nor would he want someone whose life had been saved by a firefighter, or someone who, as a child, had spent every free afternoon hanging around the firehouse. The only way to find out about these relationships is to ask.

3. Planning for Trial

The final reason to gather information is not to eliminate potential jurors, but rather to educate yourself about the jurors who end up sitting in your case. You will want to gather as much information about them as possible: Who are they, what do they care about, what have they done in their lives, what are their families like, who are their friends, what important decisions have they made?

The answers to these questions, and dozens of others like them, can help you shape your arguments so that they will be as persuasive as possible. For example, if you have learned that one of your jurors is an MBA who plays racquetball, you will avoid making disparaging comments about Yuppies, no matter how great the temptation to tweak the opposing party.

B. Challenges for Cause

You may also use voir dire to develop (or counteract) potential challenges for cause. Because a fair and impartial jury is an essential element of due process, each party is entitled to an unlimited number of challenges for cause.

1. Developing Challenges for Cause

In most jurisdictions, statutes or court rules set out the minimum qualifications for jurors. Most courts utilize screening systems so that individuals who fail to meet the basic requirements are excluded from venire panels. You may, however, nonetheless come across jurors who are disqualified by reason of age, residence, or inability to communicate in the required language. These jurors may be excused for cause.

Jurors may also be excluded on the ground of bias. In the context of jury selection, "bias" means something more than simple bent or inclination; rather, it refers to an inability to serve as an impartial juror. The standard is usually a high one.

Sometimes, of course, the need to disqualify a juror may be obvious. The juror may be closely related to one of the parties or may have had an important experience quite similar to the events at issue in the case. For example, many courts will automatically exclude crime victims from cases that involve comparable offenses. By the same token it may be possible to excuse jurors who belong to affected occupational groups—say, insurance adjusters from personal injury cases, or nurses from medical malpractice trials. Nor is it unusual for members of the venire panel to disqualify themselves, stating that some element of the case would make it impossible for them to be impartial.

Nonetheless, jurors need not be removed for cause merely because they have some similarity to one of the parties or because they have had a passing exposure to the facts of the case. Thus, a challenge for cause will often have to be developed through further questioning once a possible premise for disqualification has been discovered.

Looking again at the fire truck case, recall that one of the primary witnesses for the plaintiff will be the fire department's first-ever female lieutenant. The defendant, of course, wants to avoid jurors who will identify too closely with this witness. Imagine, then, this interchange between defense counsel and a prospective juror:

QUESTION: Do you have any close relatives who are firefighters?

ANSWER: Yes, my daughter is a firefighter in another state.

At this point a challenge for cause will almost certainly be denied. Although it may seem likely that the juror would be disposed to accept a firefighter's testimony, there is no reason to think that the juror would not be able to decide the case fairly on its facts. More

questioning is needed before a court will excuse the juror (in the absence of a peremptory challenge).

QUESTION: Would you mind telling us how your daughter came to be a firefighter?

ANSWER: Well, it's something that she always dreamed of doing. There's still a lot of prejudice against women in those positions, but she set her mind to it and she succeeded.

QUESTION: Did she have to overcome any special obstacles?

ANSWER: She sure did, but she just decided that she would be twice as good as everybody else.

QUESTION: This case is going to involve testimony from the first female fire lieutenant in our community. Do you think that she may have had to overcome the same sort of obstacles as your daughter?

ANSWER: I would think so.

QUESTION: Because of your own experience with your daughter, do you think that you might have some special insight into the career of another woman firefighter?

ANSWER: Probably, now that you mention it.

QUESTION: Would it be fair to say that you might be especially sympathetic to the challenges facing women in today's fire departments?

ANSWER: That would be fair.

QUESTION: Now, thinking of your daughter and what she went through, is it possible that you might feel uncomfortable listening to testimony that a woman fire lieutenant failed to follow regulations?

ANSWER: I might. It would depend on the testimony.

QUESTION: Well, let me ask you this. What do you think someone else might think about your reaction to a woman firefighter's testimony?

ANSWER: I suppose they might think that I'd be on her side.

QUESTION: Given that, do you think it might be better for you to sit on a different trial, one that doesn't involve an issue so close to home?

ANSWER: I guess that I would be more comfortable on a different case.

At this point a challenge for cause would get a more sympathetic hearing from the court. Still, it is not a sure thing. The juror's comfort level, though important, is not the ultimate determinant of a challenge for cause. The question is whether the juror can be fair and impartial. Thus, either plaintiff's counsel (or the court, depending upon the judge's own approach) might attempt to rehabilitate the potential juror.

QUESTION: I'm sure you understand that this case has nothing to do with your daughter.

ANSWER: Of course.

QUESTION: So would you do your best to listen to the testimony in this case and evaluate it fairly, without thinking about your daughter?

ANSWER: I certainly would.

QUESTION: Does that mean you could put aside your pride in your daughter's accomplishments and give these parties a fair trial based on the evidence in this case?

ANSWER: I'm sure that I could.

Following this questioning it will be up to the judge to decide whether or not to allow the challenge for cause. Some judges will deny all challenges unless the juror virtually admits an inability to be fair. Other courts are more lenient, excusing jurors whenever there is a reasonable basis for inferring bias.

2. Presenting Challenges for Cause

No matter how skillfully done, a challenge for cause always has the potential to embarrass or offend the potential juror. For this reason lawyers prefer to make such challenges at sidebar or in chambers. Not every judge is accommodating, however, so it is often necessary to present challenges in open court.

In these circumstances tact is essential. The manner in which you present the challenge may be taken as an affront by the subject juror or by others on the panel. Thus, you should not announce that

"We challenge Mr. Levitt, who is clearly too prejudiced to serve impartially in this matter."

Rather, try something kinder and gentler, such as

"We move that the court excuse Mr. Levitt for cause and release him to serve on a different jury."

The court, of course, might not immediately agree with your assessment of the juror. You may therefore find yourself having to be more explicit about why the person is too biased to serve on the jury. Moreover, your opponent might well be primed to argue loudly and extensively (and in the presence of the entire venire panel) that you are being unfair yourself in impugning the integrity of so fine, objective, and impartial a citizen as the upstanding Mr. Levitt. In this uncomfortable situation there are three important things to bear in mind.

First, it is never too late to ask for a sidebar. Though the court has required you to make your challenges in open court, the judge might nonetheless be willing to hear argument outside the presence of the panel.

Second, no purpose can be served by abandoning diplomacy in the presence of the venire panel. Do not argue that the potential juror is a bad or bigoted person. Argue instead that his expressed views and experiences will make it impossible for him to decide the case objectively. The distinction is not trivial; it is the difference between a personal attack and a fair request. (On the other hand, do not be so polite as to concede your point, and remember that your argument will also constitute your record on appeal.)

Finally, be aware that no matter how well justified, you still might lose the challenge for cause. For this reason many lawyers insist that you should never make a challenge for cause unless you have at least one remaining peremptory challenge available to remove the juror even if the judge will not do it for you.

C. Testing Reactions

A further strategy is to utilize voir dire as a means of testing jurors' reactions to aspects of the case. The purpose here is not to begin your argument or indoctrinate the juror, but rather to get an initial read on whether your anticipated positions are likely to make sense to the jury.

For example, the key to the defense in the fire truck case might well be to attempt to minimize the plaintiff's damages. Defense

counsel might therefore want to ask each juror a question such as, "Do you think that people ever exaggerate their injuries?" The answers are all likely to be equivocal, "Some people do, some don't; I would have to hear the evidence." But the jurors' manner of answering the question could well give counsel some insight into how they, collectively, might accept an argument that the plaintiff was not injured as badly as she claims.

Of course, anything you learn may also educate your opponent. Try to be subtle.

D. Obtaining Commitment

It is often thought that certain parties, in certain circumstances, begin each trial with a natural persuasive advantage. Conversely, other parties begin with a handicap no matter what the articulated standard of proof. For example, criminal defendants, personal injury defendants (particularly in cases involving serious injuries), large corporations, and lawyers either suing or being sued by their clients, all can typically expect to face an uphill battle. Consequently, many lawyers for such parties use voir dire as an opportunity to gain a commitment from each juror to be fair and to follow the law.

In criminal cases it is virtually standard practice for defense counsel to emphasize the presumption of innocence and to underscore the prosecution's burden of proof beyond a reasonable doubt. Many defense lawyers conclude by asking for every juror's pledge to honor and apply that standard.

In a similar vein, a lawyer in civil cases might ask jurors to "give a corporation the same fair treatment that you would give to an individual." In personal injury cases jurors will probably be asked if they understand that liability and damages are separate questions and that a severely injured plaintiff is not automatically entitled to damages. To the opposite effect, plaintiff's counsel in a medical malpractice case might ask jurors to agree not to give extra weight to a doctor's testimony.

E. Developing Rapport

Voir dire is your only opportunity to converse directly with the members of the jury panel. You can speak to them during your opening statement and final argument, but you cannot ask them questions and they cannot answer you. Moreover, first impressions tend to be lasting impressions. Thus, it is essential to regard voir dire as your

best opportunity to begin to develop a positive relationship with the jury.

Often the best way to make a good impression is to avoid making a bad impression. Never talk down to the venire panel, never overwhelm them with lawyerisms, never appear frustrated, never argue with a potential juror, never insult or mock a potential juror, and always attempt to make eye contact.

Almost every study of juror perceptions concludes that jurors are most receptive to lawyers who are well-organized, knowledgeable about the facts of the case, confident, authoritative, and polite.

Of course, you will do everything in your power to avoid inconveniencing or embarrassing members of the venire panel. You will not ask deeply probing questions unless they are clearly related to some objective in your case. You will not exhaust the panel (or any member) by dwelling on minutia or pointless details. If your questions are going to be unavoidably embarrassing, you will ask the court to conduct the voir dire in chambers. You will be unfailingly considerate, even to jurors whom you intend to excuse. Remember, the members of the venire panel may have spent hours or days together before they ever were introduced to you. Members of the panel may have become quite friendly, so that an affront to one might be taken personally by others.

V. ETHICS AND OBJECTIONABLE CONDUCT

As was noted above, the conduct of voir dire has been subjected to increasing supervision by the courts. Here follows a survey of behavior that has been held unethical or improper.

A. Contact with Venire

Direct or indirect contact with the venire panel is unethical.[9] This is true when the contact is made for the purpose of gathering information, and it is doubly true when it is done in order to influence their opinions.

B. Improper Questioning

Many courts consider it improper to use voir dire as a means of arguing the case or indoctrinating the jury. While such a "persuasive" approach was once widely advocated, it is now generally frowned upon by most judges.

9. *See* Rule 3.5(b), Model Rules of Professional Conduct.

It is particularly unethical and objectionable to use voir dire as a means of presenting inadmissible evidence. For example, it would be wrong for plaintiff's counsel in a personal injury case to proceed in this manner:

COUNSEL: Could you be fair to the defendant even though he is a business broker who earns over $100,000 a year?

Or,

COUNSEL: Would you be influenced by the fact that the defendant is heavily insured?

While each of these questions is ostensibly designed to ascertain the juror's ability to be fair, in reality they are intended to exert improper influence on the outcome of the case.

It is permissible to inquire as to jurors' understanding and acceptance of the law, but counsel cannot use voir dire to misstate the law or to suggest an incorrect standard. Defense counsel in a criminal case could not ask this question:

COUNSEL: Do you understand that the defendant cannot be convicted if you hesitate, even for half a second, to believe that he committed the crime?

Similarly, the prosecutor could not make this inquiry concerning the burden of proof:

COUNSEL: Do you understand that hundreds of defendants are convicted in this courtroom every year, so the standard cannot be that hard to satisfy?

It is likewise improper to use voir dire to begin arguing factual inferences or legal conclusions or to mischaracterize evidence in the guise of a predicate for a question.

Thus, in our accident case it would be wrong for plaintiff's counsel to ask an argumentative question such as the following:

QUESTION: If the evidence shows that the defendant was late for an important business meeting, do you think that might mean he was more likely to be a little distracted or careless?

Similarly, the next question asks the venire to accept an inaccurate statement of evidence:

QUESTION: The evidence will show that the defendant tried to drive through an intersection ahead of a fire truck that was responding to an alarm. Do you think that such conduct is ever justified?

Some lawyers may be tempted to pry into venire members' personal lives by asking unnecessarily embarrassing questions. While a certain amount of intrusion is inherent in the voir dire process, this should not be taken as license to invade a juror's zone of privacy.

Appeals to prejudice are as unacceptable during voir dire as they are at any other stage of the trial.

C. Impermissible Use of Peremptory Challenges

Peremptory challenges cannot be used for the purpose of excluding racial minorities from jury service. This rule applies to both the prosecution[10] and defense[11] in criminal cases and to all parties in civil cases.[12]

If it appears that peremptories are being used in a racially discriminatory manner, the court must hold a *Batson* hearing to determine whether there is a legitimate, non-racial basis for the challenge.

The United States Supreme Court has extended the *Batson* rule to challenges based on gender,[13] so that a mini-hearing may be necessary if it appears that one party has attempted to use peremptory challenges to exclude either female or male jurors. Lower courts have also applied the *Batson* rule to cases of religious or ethnic discrimination.

D. Making Objections and Motions in Limine

Objections may be raised in the course of voir dire just as in any other phase of the trial. Should opposing counsel stray from permissible questioning it is appropriate to alert the court:

"Objection, Your Honor, these are not proper voir dire questions."

Or,

"We object, counsel is arguing his case."

It may sometimes be necessary to be more specific:

10. *Batson v. Kentucky*, 476 U.S. 79 (1986).
11. *Georgia v. McCollum*, 505 U.S. 42 (1992).
12. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).
13. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

> "Your honor, the defense objects to the plaintiffs' incorrect statement of the burden of proof."

If opposing counsel is adept at voir dire, the questioning of jurors may seem very much like an personal conversation, with lawyer and juror engaged in a friendly chat. In those circumstances an objection, no matter how well founded, may be taken as a rude interruption. Thus, most attorneys try to keep voir dire objections to a minimum and to keep them brief and polite.

On the other hand, an unskilled or overbearing opponent may step across the line separating advocacy from respect or good taste. The jury system does not profit when attorneys offend, frustrate, or anger members of the panel, particularly when the questions have no apparent relationship to the issues in the case. While it might be tempting to watch such a lawyer alienate the venire, the better tactic is probably to rescue the potential juror with an objection:

> "Objection, Your Honor, to the irrelevant and unnecessarily personal nature of counsel's questioning."

It is also possible to direct a motion in limine to the voir dire process. In many cases, particularly in jurisdictions where wide open questioning is the norm, the court may be disinclined to limit voir dire in advance. So, for example, it could be difficult to prevail on a motion to prohibit "argumentative" questions or questions that seek to "indoctrinate the panel." While such questions are improper, most judges will probably want to hear the actual voir dire before ruling. Of course, if opposing counsel has a reputation for abusing voir dire then the motion should be made, supported by compelling facts.

Motions in limine are most likely to be successful when aimed at specific lines of questioning or specific items of evidence. So, for example, a court very well might allow a motion to prohibit all references to a disputed scientific test, an excluded document, or certain inflammatory evidence of questionable admissibility. A court might also direct counsel to refrain from questioning the venire in areas with great potential for prejudice—such as race, sex, or mental illness—depending upon the relevance to actual issues in the case.