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VOIR DIRE IN CIVIL JURY TRIALS IN ILLINOIS

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I. Introduction

The jury selection process for jury trials in the courts of the State of Illinois includes several steps that take place prior to trial. These steps include the formulation of the general jury list and the active jury list by the jury commissioners or jury administrator of the county, summoning of persons for jury duty from the active list, excusing prospective jurors for undue hardship, and drawing of prospective jurors from the venire for the trial of a particular case. 705 ILCS 305/0.01, *et seq.,* and 705 ILCS 310/0.01, *et seq.* Similarly, the jury selection process for trials in the United States district courts follows several pretrial steps as well. 28 USC §§ 1861-1878.

This article will not examine those pretrial steps in the jury selection process, but rather will discuss those parts of the jury selection process that take place during a jury trial (*i.e.*, those parts the trial lawyer participates in, especially voir dire). Discussion will focus primarily on jury selection in the Illinois courts, but also will compare the process and rules to those of the federal courts.

Voir dire is one of the most important parts—if not the most important part—of any jury trial. For lawyers to be effective at voir dire, they must understand both the process and the rules governing it. Not only do the federal rules differ from the Illinois rules, but the rules also cannot be found in a single source.

Effective voir dire requires lawyers to present themselves in a positive way to the prospective jurors. How the jurors perceive a lawyer will affect how they view the witnesses and evidence, and how they decide the case. This article offers a few suggestions for how lawyers can project a positive image during voir dire.

II. Number of Jurors

A. State of Illinois

The right to trial by jury in certain types of civil suits is guaranteed by Article 1, Section 13 of the Constitution of the State of Illinois, which provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate." This constitutional provision has been interpreted as requiring a jury comprised of 12 members. *Hartgraves v. Don Cartage Co.*, 63 Ill. 2d 425, 348 N.E.2d 457 (1976).

However, trial by fewer than 12 jurors is appropriate if the parties consent to verdict by the lesser number. *Id.* Parties also can waive the right to trial by a jury consisting of 12 members if they proceed to trial before a jury of fewer members without objection. *Anderson v. Industrial Molasses Corp.*, 11 Ill. App. 2d 210, 136 N.E.2d 536 (1st Dist. 1956).

Furthermore, in cases where the claim for damages does not exceed $15,000, Illinois statute requires a jury of only six members unless a party demands a jury of 12. 735 ILCS 5/2-1105(b). Similarly, per Illinois Supreme Court Rule 285, in jury trials of small claims the jury will consist of six members unless a party demands a jury of 12.

B. Federal

The Seventh Amendment to the Constitution of the United States guarantees the right to trial by jury in federal civil suits:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This amendment does not require that the jury in federal civil trials consist of 12 members; rather it is satisfied by a jury of six. *Colgrove v. Battin*, 413 U.S. 149, 93 S. Ct. 2448, 37 L.Ed.2d 522 (1973).

III. Right to Question Jurors on Voir Dire

A. State of Illinois

The Constitution of the State of Illinois does not give a party or the party's attorney the right to question prospective jurors as part of the jury selection process. Furthermore, no such right exists under Illinois statute. The Illinois Jury Act requires the trial judge to question prospective jurors on voir dire, but does not require that a party or the party's attorney be permitted to question them. 705 ILCS 305/12. However, under Illinois Supreme Court Rule 234, the trial judge is required to question prospective jurors on voir dire *and* to permit parties (attorneys) to ask supplemental questions, as the judge deems proper for a reasonable period of time, taking into account the complexity of the case and other factors. The rule also provides the trial judge with discretion to ask the prospective jurors any additional questions submitted by the parties.

Voir dire questions should not directly or indirectly concern matters of law or instructions. Ill. Sup. Ct. R. 234. Unfortunately, judges and attorneys frequently ignore or abuse this rule. A common example is the judge or an attorney saying, "In a criminal case the state has the burden of proof beyond a reasonable doubt. But this is a civil case, and the plaintiff has a burden of proof only by a preponderance of the evidence. If the court instructs you that the plaintiff's burden of proof is only by a preponderance of the evidence, will you follow the court's instruction?"

B. Federal

There also is no federal Constitutional requirement that a party or the party's attorney be allowed to question prospective jurors as part of the jury selection process. Under federal rules the trial judge can allow voir dire to proceed through any of three methods:

(1) Only the attorneys (or parties) question the prospective jurors;

(2) The judge questions the prospective jurors and then allows the attorneys (or parties) to question them; or,

(3) The judge questions the prospective jurors and then asks any additional questions submitted by the attorneys (or parties) as the judge deems proper.

Fed. R. Civ. P. 47.

IV. Procedural Concerns

Under paragraph 21 of the Illinois Jury Act any party has a right to have a full number of jurors in the box before beginning questioning on voir dire. 705 ILCS 305/21; *Sterling Bridge Co. v. Pearl*, 80 Ill. 251 (1875). The usual practice in Illinois courts is that all of the prospective jurors in the venire are called in a random order and seated in the same order. The first 12 (or 13 or 14) are seated in the jury box and successively called ones are seated in order in the benches or chairs in the courtroom. If a full number of jurors are not in the box, counsel needs to request the box be filled prior to start of questioning. A refusal of the request is reversible error. *Strehmann v. Chicago*, 93 Ill. App. 206 (1st Dist. 1901); *Chicago City Railway v. Fetzer*, 113 Ill. App. 280 (1st Dist. 1904). However, proceeding to question when fewer than 12 are in the box can constitute a waiver of the right. *Oakwood Stock Farm Co. v. Rahn*, 106 Ill. App. 269 (2nd Dist. 1903).

Jurors must "be passed upon and accepted in panels of four by the parties, commencing with the plaintiff." 705 ILCS 305/21. When a juror is excused for cause during or as a result of the plaintiff's attorney's questioning, or a juror is removed due to the exercise of a peremptory challenge, the next juror in line immediately replaces that juror, so the panel continues to consist of four. *Sterling Bridge Co*., *supra*. Once the plaintiff accepts four in the panel, the panel is tendered to the defendant. The defendant then goes through the same process as did the plaintiff.

Once another party breaks a panel, a party who has previously accepted and tendered the panel has a right to use all remaining peremptory challenges to strike a juror he or she previously accepted in that panel; and it is reversible error not to allow this strike. *Koester v. Johnson*, 158 Ill. App. 3d 747, 511 N.E.2d 262, 110 Ill. Dec. 427 (4th Dist. 1987). However, a party cannot exercise a peremptory challenge on a juror in a panel of four that he or she has accepted and tendered to the other side and which the other side has not broken. *Needy v. Sparks*, 51 Ill. App. 3d 350, 366 N.E.2d 327, 9 Ill. Dec. 70 (1st Dist. 1977). (Defendant cannot challenge juror in panel he or she tendered during questioning by the other side.) Furthermore, parties (attorneys) do not have the right to question a juror in a panel of four that both sides have already accepted. *People v. McClary*, 240 Ill. App. 261 (2nd Dist. 1926).

The language in paragraph 21 of the Jury Act (705 ILCS 305/21), which states "Provided, that the jury shall be passed upon and accepted in panels of four by the parties, *commencing with the plaintiff*" (emphasis added) has been interpreted as requiring the plaintiff to question and pass upon each panel of four before the defendant must question and pass upon the panel. *Collison v. Illinois Central Railroad*, 239 Ill. 532, 88 N.E. 251 (1909). Requiring the defendant to pass upon any panel of four before the plaintiff does is error; however, unless the error is shown to be prejudicial to the defendant, it will not be grounds for reversal on appeal. *Id*.

It is common, although not universal, practice these days for the trial judge to have the attorneys exercise their challenges outside the presence of the prospective jurors. This practice is preferable for several reasons. First, it is quicker. Rather than waiting for each prospective juror removed from the panel to physically leave the box and another replace him, and then repeat this process over and over again as the attorneys strike additional jurors, all movements occur at once after selection has taken place and the judge announces who has been "selected." Second, it avoids stigmatizing a rejected juror, who has to get up and leave with all eyes on him or her. Third, it avoids embarrassment or possibly more disastrous consequences when a challenge is disallowed because of a *Batson*[1] violation or because a forgetful lawyer attempts to exercise a challenge when he or she has none left.

There are no known requirements under federal law similar to Illinois' requirements that a full number of jurors be in the box and that selection proceed in panels of four in civil jury trials. Given that federal civil juries generally consist of fewer jurors ("not fewer than six and not more than twelve"), such requirements seem unnecessary. Fed. R. Civ. P. 48.

V. Challenges for Cause

A trial lawyer does not want to miss an opportunity to get rid of an undesirable juror through the use of a challenge for cause because, if the judge agrees with the challenge and excuses the juror for cause, the lawyer avoids using one of the party's limited number of peremptory challenges on that juror. Neither Illinois law nor federal law limit the number of prospective jurors who can be excused for cause.

Although trial judges may excuse prospective jurors for cause without being asked to do so, when the judge does not do so, the attorney who believes a juror should be excused for cause must request it. Failure to make such a request constitutes a waiver of the claim that the juror should have been excused for cause. *Fleeman v. Fischer*, 244 Ill. App. 3d 753, 613 N.E.2d 836, 184 Ill. Dec. 519 (5th Dist. 1993); *United States v. Uribe*, 890 F.2d 554 (1st Cir. 1989). If the trial judge does not agree the juror should be excused for cause, the lawyer can only remove that person from the panel by using a peremptory challenge.

A. State of Illinois

Section 14 of the Jury Act (705 ILCS 305/14), and Section 2-1105.1 of the Code of Civil Procedure (735 ILCS 5/2-1105.1), set forth the bases for challenges for cause in Illinois state courts. Under Section 14 of the Jury Act, a challenge for cause exists if:

(1) The juror lacks any of the qualifications mentioned in Section 2 of the Jury Act (705 ILCS 305/2), which are that the juror is:

   (a) An inhabitant of the county;

   (b) At least 18 years old;

   (c) Free from all legal exception, of fair character, of approved integrity, of sound judgment, well informed, and able to understand the English language, whether in spoken or written form or interpreted into sign language; and,

   (d) A citizen of the United States of America.

(2) The juror is not one of the "regular panel" and has served as a juror on the trial of a cause in any court in the county within one year previous to the time of being offered as a juror; or

(3) The juror is a party to a suit pending for trial in that court.

Under Section 2-1105.1 of the Code of Civil Procedure, a challenge for cause exists if the prospective juror has a *physical* impairment that affects the prospective juror's ability to perceive and appreciate the evidence. 735 ILCS 5/2-1105.1.

Usually, but not always, individuals who lack the qualifications required under Section 2 of the Jury Act will have been eliminated by the jury commission or jury administrator in the process of making up the general jury list or the active jury list from which the venire is summoned. However,

there are some possible exceptions. For example, the jury commission or the jury administrator may not discover an individual has been charged with but not convicted of crimes. However, a person's having been *charged* with various crimes in the past can be sufficient to excuse that person for cause. *People v. Gill*, 240 Ill. App. 3d 151, 608 N.E.2d 197, 181 Ill. Dec. 124 (1st Dist. 1992).

Exactly what is meant by "free from all legal exception, of fair character, of approved integrity," and so forth, which causes a person's disqualification, is not clear. Perhaps the legislature intentionally used this broad language to give trial judges considerable discretion in deciding whom to excuse for cause. There seems to be little doubt that conviction of certain crimes, especially any felony, would disqualify a person for not being of "fair character" and "of approved integrity."

At one time persons who were not free, white males, between the ages of 21 and 60, and taxable inhabitants of the county, were disqualified. *See*, *Chase v. People,* 40 Ill. 352 (1866). More recently persons in various fields of employment were exempted from jury service, including judges, physicians, attorneys, ministers, policemen, firemen, newspaper editors, and others. Ch. 78, § 4, Ill. Rev. Stat. (1985). But those exceptions were repealed in 1987.

Probably the majority of challenges for cause come from jurors who admit to being biased or prejudiced in favor of or against one side, and jurors who have suits pending in the same court. A biased or prejudiced juror is a person who lacks "sound judgment."

It is highly unlikely that a juror will be excused for not being a member of the regular panel who has served on the trial of a case within the past year. Jurors not on the regular panel are those bystanders or other persons whom the sheriff has brought in to the court off of the street, when the number of summoned jurors has been exhausted. 705 ILCS 305/12.

When the trial judge denies a challenge for cause, a party will have waived any right to complain about the denial unless the party has exhausted all peremptory challenges. *Fleeman*, *supra*.

B. Federal

Under federal law, no citizen can be excluded from jury service because of "race, color, religion, sex, national origin, or economic status." 28 USC § 1862. Those attributes that qualify a person for federal jury service or, that disqualify a person if lacking, are set forth at 28 USC § 1865(b). Under that statute, a person is qualified for jury service unless he or she:

(1) Is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) Is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) Is unable to speak the English language;

(4) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or,

(5) Has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored. 28 USC § 1865(b)

Persons who do not meet these qualifications typically will be weeded out before prospective jurors ever get to the courtroom. 28 USC § 1865(a). However, sometimes persons who should be

disqualified slip through the cracks and wind up in the venire. *See*, *Coughlin v. Tailhook Association*, 112 F.3d 1052 (9th Cir. 1997); *Uribe*, *supra*.

The federal statute is clearer in disqualifying persons who have a felony charge pending against them or a felony conviction. Moreover, the federal statute also is more restrictive in that it disqualifies persons who lack the ability to *speak* English and persons who have a *mental or physical* infirmity that prevents them from providing satisfactory jury service. A failure to ask that an unqualified juror be excused due to a lack of the required qualifications may constitute a waiver of any right to complain on appeal that the juror should not have been allowed to participate in the trial. *Id.*; *Atlas Roofing Manufacturing Co. v. Parnell*, 409 F.2d 1191 (5th Cir. 1969).

Under federal law, challenges for cause allow the removal of a prospective juror only on the basis of partiality, such as having a personal relationship with a party, witness or attorney in the case, or being biased or prejudiced. *United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996).

It is unclear under federal law whether a party must exhaust all peremptory challenges before being allowed to complain on appeal about the trial judge's denial of a challenge for cause. In *United States v. Mobley*, 656 F.2d 988 (5th Cir. 1981), the court of appeals found that exhaustion of peremptory challenges was not required for the issue to be preserved. Furthermore, dictum in the majority opinion in *United States v Martinez-Salazar*, 528 U.S. 304, 314-317, 120 S. Ct. 774, 145 L.Ed.2d 792 (2000), suggests that an exhaustion of peremptory challenges is not required for a party to be allowed to appeal from an erroneous denial of a challenge for cause. However, both *Mobley* and *Martinez-Salazar* are criminal cases. Dictum in *Thompson v Altheimer & Gray*, 248 F.3d 621, 623 (7th Cir. 2001) indicates that in a civil case a party may have to exhaust peremptory challenges before being able to appeal from a denial of a challenge for cause.

VI. Peremptory Challenges

A. Nature of the Challenge

The term "peremptory" has been defined as:

> Final; absolute; conclusive; incontrovertible . . . . Not requiring any shown cause; arbitrary . . . .

Black's Law Dictionary 1157 (7th ed., 1999).

As suggested by the definition, a peremptory challenge has been considered an unfettered right to get rid of a juror, regardless of the reason or for no reason at all. *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 836, 13 L.Ed.2d 759 (1965), overruled by *Batson v. Kentucky*, *infra*; *United States v. Annigoni*, *supra*, 96 F.3d at 1138.

> For 300 years American jurisprudence considered peremptory challenges in jury cases sacrosanct. A party had the absolute right to use the peremptory challenges allowed them by statute for any reason or no reason at all. Then, in 1986, the United States Supreme Court held that the equal protection clause of our Federal constitution prohibited the prosecution from excluding, by peremptory challenge, prospective jurors 'solely on account of their race.'

People v. Dent, 266 Ill. App. 3d 680, 639 N.E.2d 1349, 1352, 203 Ill. Dec. 530 (1st Dist. 1994).

B. Batson *Concerns*

The peremptory challenge lost its "sacrosanct" status in 1986 when the United States Supreme Court rendered its decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69

(1986). In that case the Supreme Court held that the exercise of peremptory challenges *based solely on race* in criminal jury trials, violates the Equal Protection Clause of the 14th Amendment of the Constitution of the United States. Later, the Court held the rule applies regardless of the defendant's race. *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991). Also, the Court held that the same rule applies in civil jury trials. *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 111 S. Ct. 2077, 114 L.Ed.2d 660 (1991).

The *Batson* rule also applies to criminal and civil jury trials in the state courts of Illinois. *People v. Jackson*, 145 Ill. 2d 43, 582 N.E.2d 125, 163 Ill. Dec. 859 (1991), judgment vacated on other grounds by *Jackson v. Illinois*, 506 U.S. 802, 113 S. Ct. 32, 121 L.Ed.2d 5 (1992); *Tucker v. Illinois Power Co.*, 217 Ill. App. 3d 748, 577 N.E.2d 919, 160 Ill. Dec. 594 (5th Dist. 1991); *Jones v. Rockford Memorial Hospital*, 316 Ill. App. 3d 124, 736 N.E.2d 668, 249
Ill. Dec. 474 (2nd Dist. 2000).

The party asserting that peremptory challenges have been exercised based on race must first establish a *prima facie* case of discriminatory exercise of the challenges. If that burden is met, the party who has used the peremptory challenges has to come forth with a race-neutral explanation for the challenges; however, the explanation need not be persuasive or even plausible. The court must then decide whether the party asserting discriminatory use of the challenges has carried the burden of proving purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003); *Jones v. Rockford Memorial Hospital*, *id*.

The *Purkett* pronouncement that the race-neutral explanation need not be persuasive or even plausible has been viewed as "preserving the life of the peremptory challenge." *See*, Richard C. Reuben, *Excuses, Excuses: Any Old Facially Neutral Reason May Be Enough to Defeat an Attack on a Peremptory Challenge*, 82 A.B.A. J. 20 (1996).

The *Batson* rule applies to both the plaintiff and the defendant. *Haschke v. Uniflow Manufacturing Co.*, 268 Ill. App. 3d 1045, 645 N.E.2d 392, 206 Ill. Dec. 387 (1st Dist. 1994) (plaintiff's strikes); and *Jones v. Rockford Memorial Hospital*, *supra*, (defendant's strikes).

Possible remedies for discriminatory exercise of peremptory challenges are discharging of the entire venire and starting over with a new venire or disallowing the discriminatory challenges and resuming selection with the improperly challenged jurors reinstated in the venire. *Batson*, 106 S. Ct. at 1725, n. 24. However, a sanction such as dismissal of the case because of a single discriminatory challenge is an excessive sanction. *Hunt v. Harrison*, 303 Ill. App. 3d 54, 707 N.E.2d 232, 236 Ill. Dec. 387 (1st Dist. 1999).

The *Batson* rule also has been extended to exercises of peremptory challenges based solely on gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994); *People v. Blackwell*, 164 Ill. 2d 67, 646 N.E.2d 610, 207 Ill. Dec. 44 (1995).

In contrast, the *Batson* rule does not apply to exercises of peremptory challenges based on age. *People v. McGaughy*, 313 Ill. App. 3d 656, 730 N.E.2d 127, 246 Ill. Dec. 447 (3rd Dist. 2000); *Lawler v. Macduff*, 335 Ill. App. 3d 144, 779 N.E.2d 311, 268 Ill. Dec. 697 (2nd Dist. 2002); *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993). In fact, a prospective juror's age has been considered a neutral, nondiscriminatory reason for exercising a peremptory challenge. *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997); *United States v. Grimmond*, 137 F.3d 823 (4th Cir. 1998).

In *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991), the Supreme Court applied the *Batson* analysis to the use of peremptory challenges to strike Hispanic-speaking Latinos; but the Court found no violation had occurred in the use of the challenges. Later the Court in dictum cited *Hernandez* as authority for the *Batson* rule applying to peremptory challenges based solely on ethnic origin. *Martinez-Salazar*, *supra* 120 S. Ct. at 781.

Although the Supreme Court has not expressly ruled on the issue of whether peremptory challenges based solely on national origin fall within the *Batson* rule, some lower federal courts have concluded in dictum that they do. *See, e.g.*, *Pemberthy v. Beyer*, 19 F.3d 857 (3rd Cir. 1994), and *United States v. Greer*, 939 F.2d 1076 (5th Cir. 1991). However, quite recently one of those same courts pointed out its uncertainty with whether *Batson* applies beyond race, Latino ethnicity and sex, noting the Supreme Court has never applied *Batson* to peremptory challenges based on national origin or European ethnicity. *See, e.g., Rico v. Leftridge-Byrd*, 340 F.3d 178 (3rd Cir. 2003).

The Supreme Court also has not ruled on whether the *Batson* rule extends to peremptory challenges based solely on religion. Nevertheless, some lower federal courts have indicated it may. *See, e.g.*, *United States v. DeJesus*, 347 F.3d 500 (3rd Cir. 2003), and *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998).

On the other hand, the Illinois Supreme Court has found that using peremptory challenges against prospective jurors based solely on their religion was proper. *People v. Hope*, 168 Ill. 2d 1, 658 N.E.2d 391, 212 Ill. Dec. 909 (1995). The court found religion to be a race-neutral reason sufficient to overcome a *Batson* challenge.

C. Number of Peremptory Challenges

1. State of Illinois

Under Illinois law, each side is entitled to five peremptory challenges. However, in cases of multiple parties on one or both sides, the judge can allow up to three additional peremptory challenges per each additional party on the side having the greater number of parties; but both sides must get the same total number of challenges. The parties on one side must determine how to allocate their challenges, but if the parties cannot decide, the court must determine how to allocate them. 735 ILCS 5/2-1106(a).

Illinois law does not require alternate jurors. However, the trial judge may direct selection of one or two alternates. If alternates are to be selected, each side receives one additional peremptory challenge. Also, any peremptory challenges not used in selecting the panel of 12 jurors can be used in selecting the alternates. 735 ILCS 5/2-1106(b).

2. Federal

Under federal law, each party receives three peremptory challenges. However, the trial judge may consider several plaintiffs or several defendants as a single party for the purpose of exercising peremptory challenges. The judge also can allow additional peremptory challenges and permit them to be exercised separately or jointly. Fed. R. Civ. P. 47(b); 28 USC § 1870.

Since the Federal Rules of Civil Procedure were changed in 1991, federal civil jury trials no longer utilize alternate jurors. *See*, Advisory Committee Notes, 1991 Amendment, Fed. R. Civ. P. 47(b). Instead, the civil jury can consist of any number between six and 12 jurors; but a minimum of six jurors is required for a verdict. *See*, Fed. R. Civ. P. 48 and Advisory Committee Notes, 1991 Amendment, Fed. R. Civ. P. 48.

VII. Conducting Voir Dire

A. Introduction

"Voir dire" – a French term pronounced "vwa dear" – also occasionally is pronounced as it appears in English "voir dyer." The literal meaning of voir dire is "to speak the truth." *Black's Law Dictionary* 1569 (7th ed., 1999). "The purpose of *voir dire* is to assure the selection of an impartial panel of jurors who are free from bias or prejudice." *Kingston v Turner*, 115 Ill. 2d 445, 505 N.E.2d 320, 328, 106 Ill. Dec. 14 (1987).

As discussed previously, attorneys or parties are not always allowed to ask questions of the prospective jurors during federal court voir dire. Fed. R. Civ. P. 47. Being able to actively participate in voir dire (as in Illinois state courts) is one of the most valuable privileges afforded to a party or attorney in the trial. It is the only time in the trial when the party or attorney may engage in a dialogue directly with the jurors.

The first part of voir dire in the state court, and typically in the federal court, consists of the trial judge questioning the prospective jurors. Most judges do a good job of eliciting information about each juror's background, including marital status, occupation, spouse's occupation, children and their ages and occupations, prior jury service, personal injuries, prior litigation involvement, and so forth. After the judge completes his or her questioning, the plaintiff's attorney then questions the prospective jurors. Often by the time the defendant's attorney begins his or her questioning, most, but not all, of the information the defendant's attorney needs to know already has been elicited.

How much the defendant's attorney should question prospective jurors requires a judgment call. He or she risks alienating or offending jurors by covering the same ground as the judge and plaintiff's counsel. Doing so also can irk the judge. Nevertheless, defendant's counsel should try to speak individually—even if only one or two questions—with every prospective juror (including an alternate) who could wind up on the jury if not excused or challenged. To determine the minimum number of prospective jurors to question, calculate the number of jurors and alternates to be chosen, the number of peremptory challenges afforded all parties and the number of prospective jurors likely to be excused for cause. It is not necessary to question prospective jurors who have no reasonable chance of being reached.

B. Two Primary Reasons for Actively Engaging in Voir Dire

Actively participating in voir dire, that is, having a dialogue with the prospective jurors, has two primary purposes. First, of course, you try to find out information about the prospective jurors, which lets you know or raises doubts about whether they will vote your way during jury deliberations. Second, you try to make a positive impression in the minds of the jurors. The way jurors perceive the trial attorneys may impact the way they view and decide the case.

The common statement, "You never get a second chance to make a first impression," definitely applies in voir dire. During voir dire a lawyer must make a good first impression on the prospective jurors and establish credibility, sincerity, confidence and likeability. Of course, the attorney wants to reinforce these impressions as the trial progresses by his or her conduct during opening statements, examination of witnesses and so forth, but it all starts with the first impression in voir dire.

C. Fifteen Simple "Do"s and "Don't"s of Conducting Voir Dire

Although understanding the rules is essential for conducting voir dire, how the lawyer comes across to the jury also is very important in any trial. Knowing the rules inside and out will not bring success if the lawyer alienates the jury. What follows are some simple suggestions for lawyers to follow during voir dire based on this writer's personal experience in jury trials.

1. Be Yourself

Because your personality is not likely to change for the trial, trying to act like someone other than yourself during voir dire is likely to backfire. You may come across as phony, rather than genuine and sincere. (However, if you generally are arrogant, try to make yourself more humble in the presence of the jury. See No. 6 below.)

2. "Schmoozing" Can Be Hazardous

Some people are natural "schmoozers;" others are not. Do not try to be one while questioning the jurors if it doesn't come naturally, even if the opposing attorney seems to be charming his or her way into their hearts. While schmoozing may get a few jurors on that attorney's side, many people inwardly react in a negative way, even when outwardly they appear enchanted by it.

3. Don't Be a Stand-Up Comedian

Jurors want to be entertained, but through the evidence, the witnesses and the way the lawyers present the case, not a comedy routine. Occasional humorous remarks can be effective, however, if they occur naturally and as part of the flow of the trial.

4. Don't Belittle or Embarrass Anyone

Jurors view attorneys as being in a position of power during the trial, although not to the same extent as the trial judge. No one likes a bully. If you argue with a prospective juror or ask questions that intentionally embarrass or belittle that person, you will lose points in the eyes of the jury. If you sense you accidentally put a prospective juror in an embarrassing or belittling position, try to halt the damage by politely interrupting and saying something like, "I'm sorry. I think I asked a question I should not have asked. I don't mean to embarrass you or anyone else here. So let me ask something else."

5. If Embarrassing Questions Must Be Asked, Cover Them in a Supplemental Juror Questionnaire (SJQ) or Request Isolated Voir Dire

Sometimes embarrassing questions need to be asked due to the nature of the dispute. For example, if you are defending a child molester, you certainly want to know whether any prospective juror has been a victim of molestation. To ask questions of a prospective juror about that subject in open court undoubtedly will embarrass anyone who has been a victim. Moreover, such questions may even be answered falsely. Cover those questions in an SJQ or ask the court to allow questioning of each prospective juror on the subject outside the presence of the other prospective jurors.

6. Don't Be Arrogant

Humility is a virtue, and it does not hurt to show some of it during a trial. Most people react negatively to arrogance. You cannot be passive at trial, nor do you want to come across as a bumbling idiot. Project confidence, but remember that confidence does not equate with arrogance.

Sometimes it is good to admit things you cannot do or things you do not know. For example, if you are terrible at remembering names and opposing counsel has the ability to call every prospective juror by name without having to refer to notes or a list, you can admit right away that remembering names is one of your many shortcomings.

7. Don't Exhibit Negative Reactions About Your Opponent

Even when you don't like what your opponent does or says, do not react with negative gestures such as shaking your head, rolling your eyes, throwing your hands up in disgust or tossing your pen. Jurors view that as unfair play. If the other attorney does something objectionable, make an objection. If it is not worthy of an objection, be stoic.

8. Use Simple Language and Ask Simple Questions

Voir dire is about communication. Most people, including most people called for jury duty, have limited vocabularies. If you use words or phrases they do not understand, you not only waste your time and possibly embarrass the juror being questioned, you also are likely to get a worthless or

incorrect answer. If you ask long or unwieldy questions, you might confuse the juror and, again, get a worthless or incorrect answer.

9. Use Open-Ended Questions

Open-ended questions usually elicit a narrative answer rather than a simple "yes" or "no." If, for example, a prospective juror was a plaintiff in a prior civil suit, you will get more useful information by asking, "How did the experience of having to file a suit and sit through a trial make you feel?" than by asking, "Was the litigation resolved to your satisfaction?"

10. Avoid Asking Worthless Questions

Why ask a question like, "Can you be fair to both sides?" or, "Will you follow the judge's instructions?" Does anyone ever respond, "No, I won't be fair" or, "No, I won't do what the judge says I must do"? Asking such a question is like fishing for bluegill in the middle of the ocean. They aren't there, and you are wasting your time.

One exception to this guideline might be if you know you want to keep a particular juror, but you still want to ask that juror something and cannot think of anything else to ask. Another exception might occur if you sense a juror wants to get off the jury and you also want that person off the jury. Often such a prospective juror will disqualify himself or herself in response to an otherwise worthless question about being fair.

11. Pay Attention to the Answer

Many times how a person answers a question is as important or more important than the answer itself. Additionally, looking at the prospective juror as he or she answers your question makes that person feel you consider him or her important, which will improve that person's impression of you. So pay close attention to the answer. If you can, have someone else taking notes for you as you ask the questions and listen to the answers.

12. Question Every Prospective Juror Who Has a Realistic Chance of Being Selected

Voir dire sometimes involves asking a question of the entire venire or to a group of the prospective jurors. This technique reveals which of the group has had a certain experience, has a certain characteristic, and so forth. Follow up such questions by individually questioning those jurors who have the experience or characteristic.

Nevertheless, it is important to address each juror individually at one point or another in your questioning. One-on-one questions elicit useful information more effectively than questions to the entire venire or to subgroups of the venire. You need not question a prospective juror who has no reasonable possibility of being reached after all excuses for cause and all peremptory challenges.

Another important reason to question each prospective juror individually is to ensure you have a legitimate race-neutral and sex-neutral reason for striking each juror. You never know when you may face a *Batson* challenge to your exercise of a peremptory challenge. Your completely legitimate reason may not be apparent unless that juror has been questioned on the subject.

13 Ask Questions About Life Experiences

Stereotyping can be a risky way to determine whom you want to strike and whom you want to keep. Not all Democrats sympathize with plaintiffs. Not all Republicans sympathize with defendants. For example, in a medical malpractice case it is more important to know whether a prospective juror has been the victim of a doctor's mistake and how he or she handled the situation than it is to know the person's political affiliation or other general information.

14. Be Careful With Outspoken, Opinionated Witnesses

Outspoken and opinionated prospective jurors who appears favorable to your side may or may not be good jurors to question and to try to keep. Sometimes lawyers spend a good deal of time on voir dire asking such individuals questions in order to elicit answers that will influence the opinions of other prospective jurors. Many times, however, the other jurors "rally" against them instead. Such individuals usually do not make good jurors, even if they slip by the other side's challenges. The judge may also declare a mistrial if their verbosity leads the judge to conclude the entire venire has been poisoned.

15. Be Aware of Prospective Jurors Likely to Be Reached, and Don't Lose Track of Your Peremptory Challenges or the Status of the Panel of Four

It is extremely rare to get a jury consisting totally of jurors with whom you are happy. Almost always each side winds up not striking one or more prospective jurors because of the need to save peremptory challenges for other prospective jurors who will or might be reached. Nothing is worse than having your "nightmare juror" sworn in because you used up all of your challenges before getting to that person. Always remain aware of who is coming down the pike and the need to preserve peremptory challenges for especially undesirable prospective jurors.

Also do not lose track of how many challenges you have left and how many the other side has left. It can be disastrous to try to exercise a peremptory challenge when you have none left to use, especially if the judge requires you to exercise your challenges in the presence of the prospective jurors.

If you lose count, ask the judge how many challenges each party has left. Judges or their courtroom clerks keep track of peremptory challenges as an umpire keeps track of balls and strikes. They will tell you what the count is.

Finally, always remember jurors are selected in panels of four. If you break a panel, you will give the other side a second opportunity to strike a juror whom they previously accepted.

VIII. Conclusion

Effective voir dire depends on your understanding the rules governing jury selection, and success in trial depends on effective voir dire. Hopefully, the discussion of the applicable law and the suggestions offered in this article will prove useful for future jury selections.

Endnote

[1] Batson v. Kentucky, infra

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