Jury Selection in Federal Court

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This Practice Note addresses selecting a jury in a federal civil case, including the applicable rules on picking a jury, the process and method for jury selection, researching prospective jurors and building juror profiles, conducting voir dire, exercising peremptory challenges, challenges for cause, and Batson challenges, and interviewing jurors post-trial.

The prospect of a jury trial often keeps counsel and their clients awake at night. Juries can be unpredictable, and jurors may have preconceived ideas or biases that can escape counsel during the selection process. Some cases may be won or lost during jury selection, before opening statements or a single piece of evidence is introduced. Jurors also can quickly form negative impressions of counsel based on an attorney's appearance or conduct during the selection process.

Trial attorneys therefore must prepare for jury selection well in advance and thoroughly understand the relevant rules and procedures. Although there is no one-size-fits-all approach to jury selection, and juror information is almost always limited, incomplete, and imperfect, counsel can use various tools and strategies to gather critical details about prospective jurors.

This Note examines the steps counsel should take to best position themselves to choose a winning jury, including:

- Reviewing the applicable rules (see Applicable Rules).
- Understanding the method of jury selection that the court uses (see Jury Selection Methods).
- Researching prospective jurors (see Researching Prospective Jurors).
- Building juror profiles (see Building Juror Profiles).
- Questioning prospective jurors about their backgrounds and potential biases, or voir dire (see Conducting *Voir Dire*).
- Exercising juror challenges (see Exercising Juror Challenges).
- Conducting post-trial interviews (see Conducting Post-Trial Interviews).

OVERVIEW OF THE JURY SELECTION PROCESS

Although how a jury is selected varies among courts and judges, the process in federal court generally occurs in the following order:

- The court may first mail a preliminary, administrative questionnaire to a randomly selected pool of prospective jurors from registered voter or licensed driver lists to determine if these individuals appear qualified for federal jury service based on their age and ability to understand English (see Juror Qualifications).
- The court mails summonses to an initial pool of randomly selected prospective jurors. The court then randomly selects a narrower pool of prospective jurors from the initial pool, and calls them for a specific case.
- The judge presiding over the case determines whether any jurors should be excused for hardship.
- The court or the attorneys begin questioning prospective jurors, depending on the court's rules and the judge's rules (see Roles of the Court and Counsel).
- Attorneys exercise challenges for cause and peremptory challenges (see Exercising Juror Challenges).
- The process is repeated until a sufficient number of jurors is empaneled.

APPLICABLE RULES

Because the jury selection process widely varies among courts and even among judges, it is critical for counsel to review the applicable rules before selecting a jury. Specifically, counsel should review:

- Federal Rule of Civil Procedure (FRCP) 47, which governs jury selection in federal court.
- FRCP 48, which governs the number of jurors in a federal civil case (see Number of Jurors).
- The court's local rules and administrative or standing orders, which may contain rules regarding jury selection (for example,

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D. Or. LR 47-1; D. Or. LR 47-2; D. Or. LR 47-3; D. Del. LR 47.1; E.D. Tex. Local Civil Rule 47).

- The judge's individual practice rules or form orders, which may contain the judge's procedures and preferences for jury selection.
- Case-specific orders regarding jury selection.

Courts typically post:

- Their local rules, standing orders, and judges' individual rules and form orders on their websites.
- Case-specific orders on the electronic docket for a particular case, which counsel may access through the court's Case Management/Electronic Case Filing (CM/ECF) system.

Some judges also may offer unpublished materials on their preferred process for jury selection, which counsel may request from chambers. Where possible, counsel should ask the judge before trial, such as during a pre-trial conference, about the judge's preferences and procedures for selecting a jury. Additionally, counsel should speak with other attorneys who have selected a jury before the presiding judge to learn about any unwritten or unspoken rules and preferences for jury selection.

NUMBER OF JURORS

Unlike a federal criminal jury, which requires 12 members, a federal civil jury may have between 6 and 12 members. Unless the parties stipulate otherwise, which is rare, a civil verdict must be both:

- Unanimous.
- Returned by a jury of at least six members.

(FRCP 48(a), (b).)

The FRCP require all jurors in a civil case to participate in reaching the verdict, unless the court excuses a juror for good cause under FRCP 47(c) before the jury reaches a verdict. Alternate jurors are no longer used in federal civil court (see 1991 Advisory Committee Notes to FRCP 47(b)). As a result, to ensure that at least six jurors are available to return a verdict, a court may select more than six jurors in a civil case, particularly when the court and litigants expect a lengthy trial. A court's or judge's rules also may address the number of jurors to be chosen in a civil trial (for example, D.N.H. LR 48.1 (allowing the presiding judge to decide the number of jurors)).

JUROR QUALIFICATIONS

Courts typically choose prospective jurors from registered voter lists or licensed driver lists. A federal district court must assemble this initial pool of prospective jurors randomly (28 U.S.C. § 1863(a)).

An individual may serve on a federal jury if the person:

- Is over the age of 18.
- Is a US citizen.
- Has lived in the judicial district for at least one year.
- Can speak, read, and write English well enough to complete a preliminary juror qualification questionnaire.
- Does not have any mental or physical infirmities that would make him incapable of rendering satisfactory jury service.
- Has not been convicted of a state or federal felony and has no pending felony charges (but may serve if he has had his civil rights restored after a felony conviction).

Failure to meet any of these conditions disqualifies a person from federal jury service. (28 U.S.C. § 1865(b).)

In federal court, prospective jurors must complete a preliminary juror qualification questionnaire to determine their eligibility for jury duty. The Administrative Office of the United States Courts determines the form's contents. (28 U.S.C. § 1864(a).) These questionnaires focus on a prospective juror's age and ability to read English to ensure that the juror is qualified to be part of the venire. Counsel should not confuse these administrative questionnaires with the type of questionnaires that the court and counsel may use while questioning prospective jurors for a specific case, which an attorney usually prepares before jury selection and tailors to the facts of the client's case to learn about the prospective jurors' views and potential biases (see Using Jury Questionnaires).

JURY SELECTION METHODS

The jury selection process depends in large part on the type of jury selection that the court permits. Although the methods may vary or be referred to by different names in different courts, jury selection occurs through one of two basic methods:

- The struck jury method (see Struck Jury Method).
- The jury box method, also known as the strike-and-replace or sequential method (see Jury Box Method).

Counsel should determine in advance which basic method the court employs. The local or judge's rules typically mandate which method is used, although some judges may permit the parties to stipulate to a chosen method.

STRUCK JURY METHOD

Under the basic struck jury method, the court randomly selects a certain number of prospective jurors from the venire for *voir dire*. Although this number varies among courts, it typically is equal to or greater than the number of jurors required for a viable jury in that court, plus the total number of peremptory challenges allowed to the parties. For example, if a jury of six is required and each side has three peremptory challenges under the applicable rules, the first 12 individuals seated make up the so-called strike panel.

Under the struck jury method, a judge often determines before seating the strike panel whether any of the prospective jurors should be excused for hardship (for example, because the individual suffers from a medical condition or is a caretaker). During or after *voir dire* on the strike panel, the court decides any challenges for cause, although dismissing a juror for cause is relatively rare (see Challenges for Cause). The attorneys then exercise their peremptory challenges against this group (see Peremptory Challenges). The remaining individuals from the strike panel are then empaneled on the jury.

JURY BOX METHOD

By contrast, under the jury box method, the court randomly selects individuals from the venire equal to the number of jurors needed to form a viable jury, and seats them in the jury box. The court or counsel conducts *voir dire* on only the seated panel. The court then may dismiss some individuals from the seated panel for cause or based on counsel's peremptory challenges. The court then replaces these individuals with new individuals randomly drawn from

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the initial venire, who are then questioned. The process repeats until counsel have no challenges for cause, have exhausted their peremptory challenges, and a full jury is empaneled. As a result, *voir dire* is conducted in several cycles to achieve the requisite number of jurors.

One of the main differences between the two methods is the number of individuals chosen to participate in *voir dire*. The struck jury method allows counsel to be more informed when exercising peremptory challenges because counsel sees and questions a larger pool of prospective jurors before exercising a challenge. By contrast, under the jury box method, counsel cannot make a direct comparison between a prospective juror on the seated panel in the box and an unknown replacement, who only becomes known if a prospective juror is removed from the seated panel. However, the jury box method allows counsel to focus on a smaller number of individuals at one time and may result in a more informed choice when selecting or deciding to strike a juror.

RESEARCHING PROSPECTIVE JURORS

Where possible, counsel should obtain the list of prospective jurors from the court before jury selection begins. Some courts will provide this list on request, sometimes up to one week in advance of jury selection. Counsel should research as much as possible about each prospective juror.

If the list is not available in advance, and assuming the court permits internet research on prospective jurors, counsel should plan to have colleagues or jury consultants bring laptops to court to research prospective jurors in real time and observe them during *voir dire* (see Observing Prospective Jurors). On the day jury selection begins, counsel may email prospective juror lists to colleagues back in the office, who can perform research on each prospective juror, including on social media, and promptly email the results back to counsel. Emailing the list to colleagues working outside the courtroom allows attorneys in the courtroom to pay closer attention to the prospective jurors' real-time behavior and focus on the questioning of one individual or small group at a time.

Social media is a powerful research tool that can reveal information about prospective jurors that might not otherwise be obtained through *voir dire*. For example, counsel may discover from Facebook a prospective juror's political or religious affiliation, which may be taboo topics during *voir dire*. Counsel also may get a good sense of a prospective juror's personality from Facebook posts, including whether that person is likely to be a leader or follower in the jury room. Similarly, LinkedIn can provide a wealth of information about a prospective juror's career, as well as any memberships or organizations to which the individual may belong.

However, counsel must keep applicable ethical rules in mind and take care not to communicate with any prospective juror through social media. In most instances, an attorney should limit juror research to publicly available information on social media that does not require connecting with or following the individual, and ensure that searches are performed anonymously. For example, depending on account privacy settings, LinkedIn may send users a notification that someone viewed their profiles, raising concerns that a prospective juror may feel intimidated knowing that he is being researched or interpret the contact as a form of coercion. Counsel should be extremely careful when performing research on these types of websites and applications, as the notifications that may be sent to the prospective juror could amount to an unethical ex parte communication.

Notwithstanding opinions from ethics committees or bar associations allowing social media juror research within certain boundaries, some courts still may limit or prohibit the practice altogether out of concern for the prospective jurors' privacy. For example, at least one court has expressed concern that allowing counsel to conduct social media and other internet research on potential and empaneled jurors could facilitate improper personal appeals to particular jurors, compromise the jury verdict, and compromise the jurors' privacy. Therefore, that court considered exercising its discretion to impose a ban against all internet research on the venire or the empaneled jury until the end of trial (and ultimately, the parties stipulated to the ban). (See *Oracle Am., Inc. v. Google Inc.*, 172 F.Supp.3d 1100, 1100-1104 (N.D. Cal. 2016).)

Counsel should check the court's local rules and judge's rules before *voir dire* to ensure that the court does not prohibit social media juror research.

Beyond social media, there are other publicly available resources that counsel may easily access online and that may provide insight into prospective jurors. For example, the Center for Responsive Politics hosts an online database that tracks political donations (see opensecrets.org). A prospective juror's political activity often can shed light on how he might view the case.

For more information on using social media during jury selection, see Practice Note, Social Media: What Every Litigator Needs to Know (3-568-4085).

BUILDING JUROR PROFILES

Before jury selection begins, counsel should determine the kinds of individuals who would be most beneficial and most damaging to the client. Counsel may use this assessment to compare and evaluate prospective jurors.

If time permits (particularly where the court makes the list of prospective jurors available in advance), counsel should create a juror profile chart based on the information obtained from counsel's preliminary research on social media sites or elsewhere, such as each prospective juror's name, gender, age, address, occupation, educational background, and employment history (see Sample Juror Profile Chart). Once the profiles are created, counsel may score the desirability of each individual as a juror on a numeric scale. Having a score for each individual may help quickly identify and evaluate prospective jurors during *voir dire*.

For example, on a scale of one to five, an attorney might score a prospective juror who is likely to favor the opposing party as a one, while scoring a prospective juror who is likely to favor his client as a five.

During *voir dire*, counsel also may choose to keep a scoring system to assess an individual's potential to lead the jury as a whole (for example, by rating the seemingly strongest leaders as a five). Leadership is a significant factor when determining whether to keep or strike a prospective juror. Individuals who have strong

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personalities, are politically active, or are employed in leadership positions, such as managers and executives, may function as leaders on the jury. These potential leaders may have undue or disproportionate influence on other jurors and may inhibit or dissuade independent thinking.

Whether an attorney should keep a leader on the jury depends in large part on what he believes the leader's biases to be. If it appears that the individual leans in the client's favor and is a leader, an attorney may be inclined to keep him on the jury. However, where an attorney is unsure, then the most prudent course may be to strike the individual to minimize the risk of undue influence in the jury room.

SAMPLE JUROR PROFILE CHART

#	NAME	SEX	AGE	OCCUPATION	RATING	LEADER
3	Jones, Barbara	F	57	Teacher	1	2
17	Smith, Douglas	M	20	Student	2	3
21	Bass, George	M	35	Attorney	1	5
42	Fox, Linda	F	46	Nurse	1	3
67	Mitchell, James	M	42	Engineer	4	4

CONDUCTING *VOIR DIRE*

To successfully navigate the *voir dire* process and identify the best possible jurors, counsel should consider:

- The relevant rules on who conducts *voir dire* (see Roles of the Court and Counsel).
- Using jury questionnaires prior to *voir dire* (see Using Jury Questionnaires).
- How to ask effective *voir dire* questions (see Questioning Effectively).
- Having a third party observe prospective jurors during *voir dire* (see Observing Prospective Jurors).

ROLES OF THE COURT AND COUNSEL

Courts have wide discretion over both how *voir dire* is conducted and the substance of the questions asked (see *Ysasi v. Brown,* 2014 WL 936837, at *2 (D.N.M. Feb. 28, 2014); *Lawler v. Richardson,* 2012 WL 2362383, at *8 (E.D. Pa. June 20, 2012)). In most federal courts, the presiding judge conducts *voir dire*. However, courts vary on the extent of attorney participation they permit. For example, judges may allow counsel to do some or all of the following:

- Provide a brief introductory statement to the prospective jurors.
- Directly question prospective jurors after the court conducts the initial *voir dire* (FRCP 47(a)).
- Supply to the court in advance written questions for the court to ask prospective jurors (FRCP 47(a); and, for example, D. Del. LR 47.1; D. Conn. L. Civ. R. 47(a); D. Or. LR 47-1) (see Questioning Effectively).
- Draft and submit a written jury questionnaire for the court's approval before *voir dire* begins (see Using Jury Questionnaires).

By contrast, state courts typically give attorneys more control over *voir dire*. For example, in Florida, parties have a statutory right to directly question jurors orally (Fla. R. Civ. P. 1.431(b)). New York law requires judges only to preside over the commencement of *voir dire*, and judges may leave the courtroom while attorneys conduct *voir dire* (for example, 22 NYCRR § 202.33(e)). Counsel in New York also are allowed to give a brief *voir dire* opening statement (for example, 22 NYCRR § 202.33, App. E(A)(4)).

USING JURY QUESTIONNAIRES

Jury questionnaires can be an efficient and effective way to pre-screen and collect information about jurors before jury selection, and can streamline the selection process. Using questionnaires can eliminate the need to ask basic questions and allow the court (or, if permitted, the attorneys) to ask more useful follow-up questions. For example, a jury questionnaire may ask about a juror's:

- Background and profile characteristics, such as age, gender, marital status, educational background, and occupation.
- Experiences, such as involvement in lawsuits or being a victim of a crime.
- Activities, such as hobbies, organizational memberships, and television and reading habits.
- Opinions, such as views on large corporations or police authority.

Jury questionnaires also enable prospective jurors to answer sensitive questions more privately. Moreover, questionnaires can guard against the risk of a prospective juror making statements in open court that could taint the rest of the jury pool. For example, in response to a common *voir dire* question asking if a juror knows the parties, a juror may answer, "I read in the news that the defendant settled a similar claim in the past." A questionnaire still captures this answer without revealing the prejudicial statement to other prospective jurors.

A court may use a standard jury questionnaire for *voir dire* in civil cases and invite counsel to modify or supplement it. However, courts increasingly are receptive to questionnaires that attorneys draft. Where permitted, attorneys on both sides generally must stipulate to a questionnaire or submit it to the court in advance for approval, with enough time provided for opposing counsel to make any objections (for example, E.D. Va. L. Civ. R. 51; D. Del. LR 47.1(a)).

Although counsel may be tempted to draft an exhaustive list of questions, some courts may limit the length of the questionnaire. Further, questionnaires that are too long or complicated can be overwhelming to prospective jurors. Most importantly, if counsel cannot evaluate the information gleaned from questionnaires meaningfully because they are too long and difficult to organize and analyze, the exercise may become useless.

If permitted to submit jury questionnaires, counsel should consider potential questions early in the trial preparation process and, if appropriate, hire a jury consultant to prepare questions that will help counsel select favorable jurors. For more information on hiring jury consultants and developing a jury research program, see Practice Note, Mock Jury Exercises (3-556-4766).

Substantive questionnaires usually are distributed when prospective jurors report for duty, and should not be confused with the general preliminary qualification questions typically mailed to prospective jurors in advance by the clerk, although there may be some overlap in the type of questions asked (see Juror Qualifications).

After the venire fills out a case-specific questionnaire, the judge may then conduct a brief *voir dire* and give each side a set time limit to

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orally question prospective jurors. However, in some cases, the court may agree to send case-specific questionnaires to prospective jurors in advance, often accompanying the summons to report for jury duty. Under this approach, the questionnaires are sent to prospective jurors several weeks before trial and jurors are instructed to complete and return the forms before jury selection begins, with the deadlines varying among jurisdictions. For example, many courts presiding over complex product liability cases have followed this approach, which affords both sides ample time to analyze and explore the nuances of prospective jurors' answers and consult with jury consultants.

Counsel should ask the court about using jury questionnaires well before trial so that the court can work with counsel and the parties to ensure that prospective jurors receive the questionnaires in a timely and proper manner. Courts tend to be more receptive to requests for advance questionnaires if counsel offer to help with certain logistics, such as copying and paying for the questionnaires to be mailed to jurors.

QUESTIONING EFFECTIVELY

Designing useful questions is an integral aspect of successful jury selection. Whether the judge or the attorneys conduct *voir dire*, the primary goals of questioning should be to gather information about the prospective jurors and gain an understanding of how each thinks, including how a prospective juror views authority and whether the person is a rule follower. This type of information can provide insight into how the individual will view the client, evidence, and merits of the case.

To elicit this information most effectively, counsel should:

- **Present neutral questions.** Doing so increases the chances of both a judge permitting the questions to be asked and receiving more honest answers from the prospective juror.
- **Avoid adversarial questions.** Counsel should maintain an environment that makes prospective jurors feel comfortable sharing their private thoughts, and avoid adversarial questions that may cause prospective jurors to become guarded if they sense that the attorneys are trying to lead them to a particular answer. Strategically, it also may be unwise to ask adversarial questions because these questions may signal to opposing counsel the types of jurors being sought or avoided. Counsel should aim to identify favorable jurors without revealing why they are desirable to help prevent opposing counsel from seeking to strike them from the panel.
- **Ask open-ended questions.** Counsel should avoid asking questions that merely elicit "yes" or "no" answers. Open-ended questions may draw out additional, unexpected information about an individual. If permitted to ask follow-up questions, counsel may be able to explore topics that were not previously considered. The more that a prospective juror speaks, the better counsel is able to assess the individual's mindset.
- **Pose both general and case-specific questions.** Although counsel should ask questions that directly relate to issues in the case, counsel should not overlook asking more general questions that may expose a prospective juror's philosophy on certain issues.
- **Respect a juror's privacy.** Sometimes attorneys need to explore sensitive and personal matters in light of the nature of the case. A private *voir dire* session may be a better option in these circumstances. For example, disability cases often raise questions about jurors' views and experiences with medical diagnoses and treatments for diseases. These questions can embarrass jurors or make them feel uncomfortable, particularly in a public setting. In a private *voir dire*, the individual can answer questions outside the presence of the other prospective jurors, in the judge's chambers or in an empty courtroom.

SCOPE OF PROPER *VOIR DIRE*

The scope of proper *voir dire* questions depends largely on the judge and the case. However, judges generally will not allow questions that:

- Involve personal matters that are irrelevant to the case, such as an inquiry into a prospective juror's political affiliations (although counsel typically may use publicly available, personal information to decide whether to keep or strike the prospective juror (see Researching Prospective Jurors)).
- Ask prospective jurors to weigh evidence in the case or "pin down a juror" on what his decision would be under a specific set of facts (see *Graham v. All Am. Cargo Elevator,* 2013 WL 5604373, at *3 (S.D. Miss. Oct. 11, 2013); *Sells v. Thaler,* 2012 WL 2562666, at *17 (W.D. Tex. June 28, 2012)).
- Are designed solely to reveal inadmissible matters to the prospective jurors, such as questions suggesting that a defendant has liability insurance and can afford to pay damages to the plaintiff.

If an attorney anticipates that opposing counsel may attempt to ask improper *voir dire* questions that can taint prospective jurors, or if opposing counsel actually submits improper questions to the court, the attorney should consider filing a motion in limine to preclude opposing counsel from raising or otherwise mentioning the inadmissible item (see, for example, *Federated Mut. Ins. Co. v. Peery's Auto Parts, L.L.C.,* 2012 WL 1155250, at *6 (W.D. Mo. Apr. 5, 2012)).

For more on using motions *in limine* in federal civil litigation, see Standard Documents, Motion in Limine: Motion or Notice of Motion (Federal) (5-586-7927) and Motion in Limine: Memorandum of Law (Federal) (0-585-3145).

OBSERVING PROSPECTIVE JURORS

The attorneys sitting at counsel table typically focus on prospective jurors seated in the jury box or the prospective jurors who are actually speaking. Counsel therefore should have colleagues or jury consultants in the courtroom to survey and observe the entire venire, including those sitting in other parts of the courtroom and waiting to be called.

A prospective juror's demeanor and posture can be telling, such as when individuals perk up or nod in agreement when certain questions are asked or when answers are given during the *voir dire* of other prospective jurors. Other helpful observations may include:

- The newspapers or books the prospective jurors are reading.
- Whether any prospective jurors are talking with each other and, if so, whether any cliques or friendships appear to have developed.
- Whether a prospective juror appears talkative, or shy and reserved.
- How a prospective juror is dressed, which can indicate his respect for the court system (or lack thereof).

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- A prospective juror's eagerness to be on the jury, which may be evident from how closely he pays attention during the questioning of other jurors.
- A prospective juror's indifference to jury service, as demonstrated by his sleeping or appearing otherwise disengaged during *voir dire*.

EXERCISING JUROR CHALLENGES

A strategic use of challenges can help counsel shape the jury composition in his client's favor. An attorney may remove a particular juror by exercising a:

- Challenge for cause (see Challenges for Cause).
- Peremptory challenge (see Peremptory Challenges).
- Back strike, where permitted (see Back Strikes).

The procedures for exercising challenges vary. Some judges require challenges to be exercised at sidebar or otherwise outside the presence of the jury, such as during a recess, while others may instruct counsel to make challenges silently on paper. For a long trial in particular, counsel should consider insisting that challenges for cause occur outside the presence of other jurors to prevent them from learning that unpaid jobs, vacation plans, and other explanations may excuse them from serving on the jury.

CHALLENGES FOR CAUSE

Each side has an unlimited number of challenges for cause and may raise multiple grounds. However, counsel may use these challenges only when a prospective juror either:

- Admits an inability to be impartial, which is known as actual bias.
- Has a relationship, connection, pecuniary interest, or past experience from which a lack of impartiality may be presumed. This is known as implied bias, presumed bias, or implicit bias.

(See *Bd. of Trustees of Johnson Cnty. Cmty. Coll. v. Nat'l Gypsum Co.*, 733 F. Supp. 1413, 1416-17 (D. Kan. 1990) (describing proper use of challenges for cause).)

The standard to strike a prospective juror for cause is not easily met. For example, to demonstrate actual bias, a juror's preconceived notion is insufficient. Instead, a juror must admit to having so fixed of an opinion that he could not be impartial. If a juror states during *voir dire* that he can put his opinion aside to render a verdict based on the evidence presented in court, a challenge for cause typically is not appropriate. (See, for example, *Bruner-McMahon v. Jameson*, 566 F. App'x 628, 636 (10th Cir. 2014) (affirming the district court's refusal to strike a juror for cause where the juror, who was "somewhat slanted" in favor of defendants, also repeatedly stated that she thought she could set aside her initial impression and decide the case based on the evidence at trial).)

It often is even more difficult to establish a challenge for cause based on an implied bias. These challenges should be reserved for extreme or exceptional situations where the relationship or connection between a prospective juror and some aspect of the litigation makes it highly unlikely for the average person to remain impartial. (See, for example, *Rodriguez v. Cnty. of L.A.*, 96 F.Supp.3d 990, 1010-11 (C.D. Cal. 2014); *In re Levaquin Prods. Liab. Litig.*, 2012 WL 4481223, at *6 (D. Minn. Sept. 28, 2012).)

Courts have denied challenges for cause based on implied bias where a prospective juror:

- Merely knows or is a distant relative of one of the parties, witnesses, or attorneys (see, for example, *Allen v. Brown Clinic, P.L.L.P.*, 531 F.3d 568, 573 (8th Cir. 2008)).
- Has an attenuated financial interest in the outcome of a case, although bias may be presumed where a prospective juror is a stockholder in, or an employee of, a party to the suit (see, for example, *Seyler v. Burlington N. Santa Fe Corp.*, 121 F. Supp. 2d 1352, 1362-63 (D. Kan. 2000)).

As with actual bias, if a juror states that he could be impartial despite the relationship, interests, or experience from which implied bias arises, then a challenge for cause may not be warranted (see, for example, *Preston v. Chi. Police Officer Daniel Warzynski*, 2012 WL 4498294, at *4 (N.D. Ill. Sept. 28, 2012)).

PEREMPTORY CHALLENGES

Peremptory challenges allow counsel to eliminate prospective jurors without having to provide a justification or an explanation, as long as the challenges are not based on race, gender, or ethnic origin (see *Batson* Challenges). Counsel should reserve peremptory challenges for striking the jurors most hostile to a client's case who cannot successfully be challenged for cause.

In most courts, challenges for cause are heard before peremptory challenges. The local or judge's rules often dictate the order in which the attorneys may exercise their peremptory challenges (for example, D. Del. LR 47.1(b)). Counsel should consult the applicable rules and procedures before jury selection begins to determine the exact process.

Unlike challenges for cause, a party may exercise only a limited number of peremptory challenges. In a federal civil trial, each party is entitled to three peremptory challenges (28 U.S.C. § 1870). The court may allow additional peremptory challenges in cases with multiple parties following a timely motion by the parties (for example, E.D. Va. L. Civ. R. 47(B)). In state courts, the number of challenges allowed usually is governed by rule or statute and varies from state to state.

BATSON CHALLENGES

Although counsel generally do not need to explain the basis for exercising a peremptory challenge, counsel cannot base the challenge on race, gender, or ethnic origin (see *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (extending *Batson* to civil cases)). Some courts have applied this rule to include other protected classes, such as sexual orientation (see, for example, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 489 (9th Cir. 2014)).

Opposing counsel may object to the validity of a peremptory challenge that appears to be based on discriminatory grounds, which is known as a *Batson* challenge. A court conducts a three-step inquiry when a *Batson* challenge is raised, in which the court must:

- Assess whether a prima facie case of discrimination exists.
- Consider a neutral explanation for the peremptory challenge.
- Determine if the challenge was motivated by purposeful discrimination.

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Prima Facie Case of Discrimination

To demonstrate that a prima facie case of discrimination exists, opposing counsel must show both that:

- The prospective juror is a member of a protected or cognizable group.
- The totality of the circumstances raises an inference that the other side's strike has a discriminatory purpose.

An inference of a discriminatory purpose may arise in a variety of circumstances, such as when an attorney:

- Seeks to strike a prospective juror who belongs to the same protected class as the client's opponent.
- Repeatedly seeks to strike prospective jurors in the same protected class.
- Asks different *voir dire* questions of those who belong to a protected class.

Neutral Explanation for Peremptory Challenge

If the attorney raising the *Batson* challenge shows a prima facie case of discrimination, the attorney who sought to strike the prospective juror must provide a neutral explanation. A neutral explanation is sufficient, even if illogical. Courts typically uphold peremptory strikes if an attorney offers an explanation involving a prospective juror's:

- Education or socioeconomic background (see, for example, *Cuffee v. The Dover Wipes Co.,* 2005 WL 1026831, at *1-2 (D. Del. Apr. 27, 2005), aff'd sub nom., 163 F. App'x 107, 109 (3d Cir. 2006) (upholding peremptory challenges based on counsel's explanation that individuals were blue-collar workers)).
- Prior experience with litigation or the criminal system (see, for example, *Thalheimer v. Grounds,* 2015 WL 1405414, at *12 (C.D. Cal. Mar. 26, 2015) (a juror's previous jury service in a murder trial was a sufficient explanation for peremptory challenge in a subsequent murder trial)).
- Appearance or demeanor (see, for example, *United States v. Krout,* 66 F.3d 1420, 1428-29 & n.13 (5th Cir. 1995) (in a criminal case, peremptory challenges based on tattoos, long hair, and a beard were upheld)).

Challenge Motivated by Purposeful Discrimination

If the attorney seeking to strike the juror provides a neutral explanation, the court must then determine whether opposing counsel has carried his burden of persuasion that the peremptory challenge was made with discriminatory intent (see *Johnson v. California,* 545 U.S. 162, 168 (2005)*; Partee v. Callahan,* 2010 WL 1539994, at *2 (W.D. Tenn. Apr. 16, 2010)).

Batson challenges often are unsuccessful because there is a low threshold for acceptable explanations. Nonetheless, opposing counsel may attempt to exercise *Batson* challenges during jury selection as a strategy to keep favorable jurors on the panel and, if the court allows challenges to be exercised in front of the pool, to taint the jury pool or the court by accusing his opponent of discrimination. For this reason, counsel always should be prepared to offer a neutral and inoffensive explanation when exercising peremptory challenges. Even where the court finds that opposing counsel has not established a prima facie case of discrimination, counsel should consider providing a neutral explanation on the record to help protect against a subsequent appeal.

BACK STRIKES

Some courts may permit counsel to back-strike during jury selection. This allows attorneys to challenge a prospective juror who counsel initially approved in a previous round if subsequent rounds reveal more desirable individuals (as may more often occur under the jury box method, where *voir dire* is conducted in multiple cycles of small groups).

Counsel should check whether the presiding judge permits back strikes before preparing for jury selection. Back striking can be a useful tool because it allows counsel to go back and exercise any remaining peremptory challenges even after a sufficient number of jurors have been selected. This enables counsel to continue to evaluate a prospective juror against others throughout the selection process and, if counsel ultimately has reservations about a particular individual, to strike him at any point before the jury is sworn.

CONDUCTING POST-TRIAL INTERVIEWS

Some courts grant trial attorneys leave to speak with jurors about a case after the verdict (for example, E.D. La. LR 47.5; *Cadorna v. City & Cnty. of Denver, Colo.,* 2009 WL 68560, at *1-4 (D. Colo. Jan. 8, 2009)). Where permitted, counsel should consider pursuing this opportunity even if an unfavorable verdict was reached. First, jurors often report that they are eager to speak to attorneys after a trial. Second, although speaking with jurors is unlikely to change the outcome of a trial, it is worth asking jurors about what they found important in a case, which may help counsel prepare for jury selection in future trials. The jury also may have surprising comments on both the merits of the case and counsel's presentation.

Lastly, in some cases, speaking with jurors may uncover improprieties during the deliberation process and provide a basis for a new trial, although such motions are rarely granted on this basis in civil cases (see *Warger v. Shauers,* 135 S. Ct. 521, 524-25 (2014) (a party could not seek a new trial based on one juror's post-verdict affidavit detailing what another juror said in deliberations)).

For more on new trial motions in federal court, see Practice Notes, Motion for a New Trial: Overview (Federal) (6-597-2485) and Motion for a New Trial: Drafting and Filing (Federal) (5-599-4925).

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