Jury Selection—Law and Practice

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I. INTRODUCTION

When selecting a jury, simply put, an attorney must identify and strike those potential jurors who will—no matter what the evidence—decide the case based on prejudices which are inconsistent with the client's interests. To do so, you must accept that the fundamental purpose of voir dire is to learn all the trial court will allow you to learn about potential jurors within the time frame and scope of questioning allowed. In sum, you want to know all you can about prospective jurors' opinions, biases, and their approaches to making decisions.

This Article will discuss ways to gather that information from potential jurors, identify deliberation leaders, show how to ask about important biases that could cause you to lose the case, and execute challenges for cause. This Article will also present the use of open-ended questions to obtain information, as well as the limited use of closed questions.

II. JURY VENIRE

If you are entitled to a jury trial[1] and the bond has been fixed and timely filed[2] or the cash deposit timely made,[3] "the clerk of court shall order the jury commission to draw a sufficient number of jurors to try and determine the cause," in accordance with Revised Statutes section 13:3044.[4] The qualifications of jurors eligible to serve in a Louisiana civil case are determined by requirements set forth in the Louisiana Code of Criminal Procedure.[5]

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1. LA. CODE CIV. PROC. ANN. arts. 1732 and 1733 (2011).
2. LA. CODE CIV. PROC. ANN. art. 1734(A) (2011).
3. LA. CODE CIV. PROC. ANN. art 1734.1 (2011).
4. LA. CODE CIV. PROC. ANN. art 1734(B) (2011).
5. LA. CODE CIV. PROC. ANN. art. 1751 (2011); LA. REV. STAT. ANN. § 13:3041 (2011); LA. CODE CRIM. PROC. ANN. art. 401 (2011).

The drawing of the jury venire in urban areas where many civil or criminal trials take place every week may be from a central jury pool.[6] In rural parishes, the venire is usually notified by the clerk of court through mailing to come to court for a specific case.

III. THE PURPOSE OF VOIR DIRE

The virtue of a fair jury system has been recognized for a long time. In 1807, U.S. Supreme Court Chief Justice John Marshall wrote:

> The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it.[7]

Jury bias is a problem for the defendant as well as the plaintiff. Although a significant minority of jurors demonstrates a great deal of suspicion toward plaintiffs, many people are likewise biased against tobacco companies, asbestos manufacturers, HMOs, and CEOs.[8] Suspicion of corporate management runs especially high after Enron and the recent rash of corporate scandals. But because plaintiffs have the burden of proof, they are naturally more worried about unfair juries than are defendants. One or two strong-willed jurors with deep-seated biases practically guarantee an unfair verdict or a hung jury no matter the evidence is or how well the attorney does his job.

And do not count on the courts of appeal to grant relief based on juror dishonesty in voir dire, even in the most grievous circumstances.[9] It is therefore imperative that jury selection ferret

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6. La. Ct. App. Unif. R. 12.1.

7. United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

8. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1181–82 (2003).

9. *See, e.g.*, Brown v. Hudson, 700 So. 2d 932 (La. Ct. App. 1997) (holding that a jury foreman who hid in voir dire that he had five years prior been named a defendant in a personal injury case—and who voted with the majority to decline the plaintiff recovery—did not rise to the level of grievous behavior required to set aside the jury verdict).

out verdict-changing biases even when potential jurors try to hide them.

The Louisiana Supreme Court has said "[t]he purpose of voir dire examination is to develop the prospective juror's state of mind not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' possible bias or prejudice."[10]

IV. PROCEDURAL CONSIDERATIONS

Unlike criminal defendants in Louisiana, who have a constitutional right to conduct voir dire through their attorneys, civil litigants have a statutory right to examine jurors. The court "shall examine prospective jurors as to their qualifications and may conduct such further examination as it deems appropriate."[11] "[A]ttorneys shall individually conduct such examination of prospective jurors as each party deems necessary, but the court may control the scope of the examination to be conducted by the parties or their attorneys."[12]

Know your judge. The court can control voir dire by limiting the amount of time counsel has to ask questions and to prevent what it considers to be unfair or prejudicial questioning.[13]

In a typical state court trial by a jury of twelve, each side is allowed six peremptory challenges. "If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four."[14]

There are five grounds upon which a potential juror may be challenged for cause:

> (1) When the juror lacks a qualification required by law.
> (2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;
> (3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably

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10. Alex v. Rayne Concrete Serv., 951 So. 2d 138, 154 (La. 2007) (citing Trahan v. Odell Vinson Oil Field Contractors, Inc., 295 So. 2d 224, 227 (La. Ct. App. 1974)).

11. LA. CODE CIV. PROC. ANN. art. 1763(A) (2011).

12. LA. CODE CIV. PROC. ANN. art. 1763(B) (2011).

13. Morgan v. Liberty Mutual Ins. Co., 323 So. 2d 855, 859 (La. Ct. App. 1975), *overruled on other grounds by* Harris v. Tenneco Oil Co., 563 So. 2d 317, 326 (La. Ct. App. 1990); *Trahan*, 295 So. 2d at 227.

14. LA. CODE CIV. PROC. ANN. art. 1764(B) (2011).

> believed that they would influence the juror in coming to a verdict;
> (4) When the juror served on a previous jury, which tried the same case or one arising out of the same facts;
> (5) When the juror refuses to answer a question on the voir dire examination on the grounds that his answer might tend to incriminate him.[15]

Challenges for cause should be granted "even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment accordingly may be reasonably implied."[16] The standard is not "can you follow the law?" Who would to admit they cannot? The standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[17]

If the court does not excuse a juror for cause, either party may challenge the juror for cause.[18] If a juror has not been excused for cause, the court shall inquire whether either party wishes to exercise a peremptory challenge as to that juror by alternating between the sides.[19] No peremptory challenge is allowed after the jury has been accepted and sworn. Peremptory challenges shall be exercised by communicating to the court in a side bar conference of the judge and the attorneys conducting the examination and selection of the jurors. "The side bar conference shall be conducted on the record and out of the presence of the prospective jurors."[20]

The court may seat alternate jurors to replace jurors who, prior to the time the jury retires to consider its verdict, become unable to perform their duties. The court must allow each side an equal amount of additional peremptory challenges for the seating of the alternate jurors.[21]

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15. LA. CODE CIV. PROC. ANN. art. 1765 (2011).
16. Scott v. The American Tobacco Co., 795 So. 2d 1176, 1182 (La. 2001) (citing State v. Hallal, 557 So. 2d 1388, 1390 (La. 1990)).
17. Wainright v. Witt, 469 U.S. 412, 424 (1985); State v. Tate, 851 So. 2d 921, 931 (La. 2003).
18. LA. CODE CIV. PROC. ANN. art 1766(A) (2011).
19. LA. CODE CIV. PROC. ANN. art 1766(B) (2011).
20. LA. CODE CIV. PROC. ANN. art 1766(D) (2011).
21. LA. CODE CIV. PROC. ANN. art 1769.

V. CONSTITUTIONAL CONSIDERATIONS

Peremptory challenges may not be exercised for reasons of race[22] or gender.[23] If they are, a "*Batson*" (or "*Batson*/*Edmonson*") challenge may be made by the opponent of the peremptory strike. A *Batson* challenge may be made any time before the jury is empaneled and sworn. The opponent must first make a prima facie showing of racial or gender discrimination, i.e., that a prospective juror has been struck because of race, or because of gender. This showing can be made even if the struck juror is of the same race or the same gender as the litigant opposing the strike. There is no magic proof requirement for the prima facie showing; in theory there is a multi-factor, totality-of-the-circumstances approach.[24]

The controlling Louisiana case on the subject of constitutional considerations in exercising peremptory challenges in civil cases is *Alex v. Rayne Concrete Service.*[25] In *Alex*, the Louisiana Supreme Court outlined a three-step inquiry to challenge a peremptory strike that it had formerly described in the criminal case of *State v. Snyder.*[26] In *Snyder* the court re-described the three-step *Batson* process, which guides courts' examinations of peremptory challenges for constitutional infirmities.

Snyder held that the trial court must first determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensive reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

"Gut feelings" may factor into the decision to utilize a peremptory challenge. But counsel must be prepared to articulate more of a reason for striking a juror than just a gut feeling. In *Alex*,

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22. Batson v. Kentucky, 476 U.S. 79 (1986) (criminal standard); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) (civil standard).
23. J.E.B. v. Alabama, 511 U.S. 127 (1994).
24. State v. Green, 655 So. 2d 272 (La. 1995).
25. 951 So. 2d 138 (La. 2007).
26. 942 So. 2d 484 (La. 2006).

the Supreme Court quoted itself "[i]n courts of our state, as well as in federal courts in this circuit, eye contact (or lack of it), body language, and other sense impressions appear to be recognized as important factors in decisions to exercise peremptory challenges."[27]

Attorneys must explain the cause of their gut feeling for the court to evaluate the proffered reason. Lack of questioning a juror before excluding that juror peremptorily is evidence that the explanation is a sham and a pretext for discrimination.[28] Voir dire examination should enable counsel to exercise his intuitive judgment concerning the prospective jurors' possible bias or prejudice.[29]

The court emphasized in *Alex* that *Batson* and its progeny have outlined several important social factors which affect the abuse of peremptory challenges: (1) Discrimination in selection of jurors harms not only the accused whose life or liberty interest they are summoned to try; (2) By denying a person participation in jury service on account of his race or gender, the state unconstitutionally discriminates against the excluded juror; (3) The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community; and (4) Selection procedures that purposefully exclude persons from juries for reasons of race or gender undermine public confidence in the fairness of our system of justice.[30]

A party in a civil case may seek review of a trial court judgment on a *Batson/Edmonson* ruling by supervisory writ under La. Code Civ. Proc. art. 2201 or on appeal after a final judgment if the case is rendered under La. Code Civ. Proc. art. 2083.

The appellate court standard for review of a trial court's ruling on peremptory challenges is manifest error and the trial court's rulings are entitled to great deference.[31]

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27. *Alex*, 951 So. 2d at 151 (quoting State v. Seals, 684 So. 2d 368, 375 (La. 1996)).

28. *See* Miller-El v. Dretke, 545 U.S. 231, 246 (2005); Ex parte Travis, 776 So. 2d 874, 881 (Ala. 2000); State v. Collier, 553 So. 2d at 823, n. 11 (citing In re Branch, 526 So. 2d 609 (Ala. 1987)).

29. Trahan v. Odell Vinson Oil Field Contractors, Inc., 295 So. 2d 224, 227 (La. Ct. App. 3 1974).

30. *Batson*, 476 U.S. at 88; *Edmonson*, 500 U.S. at 629; *J.E.B.*, 511 U.S. at 140.

31. State v. Collier, 553 So. 2d 815, 818 (La. 1989); State v. Elie, 936 So. 2d 791 (La. 2006); *Alex*, 951 So. 2d at 150 (La. 2007).

VI. SAMPLE VOIR DIRE IN A MOTOR VEHICLE CASE

Some of the suggested questions in this sample voir dire are from David Ball, probably the nation's most influential trial consultant. Even when time for conducting voir dire has been limited by the trial court, Ball recommends counsel conduct questioning on the areas of burden of proof, pain and suffering, and tort reform.

A. Get Them Talking

Introduce client.
Who here has been through jury selection before?
Tell me about your job.
What is your workday like?
What kind of safety rules are there?
What do you like about your work?
What do you dislike about your work?
Tell me about the work your husband or wife does.
What is a normal workday like for him/her?
Tell me about your children.
Tell me about your spare time.
Tell me about your favorite TV shows.
Tell me about what you regularly read.

B. Liability and Causation Topics

Who here has—or knows anyone who has—been involved in the following fields?

Safety
Safety investigation
Engineering
Mechanical
Medical
Doctor
Therapist
Nurse

C. Tort Reform

Some people think there are too many frivolous lawsuits. Other people think the amount of lawsuits is about right. How many of you are closer—even a little—to the people who think there are too many frivolous lawsuits?

Tell me about it.

What else?

D. Pain and Suffering

Many people would have a little trouble giving money for pain and suffering because it doesn't make the pain and suffering go away. Other people think money for pain and suffering is okay.

How many of you are closer to people who think money for pain and suffering is okay?

How many of you are closer to the people who would have trouble—even a little—giving money for pain and suffering because it can't make the pain and suffering go away?

Please tell me about that.

E. Burden of Proof

Part 1

In this kind of case you are called on to decide whether we are "more likely right than wrong."

"More likely right than wrong"—you can have doubts on both sides. As many doubts as you want. As long as after you weigh all the doubts you believe we are more likely right than wrong. If we just tip the scales just a little.

Now, we expect to show far more than tipping the scales a little. But all we have to do is tip the scales just a little.

Since that's all we have to do, some folks think it's not enough because it makes it too hard on the other side, the defense. Maybe even a little unfair. Other folks think it's okay.

Mr. Potential Juror, are you closer to thinking it might be a little unfair? Or are you closer to the folks who think it's okay?

Where do you come between the two? Tell me about that.

Who thinks it's okay?

Part 2

Anyone else have any problems with "more likely than not"? It's the way we all hope you make your decision. The defense attorneys agree you should decide the case on that basis no matter how many doubts you have, and the judge will tell you it's the law. So just to be sure, anyone else have even a small problem with that?

F. Base Money Only On Harm

One of the questions on your verdict form will be how much money the plaintiff should get. When figuring this out, some folks feel you should consider only the amount of harm. Other folks feel it's important to consider other things, such as how sorry they might feel for the plaintiff, or the fact that money cannot make the pain go away, or the fact that enough money to equal the harm might make prices go up for things or services we have to buy, or how much you like the plaintiff, or whether enough money to equal the harm would be too much money for one person, or seem like a windfall—or other considerations other than the amount of harm.

Mr. Potential Juror, are you a little closer to folks who'd base their verdict amount only on the amount of harm? Or a little closer to folks who think it's important to take those other things into account at least a little?

G. Surveillance

What if a company follows someone or observes someone for ten hours a day? How do you think the company would go about deciding what to film?

What if the company chooses to film some activities but not others?

What if the company films one minute out of the ten hour day?

Who here thinks that what the company decides not to film is as important as what the company chooses to film?

H. Harms Lists Questions

Who here has—or knows anyone who has—ever been hurt from an automobile accident? Please tell me about it.

Who here has—or knows anyone who has—ever had a permanent whole body impairment? Please tell me about it.

Who here has—or knows anyone who has—ever had chronic pain caused by trauma? Please tell me about it.

Who here has—or knows anyone who has—ever had depression from chronic pain? Please tell me about it.

Who here has—or knows anyone who has—ever had a lumbar fusion caused by trauma? Please tell me about it.

Who here has—or knows anyone who has—ever had a worsening of a pre-existing condition caused by trauma? Please tell me about it.

I. The Last Questions

Given the kind of person you are, your attitudes, life experiences, opinions, everything about you, what is there about you that might help you, even a little, in being a juror on this kind of case? What about other than your ability to be fair and listen to both sides?

Given the kind of person you are, your attitudes, life experiences, opinions, everything about you, what is there about you that you think might make it just a little bit *harder* for you to be a juror on this kind of case?

Responsibility means paying enough money compensation to fully equal the losses and the level of the harm—without putting anything into the scale except those losses and harms. That's the law. Who here thinks they might have trouble—even a little—keeping things off the scale that don't belong there?

What else is there—anything at all—that you would want to know about you, if you were me standing up here and trying to decide who will be on the jury? Anything? Even if you're not sure it makes any difference?

You have rights as a juror—one of the rights is to hear all of the evidence. So if a witness says something you don't hear, will you be comfortable raising your hand and telling the judge?

You have a second right—to understand the law. Every so often during deliberations, jurors disagree over what the law is. Sometimes a discussion will start. Will you be comfortable asking the judge to read the instructions again instead of trying to decide it among yourselves?

VII. SUGGESTED READING ON VOIR DIRE

1. LISA BLUE AND ROBERT B. HIRSCHHORN, Blue's Guide to Jury Selection, (2003).

2. DAVID BALL, David Ball on Damages 3, 61–78, 271–318 (3d ed. 2011).

3. DAVID BALL & DON KEENAN, Reptile: The 2009 Manual of the Plaintiff's Revolution, 119–27, (2009).

4. GERRY SPENCE, Win Your Case, 112–26, (2005).

5. DAVID BALL, Theater Tips and Strategies For Jury Trials, (3d ed. 2003).