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TRIAL ADVOCACY

The Art of Jury Selection: Working With Challenges

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It has been said that the purpose of jury selection is to select a 'fair and impartial' jury. The trial lawyer, as his client's advocate, must, however, always keep the ultimate goal in mind: a successful verdict in the case. Thus, the goal of jury selection, simply put, is to get a jury which will render a verdict in favor of your client.

For decades, indeed centuries, lawyers have been trying to master the art of jury selection -- trying to ensure the elimination of jurors who are biased against your case, while incorporating those who will be open to your claims. While there is no 'one size fits all' method to get a jury to vote in your favor, there are certain approaches that will increase the odds of obtaining a favorable outcome.

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

Challenges for Cause

Challenges for cause have been given different names over the years. Lawyers have referred to these challenges as challenges to the 'favor,' principal challenges and cause challenges. They all, however, are brought for the same reason: The juror is incompetent to sit as a matter of law.

With this type of challenge, a specific reason must be given to the court as to why the juror should be disqualified. In the event the potential juror states unequivocally 'I can't be fair in this case,' the cause challenge is obvious. Less obvious, however, is where the answer is not nearly as clear.

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

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

A: I think I can.

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

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

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

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

A: I think I can.

Needless to say, these answers are troublesome. But do these answers amount to a challenge for cause?

The New York Court of Appeals has provided guidance on the very issue. In People v. Johnson, et al., [FN1] the highest court in our state made clear that where potential jurors reveal knowledge or opinions reflecting a state of mind likely to preclude impartial service, they must give an 'unequivocal assurance' that they can set aside any bias and render an impartial verdict based on the evidence and the evidence alone. The Court went on to explain that when a prospective juror expresses partiality towards one side and cannot unequivocally promise to set aside the bias, that juror should be removed for cause.

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

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

A: Not necessarily.

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

A: I guess so.

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

A: I would.

Q: You would?

A: Yes.

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

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

Challenge to the Array

A type of cause challenge that is less frequently used but must be given consideration is what is known as a challenge to the array. A challenge to the array is a challenge to the entire panel based either on some irregularity in the process of summoning the jury or on some irreparable event that took place while selecting the jury. The irreparable event might be where a potential juror blurts out something that is so prejudicial that a cautionary jury instruction by the court will not cure the prejudicial effect of the statement:

Q: Have you heard anything about this case?

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

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

Because civil jury selection is often conducted outside the presence of a judge it is essential to write down the prospective juror's answers verbatim to properly inform the court of the events that transpired.

Challenges for cause are the responsibility of the lawyer whose client has been hurt by the juror's response. Generally, the rule is that all challenges must be made before the jury is sworn. Be aware that there is a prevailing rule that any reversible error by the court in failing to sustain a challenge for cause is waived if a lawyer proceeds to trial without using all of his peremptory challenges.

Peremptory Challenges

Technically, a peremptory challenge gives a lawyer the right to have a prospective juror excused without explanation. Pursuant to CPLR §4109, in

civil trials in New York each side has a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. While the trial court has the discretion to grant additional challenges equally to each side, the number of challenges is still limited.

It is for this reason that one of the main goals of jury selection, regardless of sides, is the preservation of peremptory challenges. If the trial lawyer can turn a peremptory challenge into a challenge for cause, he has dramatically increased the odds of obtaining a favorable result for his client by obtaining more favorable jurors.

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

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

A: No.

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

A: No.

By leading, the lawyer has made sure he will have to exercise a peremptory challenge. He has, in short, obtained an unequivocal assurance by that prospective juror that this fact will not influence his verdict.

However, if the lawyer had explored this area by asking open-ended questions first and then using leading questions, he might be in a much different position.

Q: Tell us about your relationship with your Dad.

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

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

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

Q: How does he like his job?

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

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

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

A: I might.

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

A: Yes, I might.

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

'Batson'

In the event that your adversary is excusing jurors based on race or gender you should always be mindful of Batson v. Kentucky [FN2] and it progeny.

In Batson, the U.S. Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, a prosecutor may not use a peremptory challenge to exclude a juror because of that juror's race.

Since its initial holding in Batson, the Supreme Court expanded the holding to civil cases as well as criminal cases and expanded the protection to other categories beside race such as gender. [FN3]

Race-Neutral Explanation

If one side makes a primae facie showing that the other exercised a peremptory challenge based on race (or gender or age) then the side exercising the challenge must provide a race-neutral explanation for that challenge. To satisfy the burden of a race-neutral explanation, it is incumbent on the lawyer opposing the challenge to identify a legitimate reason that is related to the particular case to be tried and is sufficiently persuasive to rebut a primae facie showing of a discriminatory practice. The reasons cannot be generalized statements but must have race-neutral relevance to the juror being questioned. [FN4]

Consider the following example: Suppose you represent an African-American who

was severely injured in a boating accident. During jury selection your adversary excuses the only African-American sitting as a prospective juror. You oppose your adversary's peremptory challenge based on Batson.

In response, your adversary states as a race-neutral explanation that: The juror is retired; that her child works in law enforcement; and that she likes to shop. Here, the reasons stated might well be viewed as a sham or a hidden pretext for intentional racial discrimination.

Other examples of insufficient reasons indicative of purposeful discrimination include:

that the answers given by the minority juror did not differ from the other jurors answers,

that the explanation for the challenge was too vague and general,

that the attorney asked no questions on jury selection that would indicate a good faith interest in the juror's attitudes,

that the attorney asked questions of the minority juror that were not asked of other jurors, and

that the reason stated for excusal of the minority juror are unrelated to the case.

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

Conclusion

Many times, the composition of the jury is at least as important a factor as the facts of the case itself in obtaining a successful verdict. Jurors who start out biased against your case are unlikely to be persuaded to your position through the power of your presentation or oratory.

A thorough knowledge of the rules of jury selection, coupled with a mastery of the proper techniques to employ during this crucial part of the trial, should, however, help greatly reduce your need to 'turn around' a hostile juror, by ensuring that the juror biased against your cause will be long gone before the jury is impaneled.

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FN1. 94 NY2d 600, 709 NYS2d 134 (2000).

FN2. 476 U.S. 79 (1986).

FN3. See Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (civil cases); J.E.B. v. Alabama, 511 U.S. 127 (1993) (gender).

FN4. See Batson, supra at 98.

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