

# American Bar Association

## Ladies and Gentlemen of the Jury – Have You Reached A Verdict?

*Chicago, Illinois*  
*August 7, 2005*

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## **Ladies And Gentlemen Of The Jury ... Jury Selection From The Defense Perspective**

Calling it “jury selection” is actually a misnomer because counsel cannot select the persons to serve on the jury. At best, counsel can remove or *deselect* certain individuals that he or she does not want to serve. Counsel should remove from the pool of prospective jurors those who appear to be unable to be impartial. While historically the jury was selected because of its knowledge of the facts (in England), our American system is premised on the prospective jurors not knowing about the case.

Jury selection is the first time counsel will address the jurors. Developing a rapport with the jury – a necessary element for any good litigator – should begin at this time. It will also be the jury’s first introduction to the defense case and the legal principles involved; thus, counsel has a chance to educate the jury and preview the case for them. Counsel should use this opportunity to introduce his or her theory of the case to the jurors.

*Voir Dire* can be thought of as a job interview; the job is to be a juror and the applicant pool is the venire. Through *voir dire*, counsel should determine whether the applicants are up to the task before them – deciding the case. The goal of *voir dire* is to find those unsuitable for the job and eliminate them. To that end, jury selection is both an art and a science and must be approached as such.

### **I. GENERAL GUIDELINES FOR JURY SELECTION**

#### **A. *Voir Dire***

1. The process of questioning prospective jurors.
2. The goal is to help attorneys weed through the prospective jurors to pick the best ones for their client.

3. It is important to observe nonverbal communication, including body language, of each of the prospective jurors from the minute that they walk into court.
4. Attorneys should consider how they will address the jurors – whether by first name (generally not advised) and what form of salutation (Miss, Ms. or Mrs.).
5. Avoid “legalese;” use plain language to tell the story.
6. Inquire about jurors’ experiences, assumptions and ideologies. Jurors’ experiences will shape how they analyze the issues, so it is important to learn what those experiences are and how they may impact the presentation of, decision in, the case.

## **B. Challenges Allowed**

1. Challenges For Cause
  - a. They are unlimited in number and scope.
  - b. Grounds for cause can be found in judicial precedent, statutes and court rules.
  - c. Counsel risks alienating jurors so they should be used sparingly. Counsel can minimize the negative impact by beginning with introductory remarks to the venire, where permitted.
  - d. Some examples of challenges for cause are:
    - i. A personal or business relationship with a principal of the trial [party, attorney, judge or witness].
    - ii. A preconceived opinion about the case or prior knowledge of the facts of the case. The problem of pretrial publicity can be of particular importance in high profile cases.
    - iii. A financial interest in the outcome of the case.
    - iv. Prejudice or sympathy – that renders the prospective juror unable to be impartial.
    - v. Prior experience in litigation.
    - vi. Pending litigation may disqualify the prospective juror.

## 2. Peremptory Challenges

- a. Allows a party to excuse a juror for any reason the party sees fit (or for no reason at all).
- b. Federal civil cases (28 U.S.C. §1870)
  - i. Three peremptory challenges are allowed for each party.
  - ii. Several plaintiffs or defendants may be considered a “single party” for purposes of making challenges.
  - iii. The court may in its discretion allow additional challenges, to be exercised individually or jointly by each side.
  - iv. All challenges will be determined by the court.
- c. May receive additional challenges for the selection of the alternates.

## 3. Challenges to the Array

Though used much less often, counsel can challenge the panel of jurors being presented, arguing either an equal protection violation or that the array is not a fair representation of a cross-section of the community.

## C. Preparation Is A Must

### 1. Juror Profiles

- a. Before jury selection begins, counsel should develop profiles for acceptable and unacceptable jurors.
- b. May require conducting community surveys and interviews to ascertain community attitudes toward the pending litigation.

### 2. Predetermine How The Judge Conducts *Voir Dire*

- a. Who questions the potential jurors, the attorneys directly or the judge. In federal court, it is generally the judge who conducts *voir dire*.
- b. How extensive can questioning be from the attorneys.
- c. Are prospective jurors questioned individually or as a group.
- d. Can attorneys question jurors individually or only address the panel as a whole.

- e. Is there a time limit for questioning the prospective jurors.
  - f. What, if any, information attorneys are provided in advance of the *voir dire*.
  - g. How are challenges exercised –
    - i. In front of the panel or in chambers.
    - ii. As each juror is questioned or in groups.
  - h. Know how many jurors and alternates will be selected.
3. Prepare A Set Of Proposed *Voir Dire* Questions
- a. Counsel should develop an extensive list of proposed questions.
  - b. Generally speaking, open-ended questions are better because they will get the juror talking.
  - c. Plan alternative formulations of questions in case opposing counsel objects to a question or line of questioning.
  - d. Be careful when asking the hard questions – can alienate jurors.
  - e. Be careful not to reveal so much that other side challenges all favorable jurors.
  - f. Generally two types of questions:
    - i. General background questions – asked to all prospective jurors (age, occupation, marital status, etc.).
    - ii. Case specific questions.

4. Motions *in limine*

Consider filing pretrial motions to prevent opposing counsel from asking questions that the defense believes would be prejudicial.

**D. Reliability Of The Answers Given**

- 1. Some jurors want to please the attorneys and will say what they believe counsel wants to hear and not what they truly think.
- 2. Others want to hide a particular bias.

3. And still others will say what is necessary to be dismissed from the panel and not serve as a juror
4. May have to deal with juror dishonesty; failing to be truthful can be grounds for dismissal or mistrial.

**E. General Considerations For the Corporate Defendant – the David v. Goliath Syndrome**

When there is an individual “David” plaintiff suing a corporate “Goliath” defendant, it is natural for jurors to sympathize and side with the individual, the little guy against the big, deep pocketed giant corporation. Thus, counsel should put a face on the corporation, humanize it, make it more than just a deep pocket.

**F. Types of Jurors**

1. Leaders – will take charge in the jury room. There can be different types of leaders (structural, social, opinion).
2. Opinion Generators – voice their opinions but do not take on the task of convincing the others as the opinion leaders will do.
3. Followers – generally identified by the tone of their voice.
4. Loners – difficult to predict.

**G. Jury Selection Forms**

Because jury selection generally moves at a fast pace, it is useful to have a form on which to compile the information and a prepared shorthand ready for use.

NAME	JUROR #	SEX	APPROX. AGE	ATTIRE	COMMENTS
		M/F			
		M/F			
		M/F			
		M/F			
		M/F			

Other attorneys like the form to be the same as the order in which the jurors will be sitting in the box when questioned.

J #1	J #2	J #3	J #4	J #5	J #6
J #7	J #8	J #9	J #10	J #11	J #12
J #13	J #14	J #15	J #16		

**H. Jury consultants, mock trials**

Jury consultants can be expensive but are used regularly in high profile cases because of the wealth of knowledge they can provide in the pretrial and trial proceedings.

**II. REVIEW PERTINENT RULES OF PROCEDURE**

1. The Federal Jury Selection and Service Act (28 U.S.C. § 1861 *et seq.*). This Act requires:
  - a. Random selection of pool and venire from a *fair* cross-section of the community.
  - b. Jurors must be over 18 years old, a citizen, and reside in the district for over a year.
  - c. Exemptions v. Disqualifications – those who are exempt may serve but need not have to, whereas those who are disqualified may not serve even if they wish to serve.
2. The Federal Rules of Civil Procedure (FRCP)
  - a. Govern civil trials in federal court.
  - b. They have served as the model for many state rules of civil procedure.
3. State courts all have their own rules and procedures.

**III. SELECTING A JURY IN LABOR & EMPLOYMENT CASES**

**A. Litigating Employment Issues**

The following are a sample of a defendant’s proposed questions in an employment discrimination case.

### **Defendant's Proposed Voir Dire Questions**

1. What do you know about the Defendant Company [insert name]? Have you ever had any dealings with the defendant company? If so, please describe those dealings.
2. Do you know anyone who is now or has been employed by the company? If so, please state the name of any such person, your relationship with the person, when they were employed by the company, and what their job is or was. Do you have any opinion about how the company treats its employees?
3. Would you or anyone you know benefit from a decision for or against the company?
4. Do you know or have you ever had any dealings with the attorneys representing the company [list attorneys]? If so, please describe the nature and extent of those dealings. Likewise, do you know or have you ever had any dealings with the attorneys representing the Plaintiff, [list plaintiffs and their attorneys]? If so, please describe the nature and extent of those dealings.
5. Do you know or have you ever had any dealings with any of the persons who may be called as witnesses in this case? (*See* witness lists of parties).
6. Are you currently employed? If so, please state by whom and in what position. How long have you held that position? If you have been in your present position for less than five years, please give your employment history for the last five years, including the reasons for changing jobs.
7. Have you, or has anyone close to you, ever been discriminated against or harassed in your/their employment? If so, please state what occurred, when it occurred the job you/they held, your/their employer at the time, and how the matter was resolved.
8. Have you or a family member ever filed a grievance, charge, or other complaint or protest against an employer? If so, please describe the circumstances surrounding the action.
9. Have you ever been employed in a "union shop," or worked under the terms and provisions of a collective bargaining agreement? If so, have you ever filed a complaint or grievance against a union, or had any adverse experiences with a union?
10. Have you or a family member ever been personally involved in a lawsuit, either as a party, witness, or otherwise? If so, please describe the nature of the lawsuit, your association with it, and the outcome of the case. In general, what were your feelings about the experience? Do you believe the result was fair or unfair and why?
11. Have you, or has anyone close to you, ever been employed in or had any special training in: law or the legal field; the medical profession; psychology, counseling, or social services; employee benefits, personnel, or human resources; affirmative action, anti-

discrimination, or job accommodation programs; being an officer or director of a company?  
What was the nature of this training or experience?

12. Have you, or has anyone close to you, ever been employed, or served, in local, state or federal government? What was the nature of this employment?

13. Have you or has anyone close to you ever been employed at a manufacturing plant? If so, when, where, what was your/their job, what was the size of the manufacturing plant, and what did the plant produce?

14. Have you, or has anyone close to you, ever had to [insert alleged discriminatory practice]? If so, when, describe.

15. How do you feel about the fact that the Defendant in this case is an employer? Would that cause you to favor one side or the other in this case?

16. Some people think that simply because a case goes to trial, the employee(s) suing must have been treated unfairly. What do you think?

17. Do you believe that a corporation that is being sued by employees, or applicants for employment, is entitled to the same fair and unbiased treatment as the individuals bringing the lawsuit?

18. How do you feel about the fact that the Plaintiff in this case is really the federal government? Would that cause you to favor one side or the other in this case?

19. Please identify any clubs or organizations you belong to.

20. Have you ever served in the military? If so, what branch?

21. Have you ever served on a jury before? If yes, what type of case did you serve on (civil, criminal, grand)? If yes, did you enjoy serving on the jury? Were you satisfied with the outcome in the case?

22. Are you acquainted with or know any other persons called for jury duty in this case? If so, please state who they are and how you are acquainted with them.

23. Do you have any impairment (e.g., hearing, vision, emotional, etc.) that would affect your service as a juror? If so, please explain.

24. Is there anything in your background, about which you think we should know but have not asked, that could affect your ability to be a fair and impartial juror in this case?