Worth the Effort

Some Thoughts on Jury Selection

By C. Barry Montgomery and Bradley C. Nahrstadt

I never saw twelve men in my life that, if you could get them to understand a human case, were not true and right.

—Clarence Darrow

The right to trial by jury is an English institution. During the reign of Henry III, the crown began the practice of employing a petit jury as a body of witnesses, called for their knowledge of the case. It was not until the reign

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of Henry VI that the jury would become the trier of evidence. During the seventeenth century, the jury emerged as a safeguard for the criminally accused. William Forsyth, History of Trial by Jury (Lawbook Exchange Limited 1994) (1852). By the eighteenth century, Lord Blackstone would celebrate the jury as part of a "strong and two-fold barrier… between the liberties of the people and the prerogative of the crown…" William Blackstone, Commentaries on the Laws of England 349–350 (4th ed. 1896). The right to trial by jury was so vitally important to the Founding Fathers that they enshrined it in the body of the Constitution and in its Bill of Rights. The Sixth Amendment guarantees a jury trial in all criminal actions and the Seventh Amendment provides for a jury trial in all suits at common law where the value of the controversy exceeds twenty dollars. The right to a jury trial was guaranteed in the constitutions of the original thirteen states and the constitution of every state entering the Union thereafter, in one form or another, protected the right to trial by jury.

The United States Supreme Court, in recognizing the importance of the right to trial by jury, has noted:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered… The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt, overzealous prosecutor and against the compliant, biased or eccentric judge… [T]he jury trial provisions… reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges.

Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

Given the foregoing, there can be no serious argument that jury selection—also referred to as *voir dire*—may very well be the most crucial part of any jury trial. The twelve people defense counsel selects for jury service (six in most federal trials) will be responsible for deciding whether the defendant is guilty or innocent and, in those cases where guilt is established, the amount of money the defendant will have to pay in order to make the plaintiff whole. Given the vitally important role of the jury in the trial of civil cases, defense counsel must know the parameters of proper jury selection in order to (1) "deselect" those jurors who may be predisposed toward liability or large damage awards; (2) educate the jury on what is expected of them; (3) condition potential jurors to the defense perspective and (4) negate inferences on liability and damages raised by the plaintiff.

The Rules Governing *Voir dire*

The phrase *voir dire*, from the middle French meaning "to speak the truth," generally refers to the process by which prospective jurors are questioned about their backgrounds and potential biases before being invited to sit on a jury. According to some commentators, in England and Wales, the process of *voir dire* consists of the positing of a single question: "Can you give a fair hearing to both the crown and the defense?" Any prospective juror who answers the question in the affirmative is impaneled on the jury. In the United States, *voir dire* is a much more involved process and is governed in federal cases by the Federal Rules of Civil Procedure and portions of the U.S. Code and in state court cases by the laws of the state in which the case is being tried.

Qualifications of Jurors

According to 28 U.S.C. §1861, all citizens who are age 21 or older, and who have lived in the judicial district for at least one year, are eligible to serve on a federal jury, unless they are convicted felons, are unable to speak, read and understand English, or are incapable by reason of mental or physical infirmities to render efficient service. In California, jurors must be at least 18 years of age, must not be convicted felons, must possess sufficient knowledge of the English language and may not have been deemed incompetent. *See* Cal. Civ. Proc. Code §190. In Florida, jurors must be 18 years of age or older, must not be convicted felons and must not have been adjudicated mentally incompetent. *See* Fla. R. Civ. P. 40.013. In Illinois, jurors must be at least 18 years old, free from all legal exceptions, must understand English, and must be of fair character, of approved integrity, of sound judgment and be well informed. *See* 705 ILCS 305. In New York, potential jurors are disqualified if they have been convicted of a felony or if they do not understand English. *See* N.Y. Jud. Ct. Acts §510. And in Texas, a prospective juror is not qualified to serve if he has been convicted of a felony or is under indictment or other legal accusation of a misdemeanor or felony, is unable to read and write, is not of sound mind or good

moral character or is related to a party by consanguinity or affinity within the third degree. *See* Texas Gov. Code Ann. §62.102.

Who Conducts the *Voir dire*?

Federal Rule of Civil Procedure 47(a) states that the court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the event that the court elects to conduct *voir dire*, the court is instructed to permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or submit to the prospective jurors such additional questions of the parties or their attorneys as the court deems proper. In those instances where the court insists on conducting *voir dire*, counsel must be prepared to submit written questions for the prospective jurors to the court.

It is improper to commit jurors to hypothetical questions or ask them how they would rule under certain facts.

In the state courts, *voir dire* can be conducted by the judges hearing the case, the lawyers who are trying the case, or both. For example, in California, *voir dire* is conducted by the judge alone, with discretionary supplementation by attorneys. *See* Cal. Civ. Proc. Code §222.5, Cal. R. Ct. 228. In Florida, *voir dire* is conducted by the attorneys and the judges. *See* Fla. R. Civ. P. 1.431(b), *amended by* 2005 Fla. C.O. 26 (The parties have the right to examine jurors orally on their *voir dire*. The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved). In Illinois, both the judge and the lawyers participate in *voir dire*. *See* Ill. S. Ct. Rule 234; *Grossman v. Gebarowski*, 315 Ill. App. 3d 213, 732 N.E.2d 1100 (1st Dist. 2000). In New York, in the supreme, county, district and city courts, the attorneys conduct *voir dire*. *See* 2 N.Y.C.P.L.R. 4107; *Fortune v. Trainor*, 19 N.Y.S. 598, 599 (Gen. Term 1892), *aff'd*, 36 N.E. 740 (N.Y. 1894) ("It is the right of every litigant in cases tried before a jury to have a fair, impartial, and unbiased panel, and to interrogate the jurors drawn to ascertain their fitness for service in respect thereto."). And in Texas, as in New York, the lawyers conduct the questioning of the prospective jurors. *See King v. State*, 17 S.W.3d 7, 22 (Tex. Crim. App. 2000).

Challenges

In federal court, challenges to potential jurors are governed by §1870 of the U.S. Code. Section 1870 states as follows:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

28 U.S.C. §1870. The grounds for challenges for cause are not set forth in either the Judicial Code or the Rules of Civil Procedure. As a matter of decisional law, the trial court is required to determine whether the potential juror is impartial in the constitutional sense. *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961); *Hopkins v. County of Laramie*, 730 F.2d 603 (10th Cir. 1984).

What constitutes proper cause to dismiss a juror varies from state to state. In most states, a juror will be excused for cause if he or she lacks the legal qualifications to be a juror, is the relative of a party, has some other relationship with a party (debtor/creditor, employer/employee, etc.), has been a juror or witness in a previous trial of the same action, is a party to a civil action pending in the same court, has a pecuniary interest in the action, or has a state of mind that prevents him or her from acting impartially.

In California, potential jurors will be excused for cause if they suffer from an implied bias or actual bias. Bias can be implied from the following causes: consanguinity or affinity within the fourth degree to any party, to an officer of a corporation that is a party or to any alleged witness or victim in the case at bar; standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian or ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation that is a party; having served as a trial or grand juror or been a witness in a previous or pending trial between the same parties; having served as a trial or grand juror or on a jury within one year previously where either party was the plaintiff or defendant; interest on the part of the juror in the event of the action or in the main question involved in the action (other than his or her interest as a citizen or taxpayer of a county, city or town); having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts; the existence of a state of mind in the juror evincing enmity against, or bias towards, either party; that the juror is a party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member; and if the offense charged is punishable by death, the entertaining of such conscientious opinions as would preclude the juror from finding the defendant guilty. Actual bias is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." *See* Cal. Civ. Proc. Code §§225, 229. In civil cases in California, each side is entitled to six peremptory challenges. *See* Cal. Civ. Proc. Code §231 (c).

In Florida, a juror will be excused for cause if he or she is related in the third degree to any party, the attorney of any party or any other person or entity against whom liability or blame is alleged in the pleadings; is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called; has an interest in the action; has formed or expressed any opinion about the action; is sensible of any bias or prejudice concerning the action; or is an employee

or has been an employee of any party or any other person or entity against whom liability or blame is alleged in the pleadings, within 30 days before the trial. In addition, when the nature of any civil action requires knowledge of reading, writing or arithmetic to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the skills necessary to read, write or do arithmetic is a ground for challenge for cause. *See* Fla. R. Civ. P. 1.431(c), *amended by* 2005 Fla. C.O. 26. In Florida, each party is entitled to three peremptory challenges, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties. *See* Fla. R. Civ. P. 1.431(d), *amended by* 2005 Fla. C.O. 26.

In Illinois, a juror will be excused for cause if he or she lacks the qualifications set forth above or if he or she has served on a jury within the past year. *See* 705 ILCS 305/14. In Illinois, each party receives five peremptory challenges; up to three more if there are multiple parties. *See* 705 ILCS 5/2-1106.

In New York, a juror will be excused for cause if he or she is employed by a party to the action; is a shareholder or stockholder of a corporate party; is a shareholder, stockholder, director, officer or employee, or is otherwise interested in, any insurance company issuing policies for protection against liability for damages for injury to persons or property (if the case is an action for damages for injuries to person or property); or is related within the sixth degree of consanguinity or affinity to any party. *See* N.Y.C.P.L.R. 4110. Each party in New York is allowed three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant any equal number of additional challenges to both sides as may be appropriate. *See* N.Y.C.P.L.R. 4109.

Finally, in Texas, a juror will be excused for cause if he or she is a witness in the case; is interested, directly or indirectly, in the subject matter of the case; is related by consanguinity or affinity within the third degree to a party in the case; has a bias or prejudice in favor of or against any party to the case; or has served as a juror in a former trial of the same case or in an other case involving the same questions of fact. *See* Tex. R. Civ. P. 228; Tex. Gov't Code Ann. §62.105. In Texas district courts, each party receives six peremptory challenges. In county, justice of the peace or municipal courts, each party receives three peremptory challenges. *See* Tex. R. Civ. P. 233.

Ethically Questioning and Excusing Jurors

It is important to remember that the process of selecting jurors is not without limits. Certain topics and tactics are forbidden and lawyers cannot use certain personal characteristics of potential jurors as grounds for their removal from the panel. For example, it is improper to commit jurors to hypothetical questions or ask them how they would rule under certain facts. *Gasiorowski v. Homer*, 47 Ill. App. 3d 989, 365 N.E.2d 43 (1st Dist. 1977). It is also improper to indoctrinate or pre-educate jurors or to ask them to put themselves in the place of the parties. *Id.* Moreover, it is improper to overemphasize the amount of the award sought. *Christian v. New York Central R.R. Co.*, 28 Ill. App. 2d 57, 170 N.E.2d 183 (4th Dist. 1960).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the exercise of peremptory strikes is limited by the principles of equal protection found in the U.S. Constitution. In *Batson*, the court held that peremptory challenges based on the race of the prospective juror are unconstitutional. In *Powers v. Ohio*, 499 U.S. 400 (1991), the court held that a white defendant can object to the exclusion of minorities on the jury. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the court held that the principle of non-discrimination based on race when selecting jurors applies to civil cases as well as criminal cases. And, in *Hernandez v. New York*, 500 U.S. 352 (1991), the court held that parties may not dismiss potential jurors based on their ethnicity. The next year, in *Georgia v. McCollum*, 505 U.S. 42 (1992), the Supreme Court held that criminal defendants cannot engage in discriminatory challenges. Two years later, the Court held that gender-based peremptory challenges are also prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Counsel must keep these constitutional considerations in mind when beginning the process of jury selection.

Preparing for Jury Selection in Advance of Trial

Like any other part of the trial, preparation for *voir dire* is terribly important. Unfortunately, most attorneys fail to give this essential element of the jury trial the proper attention that it deserves.

The preparation for *voir dire* begins by focusing on the factual and legal issues that are relevant to the case and make up the "building blocks" of your defensive theme or themes. As part of the initial preparation process, counsel must determine the issues that should be presented to the prospective jurors during *voir dire*. When preparing the list of issues to be addressed with the potential jurors, always include any weaknesses in the defense case. For example, suppose the defendant's main witness has made a prior inconsistent statement on an important issue. Defense counsel can ask the following: "There may be evidence that a witness made a statement that will be inconsistent with their testimony on the witness stand. Would you automatically disbelieve or disregard their testimony because of that prior statement?" Or, if the issue is consumption of alcohol, counsel could ask the following: "There may be evidence that Mr. Smith was drinking. If the evidence shows that was not the cause of the accident, could you keep an open mind on that issue?"

By "fronting" the weaknesses in the case and asking panelists how they feel about them, the jurors will not only perceive defense counsel as honest and candid, but counsel will be able to find out what the panelists think about the potential weaknesses in the case. In addition, how the panelists perceive and respond to the weaknesses in the case can help counsel restructure his or her strategy, if necessary, during the presentation of the rest of the case. Patricia O. Alvarez, *Tactical Considerations When Conducting Voir dire*, at 2, http://www.thefederation.org/documents/alvarez.htm (May 1, 2006).

The *voir dire* process requires a high level of concentration and organization. The potential jurors are sizing counsel up at all times. If counsel is unprepared, the jurors may dismiss the defendant's claims as being less worthy than those of a well-organized, well-prepared opponent. As such, counsel should prepare his or her *voir dire* questions well before trial. General questions and follow-up questions should be carefully

drafted to reflect the themes of the case and uncover the information necessary to make a determination of whether or not a particular juror should be retained or stricken from the panel. The questions should be short, simple and open-ended. The questions should be ordered in the same way counsel wants to address his or her topics during *voir dire* and the trial proper. *Id.* at 3.

When preparing the list of issues to be addressed with the potential jurors, always include any weaknesses in the defense case.

Once counsel is satisfied with the questions and their order, prepare an outline. During *voir dire*, counsel should rely on the outline rather than the questions themselves—it will make the *voir dire* flow more naturally. In addition, using an outline will give counsel the freedom and flexibility necessary to respond to the answers given by the potential jurors. *Id.*

If possible, counsel should determine the rules and policies that the trial judge follows regarding *voir dire*. In particular, counsel should make it a point *before* the trial date to determine:

- When are the jury lists first available?
- Where are the panelists seated, what order are they seated in, and are numbers assigned to each one?
- When are challenges for cause made? Are they taken up immediately or at the end of *voir dire*?
- What is the order in which attorneys question prospective jurors and exercise peremptory challenges?
- Is questioning both general and specific, or are all attorneys required first to engage in general questioning and then follow-up with specific questions?
- What are the court's rules regarding the length of *voir dire*, the proper subject matter of *voir dire*, *etc.*?
- Are there any local rules that affect the jury selection process?

In addition to obtaining the foregoing information, it may be wise to watch the selection of a jury before the judge who will be trying the case in order to get an idea of precisely how the judge conducts *voir dire* (and, just as importantly, how the judge lets the attorneys conduct *voir dire*). *Id.* at 4.

In those jurisdictions where counsel is allowed to obtain the jury questionnaires prior to the time of *voir dire*, counsel should obtain and study them. These questionnaires usually contain a great deal of valuable background information. Generally, they will inform counsel about the prospective juror's age, sex, employment, marital status, education, whether or not they have ever been a party to a lawsuit, whether or not they have ever been a witness, whether or not they have ever been the victim of a crime and whether or not they have ever served on a jury before.

As one commentator has noted, a potential juror's responses to the jury questionnaire may tell you more about the person than simply the answer. For example, people who type their responses to the jury questionnaire tend to be more organized and detailed. Robert L. Jones, *Conducting Voir dire*, A Young Lawyer's Guide to Defense Practice, 324 (2005). Always look to see how potential jurors answer certain questions. For example, if a person answers "First National Bank" to the question abut his place of employment, not only does counsel know that the person works at the bank, but in all likelihood, the respondent has a low-level job. Individuals who are leaders and who are proud of their jobs would tend to answer the question with their title and position, such as "Senior Vice-President of Operations, First National Bank." *Id.*

Conducting *Voir dire*

Psychological jury research in the area of "first impressions" indicates that first impressions are formed in face-to-face encounters within the first four to six minutes by at least 40 percent of jurors. Remember, during jury selection, not only are the lawyers selecting the jurors, but the jurors are selecting the lawyers. They are determining who they like, who they believe in, who they trust. Remember, just like your mother used to say, you never get a second chance to make a first impression.

Once defense counsel has spoken with the court about the parameters of *voir dire*, and has established a familiarity with the process by which the court will conduct jury selection, counsel should always establish a *voir dire* strategy designed to result in the type of jury that will either find favorably on the issue of liability or keep damages in check. In this regard, some generalizations apply (but are not universally true).

Introduce Yourself and Your Client

Some experts believe that the court's introduction of the attorneys and the parties at the beginning of *voir dire* is sufficient and that counsel should dispense with further introductions prior to questioning. *See* Robert B. Hirschhorn & Stacey M. Schreiber, *How to Conduct a Meaningful and Effective 30-Minute Voir dire*, Texas State Bar Advanced Peronal Injury Law Course, at E-4 (1997). However, by the time the defense attorney starts conducting his or her *voir dire*, most prospective jurors have forgotten the names of the attorneys and their clients. As such, a personal introduction should be in order.

Maintain eye contact with the prospective jurors, smile and warmly introduce yourself. When introducing the defendant, counsel should present the defendant with human regard and respect. Stand next to the defendant and put a hand on the defendant's shoulder or back to show that counsel and the defendant are a team. If the defendant is a large corporation, explain to the panel who the corporate representative is and describe the defendant to the prospective jurors in such a manner that they will not see the defendant as a heartless corporate entity, but rather as a responsible corporate citizen that acted in a reasonable manner. To the extent possible, humanize the corporate defendant. Remind the prospective jurors that corporations are made up of people, not just bricks and mortar. Tell them that a large corporation is entitled to the same fair and impartial trial as the individual plaintiff. Defense counsel may want to say something like the following: "Even though my client has chosen to do business as a corporation, will you promise not to be prejudiced against it, and instead give it the same consideration as you would a private individual such as the plaintiff? Do we start off even?" Jones, *supra*, at 326.

To the extent possible, defense counsel should tell the potential jurors something interesting about the corporate defendant. For example, if counsel is representing Sunbeam in a product liability action, remind the potential jurors how long Sunbeam has been in business and provide them with a list of the products manufactured by Sunbeam. Question the panel about their use of these products. Potential jurors who provide favorable comments or impressions about the defendant's products should obviously be targeted for inclusion on the jury. Alvarez, *supra*, at 5.

Tell the Prospective Jurors about the *Voir dire* Process

Most potential jurors have no idea about what the jury selection process entails. In order to encourage them to be more willing to participate in the process, defense counsel should explain to the panel how the jury selection process works. In that regard:

- Tell the prospective jurors that counsel will be asking them some questions.
- Prepare them for possibly intrusive personal questions and explain the importance of obtaining that information from them.
- Explain that counsel has already reviewed their juror questionnaires and already knows a lot about them based on the information provided on the jury cards.
- Explain that counsel will be taking notes during the *voir dire* in order to help decide who will be excused.
- Explain to them how the process of excusing jurors works and tell them that the jury system in our county is unique because it allows the parties to pick the most balanced jury.

Id. at 6.

Tell the Prospective Jurors about Your Goals in *Voir dire*

Part of the jury selection process should include an explanation of the purpose of jury selection. Do not insult the panel by stating "we are looking for people who can be fair and unbiased." Instead, try a more positive approach, such as saying, "we are looking to put together a jury that can listen to this case with the least interference from their personal concerns." *Id.*

Professor James Seckinger of the Notre Dame Law School and a former director of the National Institute for Trial Advocacy has suggested using the following approach:

> What we are doing here is selecting a jury to hear and decide this case. In the interests of justice, we'd like to have the best possible jury to listen and decide. We're looking for people who do not have special knowledge about or a relationship to this case or a similar case. For example, I would not be a good juror, since I have a lot of information about one side of this case.

Hamlin, *supra*, at 50. Another approach may be as follows:

> Good morning ladies and gentlemen. I am proud to stand here with Mr. Smith and have the twelve of you decide this very important case. In this part of the trial, we need to find out your feelings, impressions or opinions about the issues in this case. I want you to know that there are no right or wrong answers. We will be honest with you and we ask you to be as honest as you can with us.

Hirschhorn & Schreiber, *supra*, at E-5.

Whatever the approach, counsel should try to be as candid as possible by admitting an example of his or her own prejudices or limitations. The potential jurors will not only see defense counsel as more human, but they will also tend to identify with counsel when admitting their own prejudices and limitations. Alvarez, *supra*, at 7.

Questioning Tactics

When questioning potential jurors, the goal should always be "…to get the potential jurors to answer openly with as little evasiveness, suspicion or hostility as possible." Sonya Hamlin, What Makes Juries Listen 56 (1985). The following suggestions should be followed to reach this important goal.

Use Open Ended Questions

As noted above, the goal of *voir dire* is to get potential jurors to share their beliefs, attitudes, values and opinions *before* they are selected to sit on the jury. This goal can only be met if the potential jurors are given an opportunity to speak. Asking leading questions that result in a "yes" or "no" answer will not provide very revealing responses. Instead, counsel should attempt to elicit information through the use of open-ended questions. The typical open-ended questions begin with who, what, where, when, why and how. Examples of these types of questions include:

Question: Some people think that when a person is sued, he is liable. How do you feel about this? (Contrast this question with: "Do you believe that a defendant must be liable just because a lawsuit has been filed against him?")

Question: What opinions do you have about a lawsuit such as this? (Contrast

First Impressions Checklist

In order to facilitate a favorable first impression, defense counsel should keep the following in mind:

- Use a conversational rather than an interrogational style to put the jurors at ease.
- Keep questions simple and non-compound.
- Use simple English.
- Do not use slang.
- Show respect for your client at all times.
- Do not imply that the jurors harbor any ill will against the defendant.
- Do not imply that the jurors are biased or prejudiced.
- Do not place the jurors in the position of choosing between good and bad, right and wrong, truth and lies.
- Never embarrass a potential juror or make the juror look bad.
- Do not lecture the jury panel or appear pompous.
- Do not lie.
- Do not waste the jurors' time.
- Be confident, but not cocky.
- Avoid using legal jargon.
- Be courteous at all times toward the court, the jury and opposing counsel.
- Do not be condescending in your attitude or in the words that you use.
- Be organized.
- Be dignified, friendly and interested in the proceedings.
- Speak clearly.
- Explain any unusual terms, phrases or words.
- Use "please" and "thank you."
- Maintain eye contact.
- Be direct, yet diplomatic.
- Avoid arguing with prospective jurors.
- If possible, use the potential juror's name when questioning him or her.
- Smile.

this question with: "Do you have any objections about a lawsuit such as this?")

Question: How do you feel about the number and types of lawsuits that are filed today? (Compare this question with: "Do you think that there are too many frivolous lawsuits filed today?")

Question: What are your feeling concerning punitive damages? (Compare this question with: "Do you think that corporations that injure a person should be liable for punitive damages?")

Research has suggested that flashy dressers tend to resent authority and attempt to conceal inferiority complexes.

Question: How do you feel about the use of alcohol? (Contrast this question with: "Do you drink alcohol?")

If a juror is hesitant to answer an open ended question, follow up with "could you be a little more specific?" or "could you give me an example?" or "what experiences have you had that make you feel that way?" If you are satisfied with the answers a potential juror has given you, stop asking questions. Additional questions and answers may provide your opponent with the ammunition necessary to challenge the juror for cause. Alvarez, *supra*, at 8.

Use Educational Questions

Educational questions are used by counsel to educate the jury panel about the case or their role in deciding the dispute. They are commonly directed to the panel as a whole and are leading in nature. Examples of such questions include the following:

Question: This is a civil lawsuit. In a civil case, the plaintiff has the burden of proof. The plaintiff must prove his case by a preponderance of the evidence or the greater weight of the evidence. Does anyone have a problem with this concept?

Question: During the trial, I may make objections to the introduction of certain matters. It is my duty to see that certain evidence is not admitted. If I believe that the rules are being violated and I object, will this offend you?

Question: You are not required to lay aside your own experiences and common sense in evaluating the evidence. You are required, however, to determine the facts solely on the basis of the testimony and any other evidence produced in this case. Will all of you do that if selected as jurors?

Id. at 10.

Ask Questions about the Relationships and Issues in the Case

Any good *voir dire* will contain a series of questions about the relationships and issues in the case. The panel should be asked if they have any knowledge of the facts of the case or witnessed the events that gave rise to the lawsuit. Each potential juror should be asked if he or she knows or has ever been associated with the parties, the witnesses, the lawyers or their firms. Each prospective juror should be asked if anyone in their immediate family knows or has ever been associated with the same people. If any of the venire answers in the affirmative, follow-up questions should be asked about the nature of the relationship, whether it still exists and, if it no longer exists, the circumstances surrounding its demise. Questions should also be asked about whether the relationship would affect the potential jurors' ability to be fair to both sides. If a corporation is involved in the case, the panel should be asked if anyone has worked for the corporation or if anyone has had any experience with the corporation. Again, if the answer is in the affirmative, the potential juror(s) should be asked about those experiences. *Id.* at 9.

One question that is rarely asked, but can be very important, is whether any of the jurors know each other. If they do, defense counsel should follow up with questions designed to elicit information about the nature of their relationship and whether each potential juror can decide the case independent of that relationship. *Id.*

If Possible, Ask Questions Concerning the Law

The court, in its discretion, can limit or prohibit questions to the panel on propositions of law. If the court allows questions concerning the law, or its application to the case, counsel should not hesitate to question prospective jurors about these issues. Examples of such questions would include:

Question: If the court instructs you that negligence is the doing of something a reasonably prudent person would not do, would you follow the court's instruction?

Question: Would you follow this instruction with respect to the plaintiff as well?

Question: Do you have any personal quarrel with the law?

Question: Will the resolution of your own legal case prejudice your ability to decide this case fairly?

Alvarez, *supra*, 9.

In the event that the court does not allow counsel to ask specific questions about the law, then counsel should ask questions that seek to obtain a commitment that each juror will follow the court's instructions. Examples of such questions include:

Question: Will you follow the law, as given by the judge, regardless of what you think it should be?

Question: If the plaintiff fails to prove his/her case according to the court's instructions, would you be willing to send him/her home with nothing, even though he/she has been seriously hurt?

Question: We all have sympathy for the plaintiff's situation. Despite that sympathy, will you decide this case based on the facts and the law as given to you by the court?

Id.

Use Investigative Questions

Investigative questions are those that elicit information and attitudes that are personal or specific to the juror being questioned. All jurors come to the courtroom with a set of personal attitudes and beliefs. It is defense counsel's job to elicit responses to questions that are designed to highlight the interest, bias or prejudice in prospective jurors so that counsel can intelligently exercise peremptory and for cause challenges. Examples of investigative questions may include:

Question: Tell me what type of work you do?

Question: Have you or any family member or close personal friend ever been involved in an accident involving a serious injury? Tell me about it.

Question: Does any member of your family have a disability? Do you care for them?

Question: What is your experience with the use of handguns?

Question: What is your attitude regarding the consumption of alcoholic beverages?

These types of open-ended, investigative questions allow defense counsel to search for adverse attitudes reflected in adverse life experiences that indicate a predisposition against fairness to the defense. For example, the answer to the first question may reveal that the prospective juror was fired from his job by a related company or industry. A positive answer to the second question may reveal that the prospective juror has children of the same age and characteristics as the plaintiff. If the potential juror has been burdened with a family member who requires constant caretaking, that juror may be predisposed to finding for the plaintiff. A passionate response to the fourth question may reveal that the prospective juror had a family member or close friend who was killed in a shooting involving a handgun. Finally, an answer to the last question may reveal that the juror had a friend or family member killed in a drunk driving accident—something defense counsel would certainly want to know about if alcohol use or abuse is an issue in the case.

Watch the Non-Verbal Cues

From the moment the potential jurors are shown into the courtroom, defense counsel should focus on their interactions and on their non-verbal behavior. Watch the panelists while they are waiting. How do they interact with each other, who do they speak to, who does the speaking, is there one or more individuals who seem to be the center of juror attention? Determining who is a loner, who is reading and who is preoccupied can provide important clues that will aid counsel when deciding who can best respond to the defendant and to the issues involved in the case. Alvarez, *supra*, at 12.

While it is of primary importance to identify defense-oriented or non-biased jurors, it is also very important to identify potential leaders among the candidates for jury duty. Psychological research has identified the following leader traits:

- Leaders are usually talkative.
- Leaders are viewed as likeable and warm by their fellow jurors.
- Leaders are highly confident.
- Leaders exhibit dominant rather than passive personality characteristics.
- Most leaders are of average build, height and I.Q.

Counsel should pay close attention to the group dynamics of the potential jurors and attempt to identify jury leaders who will advocate a defense point of view during deliberations.

Pay particular attention to what the potential jurors carry into the courtroom, the clothes they are wearing, how the ladies hold their purses and what types of shoes they are wearing. If a potential juror is carrying a book, that may mean he doesn't like to waste time. If a prospective juror appears unkempt, this may mean that she has no respect for the judicial system or that she is hostile to existing institutions. Watching how women hold their purses may provide some insight into how they feel about money. If a woman clutches her purse closely to her body, it may indicate that she is suspicious or nervous. If a potential juror is wearing expensive shoes, then that juror may be from an upper social class—and be more conservative by nature. If he is wearing work shoes, counsel will want to question him about his work and his feelings about corporations and employers. *Id.*

Research has suggested that flashy dressers tend to resent authority and attempt to conceal inferiority complexes. Immaculate dressers tend to insist upon perfection in matters of proof and do not relate well to the average person. A juror who does not dress in accordance with his profession does not have the attitudes associated with his profession. Research has also shown that the conservative dresser tends to favor the defense, as does the juror who wears the American flag or a service club or Chamber of Commerce pin. *Id.*

While it is generally not wise to attribute a definite meaning to gestures and movements of the panelists, body language can be revealing. Robert Wenke, an expert on jury selection, has set forth the following guidelines regarding non-verbal cues:

- Arms folded: the person is antagonistic, not accepting of what was said.
- Fidgeting: the person is impatient.
- Talking through the teeth: the person is hostile.
- Woman with legs twisted in a knot: the person is nervous.
- Interlocked fingers with palms pushed out: the person is uneasy.
- Fingers in the collar: the person is uncomfortable.
- Clenched fists: the person is resistant or closed minded.
- Pushing back or leaning away: the person is having a negative reaction, even if outwardly agreeable.
- Leaning forward: the person is friendly, favorable.
- Covering the mouth: the person is uncertain.
- Open legs: the person is relaxed, friendly.
- Swiveling of hips during answer: the person is negative.
- Crossing the legs above the knees: the person is resistant.
- Crossing both legs and arms: the person is greatly resistant.

Robert A. Wenke, The Art of Selecting a Jury 81–83 (1989).

The body language of potential jurors who are not being questioned should be watched carefully because they are more unguarded when they feel as if they are not being observed. However, it would be an error to rely on one, or even two, nonverbal signs to select a juror. Note the following experience in this regard:

> The person who was later to be named foreperson of the jury looked at the two plaintiffs' attorneys and smiled. They smiled back and they grinned at each other. The case had gone their way and they knew it. Liability was clear and they brought out their client's damages skillfully and dramatically. The jury took only 3 hours and 15 minutes to determine zero damages and exonerate the defendants. The leader of the jury had been smiling at them because he knew he was going to give them nothing.

T. Sannito & P. McGovern, Courtroom Psychology for Trial Lawyers 88 (John Wiley & Sons 1985). The lesson to be learned: do not base the selection of a juror on only one sign or theory.

Really Listen to What the Prospective Jurors are Saying

Most human beings are driven by either logic or emotion. In general, defense attorneys want to select jurors who are ruled by their heads (logic driven) and not by their hearts (emotion driven). This is especially true when defense counsel is presenting a highly technical case. By listening carefully to how jurors answer questions, defense counsel can determine whether the potential juror is logic driven or emotion driven. The words they use are often a dead give away. Logic driven jurors say, "I think that…" or "I believe that…" Emotion driven jurors, on the other hand, tend to say, "I feel…" Stephen D. Easton, *A Defense Attorney's Guide to Building Strong Relationships with Jurors*, Winning the Defense Verdict, 50 (DRI 1999).

Listening closely to what the prospective jurors are saying is important for another reason. Oftentimes, the information behind the answer—what the juror isn't saying—is just as important as what he or she is saying. Say, for example, that a prospective juror volunteers that he has no problem with minorities. And yet, during questioning, that same prospective juror discloses that he moved out of his old neighborhood as soon as minorities moved in. Obviously, this potential juror does have problems with minorities, despite his protestations to the contrary, and he should be removed from the jury if the defendant is a member of a minority group. Or, suppose that a prospective juror says that she took more than a year to plan her last vacation. That juror is undoubtedly careful, meticulous, and detail-oriented—perhaps the very kind of juror the defense counsel wants to place on the jury. By listening carefully to what the members of the venire are saying, defense counsel can glean a lot of information that can be used to make reasoned decisions about which jurors should be kept on the panel and which jurors should be excused.

Identify Juror Types

"Jury selection" is a misnomer. Lawyers do not select "good jurors," but rather identify and deselect "bad jurors." The process of "deselection" basically focuses on identifying and rejecting biased or predisposed men and women.

Most potential jurors know that as good citizens they are not supposed to be biased. Unless they have a motive to avoid jury service, potential jurors will likely deny bias if asked general bias questions. As a result, general bias questions ("Do you think you could be fair and unbiased?" "From what you have heard, have you formed judgments that would make it difficult for the defendant to receive a fair trial?" "Do you think you can wait until all the facts are in before you make a judgment in the case?") are rarely effective in identifying "plaintiff" jurors.

Questions which include somewhat vague, but pointed references, to the facts of the case are more likely to reveal underlying bias. Examples of such questions could include:

Question: From what you have heard and read, do you believe that if a gas tank explodes during a rear-end collision, the manufacturer was careless?

Question: Do you believe that every time a pedestrian gets hit by an automobile, the driver was careless?

Question: This case involves a badly injured child. Do you feel that the defendant should pay money damages to her because this child was injured?

Jurors who demonstrate their bias against the defendant based on questions such as these should be excused from the jury.

Some jury consultants identify five different juror personality types: (1) sympathetic, (2) analytical, (3) practical, (4) conventional and (5) persuasive. *See*, *e.g.*, http://www.yournextjury.com/jurytip/. According to these experts, a juror's likelihood of finding in favor of the defendant or the plaintiff depends in large part on the juror's personality type.

The Sympathetic Juror

Sympathetic personalities tend to be "people persons" that value the welfare of others above all else. Sympathetic people are primarily motivated by caring, nurturing, and helping others, and as jurors, sympathetic personalities are primarily concerned with protecting and healing victims of harm. Sympathetic jurors are highly emotional and base their decisions on their feelings. Harry Plotkin, *Secrets of Jury Selection: Personality Types (The Sympathetic Juror)*, http://www.yournextjury.com/jurytip/ (November 2006). According to at least one commentator, these traits produce two problems for defendants:

> First, sympathetic jurors tend to be less concerned with logic and, as a result, may often overlook or ignore the evidence, the experts, jury instructions, and even the rules to awarding non-economic damages. Second, sympathetic jurors are highly sensitive and receptive to awarding non-economic damages. Sympathetic jurors are highly in tune with their feelings, they place a high premium on feelings and emotions, and they are very comfortable awarding high numbers for "feeling-based" damages such as pain and suffering, emotional distress, loss of consortium, etc.

Id.

Not surprisingly, sympathetic jurors are overwhelmingly pro-plaintiff. The best way to identify them (and hopefully obtain enough information to eliminate them) is to find out what the potential jurors do with their time and why they choose to spend their time that way. Defense counsel should search for jurors who have chosen jobs that involve interacting with people, especially in cooperative or nurturing roles. Schoolteachers, social workers, therapists, counselors, caregivers and those who work or volunteer for charitable agencies, community service organizations or not-for-profit groups are likely sympathetic personalities. Jurors who seem overly emotional and sensitive to the plight of others also fit in this category. *Id.*

The Analytical Juror

Analytical personalities are calculating, logical and curious. They like to learn new things, discover how things work and solve problems. They like to investigate complex problems and find the answers for themselves. They actually enjoy delving into challenging problems and finding complex solutions to those problems. Harry Plotkin, *Secrets of Jury Selection: Personality Types (The Analytical Juror)*, http://www.yournextjury.com/jurytip/ (February 2007).

As jurors, analytical personalities are primarily concerned with determining liability and calculating appropriate damages by carefully and objectively analyzing the evidence and the opinions of the expert witnesses. Unlike other personality types, they are able to divorce their emotions

from their analysis of liability. According to some jury consultants, analytical jurors "…tend to be reasonable in balancing fault and responsibility without prejudging the litigants, rarely let [their] emotions or the personality of the litigants interfere with their judgment, and focus heavily on the evidence and experts in trial. They are the least likely to let predispositions influence their decision-making because they are so interested in analyzing evidence that they usually withhold making judgments about credibility during opening statement." *Id.*

Analytical jurors will usually side with the party that best explains and supports its position with thoughtful reasoning and compelling evidence. In order to identify analytical jurors, counsel should look for jurors who have jobs that involve investigative, intellectual and problem solving work. Critical thinkers, scientists, researchers, lab technicians, investigators, journalists, computer technicians, economists, engineers, architects, and consultants are all likely analytical personalities. During *voir dire*, potential jurors should be asked how they approach specific situations and counsel should look for those who demonstrate a logical, analytical approach. Analytical personalities will almost always have a well-reasoned, uniquely methodical approach to problem solving. *Id.*

If counsel is representing a defendant against a plaintiff's attorney armed with strong emotions and an incredibly sympathetic client, but weak or circumstantial evidence of liability, causation or damages, analytical jurors are very adept at deflating the emotional aspects of the case and focusing fellow jurors on the evidence (or lack thereof). Likewise, if counsel is defending a case involving a plaintiff who was partially at fault in causing his own injuries, analytical jurors are best suited to understanding and assigning comparative fault. *Id.*

The Practical Juror

Practical personalities are realistic individuals who lack the hyper-sensitivity of sympathetic people and tend to deal with situations pragmatically and without emotion. Practical jurors value hard work, common sense and accomplishment. They do not like to waste a lot of effort and energy on daydreaming or complaining. Harry Plotkin, *Secrets of Jury Selection: Personality Types (The Practical Juror)*, http://www.yournextjury.com/jurytip/ (December 2006).

As jurors, practical personalities are primarily concerned with fairness, justice and restitution. They will award a plaintiff money only if there is clear causation, if the damages are clearly explained and calculable, and if there is a clear purpose to the damages. *Id.* On the other hand, practical jurors are very uncomfortable with non-economic damages. Practical personalities deal with hardship and trauma by being tough and making the best of the situation and they expect plaintiffs to do the same. They tend to view plaintiffs as whiny and malingering if they complaint about pain and cannot work. *Id.*

In identifying practical jurors, defense counsel should look for potential jurors who have chosen jobs that involve hands-on and constructive work. Manual laborers, truck drivers, technical tradesmen, farmers, firefighters, mechanics, physical therapists, military personnel and athletes are likely practical personalities. *Id.*

If defense counsel is representing a defendant in a case of questionable causation, or in a case where the plaintiff's injuries are difficult to see or assess, practical jurors should be high on the selection list. Likewise, if counsel is defending a case involving a plaintiff who is malingering, or who has unsupported claims for damages, practical jurors will be the most likely to dismiss the plaintiff's case as frivolous. *Id.*

The Conventional Juror

Conventional jurors have been defined as follows:

> Conventional personalities are rule-following, rule-oriented types with a preference for hierarchy, organization and structure. Unlike… analytical personalities… conventional personalities tend to view the world in terms of black and white, right and wrong, and in stark and simplistic ways. They are uncomfortable dealing with complicated answers, complexity, and ambiguity, and prefer to be told right and wrong by an authoritative source, hence the name 'authoritarians' often sued to describe them.

Harry Plotkin, *Secrets of Jury Selection: Personality Types (The Conventional Juror)*, http://www.yournextjury.com/jurytip/ (March 2007).

As authoritarians, conventional personalities tend to have blind faith in authority figures such as government officials, high-level executives and professionals, doctors and police officers. For these jurors, opening statements are an exercise in sizing up both sides and determining which side is "right" and which side is "wrong." As a result of their confidence and trust in authority figures, conventional jurors often need to be convinced beyond a reasonable doubt to find against the most authoritative side in the trial. *Id.*

In identifying practical jurors, defense counsel should look for potential jurors who have chosen jobs that involve hands-on and constructive work.

In identifying conventional jurors, defense counsel should look for individuals who have chosen jobs that involve multiple rules and rigid structure and as little creativity, judgment and problem solving as possible. Accountants, administrators, administrative assistants, bureaucrats, bankers, clerks, librarians and human resources personnel are most likely conventional personalities. During *voir dire*, defense counsel should ask potential jurors how they approach specific types of situations and look for those that demonstrate a conventional, by-the-book approach. In any situation brought up in *voir dire*, defense counsel should look for an approach that avoids problem solving and instead relies on seeking an expert's advice or guidance. *Id.*

If counsel is defending a case on behalf of an authoritative or powerful defendant, especially against a small individual or against claims that undermine the credibility of an institution (such as fraud or discrimination), conventional jurors will be a most willing ally. Not only do conventional jurors have strong feelings of confidence and trust in government and authority fig-

ures, they are also well attuned to obeying jury instructions and rules of liability and are relatively unemotional and unsympathetic. *Id.*

The Persuasive Juror

Persuasive personalities are opinionated, forceful leaders. They are competitive, value control, strive to dominate and love to get things done. Persuasive jurors will dominate the panel during deliberations and, for this reason, it is imperative that defense counsel identify persuasive jurors during *voir dire*. As one commentator has noted, "[w]hile some jurors may be harmless, persuasive jurors have a profound impact on every panel, and leaving a single persuasive juror with unknown predispositions on your panel is probably worse than a strongly biased but relatively quiet juror." Harry Plotkin, *Secrets of Jury Selection: Personality Types (The Persuasive Juror)*, http://www.yournextjury.com/jurytip/ (May 2007).

During *voir dire*, defense counsel should assess which jurors are willing to accept, even welcome, control and responsibility.

In trying to identify persuasive personalities, defense counsel should look for potential jurors who work in fields where leadership, initiative and persuasive power are expected. Jurors in sales, business, politics, marketing, advertising and management are likely candidates. Self-reliant jurors who welcome power or responsibility—from a CEO to a self-employed small business owner—are typically forceful, persuasive personalities. *Id.*

During *voir dire*, defense counsel should assess which jurors are willing to accept, even welcome, control and responsibility. Each potential juror should be questioned about his or her outside interests. Whereas charity work is a leading indicator of the sympathetic juror, involvement in leadership roles on the city council, PTA, labor union or homeowners' association are the trademark signs of a persuasive juror. *Id.*

Defense attorneys should avoid persuasive jurors if the defendant has been accused of the failure to act type of negligence. If a municipal defendant failed to replace a damaged guardrail or warning sign, if a pharmaceutical defendant did the bare minimum of product testing, if the defendant physician sent the plaintiff away without ordering a critical medical test, defense counsel should strike the persuasive jurors from the panel; they will likely blame the defendants for their passivity. On the other hand, defense counsel should keep persuasive jurors on the panel when the defendant took an action that can be explained and defended; regardless of the consequences, persuasive jurors respect parties who took well-intentioned action. *Id.*

There are a few other important points to keep in mind when attempting to identify juror types. A homogenous group of jurors are prone to reaching a unanimous verdict. A heterogeneous jury will argue, debate, and possibly hang a jury. In addition, plaintiffs tend to seek jurors who will base their decisions on liability and damages commensurate with the level of sympathy and empathy the plaintiff's attorney can invoke. Defendants need matter-of-fact, no nonsense jurors who will take calculated and measured approaches to the issues.

A good deal of psychological research has been done and it is apparently inconclusive as to the predictability of verdict disposition based on demographic considerations. *See*, *e.g.*, Donald E. Vinson, Jury Trials (1986). There are, however, some recognized exceptions: women are statistically more likely to award punitive damages than men; registered Democrats bring in higher damage awards; and blue collar workers and spouses tend to vote for plaintiffs in product liability cases. These considerations should be kept in mind during the jury selection process.

The age and income/employment status of a potential juror can also provide some clues as to his or her conservatism with verdicts. A commonly held belief is that working people tend to be less liberal with awards than the unemployed. The same is often said of older or retired jurors as opposed to persons in their 20s or 30s. As a general rule, those who work for a living or have to meet a payroll recognize how much effort must be given for a certain wage return or how hard monetary profit is to obtain. By the same token, older persons tend to value money based on a broader historical perspective. In short, they remember "when a dollar was a dollar" and are less likely to make a defendant part with his money. Younger jurors have grown up in a high-wage, high-growth economy where, until recently, accessibility to wealth was viewed as comparatively simple.

Discussing Damages during Voir dire

The authors believe that the issue of damages should receive at least some attention during *voir dire* in every case—even in cases of highly disputed liability. In cases where liability is hotly contested, general questioning should be employed to test juror attitudes about damages concepts and approaches. Potential jurors should be asked if they would be willing to refuse to award damages to the plaintiff if the evidence demonstrates that the plaintiff was not injured as a result of the defendant's conduct. This type of questioning allows defense counsel to introduce the idea during *voir dire* that the plaintiff may not have suffered any injury as a result of the actions or inaction of the defendant. Some other examples of general damages questions include:

Question: Do you understand that it is my duty as a lawyer to my client to present evidence on both the issues of liability and damages?

Question: Do you understand that it will be your duty as a juror to decide the issue of liability and also, only if you find that there is liability, to decide the issue of damages?

Question: Do you agree that a dollar in this courtroom is the same as a dollar in your household? Will you treat them the same?

When damages are the main issue in the case, thorough *voir dire* on specific issues is necessary. It is extremely important for defense counsel to inform prospective jurors that they can expect to hear highly charged and emotional testimony about the plaintiff's medical condition and future prognosis. Defense counsel must ask

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each member of the venire whether he or she can displace his or her sympathies, as the law requires, and decide the case fairly and reasonably. Each juror should personally commit him or herself to follow the law in the case, including that affecting damages, even though he or she might not agree with it. Following such a procedure accomplishes two objectives. First, the emphasis on requiring that jurors be honest and fair reflects back on defense counsel—demanding that others be honest and fair assures that defense counsel is a fair and honest person, as well. Secondly, members of the jury will understand that they were selected because defense counsel believed that they would follow the law and put their sympathies aside.

When eliciting an assurance from prospective jurors that a verdict will be fair and reasonable to all sides, including the defense, counsel must advise the jury of the nature and extent of the plaintiff's injuries, particularly when dealing with a catastrophic injury case. By advising the jury up front about the nature and extent of the injuries, defense counsel has an opportunity to soften the impact of the trial testimony and conditions the jury to guard against an award based on sympathy or compassion.

Other areas of inquiry to be covered through the use of open-ended investigative questions include:

- Experience caring for chronically ill or disabled family members;
- Any personal history of long hospitalizations or medical treatment;
- Attitudes about the value of a dollar; and
- If a corporate defendant is involved, experiences with large companies through employment or business dealings.

Miscellaneous Considerations

From time to time, it may be necessary for defense counsel to try to save a good juror from disqualification for cause. Perhaps the only way to do so is to attempt to "teach" the prospective juror and then give him or her the opportunity to assure the court of his or her fairness. The goal is to get the prospective juror to agree that the case before the court should be judged on its own merits, irrespective of any outside influences or beliefs.

Suppose, for example, that a potential juror who seems to fit the profile for the ideal defense juror has testified in *voir dire* that he has read a series of newspaper articles concerning the accident that gives rise to the lawsuit in question and that he questions whether he can be fair to other side in deciding the case. Defense counsel, in an effort to rehabilitate the juror and save him from being excused for cause, should ask the following series of questions:

Question: Do you understand that the newspaper articles you read about this case will not be evidence?

Question: Do you understand that your decision must be based solely on the evidence presented in the courtroom?

Question: Do you understand that you have to put those articles out of your mind?

Question: With that in mind, can you be fair to both sides?

By asking these questions, defense counsel may be able to "teach" the defense juror the answers that will avoid a dismissal for cause (a particularly important task if the plaintiff's attorney has already used all of his or her peremptory challenges and the only way this pro-defense juror could be removed from the panel is through a for-cause challenge).

In a high-stakes damages case, where the plaintiff's case depends in large part on the jury's empathy with the catastrophically injured plaintiff, the plaintiff will often play, during his or her case in chief, a day-in-the-life film of the plaintiff. Consideration should be given by defense counsel to requesting that the entire venire view the film in advance of *voir dire* in order to excuse those individuals for cause who cannot put sympathy and prejudice aside and base their verdict solely on the law and the evidence.

Finally, most trial lawyers prefer to rely on their experience to select jurors. However, in catastrophic injury or complex products or toxic tort cases, where specific product use, attitudes, or behaviors on the part of the jurors may decide the case, careful consideration should be given to hiring and working with jury consultants. These experts, who often have specialized training in psychology or human behavior, can often provide valuable data from jury research to help identify jurors who are not psychologically receptive to the defense positions in the case.

Conclusion

There are those who dismiss the importance of putting forth the effort to get a good jury. It would be a mistake to adopt their lack of concern. Although defense counsel can still get lucky and occasionally seat a favorable jury without putting forth the effort, the selection of a good jury today requires careful preparation, intuitive questioning and the creative use of challenges. Hopefully, by following the suggestions outlined herein, counsel will be able to pick a jury that levels the playing field and decides the case on the issues, not sympathy, passion, prejudice or bias. FD