Federal Rules of Criminal Procedure

Rule 24. Trial Jurors

(a) Examination.

(1) *In General.* The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) *Court Examination.* If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case.* Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case.* The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) *Misdemeanor Case.* Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

(1) *In General.* The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) *Procedure.*

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) *Retaining Alternate Jurors.* The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) *Peremptory Challenges.* Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) *One or Two Alternates.* One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) *Three or Four Alternates.* Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) *Five or Six Alternates.* Three additional peremptory challenges are permitted when five or six alternates are impaneled.

Federal Rules of Civil Procedure

Rule 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. §1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

Local Rules (Oregon)

LR 47-1 Selecting Jurors

(a) Examination of Jurors - Generally

The Court will conduct the voir dire examination of jurors. The matter of attorney voir dire can be addressed with the trial judge at the preliminary pretrial conference.

(b) Supplemental Questions by the Parties

Counsel may submit and serve any questions which they desire to be propounded to the jurors at such time as the Court orders. If there is no such order, questions must be submitted at least seven days before trial.

LR 47-2 Challenges for Cause (*See* Fed. R. Civ. P. 47(c))

Challenges to excuse a juror for cause will be taken orally.

LR 47-3 Peremptory Challenges (*See* Fed. R. Civ. P. 47(b))

(a) Numbers of Peremptory Challenges (*See* 28 U.S.C. § 1870)

The trial judge will establish the number of peremptory challenges at the final pretrial conference.

(b) Procedures for Exercising Peremptory Challenges

Unless otherwise directed by the Court, the parties will exercise their peremptory challenges in the following manner:

Step (1) Prior to the commencement of the trial, the courtroom deputy clerk will prepare a seating chart - or a numbered list - showing the names and seated positions of the jurors to be examined.

Step (2) When the time comes to exercise peremptory challenges, the clerk will circulate the seating chart between the parties, starting with the plaintiff.

Step (3) Peremptory challenges will be exercised one at a time, starting with the plaintiff, and alternating between the parties until completed.

Step (4) A party may exercise a peremptory challenge by circling the juror's name on the seating chart, and marking the chart with the number of the challenge, *e.g.*, P-1, D-1, and so forth.

Step (5) If a party elects to pass a peremptory challenge, the decision to pass will be counted as though the challenge had been exercised. However, it will not constitute a waiver of subsequent challenges unless there are no subsequent challenges by any other party.

28 U.S. Code § 1870 – Peremptory Challenges

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.

Relevant Oregon Rules of Civil Procedure

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted 01/01/05 Amended 12/01/10: Paragraphs (a)(3) and (b) amended to substitute “if permitted” for “if necessary;” paragraph (c) amended to make it clear that remedial measures do not require disclosure of information protected by Rule 1.6.

Defined Terms (see Rule 1.0):

“Believes”

“Fraudulent” “

Knowingly”

“Known”

“Knows”

“Matter”

“Reasonable”

“Reasonably believes”

“Tribunal”

Comparison to Oregon Code

Paragraph (a)(1) is similar to DR 7-102(A)(5), but also requires correction of a previously made statement that turns out to be false.

Paragraph (a)(2) is the same as DR 7-106(B)(1).

Paragraph (a)(3) combines the prohibition in DR 7102(A)(4) against presenting perjured testimony or false evidence with the remedial measures required in DR 7102(B). The rule clarifies that only materially false evidence requires remedial action. While the rule allows a criminal defense lawyer to refuse to offer evidence the lawyer reasonably believes is false, it recognizes that the lawyer must allow a criminal defendant to testify.

Paragraphs (a)(4) and (5) are the same as DR 7-102(A)(3) and (8), respectively.

Paragraph (b) is similar to and consistent with the interpretations of DR 7-102(B)(1).

Paragraph (c) continues the duty of candor to the end of the proceeding, but, notwithstanding the language in paragraphs (a)(3) and (b), does not require disclosure of confidential client information otherwise protected by Rule 1.6.

Paragraph (d) has no equivalent in the Oregon Code.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Adopted 01/01/05 Defined Terms (see Rule 1.0):

"Believes"

"Knowingly"

"Matter"

"Reasonable"

"Reasonably"

"Reasonably believes"

"Tribunal"

Comparison to Oregon Code

Paragraph (a) is similar to DR 7-109(A).

Paragraph (b) includes the rules regarding witness contact from DR 7-109, and also the prohibition against falsifying evidence that is found in DR 7-102(A)(6).

Paragraph (c) is generally equivalent to DR 7-106(C)(7).

Paragraph (d) has no equivalent in the Oregon Code.

Paragraph (e) is the same as DR 7-106(C)(1), (3) and (4).

Paragraph (f) retains the language of DR 7-109(B).

Paragraph (g) retains DR 7-105.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

Adopted 01/01/05 Amended 12/01/06:

Paragraph (b) amended to add "on the merits of the cause."

Defined Terms (see Rule 1.0):

"Known"

"Tribunal"

Comparison to Oregon Code

Paragraph (a) has no counterpart in the Oregon Code. Oregon Rules of Professional Conduct (3/1/2022) Page 21

Paragraph (b) replaces DR 7-110, making ex parte contact subject only to law and court order, without additional notice requirements.

Paragraph (c) is similar to DR 7-108(A)-(F).

Paragraph (d) is similar to DR 7-106(C)(6).

Paragraph (e) retains the DR 7-108(G).

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

(4) engage in conduct that is prejudicial to the administration of justice; or

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law, or

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

Adopted 01/01/05 Amended 12/01/06: Paragraph (a)(5) added. Amended 02/19/15: Paragraphs (a)(7) and (c) added. Defined Terms (see Rule 1.0): "Believes" "Fraud" "Knowingly" "Reasonable" Comparison to Oregon Code This rule is essentially the same as DR 1-102(A). Paragraph (b) retains DR 1-102(D).

FORMAL OPINION NO 2005-143

Communicating with Jurors after Trial

Facts:

After a verdict has been rendered and the jury has been discharged, Lawyer would like to interview jurors to determine what did or did not impress them about Lawyer's arguments, and determine whether any conduct of the jurors might give Lawyer an additional argument on appeal.

Question:

May Lawyer initiate contact with the jurors?

Conclusion:

No.

Discussion:

Oregon RPC 3.5(c) and (e) provide that a lawyer shall not

> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment;
>
> . . . .
>
> (e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

Both Oregon UTCR 3.120[1] and LR 48-2 of the United States District Court for the District of Oregon[2] generally prohibit a lawyer from initiating contact with jurors concerning a case that they were sworn to try. Violation of either the state or federal court rules would in turn violate Oregon RPC 3.5(c)(1). Even if contact is permitted by the court, Lawyer must be mindful of the requirements of Oregon RPC 3.5(c)(3).

Approved by Board of Governors, August 2005.

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[1] UTCR 3.120 Communication with Jurors:

> (1) Except as necessary during trial, and except as provided in subsection (2), parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.
>
> (2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
>
> (a) there is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict, or;
>
> (b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

[2] LR 48-2 No Communications with Jurors—before, during, and after Trial

> Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.7 (seeking to influence the tribunal or a juror) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 115 (2000) (supplemented periodically); and ABA Model RPC 3.5.

FORMAL OPINION NO 2013-189

Accessing Information about Third Parties through a Social Networking Website

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

Questions:

1. May Lawyer review a person's publicly available information on a social networking website?

2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's nonpublic information?

3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view nonpublic information?

Conclusions:

1. Yes.

2. Yes, qualified.

3. No, qualified.

Discussion:

1. *Lawyer may access publicly available information on a social networking website*.[1]

Oregon RPC 4.2 provides:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
>
> (a) the lawyer has the prior consent of a lawyer representing such other person;
>
> (b) the lawyer is authorized by law or by court order to do so; or
>
> (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not "communicating" with the site owner within the meaning of Oregon RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages.[2]

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[1] Although Facebook, MySpace, and Twitter are current popular social networking websites, this opinion is meant to apply to any similar social networking websites.

[2] This analysis is not limited to adversaries in litigation or transactional matters; it applies to a lawyer who is accessing the publicly available information of any person. However, caution must be exercised with regard to jurors. Although a lawyer may review a juror's publicly available information on social networking websites, communication with jurors before, during, and after a proceeding is generally prohibited. Accordingly, a lawyer may not send a request to a juror to access nonpublic personal information on a social networking website, nor may a lawyer ask an agent do to do so. *See* Oregon RPC 3.5(b) (prohibiting *ex parte* communications with a juror during the proceeding unless authorized to do so by

2. *Lawyer may request access to nonpublic information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer*.

To access nonpublic information on a social networking website, a lawyer may need to make a specific request to the holder of the account.[3] Typically that is done by clicking a box on the public portion of a person's social networking website, which triggers an automated notification to the holder of the account asking whether he or she would like to accept the request. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible. OSB Formal Ethics Op No 2005-164.[4]

In doing so, however, Lawyer must be mindful of Oregon RPC 4.3, which regulates communications with unrepresented persons. Oregon RPC 4.3 provides, in pertinent part:

> In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. . . .

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law or court order); Oregon RPC 3.5(c) (prohibiting communication with a juror after discharge if (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress, or harassment); Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice). *See, generally*, ABA/BNA *Lawyers' Manual on Professional Conduct* § 61:808 and cases cited therein.

[3] This is sometimes called "friending," although it may go by different names on different services, including "following" and "subscribing."

[4] See, for example, New York City Bar Formal Ethics Op No 2010-2, which concludes that a lawyer "can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties."

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers "carry special authority" and that a nonlawyer will be "inappropriately deferential" to someone else's lawyer. *Apple Corps Ltd. v. Int'l Collectors Soc.*, 15 F Supp2d 456 (DNJ 1998) (finding no violation of New Jersey RPC 4.3 by lawyers and lawyers' investigators posing as customers to monitor compliance with a consent order).[5] A simple request to access nonpublic information does not imply that Lawyer is "disinterested" in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person's social networking information, although for an unidentified purpose.

Similarly, Lawyer's request for access to nonpublic information does not in and of itself make a representation about the Lawyer's role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind "privacy settings," which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder's failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer's role in the matter.[6] By contrast, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands

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[5] *See also* ABA Model RPC 4.3 cmt [1] ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."). *Cf. In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the court declined to find an "investigatory exception" and disciplined a lawyer who used false identities to investigate an alleged insurance scheme. Oregon RPC 8.4(b), discussed below, was adopted to address concerns about the *Gatti* decision.

[6] *Cf. Murphy v. Perger* [2007] O.J. No 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that "[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.")

Lawyer's role, Lawyer must provide the additional information or withdraw the request.

If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent.[7] *See* OSB Formal Ethics Op No 2005-80 (rev 2016) (discussing the extent to which certain employees of organizations are deemed represented for purposes of Oregon RPC 4.2).

3. *Lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless Oregon RPC 8.4(b) applies*.

Oregon RPC 8.4(a)(3) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."[8] *See also* Oregon RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request.[9]

As an exception to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows a lawyer "to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct." For purposes of the rule "covert activity" means:

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[7] *In re Newell*, 348 Or 396, 409, 234 P3d 967 (2010) (reprimanding lawyer who communicated on "subject of the representation").

[8] *See In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website).

[9] See Oregon RPC 8.4(a), which prohibits a lawyer from violating the Oregon Rules of Professional Conduct (RPCs), from assisting or inducing another to do so, or from violating the RPCs "through the acts of another."

> [A]n effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's nonpublic information on a social networking website.

Approved by Board of Governors, February 2013.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communications with persons other than the client), § 8.11 (conduct prejudicial to the administration of justice), § 21.3-2(a) (prohibition against misleading conduct) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 11, 98, 99–100, 103 (2000) (supplemented periodically).

PLAYING BY THE RULE: HOW ABA MODEL RULE 8.4(G) CAN REGULATE JURY EXCLUSION

*Anna Offit**

Discrimination during voir dire remains a critical impediment to empaneling juries that reflect the diversity of the United States. While various solutions have been proposed, scholars have largely overlooked ethics rules as an instrument for preventing discriminatory behavior during jury selection. Focusing on American Bar Association Model Rule of Professional Conduct 8.4(g), which regulates professional misconduct, this Article argues that ethics rules may, under certain conditions, deter the exclusionary practices of legal actors. Part I examines the specific history, evolution, and application of revised Model Rule 8.4(g). Part II delves into the ways that ethics rules in general, despite their limited use, can spur legal and cultural change. Focusing on jury exclusion, Part III shows how Model Rule 8.4(g) in particular might be applied to more effectively challenge and sanction instances of race- and sex-based discrimination during voir dire. In so doing, this Article reaffirms the productive role that ethics rules can play in preventing forms of misconduct that undermine confidence in the American jury and justice system.

INTRODUCTION

Renewed attention to racism and sexual harassment in American society has helped to amplify concerns about the ongoing problems of race- and sex-based discrimination in the U.S. legal system. The legal profession in particular has become a focus of criticism. For example, the media has put a

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spotlight on state bar association surveys[1] that expose chronic workplace mistreatment and federal lawsuits that reveal the disparate treatment of female employees.[2] Not long before #MeToo initiated a national conversation about sexual assault, the American Bar Association (ABA) sought to address the problems of harassment and discrimination with a revision to Model Rule of Professional Conduct 8.4(g). Notably, the amended rule included a newly formulated subsection (g), which defined professional misconduct as: "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[3]

The most explicit qualification to Model Rule 8.4, aside from an ambiguous carve-out for "legitimate advocacy"[4] discussed in Part III, appears in one of the rule's comments. Revised Comment 5 to Model Rule 8.4(g) notes that in the context of jury selection proceedings, "a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)."[5] This Article considers the implications of the revised rule, and Comment 5 in particular, for the pervasive problem of race- and sex-based exclusion in the American jury system. First, as written, the comment leaves open the possibility that lawyers and judges who violate antidiscrimination law during the jury selection process can face sanctions. The possibility of punishment for discriminatory behavior, paired with the rule's inclusion of an objective mens rea standard, thus has the potential to enhance the antidiscrimination protections currently in place to promote representative juries.[6]

Part I provides a brief overview of the history and adoption of Model Rule 8.4(g) since its 2016 revision. Part II examines how ethics rules influence attorney behavior even in cases that do not result in adjudicated violations or

1. *See, e.g.*, Robert J. Derocher, *As Women Lawyers Across the Country Say #MeToo, Bar Associations Play an Important Role*, BAR LEADER (Sept./Oct. 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2018_19/september-october/as-women-lawyers-across-the-country-say-metoo-bar-associations-play-an-important-role [https://perma.cc/F734-HMX3] (citing survey results and feedback from Massachusetts, South Dakota, Florida, and Iowa, each addressing experiences of gender and sexual harassment, misconduct, and discrimination in the legal profession).

2. Tiffany Hsu, *Jones Day Law Firm Is Sued for Pregnancy and Gender Discrimination by 6 Women*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/business/jones-day-pregnancy-discrimination.html [https://perma.cc/M8L4-9TLH] (explaining that Jones Day, one of the largest firms in the country, is accused of providing the best opportunities and highest salaries to their male employees—"even when their legal skills are notably deficient"—and penalizing female employees, particularly when they took maternity leave, or had children).

3. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

4. *Id.* ("This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.").

5. *Id*. cmt. 5.

6. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986) (prohibiting race-based discrimination during jury selection).

sanctions. Turning to the illustrative context of jury exclusion, Part III argues that notwithstanding Model Rule 8.4's merely *theoretical* application to voir dire to date, it should be viewed as an additional resource for practitioners, jury reform advocates, and even prospective jurors who seek redress for exclusionary practices that strip the jury system of its democratic and inclusive character.

I. THE HISTORY AND ADOPTION OF REVISED MODEL RULE 8.4(G)

In 2008, the ABA added the elimination of bias and enhancement of diversity within the legal profession as critical ethical aspirations.[7] In this spirit, the ABA amended Model Rule 8.4 as part of an affirmative effort to better regulate attorney misconduct.[8] The amendment process resulted in a new subsection (g),[9] created to deter discriminatory and harassing behavior that was expressly "related to the practice of law."[10] Among the innovations of the revision is a mens rea requirement that encompasses even unknowing conduct, including that of attorneys who *reasonably should know* they are engaged in misconduct.[11] The new Model Rule 8.4(g) also features an expanded list of protected groups, including those who face discrimination on the basis of ethnicity, gender identity, and marital status.[12] Yet, Comment 5 delineates one specific example of conduct that does not, in and of itself, constitute impermissible discrimination: an adjudicated violation of *Batson v. Kentucky*[13] during jury selection.[14] The comment notes, in effect, that a

7. AM. BAR ASS'N, REVISED RESOLUTION 109 AND REPORT 1 (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/XU5L-DPHH].

8. *Id.* The 2007 amendment to the judicial code of conduct included the adoption of Model Rule 2.3: "Bias, Prejudice, and Harassment." *Id.* The goal of this amendment is to provide a comparable provision for lawyer professional conduct. *See id.*

9. Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS'N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4 [https://perma.cc/P2RG-QZLY]. The amendment added subsection (g) but maintained the previously adopted subsections (a) to (f).

10. MODEL RULES OF PRO. CONDUCT r. 8.4(g). In full, Model Rule 8.4(g) states that it is professional misconduct for a lawyer to:

> [E]ngage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Id.

11. The knowledge component requires that lawyers "know or reasonably should know" that their conduct is harassment or discrimination. *Id.* "Know," "reasonably," and "reasonably should know" are defined in Model Rule 1.0(f), (h), and (j), respectively. Additionally, the amended rule does not force a lawyer to comply with the 8.4(g) restrictions as long as the lawyer has a good faith belief that no valid obligation exists. *See id.*

12. *Id.*

13. 476 U.S. 79 (1986).

14. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 5.

peremptory challenge exercised in a discriminatory manner will not be enough, on its own, to constitute misconduct under Model Rule 8.4.[15]

As I show in the sections that follow, reception to and adoption of Model Rule 8.4(g) and other antidiscrimination rules has been gradual, even as attention to systemic racism and bias in the legal profession has increased.

A. States Adopting Model Rule 8.4(g) in Its Entirety

After its passage by the ABA, two states and three U.S. territories adopted Model Rule 8.4(g) in its entirety. This included Maine[16] and Vermont, which adopted it to add greater detail to their extant misconduct rules,[17] along with the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.[18] There has been one documented violation of Model Rule 8.4(g) in Vermont since its adoption.[19]

B. States with Other Rules or Comments Addressing Discrimination and/or Harassment

At present, twenty-nine states have adopted rules that explicitly prohibit discrimination. Thirty-three states have similar rules and/or comments to Model Rule 8.4 that prohibit discrimination and/or harassment by lawyers.[20] California, for example, has a distinct rule addressing conduct that constitutes prohibited discrimination, harassment, and retaliation.[21] Some of these states have removed a requirement of knowledge on the part of the offending

15. *See id.* The comment additionally specifies that attorneys are able to limit the scope and subject matter of their practices without violating the rule, provided such limitations meet the requirements of other Model Rules, including 1.5(a), 6.2, and 1.2(b). *See id.*

16. *See* ME. PRO. CONDUCT R. 8.4. While Maine adopted ABA Model Rule 8.4(g), the language is not an exact match to the ABA language and does not bar discrimination on the basis of marital status or socioeconomic status. *See id.*

17. VT. PRO. CONDUCT R. 8.4(g).

18. *See* AM. SAM. HIGH CT. R. 104; N. MAR. I. ATT'Y DISCIPLINE & PROC. RESP. R. 3(1); V.I. SUP. CT. R. 303(a).

19. *See In re* Robinson, 209 A.3d 570 (Vt. 2019).

20. Not including Vermont, as it was discussed in the "full adoption" paragraph. The rules of the thirty-two states include: ARIZ. PRO. CONDUCT R. 8.4; ARK. PRO. CONDUCT R. 8.4; CAL. PRO. CONDUCT R. 8.4; COLO. PRO. CONDUCT R. 8.4; CONN. PRO. CONDUCT R. 8.4; DEL. LAWS.' PRO. CONDUCT R. 8.4; FLA. BAR R. 4-8.4; IDAHO PRO. CONDUCT R. 8.4; ILL. PRO. CONDUCT R. 8.4; IND. PRO. CONDUCT R. 8.4; IOWA PRO. CONDUCT R. 32:8.4; ME. PRO. CONDUCT R. 8.4; MD. ATT'YS PRO. CONDUCT R. 19-308.4; MINN. PRO. CONDUCT R. 8.4; MO. SUP. CT. R. 4-4.8; NEB. SUP. CT. R. § 3-508.4; N.H. PRO. CONDUCT R. 8.4; N.J. PRO. CONDUCT R. 8.4; N.M. PRO. CONDUCT R. 16-804; N.Y. PRO. CONDUCT R. 8.4; N.C. PRO. CONDUCT R. 8.4; N.D. PRO. CONDUCT R. 8.4; OHIO PRO. CONDUCT R. 8.4; OR. PRO. CONDUCT R. 8.4; R.I. PRO. CONDUCT R. 8.4; S.C. PRO. CONDUCT R. 8.4; TENN. SUP. CT. PRO. CONDUCT R. 8.4; TEX. DISCIPLINARY PRO. CONDUCT R. 5.08; UTAH PRO. CONDUCT R. 8.4; WASH. STATE CT. PRO. CONDUCT R. 8.4; W. VA. PRO. CONDUCT R. 8.4; WIS. ATT'YS PRO. CONDUCT R. 20:8.4; WYO. ATT'YS AT L. PRO. CONDUCT R. 8.4. Texas's rule is under "Law Firms and Associations, Prohibited Discriminatory Activities," not in the 8.4 misconduct section of the rules, but it does address discriminatory behavior. *See* TEX. DISCIPLINARY PRO. CONDUCT R. 5.08.

21. CAL. PRO. CONDUCT R. 8.4.1.

lawyer, in place of "intent."[22] Indiana's rule is further distinguished by its reliance on actual conduct, manifested through words or actions, while omitting a requirement that the offending party act with intent.[23]

Of the thirty-three states with rules or comments similar in substance to Model Rule 8.4, twenty-two require that the misconduct be carried out "knowing[ly]."[24] Seventeen of those states have adopted Comment 3 to Model Rule 8.4, which includes a knowing standard for engaging in conduct that manifests bias or prejudice toward others.[25] Three states require that the lawyer who engages in discriminatory conduct intends to do so or that the conduct is intended or likely to cause harm.[26] The remaining seven states do not have rules that include a requirement of knowledge or intent with respect to alleged attorney bias, discrimination, or harassment.[27]

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22. COLO. PRO. CONDUCT R. 8.4. In Colorado, the rule is dependent on the actual conduct and the intent of the attorney:

> It is professional misconduct for a lawyer to: . . . engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Id.

23. IND. PRO. CONDUCT R. 8.4 (prohibiting lawyers from "engag[ing] in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule").

24. These states include: Arizona (comment), Colorado (comment), Connecticut (comment), Delaware (comment), Florida (rule—also a "callous indifference" standard used), Idaho (comment), Illinois (rule and comment), Iowa (including, in a rule and in the comment, a knowing standard for allowing staff in an attorney's control to engage in such conduct), Maine (rule and comment), Maryland (rule), Nebraska (comment), New Hampshire (comment), New Mexico (comment), North Dakota (rule and comment), Oregon (rule), Rhode Island (comment), South Carolina (comment), Tennessee (comment), Utah (comment), West Virginia (comment), Wisconsin (comment), and Wyoming (comment). Vermont is not on the list but does have a knowing standard, as it adopted Model Rule 8.4 in its entirety. *See* VT. PRO. CONDUCT R. 8.4(g).

25. COLO. PRO. CONDUCT R. 8.4; DEL. LAWS.' PRO. CONDUCT R. 8.4; IDAHO PRO. CONDUCT R. 8.4; ILL. PRO. CONDUCT R. 8.4; IOWA PRO. CONDUCT R. 32:8.4; NEB. SUP. CT. R. § 3-508.4; N.H. PRO. CONDUCT R. 8.4; N.M. PRO. CONDUCT R. 16-804; N.D. PRO. CONDUCT R. 8.4; R.I. PRO. CONDUCT R. 8.4; S.C. PRO. CONDUCT R. 8.4; TENN. SUP. CT. PRO. CONDUCT R. 8.4; UTAH PRO. CONDUCT R. 8.4; VT. PRO. CONDUCT R. 8.4; W. VA. PRO. CONDUCT R. 8.4; WIS. ATT'YS PRO. CONDUCT R. 20:8.4; WYO. ATT'YS AT L. PRO. CONDUCT R. 8.4.

26. COLO. PRO. CONDUCT R. 8.4; N.J. PRO. CONDUCT R. 8.4; N.C. PRO. CONDUCT R. 8.4.

27. These states' rules include: ARK. PRO. CONDUCT R. 8.4; CAL. PRO. CONDUCT R. 8.4 cmt. 3; IND. PRO. CONDUCT R. 8.4; MINN. PRO. CONDUCT R. 8.4; N.Y. PRO. CONDUCT R. 8.4; OHIO PRO. CONDUCT R. 8.4; WASH. STATE CT. PRO. CONDUCT R. 8.4.

C. States That Have (So Far) Declined to Adopt the Amended Rule

Several states have declined to adopt the amended rule altogether. Montana,[28] Texas,[29] and Louisiana[30] have chosen not to do so, for example, citing First Amendment concerns. In contrast to most states that have rules or language that address discriminatory conduct, Rule 5.08 of Texas's Disciplinary Rules of Professional Conduct ("Prohibited Discriminatory Activities"), which regulates willful expressions of bias or prejudice in connection with legal proceedings, can be found under "Section V: Law Firms and Associations."[31] More often, these types of rules are found in "Section VIII: Maintaining the Integrity of the Legal Profession."[32] It is even more common for rules prohibiting discriminatory conduct to be found under states' "misconduct" rules (often, Model Rule 8.4). Two states, South Carolina[33] and Tennessee,[34] have declined to adopt Model Rule 8.4(g), though both have rules (or comments) that explicitly address discrimination.

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28. In Montana, the legislature's joint resolution accused the rule of "seek[ing] to destroy the bedrock foundations and traditions of American independent thought, speech, and action." S.J. Res. 15, 65th Leg., Reg. Sess. (Mont. 2017).

29. In Texas, the legislature cited similar concerns about speech protected by the First Amendment, stating that the rule would "severely restrict attorneys' ability to engage in a meaningful debate on a range of important social and political issues." Tex. Op. Att'y Gen. No. KP-0123 (Dec. 20, 2016), 2016 WL 7433186.

30. In Louisiana, the legislature found the phrase "conduct related to the practice of law" to be overbroad and chilling to a substantial amount of speech that is constitutionally protected." *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, LA. STATE BAR ASS'N, https://www.lsba.org/NewsArticle.aspx?Article=c959815a-a774-441e-b411-92fe9a2dbb16 [https://perma.cc/AVU2-YBPK] (last visited Jan. 27, 2021).

31. TEX. DISCIPLINARY PRO. CONDUCT R. 5.08.

32. *Id.* r. 8.04.

33. S.C. PRO. CONDUCT R. 8.4 cmt. 3. The South Carolina rule regarding attorney misconduct addresses manifestation of attorney bias or prejudice in Comment 3 to the rule:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Id.

34. TENN. SUP. CT. PRO. CONDUCT R. 3.8. In Tennessee, the only area where the rules address discrimination is in the comments to Rule 3.8 ("Special Responsibilities of a Prosecutor"). *Id.* r. 8.4. Tennessee included Comment 3 in its misconduct rule, which addresses attorney bias or prejudice in the course of representing a client:

> A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Id.

D. States That Do Not Regulate Attorney Discrimination and/or Harassment

Fifteen states and two territories do not have ethics rules that address discrimination, harassment, or bias.[35] In addition, three states have omitted Comment 3 from their versions of Model Rule 8.4 that speak directly to prohibiting discriminatory conduct.[36] Oklahoma and Virginia, for example, removed Comment 3 from their Model Rule 8.4 equivalent, with Virginia noting, in its place: "ABA Model Rule Comment not adopted."[37]

II. DETERRING MISCONDUCT THROUGH ETHICS RULES

In the United States, the legal profession is regulated by both formal rules and informal norms.[38] The model ethics rules, including Model Rule 8.4(g), can thus be viewed as part of an effort to reflect and reinforce normative commitments to valued antidiscrimination principles. In this respect, and even apart from their regulatory function and the potential sanctions that flow from their violation, such rules are central to the working life of an attorney. They not only determine eligibility to practice but also help shape a lawyer's perception of her identity as a professional.[39] Formal legal ethics rules have largely developed within the self-regulating regime of the profession, where the legal community is afforded substantial autonomy to regulate itself.[40] The federal courts have independent authority to adopt rules of practice and to discipline attorneys, though most follow the ethics rules of the state in which the court sits.[41] In almost all jurisdictions, once state supreme courts have adopted model rules, they carry the force of law.[42] Though few enforceable legal sanctions for unethical behavior existed before the promulgation of the Model Rules of Professional Conduct,[43] courts and

35. *See* ALA. PRO. CONDUCT R.; ALASKA PRO. CONDUCT R.; D.C. PRO. CONDUCT R.; GA. PRO. CONDUCT R.; GUAM PRO. CONDUCT R; HAW. PRO. CONDUCT R.; KAN. PRO. CONDUCT R.; KY. SUP. CT. PRO. CONDUCT R.; LA. PRO. CONDUCT R.; MASS. SUP. JUD. CT. PRO. CONDUCT R.; MICH. PRO. CONDUCT R.; MISS. PRO. CONDUCT R.; MONT. PRO. CONDUCT R.; NEV. PRO. CONDUCT R.; OKLA STAT. tit. 5, app. 3-A (2020); S.D. CODIFIED LAWS § 16-18-app. (2020); VA. PRO. CONDUCT R.

36. Massachusetts has reserved Comment 3 to Rule 8.4 for future modification. MASS. SUP. JUD. CT. PRO. CONDUCT R. 8.4.

37. OKLA STAT. tit. 5, app. 3-A; VA. PRO. CONDUCT R.

38. DEBORAH L. RHODE & GEOFFREY C. HAZARD JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 8 (2d ed. 2006).

39. *Id.* at 4.

40. GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 111 (2018) (noting that the legal profession has developed in this manner as part of a social compact to "restrain self-interest, to promote ideals of public service, and to maintain high standards of performance").

41. *Id.* at 115; *see also* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 75–76 (2009).

42. *Id.* at 113.

43. W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice*, 71 FORDHAM L. REV. 1567, 1567 (2003).

regulatory authorities now enforce a complex body of law that governs lawyers' everyday work.[44]

A common critique of the ethics rules that regulate the legal profession is their underenforcement.[45] Still, the rules can promote lawyers' regulation of their own and others' behavior by articulating shared values and professional norms. One impetus for lawyers' self-regulation is their expectation that reputational damage and the possibility of sanction might result from violations of the rules. To grasp the deterrent potential of formal ethics rules, it is necessary to focus on how the rules affect lawyers' understandings of the possible or probable consequences of taking certain actions and failing to take others.

A. Professional Self-Regulation

Ethics rules promote self-regulation by modifying the personal and professional outcomes associated with compliance and infraction. In rare cases, compliance with ethics rules can lead to the enhancement of one's professional reputation—marked by awards that celebrate the ethical performance of one's duties—"fairness," "integrity," "professionalism," "public trust," and a "commitment to justice."[46] Formal and informal recognition may even be accompanied by public social gatherings that both "signal" ethical aptitude and offer credentials that can be commoditized or otherwise integrated into law firms' presentations of their employees.[47]

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44. *Id.*

45. *See generally* Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

46. This sort of biographical text can be found in descriptions of the winners of the Arizona Prosecuting Attorneys' Advisory Council "Lifetime Achievement Awards." *Lifetime Achievement Awards*, APAAC, https://www.apaac.az.gov/awards/lifetime-achievement-awards [https://perma.cc/6W64-FR56] (last visited Jan. 27, 2021); *see also Criminal Justice Section Awards*, N.Y. STATE BAR ASS'N, https://nysba.org/awards-competitions/criminal-justice-section-awards [https://perma.cc/Y6Y7-4PD5] (last visited Jan. 27, 2021) (discussing that these awards are given to an "Outstanding Prosecutor," whose "professional conduct evidences a true understanding of a public prosecutor's duty to advance the fair and ethical administration of criminal justice"). There is also peer-review-based ethical recognition for professional conduct. *See, e.g.*, *Martindale-Hubbell Attorney Peer Ratings and Client Reviews*, MARTINDALE, https://www.martindale.com/ratings-and-reviews [https://perma.cc/9XYU-EYQA] (last visited Jan. 27, 2021) ("A second rating was also given to go along with the [legal ability] rating and that was a 'V,' meaning that the attorney's peers stated they had 'Very High' ethical standards. Over the years this transitioned to 'AV', 'BV', and 'CV' ratings—with an 'AV' rating meaning that the attorney had reached the highest of professional excellence and is recognized for the highest levels of skill and integrity.").

47. William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652 (2003); *see also* Milton C. Regan Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 554–57 (1998) (discussing the various contexts in which a lawyer's professional reputation is relevant, including "for reasons ranging from personal identity, to the ease of conducting negotiation or litigation, to the possibility of obtaining referrals"); Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176 (2008) ("Because of the importance of lawyers' reputations in the minds of prospective clients, lawyers' desires to maintain specific types of reputation have

Beyond the possibility of public recognition, however, ethics rules can also encourage lawyers to consider whether their decisions reflect praiseworthy conduct in their profession.[48] The jury selection process offers an illustrative example of how fear of reprimand changes attorney behavior. Even the threat of an adjudicated *Batson* violation, however uncommon in practice, can lead federal prosecutors to modify their approaches to evaluating and dismissing prospective jurors.[49] This is because prosecutors are often more concerned about how their decisions might affect the perception of their motivations and biases than they are about the actual likelihood of professional repercussions in the form of a *Batson* violation.[50] This empirical reality may stem from the fact that lawyers perceive violations of antidiscrimination law governing jury selection as embarrassing or contrary to their professional duties.[51] To this end, lawyers frequently work to manage colleagues', judges', and adversaries' impressions of themselves, especially when they are repeat players.[52] If a judge was to perceive a prosecutor's behavior as shameful, for example, then judges may view the entire district attorney's office in a negative light.[53] And if colleagues perceive behavior as counterproductive or antithetical to collaborative work, it can precipitate adverse employment consequences, including forgone case assignments, promotions, additional work product review, or transfer to different units.

B. Creating Norms and Expectations

Model ethics rules also articulate the normative expectations of the legal community to the practitioners who join its ranks.[54] Law and psychology scholar Jeffrey J. Rachlinski, for example, has argued that ethics rules have

significant impact on the implementation of professional rules and other legal constraints on lawyer behavior.").

48. *See generally* Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587892 [https://perma.cc/SL38-ZHRJ].

49. *See* Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 370 (2005).

50. Offit, *supra* note 48 (manuscript at 47).

51. *Id.* (manuscript at 58–59) ("Beyond instrumental concern about the possibility of later appeal, the negative valence of racism and sexism in American society at-large, coupled with public scrutiny of exclusion at the hands of prosecutors, heightened Assistant U.S. Attorney's desire to avoid patterns of professional behavior indicative of animus toward particular groups.").

52. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269, 278 (Leslie C. Levin & Lynn Mather eds., 2012) ("In some jurisdictions, opposing counsel tend to see each other frequently, and they understand that conflicts have high costs in compromising their ability to negotiate guilty pleas and achieve other efficiencies.").

53. *Id.* ("In particular, individual prosecutors or their offices as a whole may respond to how other local actors and agencies regard their behavior, preferring others to regard their behavior as legitimate and consistent with established practices and conventions.").

54. *See generally* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

an expressive function that precipitates changes in social norms.[55] Unsurprisingly, the attachment of criminal punishment to certain conduct can prompt critique or condemnation by others.[56] As a result, and even in the absence of enforcement, the existence of rules can reduce the prevalence of socially undesirable behavior.[57] In a similar vein, legal ethics scholar W. Bradley Wendel has argued that lapses in professional judgment often result from failures of "internalized standards of professional conduct" that attorneys reinforce through the "monitoring and criticism" of fellow lawyers.[58] In the context of the criminal justice system, Wendel argues that this sort of informal monitoring and surveillance advances notions of "honor" that balance "the opposing obligations to be a zealous advocate for the interests of one's client, as well as an officer of the court."[59]

Wendel also suggests that the Model Rules can regulate behavior informally. This includes sanctioning in the form of being the subject of gossip by colleagues or opposing counsel.[60] Informal behavioral regulation can also take the form of lawyers responding to unethical behavior by becoming uncooperative in scheduling and administrative matters, practicing "by the book" so as to increase expenses and other adverse effects on clients and judges, or excluding unethical lawyers from referral networks.[61] In this manner, informal forms of ethical regulation among legal actors who work with each other regularly can become as, if not more, influential than formal legal sanctions.

Law and society scholars have also discussed the fluid relationship between legal sanctions and informal norms of conduct. Stewart Macaulay's influential study of "exchange relationships,"[62] for example, observed the extent to which businesses treated purchase agreements as contracts despite the fact that such agreements did not meaningfully plan for contingencies and could not be used to induce performance.[63] Macaulay noticed, in particular, that businesses felt greater motivation to comply with agreements out of an interest in maintaining strong and enduring relationships than because of the threat of potential litigation.[64] Likewise, Lisa Bernstein, who studied nonlegal regulation in the cotton industry, noted that "a transactor's sense of self-esteem, his position in the community, and his social connections were

55. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1538–39 (2000).

56. *Id.* at 1544 ("Criminalizing undesirable conduct to support a social norm can embolden people to levy informal sanctions against a violator and signal potential violators that their conduct will draw a severe social sanction.").

57. *Id.*

58. GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 19–20 (3d ed. 1999).

59. Wendel, *supra* note 43, at 1570.

60. W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1953, 1969 (2001).

61. *Id.* at 1959–60.

62. Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 56 (1963).

63. *Id.*

64. *Id.* at 63.

intertwined with his business reputation."[65] Breach of contract could thus harm one's social, as well as professional, well-being.[66]

It is precisely these types of extralegal concerns that make lawyers sensitive to informal sanctions, including gossip or "war stories" that might lead others to view them as uncooperative, aggressive, or untrustworthy.[67] Although reputational self-consciousness can be useful in regulating behavior in repeat interactions, it may be less effective in influencing one-off interactions in which lawyers know they are unlikely to encounter each other in the future.[68] Still, even the possibility or threat of destructive gossip can serve to deter unethical behavior[69]—with ethics rules supplying normative force for such self-consciousness. This threat is only more acutely felt at a time when allegations of wrongdoing can circulate publicly and instantaneously through social media.[70]

In the criminal context, empirical research by Ellen Yaroshefsky and Bruce A. Green has shed light on the roles these considerations can play in the everyday decision-making of prosecutors. They observed that one of the greatest influences on prosecutorial conduct was informal peer pressure.[71] In particular, they found that prosecutors' conduct was shaped by their preference for having others "regard their behavior as legitimate and consistent with established practices and conventions."[72] This heightened self-awareness on the part of prosecutors is only amplified by the fact that they often work with the same judges or defense attorneys; prosecutors have a stake in establishing and maintaining good reputations, as they rely on the good will of the courts and public defenders' offices for the smooth management of their work.[73] Even an informal expression of frustration or disapproval from a judge can jeopardize this productive and advantageous rapport.[74] Other studies have corroborated this insight into the social

65. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1749 (2001).

66. *Id.*

67. *Id.*; *see also* Wendel, *supra* note 43, at 1599 ("Judges often rely on the reputation of counsel or the history of dealing with one of the lawyers when making discretionary judgments. If one lawyer has appeared uncooperative, the judge may rule against her in a discovery dispute, even though the judge would have been inclined to grant a different lawyer a break.").

68. Wendel, *supra* note 43, at 1605.

69. *Id.*

70. Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html [https://perma.cc/LV46-PVPG].

71. Yaroshefsky & Green, *supra* note 52, at 277–78.

72. *Id.* at 278; *see also* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 449–50 (2002) ("However much (or little) we enforce professional regulation, we have to acknowledge that courts and disciplinary agencies never will become familiar with most activities in which prosecutors engage. We inevitably rely heavily on prosecutorial self-regulation and self-enforcement. . . . [R]ightly or wrongly, the perception of independence contributes to federal prosecutors' sense of self-worth." (footnote omitted)).

73. *Id.*

74. *Id.*

dynamics of the courtroom work group, including relationships among prosecutors, public defenders, and judges.[75]

The impact of formal ethics rules—and informal ethics norms—on prosecutorial behavior and decision-making is especially important in the context of jury selection, discussed in the next part. This is because prosecutorial misconduct, discrimination, and abuses of discretion have been a central focus of those attuned to the pervasive problem of race-based jury exclusion and systemic racism in the legal system more broadly.[76]

III. APPLICATIONS OF MODEL RULE 8.4(G) TO DISCRIMINATION DURING JURY SELECTION

As a matter of both practice and scholarly focus, jury selection has long been considered a locus of race-based discrimination in the legal system.[77] Of particular concern is the extent to which lawyers can use peremptory challenges to strike otherwise eligible jurors of color with impunity.[78] Although the *Batson* doctrine ostensibly forbids the racial exclusion of prospective jurors,[79] attorneys can easily circumvent the law by offering race-neutral explanations for the peremptory strikes they exercise, if challenged.[80] Among the limitations of *Batson*, scholars have highlighted the doctrine's emphasis on discerning racial animus on the part of attorneys accused of dismissing jurors based on race.[81] This has prompted concern

75. *See, e.g.*, Marc G. Gertz, *The Impact of Prosecutor/Public Defender Interaction on Sentencing: An Exploratory Typology*, 5 CRIM. JUST. REV. 43 (1980); Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1 (2013).

76. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

77. *See, e.g.*, Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012) (finding that prosecutors in capital prosecutions were 2.5 times more likely to strike otherwise eligible Black prospective jurors from venires than white jurors); Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 414 (2017) (examining the extent to which lawyers' exercise of peremptory challenges based on citizens' arrest records lead to the disproportionate exclusion of Black and Latinx prospective jurors); Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71 (2014) (acknowledging the centrality of race to prosecutors' approaches to jury selection and outlining the extent to which *Batson* and its progeny have failed to address the continuing problem of race-based jury exclusion); Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724467 [https://perma.cc/CYY3-GXX8] (examining the role that the challenge dismissals of jurors "for cause" plays in facilitating forms of socioeconomic exclusion that perpetuate racial disparities on juries).

78. *See, e.g.*, Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585 (2012).

79. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).

80. *See generally* EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/L865-6TDZ].

81. *See, e.g.*, Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 505 ("Any trial attorney with the wherewithal to refrain from using gender or race words in the explanation and the discipline to avoid accepting a juror to whom the exact same 'neutral

that the law's focus on expressions of *explicit* racial bias on the part of attorneys has come at the expense of attention to more routinized forms of prejudice that pervade peremptory[82] and cause challenges[83] alike.

A. The Amended Rule's Inclusion of an Objective Mens Rea Standard

Concern about the impact of attorney bias on jury demographics has catalyzed state-level reform aimed at helping lawyers challenge—and remedy—the discriminatory excusal of prospective jurors. One decisive step toward enhancing the use and effectiveness of the *Batson* doctrine was implemented by the Washington State Supreme Court in *State v. Jefferson*.[84] In this attempted murder case, prosecutors used their last peremptory strike to dismiss the last remaining Black prospective juror from the venire.[85] Yet when defense counsel challenged the move, the trial court found, under the third step of the *Batson* test, that the "race-neutral" reasons the state advanced for its strike did not reflect purposeful discrimination on the part of the challenged lawyer, as the law required.[86]

The Washington State Supreme Court reversed the conviction on appeal, citing numerous procedural and practical limitations of the *Batson* doctrine.[87] In an effort to modify *Batson* to address its shortcomings,[88] the court adopted a new framework for challenging discriminatory peremptory challenges: General Rule 37 (GR 37).[89] Among the innovations of the new rule was its departure from the racial animus requirement that for so long required judges to adjudicate *Batson* violations perpetrated only by explicitly biased lawyers.[90] Instead, GR 37 substitutes judges' subjective assessments of how to draw the line between deliberate and unintentional discrimination with consideration of how an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" during the adjudication of a *Batson* challenge.[91] GR 37 requires, further, that judges imagine this

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explanation' would apply has beaten what one court calls the *Batson* 'charade.'" (quoting People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996))).

82. *See, e.g.*, Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 209 (2005) ("The automatic use of these stereotypes is not necessarily related to whether the decision-maker consciously agrees or disagrees with the particular stereotype."); *see also* Offit, *supra* note 77.

83. *See generally* Offit, *supra* note 77.

84. 429 P.3d 467 (Wash. 2018).

85. *Id.* at 471. The stated rationale for exercising a peremptory strike to remove the prospective juror was the juror's perception that jury service was a waste of time, his familiarity with the film *12 Angry Men*, and his characterization of his deliberations in a case during jury service in the past. *Id.*

86. *Id.* at 472.

87. *See id.* at 476; *see also* City of Seattle v. Erickson, 398 P.3d 1124, 1131 (Wash. 2017); State v. Saintcalle, 309 P.3d 326, 334–36 (Wash. 2013).

88. *See* Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 242 (2020).

89. *See Jefferson*, 429 P.3d at 477.

90. *See infra* note 92 and accompanying text.

91. WASH. STATE CT. GEN. R. 37.

objective viewer as a person in possession of sophisticated knowledge of institutional and subconscious racism.[92]

The development of Model Rule 8.4(g) reflects similar recognition of the critical need for a more expansive approach to the mens rea of attorneys engaged in discriminatory behavior during trial. Prior to its incorporation into the rule, the text of subsection (g) stated that a lawyer in violation of the rule must "knowingly manifest[]" discriminatory action[93]—a condition that changed to "knowingly" or "reasonably should know."[94]

This significant development was the product of deliberation and compromise. When the ABA first proposed the new rule in 2015, it invited feedback on the specific question of whether the rule should include a mens rea.[95] Following this, the proposed draft that was circulated in August 2016 eliminated a knowledge (or other mens rea) requirement for the rule altogether, such that the rule read, in pertinent part: "It is professional misconduct for a lawyer to: . . . (g) harass or discriminate on the basis of race, sex, religion . . . ."[96] The committee ultimately submitted a revised report with a knowledge requirement specified in the rule,[97] after some argued that in the absence of a mens rea requirement, the rule could be viewed as a quasi-criminal rule of absolute liability.[98]

Much like the Washington State Supreme Court's objective mens rea standard pertaining to juror discrimination, ABA Revised Resolution 109 recognized, in explicit terms, that the inclusion of both a subjective and objective mens rea would "safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination."[99] And the "reasonably should have known" standard was defined as "denot[ing] 'that a lawyer of reasonable prudence and competence would ascertain the matter in question.'"[100]

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92. *See id.* r. 37(f) ("Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."). GR 37 was the product of the collaborative labor of a work group convened by the Washington State Supreme Court, drawing on input from the American Civil Liberties Union and the Washington Association of Prosecuting Attorneys. *See* JURY SELECTION WORKGROUP, PROPOSED NEW GR 37: FINAL REPORT (2018), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf [https://perma.cc/VQM6-B4S8].

93. MODEL RULES OF PRO. CONDUCT r. 8.4(d) cmt. 3 (AM. BAR ASS'N 1998) (amended 2016).

94. *Id*. r. 8.4(g).

95. *See id*. r. 8.4 (Discussion Draft 2015).

96. AM. BAR ASS'N, RESOLUTION AND REPORT 1–2 (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf [https://perma.cc/7MQ4-WQKA].

97. *See* AM BAR ASS'N, *supra* note 7.

98. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 217 (2017).

99. AM BAR ASS'N, *supra* note 7, at 8.

100. *Id.* (citing MODEL RULES OF PRO. CONDUCT r. 1.0(j)).

Despite the similar inclusion of an objective mens rea standard, Model Rule 8.4(g) stopped short of permitting a single discriminatory peremptory challenge to rise to the level of an ethics rule violation.[101] Instead, this part of the comment proposes the rule be interpreted as a less stringent check on illegal jury exclusion than *Batson*, which dispensed with prior case law holding that racial jury exclusion in a single trial would not violate antidiscrimination law.[102] A more effective and expansive approach to the ethical regulation of jury exclusion would acknowledge the harm of illegally excluding even a single juror[103] by specifying that one discriminatory peremptory challenge should create a rebuttable presumption that Model Rule 8.4(g) has been violated.[104]

Despite its shortcomings, it is notable that Comment 5 to Model Rule 8.4(g) explicitly references jury selection as a context in which attorneys *can be subject to ethical regulation*, even though this remains untested.[105] In light of this significant acknowledgment, the rule may complement and enhance *Batson* challenges as a secondary means of identifying and remediating forms of jury exclusion that deprive citizens of their right to participate in the legal system. As discussed in Part II, even the *possibility* of an ethics violation can encourage greater vigilance, care, and consciousness of *Batson* on the part of attorneys engaged in routine assessments of prospective jurors.

B. Distinguishing Illegal Discrimination from "Legitimate Advocacy"

Model Rule 8.4(g) concludes with a significant, though ambiguous, carve-out for "legitimate advice or advocacy."[106] This language was not entirely new for the rule; under previous Comment 3 to Model Rule 8.4(d), the ABA stated that a

> lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national

101. *Id.* at 2 (noting that a "trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of" subsection (g)).

102. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 221 (1965) ("This Court has held that the fairness of trial by jury requires no less. Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." (citation and footnote omitted)).

103. The U.S. Supreme Court interprets *Batson* as holding that the discriminatory removal of a single prospective juror is a constitutional violation. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2248 (2019) (noting that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose" (citing Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016))); *see also* Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

104. I thank Adam M. Gershowitz for suggesting this proposed modification of the language of Comment 5. *See also* Lonnie T. Brown Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 310–11 (2003).

105. MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS'N 2020).

106. *See id.* r. 8.4(g).

> origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[107]

Under both the old comment and the new rule, an exception for "legitimate advocacy" thus remains intact.[108]

Scholars and practitioners seeking clarity on this point, however, will be disappointed, as the rule fails to distinguish legitimate from illegitimate advocacy.[109] There was in fact no definition provided upon the term's incorporation into the comment.[110] Some have argued that the phrase should be understood as a moral commentary on the *ends* sought through advocacy, while others have focused on legal process.[111] Yet under any definition, it remains unclear whether bias and discrimination are ever defensible parts of legal practice.[112] The issue becomes particularly murky in the context of jury selection, where some have argued that bias and zealous advocacy go hand in hand.[113] The line between permissible and illegal jury exclusion is particularly difficult to regulate when uncontested peremptory challenges can be exercised without transparency on the part of the lawyers who use them.[114] This conundrum led one of the drafters of Model Rule 8.4(g) to acknowledge the fact that "race, gender, and other factors are sometimes legitimate subjects of consideration" and that discussion of such attributes during voir dire should not necessarily run afoul of the rule.[115]

The rule is clear that a single *Batson* violation will not trigger an ethics violation. In writing about the previous iteration of the rule, one scholar has argued that the placement of the reference to a peremptory challenge *after* its reference to legitimate advocacy (in Comment 2) suggests that it was not the intent of the rule drafters for *Batson* violations to automatically precipitate ethics violations.[116] A more probable interpretation, however, is one that the same author concludes with: though a single *Batson* violation may not in itself rise to the level of an ethics violation, a *Batson* violation alongside *other*

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107. *Id.* r. 8.4(d) cmt. 3 (amended 2016).

108. Interestingly, though the drafters of Model Rule 8.4(g) in 2016 initially chose not to include a legitimate advocacy provision in the rule, they reversed course soon after. *See* Michael William Fires, Note, *Regulating Conduct: A Model Rule Against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 746 (2017).

109. *See id.* at 741.

110. *Id.*

111. *See* Note, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility,* 40 HARV. J.L. & PUB. POL'Y 773, 786 (2017).

112. Comment, Batson v. Kentucky *and the ABA Model Rules of Professional Conduct: Is a Violation of* Batson *Also an Ethical Violation?*, 29 J. LEGAL PRO. 205, 210 (2005).

113. *See, e.g.*, Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 528–30 (1998) (defending the ability for defense attorneys to strike or empanel prospective jurors based on race).

114. *See* EQUAL JUST. INITIATIVE, *supra* note 80, at 47.

115. Fires, *supra* note 108, at 742.

116. *See* Comment, *supra* note 112, at 210–11.

"biased conduct or some other aggravating factor" *may* rise to the level of an ethics violation.[117]

In contrast to Model Rule 8.4(g)'s open-ended reference to legitimate advocacy, modifications of the *Batson* doctrine, including Washington State's GR 37, have sought to add greater specificity to impermissible juror discrimination. Washington's rule, for instance, designates particular bases for peremptory challenges presumptively invalid to the extent that they have historically encompassed protected groups, including those who have past contact with law enforcement officers or who distrust the police.[118] Reference to aspects of a juror's demeanor, such as her "inattentive[ness]" is also regarded by the rule as having "historically been associated with improper discrimination."[119] As an ethics rule extending to misconduct beyond jury exclusion, it is hardly surprising that Model Rule 8.4(g)'s regulation of discriminatory forms of juror assessment leaves the *Batson* doctrine, and a judge's discretion to enforce it, unaltered. Yet, the revision of the rule to incorporate an objective mens rea standard, combined with the ability of even underenforced antidiscrimination rules to modify conduct discussed in Part I, holds promise for the rule's continued adoption and more expansive application.

CONCLUSION

Jury selection proceedings, among other sites of racial exclusion in the U.S. legal system, remind us of the vital importance of ethics rules as both a moral compass and practical deterrent for reputation-conscious practitioners. In its newly revised form, which includes an objective mens rea standard and explicit reference to *Batson* violations as a trigger for ethical scrutiny, Model Rule 8.4(g) should be applied to the task of further democratizing juries. To the extent that the threat (if not reality) of an adjudicated *Batson* violation already prompts lawyers to modify their assessments of jurors during the peremptory challenge phase of voir dire, as discussed in Part II, the explicit threat of an ethics violation can only enhance antidiscrimination law's potential.

117. *Id.* at 210.
118. *See* WASH. STATE CT. GEN. R. 37.
119. *Id.*

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Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection

John G. Browning

Although lawyers may have many persuasive reasons for wanting to use social media to perform research about prospective jurors, ethical considerations and potential dangers make it essential for every trial lawyer to know the risks and rewards of such online investigations.

> *Commit the oldest sins the newest kind of ways.*
>
> —William Shakespeare, *Henry IV, Part 2* (4.5.)

Week in and week out, in both civil and criminal cases, attorneys on both sides of the docket probe with questions during voir dire as they seek to learn more about the prospective jurors. Will they be more likely to align with that lawyer's side of the case? Do they have a preexisting bias on a particular issue? Today, everything from a venireperson's body language during questioning to his or her television viewing habits translates into more data to be factored into the jury selection process.[1] And while most cases don't feature the lengthy, detailed questionnaires used in high-profile or complex litigation, the importance of weeding out the "wrong" jurors and seating the "right" jurors has spawned an effort to find out as much about potential jurors as possible and driven the growth of fields like jury consulting.

However, thanks to the Internet and the explosive growth of social networking sites like Facebook and Twitter, lawyers and litigants now have a digital treasure trove of information right at their fingertips accessible with the speed of a research engine. In a world where 74 percent of all adult Americans have at least one social networking profile and in which Twitter processes over a half a billion tweets every day, there's a strong likelihood of finding out whatever you want about your jury pool. Welcome to jury selection in the digital age, where, with a few mouse clicks, an attorney can learn all about a prospective juror—his or her taste in movies and music, political affiliations, education,

hobbies, and literally his or her "likes" and dislikes. But where are the ethical boundary lines drawn for attorneys engaged in such online investigations?

This article will look at the ethical considerations for lawyers pondering whether to "Facebook the jury," and examine ethics opinions and cases from around the country that have weighed in on this issue. It will also discuss some of the leading reasons why attorneys would want to conduct such online juror research, as well as the potential dangers for attorneys in doing so. As voir dire increasingly incorporates "voir Google," knowing the risks and rewards of such research becomes vital for any trial lawyer.

Dangers of Conducting Online Investigations of Jurors

The most obvious reason that online investigation of jurors can be dangerous is that no trial lawyer wants to alienate a juror or prospective juror by appearing invasive or disrespectful of that individual's privacy. In the high-profile 2013 "Hustle" mortgage fraud trial in the Southern District of New York, for example, a juror notified the judge when he received an automatic notification from LinkedIn that a junior member of one of the defense teams had viewed his profile on that social media networking site.[2] Although there were no sanctions dispensed, this incident no doubt made for some uncomfortable moments for that lawyer.

Courts and legislators also have concerns about the privacy of a juror's social networking profile. In Michigan, one federal judge concluded that there is no recognized right to monitor jurors' use of social media, opining that such efforts by lawyers could intrude on the "safety, privacy, and protection against harassment" to which jurors are entitled, and "unnecessarily chill" the willingness of jurors to participate in the democratic system of justice.[3] In the penalty phase of the high-profile Jodi Arias murder trial in Arizona in December 2013, the presiding judge denied the defense's motion to order jurors to reveal Twitter account information, ruling that juror privacy concerns outweighed the defense's desire to monitor jurors to discover if any were communicating about the case on Twitter.[4]

Another potential danger for attorneys "Facebooking the jury" can stem from what the attorney does with that information. For example, an assistant district attorney (ADA) in Texas was fired in 2014 for allegedly making "racially insensitive remarks" after his Facebook research led him to exercise a peremptory strike of an African American woman on the panel—a strike that resulted in a *Batson* proceeding.[5] During jury selection for the robbery trial of convicted murderer Darius Lovings, ADA Steve Brand struck the panelist because she had been vocal in her desire to be on the jury and because his Facebook research revealed that she was a member of the NAACP and had posted on her Facebook page a comment and link referring to the *Negro Motorist Green Book* (a travel guide for

African Americans during the Jim Crow era).[6] Brand argued that the prospective juror "appeared to be an activist."[7] The judge did not agree that this was a race-neutral reason for striking the juror, and sustained defense counsel's *Batson* challenge.

Dangers of Not Conducting Online Juror Research

But while the dangers of inadvertent contact with jurors, violating juror privacy, and risking revelations of an improper basis for peremptory strikes are genuine, these concerns are outweighed by the dangers of *not* conducting online research. The first obvious danger is the very real threat of jurors risking a mistrial or overturned verdict due to their own online misconduct. The legal landscape is littered with the many instances in which the hard work of a judge, lawyers, and other jurors has been undone by the actions of a single juror who has taken it upon himself or herself to venture online and "research" the issues, parties, and even evidence in a case, or to communicate with third parties (sometimes even one of the litigants themselves) about the case.[8] In 2011, the Arkansas Supreme Court overturned a capital murder conviction because of a juror's tweets from the jury box.[9] In 2012, the Vermont Supreme Court set aside a child sexual assault conviction after the revelation that a juror had gone online to research the cultural significance of the alleged crime in the Bantu culture of the Somali defendant.[10] Jurors have posted on Facebook about their deliberations, sent "friend" requests to parties, and even courted mistrials by communicating with a party on the social networking site. Equally disturbing is the very real possibility that—despite being warned not to engage in such online misconduct by the judge—some jurors may nevertheless do so and even lie about their actions.[11] With the palpable threat of online juror misconduct, attorneys who choose not to research or monitor jurors online risk never learning of such misconduct in the first place. The result is a disservice to their clients and to the administration of justice.

Besides not learning of actual online misconduct, another potential consequence for lawyers who pass up online juror research is the danger of seating a juror who has lied about significant information bearing on his or her suitability as a juror, such as his or her litigation history or opinions about issues central to this case. For example, in 2011, a prospective Oklahoma juror was questioned during voir dire in the murder trial of Jerome Ersland, a pharmacist who allegedly shot a would-be robber five times while the thief lay wounded and motionless on the floor.[12] The panelist was asked if she had previously expressed any opinion on the case, and she replied no. The defense then discovered a Facebook post she had made six months before trial, which read: "First hell yeah he need to do sometime!!! The young fella was already died from the gun shot wound to the head, then he came back with a diffrent gun and shot him 5 more times. Come let's be 4real it didn't make no sense!"[13] The panelist (who claimed to have forgotten making the

comments in question) was dismissed from the jury pool, found in contempt, and sentenced to 100 hours of community service.

Indeed, juror dishonesty during voir dire—and its consequences for all involved in the justice system—is an issue commanding increasing attention. Recently, a judge in Florida proposed that online searches of jurors' backgrounds be required so that trial lawyers can bring any withheld information to the court's attention before the start of actual trial.[14] Pinellas Circuit Judge Anthony Rondolino made the comments while denying a motion for new trial in the case of an 84-year-old woman who fell and died in the stairwell of an assisted living facility. The woman's estate sought $15 million, only to have a six-person jury find no negligence on the part of the facility. After trial, the plaintiff's lawyers did online research and found that all six jurors had failed to disclose their own civil litigation history. Collectively, this included three bankruptcies, two foreclosures, an eviction, a child support action, a paternity suit, five domestic violence cases, a declaratory judgment, an appeal, and a contract lawsuit.[15] Observing that there was "plenty of time to gather the information" during the two-week trial (including a three-day period when the court was recessed), Judge Rondolino proposed that lawyers be required to conduct online research and raise any objections after jury selection, but before trial. Such a process would avoid handing lawyers a "gotcha card" in which they could wait and see how the verdict turned out before choosing to come forward with the results of online research.

Perhaps no case demonstrates both the potential risks of not "Facebooking the jury" and the uncertainty displayed by courts about the issue of allowing such online investigation quite like *Sluss v. Commonwealth*.[16] In *Sluss*, appellant Ross Brandon Sluss had been convicted of (among other charges) murder and driving under the influence of intoxicants after crashing his pickup truck into a SUV with several passengers. One of the passengers, 11-year-old Destiny Brewer, died. The tragedy and ensuing criminal case garnered tremendous publicity, including extensive discussion online on sites like Facebook and Topix. The trial court, sensitive to the amount of attention the case had received, engaged in extensive voir dire procedures.

After his conviction, Sluss sought a new trial based on juror misconduct, arguing that two jurors, Virginia Matthews and jury foreperson Amy Sparkman-Haney, were Facebook "friends" of the victim's mother, April Brewer. During voir dire, both Matthews and Sparkman-Haney had been silent when the jurors were asked if they knew the victim or any of the victim's family. Moreover, during individual voir dire, Matthews replied unequivocally that she was not on Facebook, and though Sparkman-Haney acknowledged having a Facebook account and being vaguely aware that "something" had been set up in the victim's name, she did not share anything beyond that.[17]

While the court analyzed the nature of Facebook "friend" status and ultimately held that fact alone would be insufficient grounds for a new trial, it was clearly more troubled by the jurors' misstatements during voir dire, especially because it was unknown "to what extent the victim's mother and the jurors had actually communicated, or the scope of any actual relationship they may have had."[18] In what it acknowledged was "the first time that the Court has been asked to address counsel's investigation of jurors by use of social media," the Kentucky Supreme Court then turned to whether or not defense counsel should have discovered the online evidence of juror misconduct prior to the verdict.[19]

The court ultimately held that there was juror misconduct that warranted, at minimum, a hearing to determine the nature and extent of the Facebook interaction, if not an actual new trial. It also excused the attorney's failure to discover the misconduct earlier, because the jurors' answers during voir dire had given him "little reason . . . to think he needed to investigate a juror's Facebook account or that he even could have done so ethically given the state of the law at the time of trial."[20] But, the court did go on to an extensive discussion of the ethical parameters surrounding counsel's investigation of jurors on social media sites, and conceded that "the practice of conducting intensive internet vetting of potential jurors is becoming more commonplace."[21] The court observed that while much of the information being sought "is likely public, a reasonable attorney without guidance may not think this investigatory tactic appropriate, and it is still such a new line of inquiry that many attorneys who themselves are not yet savvy about social media may never even have thought of such inquiry."[22]

The *Sluss* case would not be the last case in which lawyers failed to discover, during voir dire, a juror's Facebook ties to a party, witness, or victim; the Kentucky Supreme Court encountered the issue the following year in *McGaha v. Commonwealth*, and so have other courts around the country.[23]

Judicial Attitudes toward Researching Jurors Online

Courts around the country have exhibited varying attitudes toward the concept of attorneys performing online research on prospective jurors. For example, in the 2013 state court criminal trial of a defendant accused of child sexual abuse, Montgomery County (Maryland) Judge Richard Jorden banned such research during voir dire, saying it could have "a chilling effect on jury service, by jurors, to know 'I'm going to go to the courthouse. . . . I'm going to be Googled. They're going to find all kinds of stuff on me,' and it feels kind of uneasy, at least."[24]

Federal judges have displayed similar reticence. In a May 2014 survey of judges conducted by the Federal Judicial Center, 25.8 percent of the respondents admitted that they banned

attorneys from using social media during voir dire (nearly 70 percent of the judges responded they never addressed this issue with lawyers).[25] When asked to explain why they didn't permit attorneys to engage in such research, those judges who answered accordingly pointed to both concerns for juror privacy and logistical considerations. Twenty percent of the judges wanted to protect juror privacy, while another 4 percent were worried about jurors feeling intimidated. Another 17 percent felt that allowing such research would be distracting, while 16 percent were concerned about the practice prolonging voir dire. Another third of the respondents considered such online research unnecessary, reasoning that attorneys could conduct it before court or that the information provided during "regular" voir dire was sufficient.

But increasingly, courts are not only recognizing a right to perform such research, but even imposing—in one jurisdiction (Missouri)—an affirmative duty to do so. In *Carino v. Muenzen*, a New Jersey medical malpractice case, the appellate court considered the plaintiff's attorney's request for a new trial after the lawyer had been prevented by the trial judge from conducting online research on the venire panel.[26] As jury selection began, defense counsel objected when he noticed his adversary accessing the Internet on his laptop. After acknowledging to the court that he was Googling the potential jurors, and pointing out "we've done it all the time, everyone does it. It's not unusual," the plaintiff's attorney was stunned when the court refused to allow it. The trial judge felt that allowing such juror research would jeopardize maintaining "a fair and even playing field."[27]

Although the appellate court affirmed the defense verdict on other grounds, it explicitly recognized the right to use the Internet to investigate potential jurors during voir dire, and concluded that the trial judge had acted unreasonably in preventing use of the Internet by the plaintiff's counsel. The court held:

> There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.[28]

In a federal court personal injury case, the defense appealed the unfavorable verdict on the grounds of its posttrial Internet research into two jurors who had failed to disclose material injuries and lawsuits involving themselves and relatives in response to questions posed in a juror questionnaire and voir dire.[29] The online research was performed using public records databases to get information that included lawsuits filed. The court rejected the defense's argument of recently discovered evidence of juror bias, finding instead that

the "defendant waived its present objections because the basis of the objections might have been known or discovered through the exercise of reasonable diligence."[30] In other words, no new trial was warranted because online resources were widely available to the defense long before the actual verdict, and the defense had an obligation to explore them.

And in the 2010 case of *Johnson v. McCullough*, the Missouri Supreme Court came up with a new standard in providing competent representation in the digital age—the duty to conduct online research during the voir dire process.[31] During the voir dire phase of a medical malpractice trial, the plaintiff's counsel inquired about whether anyone on the venire panel had ever been a party to a lawsuit. While several members of the panel were forthcoming, one prospective juror, Mims, did not disclose that she had been a party to litigation, and was selected as a jury member. Following a defense verdict, the plaintiff's counsel researched Mims on Missouri's PACER-like online database, Case.net, and learned of multiple previous lawsuits involving the juror. The trial court granted a motion for new trial based on Mims's intentional concealment of her litigation history, but the Missouri Supreme Court reversed. The court reasoned:

> [I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.[32]

In light of this, the court imposed a new affirmative duty on lawyers, holding that "a party *must* use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial."[33]

The *Johnson* standard was codified in Missouri Supreme Court Rule 69.025, which became effective January 1, 2011. It mandates background Internet searches on potential jurors, specifically Case.net searches of a potential juror's litigation history. However, the first reported case interpreting Rule 69.025 and the *Johnson* standard would soon raise more questions about the scope and timing of such Internet searches by trial counsel.[34]

In *Khoury v. ConAgra Foods, Inc.*, the plaintiffs brought suit against ConAgra for personal injury and loss of consortium damages, claiming that Elaine Khoury suffered from a lung disease, bronchiolitis obliterans, allegedly caused by exposure to chemical vapors during her preparation and consumption of ConAgra's microwave popcorn. After a voir dire in

which the members of the venire panel were questioned about their prior litigation history, both sides conducted searches of Missouri's automated case record service. The parties exercised both their peremptory strikes and their strikes for cause, and a jury was empaneled. The next morning, ConAgra's counsel brought to the court's attention that, separate and apart from litigation history information, their Internet research had uncovered Facebook postings by one juror, Piedimonte, indicative of bias and intentional failure to disclose information. Piedimonte, they said, was "a prolific poster for anti-corporation, organic foods."[35] ConAgra moved for a mistrial or, alternatively, to strike Piedimonte from the jury. The court denied the motion for mistrial, but did strike Piedimonte from the jury and proceeded with 12 jurors and three (instead of four) alternate jurors. After a defense verdict, the Khourys appealed, arguing, among other things, that the trial court erred in removing juror Piedimonte, maintaining that ConAgra's broader Internet search was not timely. The appellate court rejected this argument, observing that the *Johnson* standard and the subsequent Supreme Court Rule 69.025 were limited to Case.net searches of potential jurors' litigation history, not a broader search for any alleged material nondisclosure.

The court also acknowledged the potential in the digital age for a revisiting of Rule 69.025, stating that "the day may come that technological advances may compel our Supreme Court to re-think the scope of required 'reasonable investigation' into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled," including sites like Facebook or LinkedIn.[36]

Ethics Opinions Discussing Researching Jurors Online

In addition to actual case authority granting some measure of precedential value and judicial perspective, the ethics opinions promulgated by various local or state ethics bodies as well as the American Bar Association (ABA) itself provide much-needed guidance for lawyers contemplating "Facebooking the jury." The first of these was New York County Lawyers' Association (NYCLA) Committee on Professional Ethics Formal Opinion 743, which examined not only lawyer online research into prospective jurors, but also the ramifications of New York Rule of Professional Conduct 3.5 and the investigation of jurors during the ongoing trial.[37] The committee divided its discussion into two distinct phases: the pretrial phase, in which there are only prospective, not actual, jurors; and the evidentiary or deliberation phase.

In both phases, the committee made it clear that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page," is permissible so long as the lawyer has no direct or indirect contact with jurors.[38] Referencing not only the *Johnson v. McCullough* decision and the *Carino v. Muenzen* holding but also the New York State Bar

Association's previous Ethics Opinion 843 on accessing publicly available social networking pages of witnesses or unrepresented parties, Opinion 743 analogized that purely passive monitoring of jurors was comfortably within ethical bounds. However, the committee ventured into a murkier area with its discussion of impermissible contact. The opinion cautions lawyers to not "act in any way by which the juror becomes aware of the monitoring."[39]

The committee went even further in its concern about what might be categorized as indirect contact, such as the automatic notification sent by a site to its user alerting him or her that a third party has viewed or accessed the user's profile. As the committee opined, "[i]f a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[40]

But does such a broad interpretation of "impermissible communication" make sense, not just with regard to the functionality of existing technology but also of the features that future technologies may offer a user in terms of alerts? Is an autonotification truly a "communication"? A terse, automatically generated notification lacking any substantive content should not reasonably be considered a "communication." Equally important, it should not be treated as an impermissible communication by the attorney because it is not sent consciously or otherwise by the attorney himself or herself.

Following the NYCLA, the Committee on Professional Ethics for the New York City Bar Association (NYCBA) issued its own ethics opinion the following year.[41] Citing cases like *Johnson* and *Carino*, along with cases detailing lawyers' awareness of online juror misconduct, the NYCBA committee agreed with the earlier ethics opinion and held that an attorney may conduct juror research using social media services and websites. And, like the NYCLA opinion, the NYCBA opinion made it clear that attorneys performing such research could not engage in communication with a juror. However, this opinion proceeded to address the broader issue of what exactly constitutes an impermissible, ex parte communication with a juror.

"Communication," the committee ruled, should be understood in its broadest sense as "the process of bringing an idea, information or knowledge to another's perception."[42] This would include not only sending a specific, substantive message, but also any notification to the other person being researched that he or she has been the object of a lawyer's search. The paramount issue, in the eyes of the committee, is that the juror or potential juror not learn of the attorney's actions. As the opinion states, "the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research."[43]

Like its NYCLA counterpart, the NYCBA opinion discusses an attorney's obligation to reveal improper juror conduct to the court. But it also addresses other issues, such as the potential for deception or misrepresentation when researching jurors on social networking sites. Citing New York Rule of Professional Conduct 8.4's prohibition on deception and misrepresentation, the opinion states that—in the jury research context—attorneys may not misrepresent their identities, associations, or memberships in order to access otherwise unavailable information about a juror. So, for example, an attorney "may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network."[44]

Another issue that troubled the NYCBA committee was the impact on jury service of lawyers using social media sites to research jurors. Echoing the concerns of some judges who have banned this practice by lawyers, the committee admitted that "[i]t is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives."[45] But, the committee pointed out, viewing a public posting is similar "to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption."[46] The committee also added that "[t]he potential juror is aware that her information and images are available for public consumption."[47]

These two ethics opinions are not the only source of guidance from the New York Bar. In March 2014, the Commercial and Federal Litigation Section of the New York State Bar Association issued a comprehensive set of *Social Media Ethics Guidelines*.[48] These guidelines address a variety of issues impacting a practitioner's use of social media. Guideline 6 addresses various aspects of "researching jurors and reporting juror misconduct."[49] Relying on and citing the two New York ethics opinions, these guidelines reaffirm that: (1) lawyers can conduct social media research; (2) lawyers may view a juror's social media website as long as there is no communication with the juror; (3) lawyers may not use deceit to view a juror's social media profile; (4) lawyers may view or monitor the social media profile or posts of a juror during trial, provided that there is no communication; and (5) lawyers must promptly inform the court of possible juror misconduct the lawyer discovers by viewing a sitting juror's online postings.

Oregon was the next state to address the issue of "Facebooking the jury," as the Oregon Bar Association Ethics Committee examined lawyer investigation of the social networking profiles of jurors, witnesses, and opposing parties in Formal Opinion No. 2013-189.[50] With respect to jurors, Oregon's key holding followed its New York counterparts. Oregon affirmed that lawyers may access a juror's publicly available social networking information,

but neither a lawyer nor the lawyer's agent may send a request to a juror to access nonpublic personal information on a social networking site.

Oregon, however, ventured into uncharted territory by further advising that Oregon Rule of Professional Conduct 8.4(a)(3), which prohibits deceitful conduct, does *not* automatically preclude a lawyer from enlisting an agent to deceptively seek access to another person's social networking profile. It held that while a lawyer "may not engage in subterfuge designed to shield [his or her] identity from the person" whose profile he or she is seeking to access, an exception exists.[51] Oregon Rule 8.4(b) (which has no analog in the ABA Model Rules) creates an exception permitting lawyers "to advise clients and others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with [other] Rules of Professional Conduct."[52] Under such "limited instances," the Oregon ethics authorities concluded that a lawyer "may advise or supervise another's deception to access a person's nonpublic information on a social networking website" as part of an investigation into unlawful activity.[53] Could this language be used to justify having a trial consultant, investigator, or other agent pose as someone else or otherwise be deceptive in order to gain access to a juror's privacy-restricted profile if there is a suspicion of juror misconduct? While the language is vague by referring only to "persons," the wiser course of action would be to adhere to the opinion's earlier mandate: "a lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so."[54]

In April 2014, the ABA weighed in with Formal Opinion 14-466, "Lawyer Reviewing Jurors' Internet Presence."[55] Like the New York and Oregon ethics opinions, Opinion 466 held that it is not unethical for a lawyer to review the Internet presence of a juror or potential juror, so long as the lawyer refrains from communicating, either directly or indirectly, with the juror, and neither an applicable law nor a court order has limited such review. Noting the strong public interest in identifying jurors who might be tainted by improper bias or prejudice (à la *Sluss*), the ABA's Standing Committee on Ethics and Professional Responsibility sought to balance this interest with the equally strong public policy in preventing jurors from being approached ex parte by either the parties to a case or their agents. Opinion 466 identifies three levels of attorney review of a juror's Internet presence:

> passive lawyer review of a juror's website or ESM [electronic social media] that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

> active lawyer review where the lawyer requests access to the juror's ESM; and

> passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer[.]56

As with earlier state ethics opinions, the ABA opinion concludes that there is nothing ethically forbidden about passive review of a juror's public online profile. Analogizing this to driving down a prospective juror's street to see where he or she lives, the opinion finds that "[t]he mere act of observing that which is open to the public" does not constitute an act of communication.[57] At the opposite end of the spectrum, the opinion states that level two (active lawyer review) is ethically prohibited, because it constitutes communication to a juror seeking information that he or she has not made public. Continuing with the previous analogy, Opinion 466 considers this situation to be akin to "driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[58]

With regard to level three, Opinion 466 departs from the New York ethics opinions and holds that such autonotifications do not amount to communication to the juror. The opinion states, "The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of [Model] Rule 3.5(b)."[59] Returning to its earlier analogy, the opinion states that the site—not the lawyer—is communicating with the juror, based on a purely technical feature of the site itself. As the opinion describes it, "[t]his is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer ha[s] been seen driving down the street."[60]

Despite this divergent view of what constitutes an impermissible "communication," the ABA opinion nevertheless has words of caution for lawyers who review juror social media profiles. First, hearkening back to the new standard of attorney competence that mandates being conversant in the benefits and risks of technology, the opinion reminds lawyers to be aware of "these automatic, subscriber-notification features."[61] Second, the opinion refers to Model Rule 4.4(a) on prohibiting lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person."[62] It admonishes lawyers reviewing juror social media profiles to "ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[63]

When it was issued, Opinion 466 received national publicity and engendered some controversy, including criticism that it sanctioned the wholesale invasion of juror privacy.[64] But the very next state to consider the issue of researching jurors using social media followed the ABA approach. The Pennsylvania Bar Association, in early October 2014, issued Formal Opinion 2014-300.[65] Agreeing with every other jurisdiction to speak on the

issue, the Pennsylvania Bar concluded that lawyers may ethically use online sites including social networking platforms to research jurors, so long as the information was publicly available and doing so did not constitute an ex parte communication. The Pennsylvania Bar broke ranks with New York, however, on the question of whether a passive notification sent by a site like LinkedIn to notify users that an individual has viewed their profile constitutes an ex parte communication. The committee agreed completely with ABA Formal Opinion 14-466, explaining that "[t]here is no ex parte communication if the social networking website independently notifies users when the page has been viewed."[66] Additionally, "a lawyer may be required to notify the court of any evidence of juror misconduct the lawyer discovers on a social networking website."[67]

Conclusion

Given human nature and how some percentage of the population will react when plucked from the anonymity of their personal lives by a jury summons and subjected to probing questions by attorneys, it is inevitable that some people will lie during voir dire. And despite revised jury instructions that specifically warn against online investigation or communications about a case using social media, instances of tweets and Facebook posts causing mistrials, threatening to overturn and overturning convictions, and resulting in increasingly stiff punishments for errant jurors continue to crop up regularly on the legal landscape.[68]

Researching the social media activity of prospective jurors, and continuing to monitor social media activity during trial, can be vital to seating an honest, unbiased jury and to ensuring that any online misconduct is promptly brought to the court's attention. The practice of such investigation has not only become a key part of the role played by modern jury consultants,[69] it has also been immortalized in pop culture in television courtroom dramas like *The Good Wife* and *How to Get Away with Murder*. It has become an important tool in documenting juror misconduct,[70] and the ready availability of juror research applications and affordable, user-friendly software has leveled the playing field for solos and small firm attorneys who may not be able to afford trial consultants.[71] A greater understanding of the ethical boundaries governing such research, however—on the part of not only lawyers but the judiciary as well—is critical to ensuring that an already widespread practice is properly conducted. n

Notes

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3. United States v. Kilpatrick, No. 10-20403, 2012 WL 3237147, at *3 (E. D. Mich. Aug. 7, 2012) (rejecting the arguments made against the empaneling of an anonymous jury, because an anonymous jury would prevent the lawyers from monitoring the jurors' use of social media during the trial in order to determine if the jurors were engaging in online misconduct).

4. Steve Stout, *Judge Denies Arias Motion for Change of Venue, Jurors' Twitter Names*, CBS 5 KPHO (Dec. 23, 2013), www. kpho. com/story/24070733/judge-sherry-stephens-has-ruled-the-sentencing-phase-retrial-of-convicted-murderer-jodi-arias-will-stay-in-phoenix.

5. Jasmine Ulloa & Tony Plohetski, *District Attorney Lehmberg Fires Key Lawyer in Her Office*, Austin Am. -Statesman, June 12, 2014, at A1.

6. *Id.* at A9.

7. *Id.*

8. *See, e. g.* , State v. Abdi, 45 A. 3d 29, 36–37 (Vt. 2012).

9. Dimas-Martinez v. State, 385 S. W. 3d 238, 248–49 (Ark. 2011).

10. *Abdi*, 45 A. 3d at 36–37.

11. *See, e. g.* , State v. Dellinger, 696 S. E. 2d 38, 40, 44 (W. Va. 2010). For example, in one recent Florida case, juror Alexander Sutton made comments on his Facebook page that reflected disdain for jury service and arguably demonstrated bias, and then compounded the wrongdoing by lying to the judge about it, resulting in contempt charges. *See* Jane Musgrave, *Palm Beach County Juror Removed in Handcuffs, Faces Contempt Charge over Facebook Posting*, Palm Beach Post, June 2, 2014, www. mypalmbeachpost. com/news/news/crime-law/local-juror-removed-in-handcuffs-faces-contempt-ov/ngBDL/.

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13. *Id.*

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17. *Id.* at 222.

18. *Id.* at 223–24.

19. *Id.* at 226.

20. *Id.*

21. *Id.* at 227.

22. *Id.*

23. 414 S. W. 3d 1 (Ky. 2013); *see also* Slaybaugh v. State, No. 79A02-1411-CR-798, 2015 WL 5612205 (Ind. Ct. App. Sept. 24, 2015); State v. Webster, 865 N. W. 2d 223 (Iowa 2015).

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27. *Id.* at *4.

28. *Id.* at *10.

29. Burden v. CSX Transp. , Inc. , No. 08-cv-04-DRH, 2011 WL 3793664, at *1 (S. D. Ill. Aug. 24, 2011).

30. *Id.* at *9.

31. 306 S. W. 3d 551 (Mo. 2010) (en banc).

32. *Id.* at 558–59.

33. *Id.* at 559 (emphasis added).

34. Khoury v. ConAgra Foods, Inc., 368 S. W. 3d 189, 202 (Mo. Ct. App. 2012).

35. *Id.* at 193.

36. *Id.* at 203.

37. NYCLA Comm. on Prof'l Ethics, Formal Op. 743, at 1 (2011), *available at* www. nycla. org/siteFiles/Publications/Publications1450_0. pdf.

38. *Id.* at 2–3.

39. *Id.* at 4.

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41. N. Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012), *available at* www. nycbar. org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

42. *Id.* (emphasis omitted).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Commercial & Fed. Litig. Section, N. Y. State Bar Ass'n, Social Media Ethics Guidelines (2015), *available at* www. nysba. org/socialmediaguidelines/.

49. *Id.* at 25–30.

50. Or. State Bar, Formal Op. 2013-189, at 577 (2013), *available at* www. osbar. org/_docs/ethics/2013-189. pdf.

51. *Id.* at 581.

52. *Id.*

53. *Id.* at 582.

54. *Id.* at 578 n. 2.

55. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

56. *Id.* at 2.

57. *Id.* at 4.

58. *Id.*

59. *Id.* at 9.

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 6 (quoting MODEL RULES OF PROF'L CONDUCT R. 4. 4(a)).

63. *Id.*

64. *SeeEditorial:A Troublesome Opinion regarding Juror Internet Research*, CONN. LAW TRIB. , June 24, 2014 ("The combination of allowing lawyers to do internet research on jurors and requiring the reporting of potential inconsistencies has the potential to make jury selection more adversarial and less pleasant for the citizens who are doing their civic duty. ").

65. Pa. Bar Ass'n, Formal Op. 2014-300 (2014).

66. *Id.*

67. *Id.*

68. *See, e. g.* , JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW (2010); THADDEUS A. HOFFMEISTER, SOCIAL MEDIA IN THE COURTROOM: A NEW ERA FOR CRIMINAL JUSTICE? 49–54 (2014).

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Authors

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36 P.3d 468
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In re Complaint as to the CONDUCT OF L. Britton EADIE, Accused.

OSB 96-80, 97-105, 97-109, 97-114; SC S47751.

Supreme Court of Oregon.

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Decided December 6, 2001.

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L. Britton Eadie, West Linn, argued the cause and filed the brief in propria persona.

Mary A. Cooper, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

Before CARSON, Chief Justice, and GILLETTE, DURHAM, LEESON, De MUNIZ, and BALMER, JJ.[1]

PER CURIAM.

In this lawyer discipline proceeding, the Oregon State Bar (Bar) charged the accused with statutory violations and multiple violations of the Code of Professional Responsibility in connection with his representation of several clients: Disciplinary Rule (DR) 1-102(A)(3) (dishonesty and misrepresentation); DR 1-102(A)(4) (conduct prejudicial to administration of justice); DR 6-101(A) (incompetence); DR 6-101(B) (neglect of client matter); DR 7-102(A)(5) (false statement during representation); DR 7-106(C)(1) (alluding to inadmissible evidence); DR 7-106(C)(7) (intentionally or habitually violating rules of procedure or evidence); DR 7-110(B) (*ex parte* communications); ORS 9.460(2) (misleading statements); and ORS 9.527(4) (willful deceit or misconduct). A trial panel of the Disciplinary Board concluded that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), DR 6-101(A), DR 7-102(A)(5), DR 7-106(C)(7), and ORS 9.460(2), and recommended that the accused be disbarred. Our review is automatic. BR 10.1. On *de novo* review, BR 10.6, we find that the accused violated DR 1-102(A)(3), DR 1-102(A)(4), DR 6-101(A), DR 7-102(A)(5), DR 7-106(C)(1), and DR 7-106(C)(7). We conclude that a three-year suspension from the practice of law is the appropriate sanction.

I. FACTS AND TRIAL PANEL FINDINGS

The Bar has the burden of establishing misconduct by clear and convincing evidence. BR 5.2. "Clear and convincing evidence" means evidence establishing that the truth of the facts asserted is highly probable. *In re Johnson,* 300 Or. 52, 55, 707 P.2d 573 (1985). We find proof of the following facts by clear and convincing evidence.

A. *Burke Matter*

The accused represented Shon in a dispute with her neighbor, Burke, regarding an easement.

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On January 31, 1995, the accused filed a complaint seeking to terminate Burke's easement over Shon's property. The complaint also sought costs and disbursements. Burke did not retain a lawyer to represent her, and the parties thereafter negotiated a settlement agreement. The agreement provided that Shon would dismiss the complaint in return for Burke's promises to execute and return a quitclaim deed, and to remove structures and debris from the property. Burke did not file an answer to the complaint.

On March 8, 1995, in response to a letter that Burke had written to the accused about the settlement, the accused wrote a letter to Burke summarizing the terms of the settlement and concluding:

"The easement is terminated as indicated in your letter. *The complaint will be dismissed when the properly executed quit-claim deed is returned and recorded, as indicated above.*"

(Emphasis added.)

Burke executed and returned the quitclaim deed, and fulfilled her other duties under the settlement agreement. The accused thereafter submitted a proposed form of judgment to the trial court, with a copy to Burke, that included an award of costs to Shon. In his cover letter, the accused informed the court that he was seeking a prevailing-party fee. The trial court returned the proposed judgment to the accused, explaining that, unless stipulated, Shon was not a prevailing party and that she therefore was not eligible to recover costs. Burke also wrote a letter to the accused stating that she "d[id] not agree to pay [Shon's] costs and disbursements."

The accused thereafter attempted to recover costs by applying to the trial court for a default judgment against Burke, alleging that Burke had "failed to answer or appear" and not mentioning the settlement agreement. The accused did not serve a copy of the application on Burke. The court entered the default judgment, which included an award of costs. Burke became aware of the entry of the default judgment only after the accused demanded payment under the judgment.

Burke moved to set aside the default judgment on the basis of "fraud, misrepresentation, or other misconduct." ORCP 71 B(1)(c). The trial court denied the motion.

In its cause of complaint relating to the Burke matter, the Bar charged the accused with violating DR 1-102(A)(3), DR 1-104(A)(4), and DR 7-110(B). The Bar maintained that the accused made a misrepresentation and engaged in prejudicial conduct when he reached an agreement with Burke that did not mention costs, then later attempted to improve on the settlement by filing a judgment of dismissal that included an award of costs. The Bar also alleged that the accused engaged in a written communication with the court on the merits of an adversary proceeding without delivering a copy to the opposing party when he submitted the proposed default judgment to the court without serving a copy on Burke.

The trial panel concluded, apparently on grounds of issue preclusion, that the trial court's denial of Burke's motion to set aside the default judgment under ORCP 71 B(1)(c) precluded the trial panel from finding a disciplinary violation. The trial panel also found that, because Burke had not filed an answer to Shon's complaint, she "had not filed an appearance in the litigation that would have entitled her to notice" from the accused regarding the accused's application for a default judgment. Accordingly, the trial panel concluded that the accused had not violated DR 1-102(A)(3), DR 1-102(A)(4), or 7-110(B) as charged.

B. *Collins Matter*

In 1996, the accused represented Collins in a personal injury action against Harbertson, the driver of a car that allegedly had struck Collins. Safeco, Harbertson's insurer, retained lawyers Brisbee, Mead, and Johnston to represent Harbertson.

After the accused had filed a complaint against Harbertson, the trial judge set pretrial conference and trial dates. Harbertson's lawyers thereafter moved to strike portions of the complaint. After successfully arguing the motion to strike, Mead gave the accused a proposed order for submission to

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the judge. The accused objected to the proposed order and added:

"* * * My notes indicate that [the judge] specifically stated that this matter would be put back on the trial docket, I think he intended that it would be scheduled for trial earlier than May 1996? An order to that effect would be appropriate." (Question mark in original.)

The accused then submitted a proposed order to the judge, rescheduling the pretrial conference and trial dates. In a letter accompanying the proposed order, the accused stated:

> "I believe that this proposed form of order accurately reflects your findings and rulings on defendants' motion and *your intent as to rescheduling the pre-trial and trial dates in this case*."

(Emphasis added.) After the judge signed the accused's proposed order, Brisbee reminded the judge that he had not discussed changing the pretrial conference and trial dates, and questioned whether the judge had contemplated doing so. The judge agreed with Brisbee and modified the order to delete the date changes that the accused had submitted to the judge.

In April 1996, Brisbee scheduled a hearing before a different judge on a motion to compel production. The day before the hearing, the accused, without serving Harbertson's lawyers, filed a written motion to disqualify that judge. Harbertson's lawyers did not learn about the accused's motion until they appeared before the judge, who sent them to a courtroom where a different judge was presiding. When they arrived at that courtroom, however, the accused announced that he planned to file an affidavit of prejudice against that judge as well. After a period of delay, a third judge heard the defense motion to compel production.

Several months later, on October 6, 1996, a judge in the Collins litigation imposed a sanction on the accused for filing a meritless discovery motion. Ten days later, on October 16, 1996, the accused served a subpoena *duces tecum* on a Safeco employee to produce Safeco's file on the Collins/Harbertson accident by October 24, 1996. Brisbee told Johnston to file a motion to quash the subpoena. Because the accused's subpoena required production in only eight days, Johnston acted quickly. On October 16, the day that the accused served the subpoena, Johnston called the accused and left a telephone voice message, stating that she wanted to discuss her intent to file a motion to quash and that, if she did not hear from him, she would appear in court *ex parte* on October 18, 1996, to request an expedited hearing on the motion. Johnston's secretary also telephoned the accused and told him of Johnston's plan. In response to that information, the accused told the secretary, among other things, "I object," and hung up. Later, Johnston's secretary attempted to send the accused a facsimile copy of the motion to quash, but the facsimile would not go through, and no one answered the telephone at the accused's office. Johnston then told her law clerk, Morrow, to deliver a copy of the motion to the accused's office. Morrow went to the accused's office on the evening of October 17, 1996. Morrow saw the accused through a glass door and told him that he had documents to deliver. The accused would not open the door, so Morrow told the accused that he was leaving the documents and placed them in the door jamb while the accused watched.[2]

On October 18, 1996, Johnston appeared in court and received a date for the hearing on the motion to quash. The accused did not appear. Johnston then sent the accused a facsimile letter stating the date and time for the hearing. The accused responded by writing a letter that accused Brisbee and Johnston of "judge shopping," and stated that the accused neither had been served with the motion to quash nor had been advised that Johnston planned to appear in court to request a hearing date on the motion. The accused sent copies of that letter to two Washington County judges. At a hearing on October 22, 1996, the accused told the judge: "[T]hey didn't even attempt to

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confer with me. There was no one that made any effort to communicate with me in my office in any way whatsoever."

The case of *Collins v. Harbertson* eventually was tried to a jury, which returned a defense verdict. The court thereafter imposed sanctions

on the accused for failing to obey discovery orders.

In its causes of complaint relating to the Collins matter, the Bar alleged that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), DR 7-102(A)(5), ORS 9.460(2), and ORS 9.527(4) by seeking to have the judge change the pretrial conference and trial dates. The Bar alleged that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), DR 7-102(A)(5), ORS 9.460(2), and ORS 9.527(4) by telling several judges that opposing counsel had made no effort to notify him of Johnston's *ex parte* court appearance. Finally, the Bar alleged that the accused had violated DR 7-106(C)(7) and DR 7-110(B) by failing to serve the written motion to disqualify the trial judge on Harbertson's lawyers. According to the Bar, an established rule of procedure required him to do so.

The trial panel found that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), and ORS 9.460 by misrepresenting to the court his intentions regarding scheduling in *Collins v. Harbertson*. However, the trial panel held that the accused did not violate ORS 9.527(4) or DR 7-110(B).[3]

The trial panel also found that it could not determine whether the accused had received the telephone messages from Johnston or her secretary, or Johnston's facsimile about the hearing on scheduling the defense motion to quash. However, the trial panel accepted Morrow's testimony that Morrow had delivered the papers, and it specifically refused to credit the accused's testimony on that point. The trial panel found that the accused violated DR 1-102(A)(3) and DR 1-102(A)(4).[4]

C. *Cassady Matter*

The accused represented Cassady against Huber in a personal injury action in which the sole issue was damages. During jury selection in the case, the accused improperly mentioned Huber's insurance coverage. *See* OEC 411 (limiting admissibility of evidence concerning liability insurance); *Johnson v. Hansen,* 237 Or. 1, 4, 389 P.2d 330 (1964) (unnecessary injection of insurance information prejudicial). Although the jury selection proceedings were not transcribed, the judge who presided over the trial testified at the disciplinary hearing that, when a potential juror raised the issue of insurance, the accused responded that there was plenty of insurance to go around and that the jury should not worry about it. During trial, the accused again raised the issue of Huber's insurance coverage, contrary to the judge's repeated admonitions not to do so.

During the course of the trial in *Cassady v. Huber,* the accused did not appear to be prepared for trial and was either unfamiliar with or unwilling to comply with the rules of evidence. For example, during his direct examination of a physician that the accused had called as an expert on Cassady's behalf, he handed the witness a stack of medical bills that the witness had not seen previously and asked him whether the bills were reasonable and necessary. It also became evident during the trial that the accused had failed to order a copy of the transcript of Cassady's deposition. Accordingly, he was unprepared when defense counsel used that deposition transcript at trial to impeach Cassady.

The accused also ignored the trial court's evidentiary rulings. For example, the accused repeatedly attempted to introduce hearsay, despite the trial court's repeated rulings that those reports and opinions were inadmissible. Moreover, during his direct

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examination of Cassady's treating physician, the accused asked the physician questions about which the physician had no personal knowledge and then ignored the court's rulings about those questions.

The jury began its deliberations in *Cassady v. Huber* late on the second day of trial. According to the trial judge, the case could have been tried more quickly if the accused had been prepared

and competent. The jury awarded Cassady compensatory damages.

Huber promptly paid the amount that she owed under the judgment, and the accused accepted satisfaction of the judgment on Cassady's behalf. Thereafter, the accused filed a motion for a new trial. Huber opposed the motion, arguing that there was no legal basis for the motion and requesting sanctions against the accused for having filed it. *See Nickerson and Nickerson,* 296 Or. 516, 520, 678 P.2d 730 (1984) (party cannot accept benefits of judgment and also pursue course that might overthrow right to benefits). The court set a hearing date on the motion for a new trial and notified the accused of that date. The accused failed to appear despite the court's efforts to contact him. The court held the accused in contempt and, in its contempt order, noted that the accused's affidavit accompanying his motion for a new trial was "full of inaccuracies."[5] The court also denied Cassady's motion for a new trial. Following a subsequent hearing on the defense motion for sanctions against the accused for having filed the motion for a new trial, the trial court imposed sanctions on the accused for filing the baseless motion for a new trial and for making false statements in the affidavit that accompanied the motion.[6]

In its cause of complaint relating to the Cassady matter, the Bar charged the accused with violating DR 6-101(A), DR 6-101(B), DR 7-106(C)(1), and DR 7-106(C)(7).[7]

The trial panel concluded that the accused had failed to represent Cassady competently, in violation of DR 6-101(A), and that he intentionally or habitually had violated procedural and evidentiary rules, in violation of DR 7-106(C)(7). However, the trial panel concluded that the Bar had not shown that the accused had neglected a legal matter in representing Cassady, in violation of DR 6-101(B), or that he had alluded to inadmissible evidence, in violation of DR 7-106(C)(1).[8]

D. *Martin Matter*

The accused represented Martin in a personal injury case for injuries that she received when a kitchen cabinet in her apartment fell on her. The complaint that the accused filed on Martin's behalf named many defendants, including various subcontractors and others, some of whom later provided evidence that they should not have been named as defendants.

Several of the defendants named in the complaint filed motions for summary judgment, and the accused delegated responsibility for opposing those motions to a new associate in his office, Gresham. Gresham had minimal legal experience and never before had opposed a motion for summary judgment. The accused was aware of Gresham's inexperience, but he assigned the matter to Gresham nonetheless.

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To respond to each defendant's motion for summary judgment, Gresham needed to submit documents or affidavits on Martin's behalf that would show the court that there was a genuine issue of material fact requiring a trial. ORCP 47 C. Rather than doing so, Gresham opposed the motions orally, relying solely on legal arguments. The trial court granted the defense motions, then stated:

> "I will be fairly blunt. I suspect that at least half the motions I just granted could have been overcome by appropriate documents had they been filed. Without their being filed, I can't do the right thing. I have to do the legally required thing * * *."

Thereafter, the trial court imposed sanctions on the accused for failing to investigate information suggesting that claims against several of the defendants whom he had named in the complaint should have been dismissed. *See* ORCP 17 C (authorizing imposition of sanctions against lawyers who file pleadings not based on lawyer's "reasonable knowledge, information and belief,

formed after the making of such inquiry as is reasonable under the circumstances"). According to the court, the accused's conduct was "the most egregious set of circumstances I have ever seen."

In its cause of complaint relating to the Martin matter, the Bar charged the accused with violating DR 6-101(A) and DR 6-101(B). The trial panel concluded that the accused did not represent Martin competently, in violation of DR 6-101(A). However, the trial panel concluded that the Bar had not shown that the accused had neglected a legal matter entrusted to him, and it therefore dismissed the charge under DR 6-101(B).

E. *Trial Panel Sanction Determination*

The trial panel concluded that, in view of the prior disciplinary record and the ethical violations found by the trial panel arising out of four separate cases, and involving numerous and factually separate circumstances, "disbarment is the only way to protect the public and the integrity of the profession."

II. ISSUES ON REVIEW

A. *Burke Matter*

1. DR 1-102(A)(3)

It is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 1-102(A)(3). To violate the rule, an accused's misrepresentations, whether direct or by omission, must be knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process. *See In re Kluge,* 332 Or. 251, 255, 27 P.3d 102 (2001) (so stating).

As a threshold matter, we address whether the trial court's denial of Burke's motion to set aside the default judgment under ORCP 71 B(1)(c) precluded the trial panel from holding that the accused had violated DR 1-102(A)(3). Although there may be circumstances in which the doctrine of issue preclusion would prevent consideration of a claim that a lawyer had violated a disciplinary rule, issue preclusion plays no role here. Issue preclusion requires, among other things, that the party sought to be precluded was a party (or was in privity with a party) to the prior proceeding and that the party sought to be precluded had a full and fair opportunity to be heard on that issue. *See Nelson v. Emerald People's Utility Dist.,* 318 Or. 99, 104, 862 P.2d 1293 (1993) (setting out elements of issue preclusion). The Bar neither was a party nor was in privity with a party in *Shon v. Burke*. Even assuming that the terms "fraud, misrepresentation, or other misconduct" under ORCP 71 B(1)(c) mean the same as "dishonesty, fraud, deceit, or misrepresentation" under DR 1-102(A)(3), the Bar did not have a full and fair opportunity to be heard in the hearing on Burke's motion under ORCP 71 B(1)(c) to set aside the default judgment. The trial panel was not constrained by principles of issue preclusion from finding that the accused intentionally had misrepresented the question of payment of court costs in his settlement letter to Burke and that Burke had relied on the omission to her detriment.

We turn to the merits on this issue. The Bar contends that the accused violated DR

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1-102(A)(3) and DR 1-102(A)(4) by making a misrepresentation by omission to Burke in the settlement agreement and by applying for a default judgment that included costs after he had told Burke that he would dismiss the complaint once she had complied with the terms of the settlement agreement. The accused contends that his conduct was not unethical.

We find that the accused intentionally omitted from the settlement agreement his intent to seek costs. The complaint that the accused filed in *Shon v. Burke* made clear that the accused sought costs. However, Burke objected to paying costs. Burke's objection indicates that, to her, the matter of costs was an important element of the settlement. The settlement agreement that the

accused sent to Burke made no mention of costs, leading Burke to believe that the settlement did not include them. The accused intentionally failed to disclose a material fact—namely, that he intended to seek costs—to obtain Burke's acquiescence to settle her dispute with Shon. The accused violated DR 1-102(A)(3).

We turn to the accused's submission of a default judgment to the court that contained an award of costs to Shon after the parties had settled the case. As we have explained, the accused concealed his intent to recover costs against Burke by not including them in the settlement agreement. After Burke had agreed to the settlement and had complied with its terms, she was entitled to believe that the matter was resolved and that the accused would dismiss the action. The accused did not inform Burke that he intended to seek a default judgment notwithstanding the settlement. The accused's failure to correct a false impression created by nondisclosure of a material fact—that the settlement agreement did not resolve completely the case of *Shon v. Burke*—was a misrepresentation under DR 1-102(A)(3).

2. DR 1-102(A)(4)

It is professional misconduct for a lawyer to "[e]ngage in conduct that is prejudicial to the administration of justice." DR 1-102(A)(4). To establish a violation of that rule, the Bar must show: (1) that the accused lawyer engaged in "conduct" by doing something that the lawyer should not have done or by failing to do something that the lawyer was supposed to do; (2) that the conduct occurred during the course of a judicial proceeding or another proceeding that has the trappings of a judicial proceeding; and (3) that the conduct was prejudicial because it involved several acts that caused some harm to the administration of justice or because it involved a single act that caused substantial harm to the administration of justice. *In re Gustafson,* 327 Or. 636, 643, 968 P.2d 367 (1998).

The Bar argues that the accused violated DR 1-102(A)(4) by applying for a default judgment for costs against Burke, contrary to the settlement agreement that called for dismissal of Shon's action against Burke, and by failing to give Burke notice, under ORCP 69 A(1), of his intent to apply for a default judgment. The Bar contends that Burke's "substantive interests were substantially and adversely affected by the Accused's conduct."

As we have explained above, to establish a violation of DR 1-102(A)(4), the Bar must satisfy all three prongs of the test summarized in *Gustafson*. Here, the Bar has not demonstrated that the accused's conduct in applying for the default judgment was an act that caused substantial harm to the administration of justice. To the extent that the Bar makes an argument regarding the "prejudice" prong of that test in this matter, it focuses solely on prejudice to Burke, not on prejudice to the administration of justice. The Bar has not met its burden of proving that the accused violated DR 1-102(A)(4).

3. DR 7-110(B)

Unless otherwise authorized by law, it is professional misconduct for a lawyer to communicate in writing on the merits with a judge or an official before whom the proceeding is pending unless the lawyer "promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer." DR 7-110(B)(2). This court has construed the term "on the merits" in that rule to include

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procedural as well as substantive matters. *In re Schenck,* 320 Or. 94, 103, 879 P.2d 863 (1994).

The Bar contends that the accused violated DR 7-110(B) by failing to notify Burke of his intent to apply for a default judgment. The accused responds that he was not required to provide Burke with notice because he was "authorized by law" under ORCP 69 A(1) not to do so.

ORCP 69 A(1) requires a party seeking a default judgment to provide the opposing party with written notice at least ten days prior to the entry of the order of default

"[i]f the party against whom an order of default is sought *has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default* [.]"

(Emphasis added.) It is undisputed that Burke did not file an answer to Shon's complaint and sought instead to settle the case. The Bar contends that, by informing the accused before the settlement that she objected to paying his costs, Burke triggered the ten-day notice requirement in ORCP 69 A(1). The Bar relies on *Morrow Co. Sch. Dist. v. Oreg. Land and Water Co.,* 78 Or. App. 296, 300 n. 4, 716 P.2d 766 (1986), for the proposition that "almost anything that indicates that a party is interested in the case will suffice" to trigger the ten-day notice requirement in ORCP 69 A(1).

The Bar reads too much into that statement in *Morrow*. By its terms, ORCP 69 A(1) requires notice to an opposing party only if the party has filed an appearance or provided written notice of an intent to file an appearance. The legal meaning of the word "appearance" is "[a] coming into court as a party" or "[a] formal proceeding by which a defendant submits himself to the jurisdiction of the court." *Black's Law Dictionary,* 97 (6th ed. 1990). Burke's letter to the accused stating that she was opposed to paying costs was not an "appearance" as that term is used in ORCP 69 A(1). The accused was not required to serve Burke with notice that he intended to apply for a default judgment. *See* ORCP 9 A (no service required on parties in default for failure to appear). Because an exception to the general rule requiring notice was "authorized by law," the accused did not violate DR 7-110(B).

B. *Collins Matter*

1. DR 1-102(A)(3) and DR 7-102(A)(5)

As we have discussed above, a lawyer commits professional misconduct by knowingly engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 1-102(A)(3). The misrepresentation must be material. Moreover, in representing a client or the lawyer's own interests, the lawyer shall not "[k]nowingly make a false statement of law or fact." DR 7-102(A)(5).

The Bar contends that the accused knowingly caused the trial judge in the Collins matter to sign an order containing a provision that the judge had not considered regarding the pretrial and trial dates in *Collins v. Harbertson*. The accused does not respond.

At the trial panel hearing, the accused testified that he recalled hearing the judge mention that he wished to change the pretrial conference and trial dates in *Collins v. Harbertson*. Harbertson's lawyers testified that the judge had made no such statement. Assessing the witnesses' testimony, which was the only evidence regarding those charges, we agree with the trial panel that the accused knowingly misrepresented the judge's intent regarding the scheduling of *Collins v. Harbertson*. The misrepresentation was material in that it affected the judge's decision-making process about the scheduling of the trial. The accused violated DR-102(A)(3) and DR 7-102(A)(5).

We agree with the trial panel's finding that the accused made a knowing misrepresentation to two Washington County judges when he stated that Johnston and Brisbee had made no effort to notify him before filing the motion to quash the accused's subpoena. Even assuming that the accused did not receive either Johnston's voice mail message or the facsimile, the record nonetheless establishes that Johnston and Brisbee attempted to consult with the accused through Morrow, and that the accused's contrary assertion was a knowing

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misrepresentation in violation of DR 1-102(A)(3) and DR 7-102(A)(5).

2. DR 1-102(A)(4)

Our finding that the accused made misrepresentations in violation of DR 1-102(A)(3) establishes that the accused did something that he was not supposed to do, thus satisfying the first prong of the three-pronged test for finding a violation of DR 1-102(A)(4), described earlier in this opinion. *See Gustafson,* 327 Or. at 643, 968 P.2d 367 (summarizing three-pronged test). The accused's conduct occurred during the course of a judicial proceeding in the case of *Collins v. Harbertson,* thereby satisfying the second prong. The proposed order that the accused submitted to the judge changing the pretrial and trial dates contained a misrepresentation that was calculated to induce the judge to acquiesce to a trial date that the accused preferred. Changing the trial date substantially harmed the administration of justice, satisfying the third—or prejudice—prong. The accused's misrepresentation made it necessary for the judge to resolve the dispute that arose as a result of the accused's misrepresentation and to redraft his order. *See In re Meyer (I),* 328 Or. 211, 214, 970 P.2d 652 (1999) (harm under DR 1-102(A)(4) can occur when procedural functioning of a case or hearing is impaired; harm may be actual or potential). The accused violated DR 1-102(A)(4).

3. DR 7-110(B)

As previously noted, DR 7-110(B) provides that, unless otherwise authorized by law, it is professional misconduct for a lawyer to communicate in writing on the merits with a judge or an official before whom the proceeding is pending unless the lawyer "promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer."

The Bar contends that the accused violated that rule by failing to serve opposing counsel with his written motion to disqualify the trial judge. The motion was "on the merits" in *Collins v. Harbertson.* The accused does not dispute that he filed a written motion on the merits. However, he contends that he filed his motion to disqualify under ORS 14.270[9] and that nothing in that statute requires service "upon anyone or any entity other than the court."

The accused's reliance on ORS 14.270 is misplaced. That statute provides that, under certain circumstances, notice to the court may be oral. The statute creates no exception to the general rule regarding service of a written motion on opposing counsel. *See* ORCP 9 A (unless excepted by rule, "every written motion * * * shall be served upon each of the parties"). The accused violated DR 7-110(B) by failing to serve notice of the written motion to disqualify on opposing counsel.[10]

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C. *The Cassady Matter*

1. DR 6-101(A)

A lawyer must provide "competent representation to a client," which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." DR 6-101(A). This court has held that determining whether a lawyer acted incompetently, in violation of that rule, is a fact-specific inquiry:

> "The question whether a lawyer has competently represented a client is, of course, a fact-specific inquiry. A review of this court's cases shows that incompetence often is found where there is a lack of basic knowledge or preparation, or a combination of those factors.
>
> "In contrast, lawyers have been found not guilty of providing incompetent representation where the lawyers showed experience and professional ability to perform work, or where the Bar failed to prove that a position taken by the lawyer was

> `advanced in pretense or bad faith, or in culpable ignorance.' In sum, competence or incompetence can best be measured on a case-by-case basis using the standard stated in DR 6-101(A) itself."

In re Gastineau, 317 Or. 545, 553-54, 857 P.2d 136 (1993) (footnote and citations omitted).

In its cause of complaint, the Bar alleged that the accused failed to represent Cassady competently at trial. The Bar identifies many deficiencies in the accused's performance, ranging from repeatedly asking witnesses questions about which they had no knowledge and asking witnesses to give opinions about reports that were not in evidence, to his inability to authenticate or establish proper foundations for evidence. The accused responds that Greene "did not offer any specific basis * * * as to whether the accused had performed his duties in a competent manner in the Cassady trial."

Our review of the record substantiates the Bar's contention that the accused did not represent Cassady competently at trial. Several examples demonstrate the accused's lack of legal knowledge, skill, or preparation. First, the accused repeatedly attempted to inject the issue of Huber's insurance at the trial. The trial judge admonished the accused many times not to mention insurance. Nonetheless, the accused continued to do so. The accused persists in his belief that the jury was entitled to hear evidence about Huber's insurance coverage and that the evidence would have been admissible had it not been for the judge's bias against the accused.

Second, the accused was not prepared for trial. The Bar's expert witness, Greene, testified that it is "absolutely essential" for a lawyer to have a copy of the client's deposition transcript at trial so that the client does not mistakenly make statements inconsistent with the client's prior testimony. The accused did not order a copy of Cassady's deposition transcript for use at trial. In addition, the accused failed to show Cassady's medical bills to his own medical expert before trial, causing the expert to be unprepared to testify at trial.

Third, during the trial, the accused attempted to show the jury through the testimony of Cassady's treating physician that Cassady had a good work ethic, even though the physician had no knowledge of her work ethic. The accused appeared to be oblivious to that problem.

Fourth, the accused repeatedly posed questions to witnesses seeking hearsay or other incompetent evidence, a practice that he continued even after the trial judge had ruled the evidence inadmissible. Fifth, the accused made multiple unfounded objections during the trial. Finally, the accused moved for a new trial after accepting satisfaction of judgment on Cassady's behalf, despite the long-established rule that a party cannot move for a new trial after accepting the benefits of a judgment in its favor. *See Snipes v. Beezley,* 5 Or. 420, 422 (1875) (too late to move for new trial after receiving payment on judgment). The accused's conduct at Cassady's trial reveals a lack of understanding of basic legal concepts concerning the conduct of a trial and the consequences of accepting satisfaction of a judgment.

Both the trial judge in the Cassady trial and Greene testified that the accused had

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performed incompetently in the Cassady trial. According to the judge, "in 14 years, it was the worst presentation by an attorney I've ever seen." On *de novo* review, we find that the accused performed incompetently in his representation of Cassady at trial. The accused violated DR 6-101(A).

2. DR 7-106(C)(1) and DR 7-106(C)(7)

In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not "[s]tate or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by

admissible evidence," DR 7-106(C)(1), or "[i]ntentionally or habitually violate any established rule of procedure or of evidence," DR 7-106(C)(7).

The Bar contends that, in the Cassady matter, the accused violated both those rules by referring to Huber's insurance coverage during *voir dire* and during the trial itself after the judge had admonished him not to do so. The accused acknowledges that he made several references to insurance but apparently believes that he was entitled to do so.

Greene testified that the rules do not allow a lawyer to discuss insurance during *voir dire* in a personal injury case and that the accused's repeated references to Huber's insurance could have caused a mistrial. Even without instruction from the court, the accused should have known that evidence of Huber's insurance was not admissible. However, in light of the judge's repeated warnings that the accused was not to mention insurance coverage, the accused had no reasonable basis for believing that he was entitled to do so.

The accused's reference to insurance was intentional. The accused had filed a motion *in limine* to prevent Huber's witnesses from mentioning any collateral sources of payment that Cassady might have received. That motion established that the accused understood that insurance could be a sensitive subject at trial. Although he had sought the trial court's aid in preventing Huber's witnesses from referring to insurance payments that Cassady might have received, the accused nonetheless repeatedly attempted to inform the jury that Huber had insurance coverage. The accused violated DR 7-106(C)(1) and DR 7-106(C)(7).

D. *Martin Matter*

1. DR 6-101(A)

As discussed above, DR 6-101(A) requires a lawyer to represent clients competently. The Bar alleged that the accused had violated that rule by delegating Martin's response to the defense motions for summary judgment to Gresham and then failing to supervise Gresham adequately. The accused responds that he provided what he believed to be reasonable supervision of Gresham, but he faults Gresham for failing to confer with the accused on important matters. The accused also contends that Gresham's testimony that the accused did not give him any guidance in preparing to oppose the summary judgment motions was biased, that Gresham obviously had been coached by the Bar regarding his testimony, and that time records should clearly demonstrate Gresham's failure to confer with the accused on important matters.

Before the trial panel, Gresham testified that, when the accused assigned him to oppose the defense motions for summary judgment in the Martin case, Gresham had had no experience in handling such matters and that he had received no guidance from the accused. In his deposition, the accused stated that he had not conferred with Gresham about how to oppose the motions for summary judgment and that, when the accused learned that Gresham had not filed the documents required to create material issues of fact, the accused, like everyone else in his office with whom he spoke about the matter, was appalled. Before the trial panel, by contrast, the accused testified that he thought he had supervised Gresham adequately. As noted, the accused contends before this court that he provided Gresham what the accused believed to be reasonable supervision in the Martin case.

The accused does not dispute that he had supervisory responsibility for Gresham or that he was Martin's attorney of record. We find it highly probable that, consistent

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with the accused's deposition testimony, the accused did not supervise Gresham's opposition to the defense motions for summary judgment in the Martin matter. The accused violated DR 6-101(A). *See In re Spies,* 316 Or. 530, 538, 852 P.2d 831 (1993) (lawyer failed to act competently,

in part, by failing to prepare certified law student to handle hearing).

2. DR 6-101(B)

DR 6-101(B) provides that a lawyer "shall not neglect a legal matter entrusted to the lawyer." The Bar also alleged that, by entrusting opposition of the summary judgment motions to Gresham, the accused violated that rule. The accused responds that Gresham had the requisite qualifications to be an effective advocate for clients in litigation.

To prove a violation of DR 6-101(B), the Bar must show a "course" of negligent conduct. *In re Meyer (II),* 328 Or. 220, 225, 970 P.2d 647 (1999). The Bar has failed to prove by clear and convincing evidence that the accused has engaged in a "course" of negligent conduct in violation of DR 6-101(B).

E. *Summary*

In sum, we find that the accused violated DR 1-102(A)(3) in both the Burke and Collins matters; DR 1-102(A)(4), DR 7-102(A)(5), and DR 7-110(B) in the Collins matter; DR 6-101(A), DR 7-106(C)(1) and DR 7-106(C)(7) in the Cassady matter; and DR 6-101(A) in the Martin matter. Those violations fall into four categories: misrepresentation and conduct prejudicial to the administration of justice; incompetence; *ex parte* contact; and misconduct at trial. We turn to the appropriate sanction. In that regard, the Bar argues that this court should affirm the trial panel sanction and disbar the accused. The accused responds that the complaint should be dismissed.

III. SANCTION

In arriving at the appropriate sanction for lawyer misconduct, this court makes a preliminary determination by consulting the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (ABA Standards). *Gustafson,* 327 Or. at 652, 968 P.2d 367. The ABA Standards direct us to analyze the accused's misconduct in light of the following factors: the duty violated, the accused's mental state at the time of the misconduct, the actual or potential injury that the accused's misconduct caused, and the existence of any aggravating or mitigating circumstances. ABA Standard 3.0. Finally, we analyze this court's case law to determine the sanction that should be imposed in the particular situation. *In re Devers,* 328 Or. 230, 241, 974 P.2d 191 (1999).

We analyze the factors described above with respect to each of the categories of misconduct identified in this case: misrepresentation and conduct prejudicial to the administration of justice; incompetence; *ex parte* contact; and misconduct at trial.

A. *Preliminary Determination*

1. Misrepresentation and Conduct Prejudicial to Administration of Justice

The accused's misrepresentations in the Burke and Collins matters violated his duty to the public to maintain personal integrity. ABA Standard 5.1. The accused violated his duty to the legal system to refrain from making false statements and misrepresentations. ABA Standard 6.1.

We find that the accused's misrepresentations were intentional. That is, the accused acted with a conscious objective or purpose to accomplish a particular result. ABA Standards at 7. In the Burke matter, the accused intentionally submitted a default judgment for the purpose of being awarded costs after leading Burke to believe that he would dismiss Shon's action if Burke agreed to the settlement. The accused's dishonesty caused Burke actual injury, because a default judgment was entered against her.

In the Collins matter, the accused wanted the pretrial and trial dates changed, and he intentionally misrepresented to the trial judge that the judge had intended to change those dates. The accused also intentionally

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told several judges in the Collins matter that opposing counsel had made no effort to notify the accused of the hearing to quash the subpoena that the accused had issued to the Safeco employee, apparently with the motive to impugn the integrity of opposing counsel. The accused's intentional misrepresentations created the potential for significant injury. As noted, the accused's misrepresentations to the trial judge regarding the "changed" pretrial conference and trial dates caused substantial harm to the administration of justice. The accused's misrepresentations in the Burke and Collins matters seriously adversely reflect on his fitness to practice law.

ABA Standard 5.11(b) makes disbarment the appropriate sanction when a lawyer engages in intentional, albeit noncriminal, misconduct that involves dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects upon the lawyer's fitness to practice law. ABA Standard 6.11 generally makes disbarment the appropriate sanction when a lawyer, with the intent to deceive the court, makes a false statement and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding. The ABA Standards call for such a harsh sanction because, as explained in the introduction to ABA Standard 5.0, "[t]he most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies." The ABA Standards suggest that disbarment is the appropriate sanction for the accused's misrepresentations.

2. Incompetence

Having agreed to represent a client, a lawyer must be competent to perform the services requested. ABA Standard 4.0. It is evident from the record that the accused tenaciously represented Cassady and believes that he did so competently. However, tenacity is not the same as competence, and, as our review of the record has shown, the accused did not represent either Cassady or Martin competently. In the Cassady litigation, the accused's incompetent trial techniques harmed the legal system and the parties. In the Martin matter, the accused's incompetence harmed his client. Disbarment generally is appropriate when a lawyer demonstrates a lack of understanding of the most fundamental legal doctrines or procedures and the client is actually or potentially injured. ABA Standard 4.51. However, disbarment as a sanction should be imposed only on lawyers "whose course of conduct demonstrates that they cannot or will not master the knowledge and skills necessary for minimally competent practice." *Commentary* to ABA Standard 4.51. Suspension generally is appropriate when a lawyer engages in an area of practice in which the lawyer knows that he or she is not competent and causes injury or potential injury to the client. ABA Standard 4.52. Reprimand generally is appropriate when a lawyer: (1) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (2) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client. ABA Standard 4.53.

Our review of the record in this case leads to the conclusion that disbarment would not be an appropriate sanction for the accused's incompetence in the Cassady and Martin matters, because we are not persuaded that the accused is incapable of mastering the knowledge and skills necessary for minimally competent practice. Neither is it clear to us that the accused engaged in practice in an area of the law in which he knew he was not competent. However, the records of the Cassady and Martin matters reveal that the accused failed to understand relevant legal doctrines or procedures, and caused actual injury. In light of the significant sanction we impose for all the accused's misconduct, discussed below, we need not address what sanction would be appropriate if this proceeding involved only the accused's incompetence.

3. *Ex parte* contact

The accused violated his duties as a lawyer by engaging in *ex parte* communications with a judge in the Cassady matter. ABA Standard 6.3. We find the accused's mental state

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in filing the written disqualification motion without serving opposing counsel to be negligent, as he misunderstood his legal obligation to do so. In failing to serve opposing counsel with the disqualification motion, the accused caused actual injury. Opposing counsel arrived to argue the motion to compel, only to discover that the accused had succeeded in disqualifying the judge who was assigned to hear the motion and delaying the hearing.

ABA Standard 6.33 provides that reprimand generally is appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party. Standing alone, the accused's misconduct regarding his *ex parte* contact would merit a reprimand.

4. Trial misconduct

The accused abused the legal process by repeatedly raising the issue of Huber's insurance to the jury during the Cassady trial. ABA Standard 6.2. As we have explained, we find that the accused acted intentionally. Injecting the existence of Huber's insurance at trial caused potential injury, because the threat of a mistrial hung over the proceedings after the accused mentioned insurance. The trial judge testified that he would have granted a mistrial if the defense had moved for one.

ABA Standard 6.21 provides that disbarment generally is appropriate when a lawyer knowingly violates a rule with the intent to obtain a benefit for the lawyer or another and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

It appears that, in raising the issue of Huber's insurance in the Cassady trial, the accused intended to obtain a benefit for Cassady, namely, assuring the jury that it could award Cassady damages without harming Huber. The ABA Standards indicate that disbarment is the appropriate sanction for the accused's misconduct in intentionally and persistently attempting to interject the fact of Huber's insurance at trial.

In summary, the ABA Standards point to disbarment as the appropriate sanction for the accused's intentional misrepresentations and his trial misconduct. The ABA Standards point to a sanction short of disbarment for the accused's incompetence and his *ex parte* contact. We turn to aggravating and mitigating circumstances.

B. *Aggravating and Mitigating Circumstances*

"[A]ggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed." ABA Standard 9.21. The first aggravating factor in this proceeding is that the accused has a prior disciplinary offense. ABA Standard 9.22(a). In 1994, the accused stipulated to discipline for contacting a represented party without the permission or presence of that party's counsel, in violation of DR 7-104(A)(1). The accused received a public reprimand for that violation.[11]

In weighing the prior offense as an aggravating circumstance, we consider its relative seriousness and the resulting sanction; the similarity of the prior offense to the offense in the present case; the number of prior offenses; the relative recency of the prior offense; and the timing of the current offenses in relation to the prior offense and resulting sanction. We also consider whether the accused lawyer had been sanctioned for the prior offense before engaging in the misconduct at issue in the present case. *In re Jones,* 326 Or. 195, 200, 951 P.2d 149 (1997). Applying those considerations, we conclude that the accused's prior offense deserves little weight as an aggravating factor in this proceeding. His

record of discipline is limited to one instance of misconduct for which he received only a public reprimand. That sanction regarded a matter that is not similar to the misconduct at issue here, and the misconduct occurred several years ago. We turn to other aggravating circumstances.

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The accused has engaged in misconduct involving four different client matters. In three of those matters, the accused committed multiple ethical violations. ABA Standard 9.22(d). The accused has failed to acknowledge the wrongful nature of any of his misconduct. ABA Standard 9.22(g). The accused has substantial experience in the practice of law, having been admitted to the bar in 1987. ABA Standard 9.22(i).

Mitigating circumstances are "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." ABA Standard 9.31. The only mitigating factor here is that the accused cooperated with the Bar during its initial investigation. ABA Standard 9.32(e).

C. *Oregon Cases*

In past cases, when this court has found misrepresentation in addition to other misconduct, the court has imposed lengthy suspensions or disbarment. *See In re Gallagher,* 332 Or. 173, 190, 26 P.3d 131 (2001) (two-year suspension for two misrepresentations plus other misconduct); *In re Wyllie,* 327 Or. 175, 184, 957 P.2d 1222 (1998) (two-year suspension for submitting false MCLE forms and failing to cooperate with investigation); *In re Recker,* 309 Or. 633, 641, 789 P.2d 663 (1990) (two-year suspension for misrepresentation to court plus other disciplinary rule violations). However, multiple misrepresentations to courts, the Bar, or clients, combined with other serious ethical violations, has led to disbarment. For example, this court disbarred a lawyer who notarized false documents and made misrepresentations to clients in an unlawful living trust scheme. *In re Morin,* 319 Or. 547, 566, 878 P.2d 393 (1994). The accused in that proceeding also failed to respond truthfully to the Bar's inquiries during its investigation. *Id.* at 564, 878 P.2d 393. This court also disbarred a lawyer who filed a false affidavit with a probate court, committed a misdemeanor, and violated several other disciplinary rules. *In re Hawkins,* 305 Or. 319, 326, 751 P.2d 780 (1988). Further, this court disbarred a lawyer who, among other things, made multiple misrepresentations to clients and court staff, represented a client incompetently, and neglected a legal matter. *Spies,* 316 Or. at 541, 852 P.2d 831. However, the lawyer's conduct in that proceeding was part of a downward personal spiral of "increasingly irresponsible" conduct. *Id.* at 540, 852 P.2d 831. Other situations in which this court has disbarred a lawyer have involved serious misconduct on the heels of an already lengthy record of disciplinary violations. *See, e.g., In re Miller,* 310 Or. 731, 739, 801 P.2d 814 (1990) (multiple misrepresentations, excessive fee, lengthy disciplinary record).

In this proceeding, the accused not only made misrepresentations in the Burke and Collins matters, he provided incompetent representation in the Cassady and Martin matters. We note that, in *Spies,* misrepresentation and incompetence played a significant role in the decision to disbar the lawyer. *Spies,* 316 Or. at 540, 852 P.2d 831. However, in the case that is most similar factually to this case, this court imposed a lengthy suspension rather than disbarring the lawyer. In *In re Chambers,* 292 Or. 670, 642 P.2d 286 (1982), the lawyer negligently failed to prepare and return a proper summons and failed to communicate with his client. In a criminal matter, the lawyer was incompetent in conducting his investigation of exculpatory evidence on behalf of his client and subsequently trying the case "by the seat of his pants." *Id.* at 678, 642 P.2d 286. In a third matter, the lawyer knowingly made a false statement of fact when he represented to an accident victim that he was an insurance agent. *Id.* at 680-81, 642 P.2d 286. When *Chambers* was decided, the maximum suspension possible short of disbarment was three years. *See* BR 6.1(a)(iii)

(three-year suspension maximum length for proceedings commenced before January 1, 1996).[12] This court held that a two-year suspension was the appropriate sanction. *Chambers,* 292 Or. at 682, 642 P.2d 286.

In this proceeding, the Bar, like the trial panel, asserts that disbarment is required to protect the public and the integrity of the profession. However, this court's case law

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does not support disbarment for the accused's misconduct, although it does support a lengthy suspension.

The accused's conduct is more egregious than the conduct in *Chambers*. The accused acted dishonestly in submitting a default judgment after settling the dispute with Burke. The accused intentionally misrepresented to the trial judge that the judge had ordered a change in the pretrial conference and trial dates in the Collins matter. The accused intentionally sought to impugn the integrity of opposing counsel in the Collins matter when he claimed that opposing counsel had made no effort to notify him of a hearing to quash the subpoena that he had served on a Safeco employee. The accused deliberately and repeatedly injected the issue of insurance into a trial to prejudice the jury in favor of his client, Cassady. The trial judge found the accused's representation of Cassady to have been the worst performance he had seen as a trial judge, resulting in prejudice to Cassady's interests. The accused's failure to assure that evidence was presented to defeat the motions for summary judgment in the Martin matter also damaged his client.

The foregoing examples, taken together, reveal a disturbing pattern of a lawyer who disrupts the functioning of the legal system and the interests of parties in that system through a combination of intentional and negligent misconduct. Considering together the ABA Standards, the aggravating factors, and this court's case law, we conclude that a three-year suspension from the practice of law is the appropriate sanction. Requiring the accused to show the requisite character and fitness to practice law for readmission under BR 8.1(a)(iv) following that suspension will protect the public and the integrity of the profession.

The accused is suspended for three years, effective 60 days from the date of the filing of this decision.

Notes:

1. Riggs, J., did not participate in the consideration or decision of this case.

2. The accused admitted that he had heard pounding on his office door that evening and had seen someone outside, but he denied that he had seen Morrow deliver anything or that he had found documents left in the door jamb.

3. The trial panel stated that the accused had not violated DR 7-102(A)(5) when he failed to serve opposing counsel with the motion to disqualify the trial judge. However, it is clear from the trial panel's opinion that it meant to state that the accused had not violated DR 7-110(B).

The trial panel did not address the Bar's allegation that the accused also had violated DR 7-102(A)(5) by knowingly making a false statement of law or fact in the Collins matter.

4. The trial panel did not address the Bar's allegation that the accused had violated DR 7-106(C)(7) by intentionally or habitually violating rules of procedure or evidence in his handling of the Collins matter, and the Bar has abandoned that issue on review.

5. The court eventually vacated the contempt order so that the matter could be heard by

another judge. The record does not reveal the outcome.

6. The court thereafter vacated that order for lack of jurisdiction, because the accused already had filed an appeal from the order denying his motion for a new trial.

7. Although the Bar's cause of complaint alleged that the accused had made misleading statements to the court and in affidavits in connection with a discovery dispute over a photograph of Cassady's damaged car that fell out of the accused's file during the trial, the Bar did not charge the accused with violating DR 7-102(A)(5) or ORS 9.460. Nonetheless, as we note below, the trial panel concluded that the accused violated DR 7-102(A)(5) and ORS 9.460 by making misleading statements regarding the photograph. The Bar does not ask this court to hold that the accused violated any disciplinary rules in connection with the photograph incident at Cassady's trial.

8. The trial panel also concluded that the accused had violated DR 7-102(A)(5) and ORS 9.460 in the Cassady matter, even though the Bar did not charge those violations in its complaint. The Bar does not argue those violations on review. In addition, on review, the Bar has abandoned its charge of neglect under DR 6-101(B) in the Cassady matter.

9. ORS 14.270 provides:

"An affidavit and *motion for change of judge* to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer. *Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day.* No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section."

(Emphasis added.)

10. We decline to address the Bar's charges under ORS 9.460(2) and ORS 9.527(4), because they are redundant of its charges under DR 1-102(A)(3) and DR 7-102(A)(5), and the Bar does not argue that a finding that the accused had violated those statutes would enhance or otherwise affect the sanction. *See In re Kimmell,* 332 Or. 480, 487, 31 P.3d 414 (2001) (illustrating point); *In re Lawrence,* 332 Or. 502, 511, 31 P.3d 1078 (2001) (same).

11. The Bar had charged the accused with violating several disciplinary rules, but the stipulation for discipline involved only DR 7-104(A)(1).

12. Under BR 6.1(a)(iv), the maximum period of suspension short of disbarment in proceedings commenced after December 31, 1995, is five years.

Jury Selection in Federal Court

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

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

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

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

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

OVERVIEW OF THE JURY SELECTION PROCESS

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

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

APPLICABLE RULES

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

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

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

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

Courts typically post:

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

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

NUMBER OF JURORS

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

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

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

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

JUROR QUALIFICATIONS

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

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

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

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

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

JURY SELECTION METHODS

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

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

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

STRUCK JURY METHOD

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

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

JURY BOX METHOD

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

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

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

RESEARCHING PROSPECTIVE JURORS

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

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

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

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

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

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

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

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

BUILDING JUROR PROFILES

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

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

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

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

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

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

SAMPLE JUROR PROFILE CHART

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

CONDUCTING *VOIR DIRE*

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

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

ROLES OF THE COURT AND COUNSEL

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

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

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

USING JURY QUESTIONNAIRES

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

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

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

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

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

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

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

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

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

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

QUESTIONING EFFECTIVELY

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

To elicit this information most effectively, counsel should:

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

SCOPE OF PROPER *VOIR DIRE*

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

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

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

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

OBSERVING PROSPECTIVE JURORS

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

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

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

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

EXERCISING JUROR CHALLENGES

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

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

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

CHALLENGES FOR CAUSE

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

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

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

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

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

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

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

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

PEREMPTORY CHALLENGES

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

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

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

BATSON CHALLENGES

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

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

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

Prima Facie Case of Discrimination

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

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

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

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

Neutral Explanation for Peremptory Challenge

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

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

Challenge Motivated by Purposeful Discrimination

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

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

BACK STRIKES

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

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

CONDUCTING POST-TRIAL INTERVIEWS

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

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

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

05-20

How To Do Voir Dire

A. **Nine Objectives of Voir Dire**

1. Disclosure of you, person accused,
2. Promote Disclosure the values and attitudes of the prospective jurors.
3. Introduce theory of the case (legal concepts, emotional and factual issues) and gauge the jurors' response to the theory of the case.
4. Evaluate who you want off.
5. Gain insight into how best to package your theory of the case for this
6. particular jury.
7. Empower the jury
8. Establish rapport
9. Educate by having the jurors teach each other

B. Techniques:

1. Self-disclosure - you tell something first about yourself, about the person accused.
2. Concreteness - tell them why you are asking the question.
3. Reflection - Repeat back to them what you heard them say. See who shares or differs with that answer, belief or common feeling. Reward their honesty. (No bad answers).
4. Encourage everyone to be honest and open.
5. Ask a single juror no more than three questions at one time
6. Get it and spread it.
7. Establish Eye Contact - use non-verbal actions by jurors; smile laugh, frown, etc. as an introduction to ask them a direct question.
8. Try to get the jurors sharing and interacting with one another. (The more they talk, the more you learn; the more they interact with one another, the more you learn of how they would interact in the jury room and the less likely the judge is to cut off your voir dire because the citizens are talking and not you.)
9. Get someone to watch the jury selection so you can completely focus on who you are speaking to.

C. Ask open-ended questions! - Most important!! There are no bad answers in jury selection (the opposite of cross-examination).

Examples: *what was the first thing that came to your mind when...?

*what do you feel when you hear.....?
*what was your gut reaction..... why?.....
*have you ever heard others say.....?
*have you ever heard of instances when...?
*could you share some examples?
*what do you think about what you heard?
*does anyone else have examples or
experiences?
*what would you suggest?
*how would you ask a question regarding
racial feelings; on drugs, etc.?
*I am concerned that...(race, homosexuality,
drugs, guns, etc.) may affect how someone
would view the evidence in this case.
*why do you think **I** may feel that way? Do
you think this is a legitimate fear?
*how many people are reluctant to talk in front of strangers
about themselves?

D. Ask headline questions
Example:. Some people may think the fact that someone owns a gun means that they are a violent person other may think that gun ownership has nothing to do with whether someone is a violent person what do you think?

E. Ask spectrum questions
Example: With 1 being not strong at all and 5 being very strong. This How would you agree your feelings about...?

F. Get It And Spread It

E. Empower the jury - ask their permission to inquire into certain areas. Explain that you are protecting their rights.

G. Robert Hirschhorn's top 10 questions phrases attorney should never use in voir dire:

10. Do you understand the law says...?
9. I take it from your silence that no one disagrees with the proposition that...?
8. Does anyone have a problem with...?
7. Will you keep an open mind and not decide this case until you have heard all

of the evidence?
6. Can you set aside your biased and decide the case on the facts?
5. Has anyone formed an opinion about...?
4. To every one of you be fair and impartial juror in a case like this?
3. Will you promise me that...?
2. I trust you will agree...?
1. Do any members of the panel have any feelings about...?

The better way to ask a question it is to directed it to a particular juror. For example:

(juror's name)what feelings do you have about...?
Unless you are **required** by the court asked the question of the entire panel. Ask the question to a particular juror

H. Life experience voir dire:

Asks for examples in their past how they have dealt with the particular situation or issue in this case.
Use examples from ordinary life (school, occupations, hobbies) to illustrate legal concepts, factual elements and emotion of your case.

Examples:

Computer Person - is aware that garbage in, garbage out. He/she is also aware that insufficient data would not allow a program to run and that insufficient data will give inaccurate results. This ties into the burden of proof, lack evidence, etc.

School teachers - or anyone who has been though school knows of the student who always waived their hand to answer first, sure that they had the right answer. Often times, however, the student was wrong. Certainly does not mean accuracy (ID Cases).

Medical Profession - aware of a "false-positive". A test which showed positive results but was actually inaccurate discovered only upon a second test of further investigation.

Concept:
Create a free speech zone.
Toss out a beach ball.
If jurors are saying terrible stuff, you are winning. Get them to hit the ball to each other.

Tips for weeding out juror bias

JIM M. PERDUE SR.

Targeted questions will help you determine which jurors will assess your client's case fairly—and which harbor prejudices that must be eliminated before trial.

Every trial lawyer knows what it is like to debrief a jury after an unfavorable result and learn that the result might have been different but for one or two of the jurors. We have all found ourselves saying, "I wish I had asked about that during the voir dire examination."

Trial judges will limit what you can ask in written questionnaires or voir dire. But in my experience, certain questions are critical. One approach is to identify the characteristics you would like to know about a potential juror.

Over the years, I have come up with nine things I want to know about any potential juror:

- Are you honest?
- Are you a leader?
- How will you relate to other members of the jury?
- How will you relate to me?
- How will you relate to the plaintiff?
- How will you relate to the defendant?
- How will you relate to the story?
- How will you view the scientific evidence?
- How will you view a verdict for the plaintiff?

Of course, identifying the questions is easy. Getting answers is the hard part. Asked straight out, these questions

JIM M. PERDUE SR. *practices in Houston.*

ADAM PAINE AND CHRIS CHOI

would probably not prompt accurate or helpful answers. In some cases, you would provoke a blank stare or hear "I have no idea." So more subtle approaches are necessary.

Are you honest?

You might ask:

- "Who always reads the package insert the pharmacist encloses with your prescription?"
- "Who always walks around their car and checks their tires before getting in?"
- "Who always goes over the grocery store receipt and checks it against items purchased when they put groceries away at home?"

You ought to be suspicious of people who raise their hands when you ask questions like these. They are either lying or are so cautious they could never accept the idea that a plaintiff might be blame-free. They may admit to having a bias against civil actions or damages awards while insisting they "can be fair."

Consider asking whether anyone agrees with this statement: "One of the most honest things someone can do is not serve on a jury when it is the wrong case for them." Most people agree that jury service is a civic responsibility. We hear less about the equally important duty of *not* serving. Often, people with integrity who admit to a potential bias may agree that the decision not to serve is as laudable as the decision to serve.

When I identify someone I think is biased against plaintiffs but basically honest, I may ask, "Can you see yourself, after delivering your verdict in this case, saying to your friends or coworkers, 'I can't believe they took me on that jury?'" Often, people with well-established attitudes have expressed them to coworkers, friends, and family. The question may prompt them to express their prejudgment more candidly.

Are you a leader?

Identify potential leaders in the jury room by asking:

- How many of those who have served on a civil or criminal jury were elected and participated as the foreperson of that jury?
- Is there anyone who has ever had the responsibility of supervising other employees?
- Have you ever served as a president of any organization or the chairman of any board?

People who answer yes to these questions usually are born leaders. But to be sure, you may want to follow up with a question or two asking them if they enjoyed their leadership or supervisory responsibilities.

We hear little about the important duty of not serving on a jury. People who admit to a potential bias may agree that the decision not to serve is as laudable as the decision to serve.

How will you relate to other members of the jury?

The essential question is, "Does anybody on the venire panel know anyone else?" A personal bond can significantly affect jury dynamics. You and your associates should observe the panel members during breaks. Those who seem standoffish or who isolate themselves may be the type who are determined to go against the evidence and the majority because of their self-image as independent thinkers or loners.

How will you relate to me?

The Greeks taught us that it is difficult to separate the message from the messenger. How jurors relate to plaintiff lawyers in general—and you specifically—can affect their deliberations. These questions may reveal a potential for both positive and negative attitudes:

- How many of you have been represented by a lawyer?
- Does any of you feel your lawyer didn't properly represent you?
- Is anyone on the panel related to a lawyer? What kind of law practice does he or she have?
- Has any of you ever been in a situation where you felt the legal system didn't work for you?
- Has anyone here had an experience where you felt that the legal system *did* work for you and that an injustice was repaired?
- Who among you just doesn't like lawyers?
- Who doesn't like lawyers who represent consumers and patients in cases like this?
- Has any of you ever been named as a defendant in a lawsuit?
- What kind of case was it?
- How long ago was it?
- Who represented you?
- Were you finally able to conclude the case? How?
- Were you satisfied with the way the civil justice system worked for you as a defendant?

How will you relate to the plaintiff?

The verdict largely reflects how jurors view the person bringing suit. Because people tend to trust and defer to doctors, potential jurors may view a plaintiff in a medical malpractice case negatively and, as a result, may distance themselves emotionally from him or her.

A fact-finder who feels distant from the plaintiff is not likely to return a verdict in his or her favor. I use the following questions during voir dire in medical malpractice cases:

- Who would say, "I can't see myself ever suing a doctor"?
- What would convince you to sue a doctor?
- If you believed that one of your family members was injured as a result of improper medical care in a hospital, what would you do?
- How would you go about investi-

gating your suspicion that the care may have been improper? Who would you call?

- What independent investigation is done when someone is injured by medical malpractice?

The last is a rhetorical question. Answer it by explaining something along these lines:

> We all know that if you're in a car wreck, a police or sheriff's officer will survey the scene and conduct an independent investigation. If your loved one is a passenger on a plane that crashes, the Federal Aviation Administration investigates. If you are a train passenger and injured in a wreck, the National Transportation Safety Board will investigate. The Occupational Safety and Health Administration investigates deaths and injuries at factories and construction sites.
>
> But there is no medical board or government agency that investigates instances of medical malpractice. And if a hospital does an investigation after a patient is injured, it is privileged by statute—meaning the patient or the family cannot be told the results. Let me repeat: No independent government agency investigates death or injury due to medical negligence.

Either before or after confirming that the panel is familiar with these facts, you might ask, "Who believes that unless the plaintiff produced some fault-finding by officials of a government agency, they cannot make a case of professional negligence?"

In cases where a plaintiff has suffered severe brain injury, I ask: "Would you want to see the plaintiff?" Many attorneys are surprised by the number of potential jurors who do not raise their at hands this question.

Experience has taught me that if someone who may have to make the most important decision in someone else's life does not even want to see that person, the potential juror is unlikely to be true to his or her charge.

How will you relate to the defendant?

Pro-defense jurors may believe the myth that undeserving plaintiffs seek out reasons to blame others for their personal tragedies. The challenge is even greater in cases of physician negligence. The following questions may help identify those who are overly sympathetic to the defense:

- Is any of you closely related to a doctor? What is the nature of his or her practice?
- Did any of you ever want to be a doctor? What kind of doctor? Why?
- Is there anyone who ever wanted to be a lawyer? What kind of lawyer? Why?
- Who at this point feels sympathy for the defendant hospital and doctors because they have been sued by the plaintiff?
- Who believes this is likely to be a frivolous case because it is brought against doctors and a hospital?
- Who feels doctors and hospitals are sued too often?
- Who thinks patients have unreasonable expectations of their health care providers?
- Who feels that since doctors are human, they should be expected to make mistakes?
- Who believes that it is better to let the medical profession protect the public against incompetence of health care providers?
- How many of you feel you could not hold a doctor liable or responsible if they made what is sometimes called an "honest mistake"?
- What is your idea of an honest mistake?
- Are you saying that an injured patient would have to prove to you that the doctor intentionally injured the patient before you could consider the doctor responsible?
- If the mistake was a result of carelessness, would that be sufficient to find the doctor legally responsible?
- Do you believe that a doctor should be held responsible for injuring a patient because the doctor was not as careful as he or she should have been?

The division between people who tend to be pro-plaintiff and those who favor the defense is a continuation of the debate between the Jeffersonians and the Hamiltonians that began at the founding of our republic.

How will you relate to the story?

Professor Jeffrey Abramson of Brandeis University suggests that the division between people who tend to be pro-plaintiff and those who favor the defense is a continuation of the debate between the Jeffersonians and the Hamiltonians at the founding of our republic:

> Hamiltonians believe that the affairs of government, society, and the law are beyond the ken of ordinary laymen. They are committed to the view that the levers of power must remain in the hands of the educated and propertied because only they possess the wisdom and maturity necessary to secure stable institutions. Hamiltonians adhere to the concept, "What's good for General Motors is good for America."[1]

Thomas Jefferson believed that government worked best when all citizens had a seat at the table. He was a firm believer in the jury system, insisting that it was more essential to a democracy than the right to vote.

Hamiltonians subscribe to these pro-defense myths:

- Corporations make wealth for everyone.
- People are poor because of their own actions.
- Bad things just happen (fate or God's will) and people just look for someone to sue.
- There has been a litigation explosion of frivolous personal injury cases.

Hamiltonians are convinced that lay jurors despise the rich, have it in for big corporations, and love to put their hands into "deep pockets" and redis-

tribute other people's money.

The higher the socioeconomic status of the Hamiltonians, the more critical they are of civil litigation. They believe that people who work hard deserve to keep what they earn. Hamiltonians believe that plaintiff lawyers are an unsavory lot serving undeserving clients. And they will speculate on the plaintiff's motives for bringing the suit as much as they will about the defendant's behavior.

Pro-consumer jurors believe in Jeffersonian ideals. They are modern-day populists. While they would prefer to stay out of politics and off juries, they know they are sometimes needed to help clean up corruption. Jeffersonians respond to what they see as the moral heroism of deserving victims whose water, air, and lungs have been poisoned by corporate giants or bodies wrecked by incompetent medical professionals.

Populists sympathize with victims who are hardworking, self-reliant, and reluctant to hire lawyers or go into a courtroom. They are willing to compensate for severe injuries caused by hazards the plaintiff did not even know existed. At the same time, populists are fiercely suspicious of faceless corporations, the arrogance of power, and the lack of individual moral responsibility for a company's actions.

But since Jeffersonians are reluctant crusaders, be cautious with people who say they want to serve on a jury. Simply ask, "Who would *like* to serve on this jury?" Watch out! They may want to be on your jury just to teach you a lesson—one you do not want to learn.

Keeping in mind the philosophical differences between Hamiltonians and Jeffersonians is to your advantage. Questions that elicit this dichotomy are endless and should reveal who agrees with pro-defense myths.

How will you view the scientific evidence?

Most trials involve scientific and medical evidence. Ask questions that will help you determine how potential jurors might react to this kind of testimony. Some examples:

- What kind of evidence would help

you decide whether the patient was injured because he or she did not get good, safe care?

- Who feels it is appropriate in a case involving scientific or technical issues to count up the number of experts testifying for each side and decide the case on that basis?
- Is there anyone who believes that if one side or the other called more expert witnesses, that would give them the edge?
- Does any of you believe that the defendant does not have any obligation to prove the defense? In other words, that the only person who has to prove his or her case is the plaintiff? Can the defendant offer any theory without having to prove it?
- Can you examine the defense contentions as critically as I know you will examine the plaintiff's, by looking to see whether there are conflicts in what the experts are saying?
- Can you look at a defense argument the same way you would look at a plaintiff's, by asking yourself whether it makes sense, not just whether an expert is saying it?

If a diagnostic test is part of your case, ask the panelists whether anyone has had this type of test. What were the results? What actions did the doctor take? When the issue is a medical diagnosis, ask whether anyone has had that medical condition or knows of anyone who has. How was it diagnosed? What did the doctor do about it?

If substantial future medical expenses are an issue in the case, explain how the money will be protected. If a guardian ad litem is present, introduce him or her to the panelists and explain the guardian's role.

How will you view a verdict for the plaintiff?

Identify jurors who are uncomfortable with the idea of awarding substantial damages for bodily injury by asking, "Is there anyone who believes that a substantial verdict for Paula Plaintiff could only hurt you or others?"

Or you may ask, "Is it your belief that a plaintiff's verdict can never serve to improve the quality of health care? Do you think it can never cause manufacturers to improve their products? Do you think it can never cause hospitals to be more attentive to patients' needs?"

A more subtle approach is to ask the prospective jurors, "What would be your definition of a fair verdict in this case?" Those who say fair means "everybody is treated the same" are likely to lean toward modest damages. Those who believe fair is "getting what you're entitled to" are more prone to favor the plaintiff's recovery.

To ferret out attitudes about damages, you can ask, "What elements of damages would you feel are appropriate to consider?" The answers will give you some idea what jurors have in mind.

Those who cite only out-of-pocket losses are apt to side with the defense. Those who talk about intangible things—how the widow will raise her family, whether the children will be able to attend college, how a physically impaired person will retain his or her dignity—are likely to consider noneconomic aspects of damages even if they don't put a legal label on them.

Another way of approaching this question is to ask, "What facts would be significant to you in determining whether substantial damages would be appropriate?"

The answers can often guide you at trial, indicating what parts of your case merit emphasis.

The best voir dire is one that identifies those who are against you without pointing out those who are with you. During this process, I want panel members to do most of the talking and pro-defense jurors to feel comfortable expressing their prejudices. For this reason, most of the questions I ask are designed to elicit negative responses.

Voir dire is the most difficult—and, to many, the least-liked—part of trial. But a successful trial lawyer knows it's better to take the bitter medicine early than to die on verdict later. ■

Note

1. Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497 (2000).

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OREGON CASE LAW RELATING TO VOIR DIRE ISSUES
2022 VOIR DIRE TRIAL SKILLS TRAINING, DECEMBER 2, 2022[1]

State v. Soprych, 318 Or App 306 (2022). The court held that prosecutor's voir dire question to jury and hypothetical related to defendant's guilt undermined his presumption of innocence and deprived him of his right to a fair trial.

State v. Banks, 367 Or 574 (2021). Court held that (1) the trial court erred in overruling defense counsel's objections to prosecutor's improper statements during voir dire telling jury that the rules of evidence limited what prosecutor could present to jury; and (2) trial court's error in overruling defense counsel's objections to prosecutor's improper statements during voir dire was not harmless.

State v. Gollas-Gomez, 292 Or App 285 (2018). The Court held that the trial court abused its discretion when it denied defendant's motion to strike prospective juror for cause at a sexual abuse trial when the juror had worked for 17 years as a Social Service Specialist for child welfare and never indicated that he could be impartial.

State v. Vaughan- France, 279 Or App 305 (2016). Court held that the trial court acted within its discretion by keeping a juror who at first claimed she could not be impartial because she eventually agreed to impartiality.

State v. Turnidge, 359 Or 364 (2016). 1) The Court held that the dismissal of 3 prospective jurors for their views against the death penalty would interfere with their ability to follow the law and therefore, the lower court did not abuse its discretion in excusing those jurors under the Sixth Amendment, under the standards set in *Witherspoon* and *Witt.* 2) The Court held that although it did not agree with the lower court's decision to destroy juror questionnaires after voir dire was completed, the destruction of the

[1] *Shouts out to **Chloe Lyons** and **Corrine Gibson**, 1L OCDLA members at the UO Law School, for their enthusiasm to research this project together. Remember these names when hiring summer law clerks in 2023!*

questionnaires did not prejudice defendant under the Due Process clause, as voir dire provided all parties a full opportunity to make record of of the information on the questionnaires.

State v. McAnulty, 356 Or 432 (2014). The court held that (1) trial court did not abuse its discretion in excusing prospective juror for cause other than actual bias, such that excusal did not constitute violation of defendant's right to impartial jury during penalty phase of trial pursuant to defendant's guilty plea for aggravated murder, where juror stated during voir dire that she did not know if there would be a circumstance under which she would consider whether death penalty was appropriate; (2) trial court did not abuse its discretion in excusing prospective juror for cause when juror's strong opposition to the death penalty would have substantially impaired their ability to decide the case fairly.

State v. Washington, 355 Or 612 (2014).The Court held the trial court's determination that the nature of case justified empaneling anonymous jury, based on findings regarding defendant's prior convictions for violent crimes, his affiliation with criminal gang, his alleged threats against witnesses, and fact that he was facing death penalty, did not violate defendant's right to impartial jury, in capital murder trial, where the trial court advised every group of prospective jurors during voir dire that referring to them by number, and not by name, was how it was done in all cases

State v. Sundberg, 349 Or 608 (2011). The court held that 1) because the trial court had not made any finding that the circumstances of the particular case would support a need to protect the jurors' identities, the use of an anonymous jury was error and it compromised the presumption of innocence, and 2) in a matter of first impression, trial court's empaneling of an anonymous jury violated defendant's right to an impartial jury.

State v. Haugen, 349 Or 174 (2010). The Court held that the trial court's refusal to provide an interpreter for a non-English-speaking prospective juror, and its subsequent decision to exclude the prospective juror because he was unable to participate at trial without an interpreter, did not violate state statutes as interpreters were available during voir dire but not at trial

State v. Dalessio, 228 Or App 531 (2009). Court held that trial court abused its discretion by failing to dismiss a juror who did not affirm his commitment to impartiality.

State v. Evans, 344 Or 358 (2008). The Court held that the comment of prospective juror (that the juror had an "outstanding stalking order" against the defendant,) who was dismissed for cause, in presence of other prospective jurors during voir dire, was not so inherently prejudicial as to deprive defendant of his constitutional right to an impartial jury.

State v Carter, 205 Or App 460 (2006). Court held that trial court erred in denying defendant's challenge for cause because juror never confidently assured court that he could set aside his bias regarding assumption of innocence.

State v. Longo, 341 Or 580 (2006). The Court held that the State did not unconstitutionally use peremptory challenges to eliminate minority jurors when the court found "no reason to believe" one of the jurors was a minority.

State v. Johnson, 340 Or 319 (2006). The Court held that (1) There was no error on the part of the trial court granting the state's request to excuse, for cause, ten potential jurors who indicated that they could not, under any circumstances, vote to impose the death penalty and (2) that the trial court did not err in refusing to excuse six different potential jurors for cause.

Ryan v. Palmateer, 338 Or 278 (2005). The court held that (1) trial counsel in attempted rape proceeding did not render ineffective assistance by failing to challenge prospective juror who made statement during voir dire that she had several friends who had told her that they have been raped and that she believed them; (2) prejudice could not be presumed, for purposes of defendant's ineffective assistance of counsel claim, as a result of trial counsel's mistakes.

State v. Fanus, 336 Or 63 (2003). Court held that initial formulated opinions on guilt of defendant do not outweigh juror's unequivocal assurance that she can set aside her bias to apply the law.

State v. Compton, 333 Or 274 (2002). Court held that if juror eventually agrees to perform juror tasks, including the presumption of innocence, then her previous statements on guilt until proven innocent are not enough to deem the trial court erred in denying challenge for cause.

State v. Allen, 332 Or 244 (2001). The Court held that the defendant's failure to make a timely challenge (during voir dire) that the jury pool was not being selected lawfully precluded appellate review.

State v. Lotches, 331 Or 455 (2000). The Court held that the trial court's refusal to excuse for cause a juror who expressed general view favoring death penalty was not error, nor was for-cause exclusion of two potential jurors based on their perceived inability to set aside personal beliefs about death penalty.

State v. Simonsen, 329 Or 288 (1999). The Court held that (1) an inadvertent and passing reference to a defendant's earlier death sentence during *voir dire* did not require the dismissal of a jury panel and (2)by failing to object during voir dire, defendant failed to preserve for appeal alleged error in allowing juror who stated she had served on another panel less than 24 months previously to serve at defendant's capital sentencing proceeding.

State v. Barone, 329 Or 210 (1999). The Court held that defendant was not entitled to additional peremptory challenges.

State v. Barone, 328 Or 68 (1998). Court held that despite extreme personal bias in favor of the death penalty and against mitigating factors, juror's commitment to adhere to court instructions relieved trial court of abuse of discretion.

State v. Holcomb, 131 Or App 453 (1994).The Court held that: (1) juror's statement during voir dire that he had been a burglary victim some ten years earlier and subsequent statement during deliberations that he had been robbed many times did not constitute misconduct, and (2) juror's lie during voir dire regarding whether he had ever been charged with a criminal offense was the kind of misconduct that cannot be considered harmless and thus warranted grant of new trial.

State v. Loke, 131 Or App 751 (1994).The Court held that restricting the defendant's voir dire of the jury panel to 32 minutes, without allowing requested additional time, was reversible error.

State v. Langley, 314 Or 247 (1992), adh'd to on recons, 318 Or 28, 861(1993). The Court held that although some veniremen and some empaneled jurors were familiar with publicity about the defendant, the defendant was not denied a fair and impartial trial because jurors could not recall specifics and stated they had no preconceived notions about defendant's guilt or innocence.

State v. Rogers, 313 Or 356 (1992). The Court held that (1) the defendant was entitled to new penalty phase proceeding where sentencing jury was not asked whether death penalty was appropriate for defendant, considering all aspects of his life and crimes and (2) none of the three jurors defendant contended that the trial court erred in denying his challenge for cause could be challenged for implied bias under ORS 136.220, and the trial court did not err in denying defendant's challenge on that ground.

State v. Pinnell, 311 Or 98 (1991). ****Superseded by statute in *State v. Williams***** The Court held that the trial court committed harmless error by allowing voir dire questioning of prospective jurors as to whether they would consider proof of prior crimes in penalty phase of trial

State v. Stevens, 311 Or 119 (1991). The Court held that the State constitutional guarantee of the accused's right "to be heard by himself and counsel" did not allow him personally to ask a number of questions of each prospective jurors on voir dire.

State v. Walton, 311 Or 223 (1991). The Court held (1) The trial court in capital prosecution properly sustained prosecutor's objection to defense counsel's question of state's witness as to witness' interest in homicides and (2) Trial court in capital prosecution did not abuse its discretion in excusing for cause juror who opposed death penalty.

Ertsgaard by Ertsgaard v. Beard, 310 Or 486 (1990). The Court held that the trial court abused its discretion in granting a new trial where a juror failed to disclose her favorable disposition toward one of the defendants because counsel did not ask specific enough questions.

State v. Douglas, 310 Or 438 (1990). The Court held that the defendant failed to show that the trial court's decision to deny motion to dismiss juror for cause was reversible error, where the defendant did not object to any jurors who ultimately heard the case.

State v. Farrar, 309 Or 132 (1990). The Court held that the defendant, who had challenged the trial court's denial of his motion to dismiss a juror for cause, was not entitled to relief despite having unused peremptory challenges remaining.

State v. Montez, 309 Or 564 (1990). Court held that the trial court did not abuse their discretion for dismissing anti-death penalty jurors because they doubted their ability to assign the death penalty if the law required.

*State v. Nefsta*d, 309 Or 523 (1990). The Court concluded that a trial court did not abuse its discretion in excluding a potential juror for cause. The juror had expressed general objections to the death penalty but also had stated that he would be able to set aside that view and vote for the death penalty in appropriate circumstances.

State v. Wagner, 305 Or 115 (1988), cert. granted, judgment vac'd, 492 US 914, 109 S Ct 3235, 106 L Ed 2d 583 (1989) Court held that prospective juror who generally favors death penalty did not have to be excused as matter of law from sitting on jury in aggravated murder prosecution. Despite juror's opinions, he did not say he would be unable to set aside his personal feelings or that his belief in imposition of death penalty would cause him to disobey trial court's instructions on law.

State v. McFerron, 52 Or App 325 (1981). The Court held that: (1) failure of juror to respond to question on voir dire that he did not feel that he could leave his "vengeance" out of the deliberations and that it would be extremely difficult to follow the judge's instructions constituted a "false statement" which would prevent a fair trial and thus a retrial of defendant after mistrial was declared was not barred by double jeopardy, and (2) there was "manifest necessity" for mistrial, even though trial could have proceeded with 11 remaining jurors, in that State has right to jury of 12, and cannot be required to proceed with fewer, and thus retrial of defendant was not barred by double jeopardy.

State v. Ziebert, 34 Or App 497 (1978). The court held that under circumstances including the fact that defendant's prior conviction involved an element of theft and that the State forcibly directed the jury's attention to the prior conviction, the trial court committed prejudicial error by not allowing defendant to question prospective jurors on voir dire as to whether they might be prejudiced by defendant's prior conviction.

Lambert v. Sisters of St. Joseph of Peace, 277 Or 223 (1977). The court held that voir dire examination demonstrated substantial probability of actual bias on part of juror, who stated that he thought defendant was a very good doctor and that plaintiffs might have a harder time convincing him

because of his prior association with defendant, and thus plaintiffs, who were deprived of right to have issues determined by impartial juror, were entitled to new trial.

Turman v. C. Billing Bureau, Inc., 279 Or 443 (1977). The court held that a false representation during voir dire by a juror of his interest, status or situation in a case, or if the juror conceals a material fact relative to the controversy, is prejudicial misconduct for purposes of new trial and therefore it was not abuse of discretion to deny a new trial based on defendant's belated discovery that son of one juror, who stated that three or four years previously he had had dealings with a collection agency in California, had been recent object of defendant's collection activities.

Isom v. River Island Sand & Gravel, Inc., 273 Or 867 (1975). The Court held that the trial court did not abuse discretion in denying motion for new trial in personal injury action despite contentions that jury foreman failed to reveal that company of which he was president was codefendant in pending personal injury action and that another defendant in that case was represented by same law firm which was representing defendants in case at bar during voir dire.

Creel v. Shadley, 266 Or 494 (1973). The Court held that reversal was required where two jurors were improperly excused from the jury panel by a disqualified trial judge despite his belief that the jurors would eventually be disqualified for cause.

State v. Stocker, 11 Or App 617 (1972).The Court held that defendant was not entitled to a new trial because one of the jurors did not reveal in the voir dire that, about ten years prior to the trial, she had been the prosecuting witness in several worthless check cases, since the record disclosed that the juror answered every question truthfully and properly on her voir dire examination, that at no time was she asked whether she had been involved as a witness or otherwise in a criminal case, and that no question was asked her which could reasonably have been expected to prompt her to volunteer such information.

Transamerica Title Ins. Co. v. Ted L. Millar, Inc., 258 Or App 258 (1971). The Court held that a plaintiff who observed verbal exchange between juror and one defendant but who did not request court to interrogate juror or defendant concerning conversation was not entitled to a new trial on the basis of juror misconduct.

Zeiszler v. Fields, 255 Or App 540 (1970). The Court held that a juror who failed to disclose on voir dire that she had sat on previous case and had been castigated by the plaintiff's mother for failing to bring back verdict for her son, and that seven other jurors who also served on prior case had read and discussed with other jurors a letter written to newspaper by mother of plaintiff in prior case criticizing verdict in that case did not clearly establish that misconduct, if any, constituted a serious violation of jurors' duty and deprived defendants of fair trial.

State v. Barnett, 251 Or App 234 (1968). The Court held that the trial court erred in not permitting the defendant to ask the prospective jurors their religious faiths and the defendant was not precluded from doing so by fact that prospective jurors stated they did not have any religious beliefs that would prevent them from being impartial jurors and from giving defendant a fair trial.

State v. Anderson, 15 Or App 607 (1966). The court held that the lower court did not abuse its discretion in denying the motion for a continuance where jurors may have been in the courtroom during the voir dire examination of prospective jurors in previous prosecutions of the defendant absent showing that any juror who actually sat in the case either knew or had heard anything about defendant or his difficulties with law before trial.

Schmitz v. Yant, 242 Or App 308 (1965). The Court held that statements by prospective juror who did not subsequently sit in trial made during recess in voir dire examination, reciting circumstances of his own prior injury and declaring that he did not see how there could be any loss of love and affection no matter how serious the injury if man and wife loved each other was not proper ground for granting of new trial following judgment adverse to plaintiff.

State v. Buck, 239 Or App 577 (1965). The Court held that there was no abuse of discretion by the trial court in ruling that the defendant had not been placed in jeopardy as result of proceedings extending only to commencement of examination of juror number one on voir dire.

Johnson v. Hansen, 237 Or App 1(1964). The court held that although a question asked of a juror on voir dire involving insurance was improper, failure to award a mistrial on the basis of the asking of such question was not an abuse of discretion because it was not sufficiently prejudicial.

State v. Howell, 237 Or App 382 (1964). The Court held that the defendant's motion to stay criminal proceedings until a new jury panel was chosen was untimely where it was not made until after voir dire examination of jurors was completed and counsel for defendant had announced that defendant was satisfied with jury.

Skeeters v. Skeeters, 237 Or App 204 (1964). The court held that the trial court did not abuse its discretion in overruling defendants' motion for new trial of personal injury action because plaintiff's attorney on voir dire asked prospective juror if he felt that insurance representative, in dealing with insured, should be honest and tell truth in his dealings.

State v. Benson, 235 Or App 291 (1963). The Court held that failure of the defendant to inquire on voir dire whether juror had ever been convicted of a felony served to waive the incompetence of the juror on the ground of his prior felony conviction

State v. Stultz, 235 Or App 534 (1963). The Court held that the defendant was not prejudiced in the examination of prospective jurors by absence of a complaining witness when the name and address of

the complaining witness was given and when the defendant was permitted to examine prospective jurors in detail as to whether they knew the complaining witness.

State By and Through State Hwy. Common. v. Hewitt, 229 Or App 582 (1962). The Court held that the trial court did not err in refusing to declare a mistrial after defense counsel first asked but then withdrew question as to whether party who sold land to defendant less than two years before condemnation was in financial distress at the time of sale

Pfleeger v. Swanson, 229 Or App 254 (1961). The Court held that voir dire examination was not part of 'trial of facts' within statute (ORS §18.230. Repealed by Laws 1979, c. 284, § 199) providing that judgment of nonsuit may be given against plaintiff on motion of plaintiff at any time before issues have been joined and trial of facts has commenced.

Walker v. Griffin, 218 Or App 613 (1959), *overruled by Beglau v. Albertus,* 272 Or App 170 (1975). The Court held that a new trial was proper where a juror misrepresented his interest in the case, defendant had used his peremptory challenges, and without adequate knowledge to do so, defendant could not challenge juror for cause.

Lilley v. Gifford Phillips Wood Products, 211 Or App 439 (1957). The Court held that under statute providing for challenge of a juror for implied bias where such juror served on a previous trial in the same action, or in another action between the same parties for the same cause of action, a juror may be challenged thereunder only where cause of action in the case at bar is exactly the same as cause of action previously tried before such juror, but does not include all causes between the same parties where a fact or a combination of facts offered to support a cause of action may be the same or similar, even though the cause of action is different.

State v. Jensen, 209 Or App 239 (1956). The Court held that the fact that the district attorney, in examining jurors on voir dire, asked them whether they had "moral or conscientious scruples", instead of "conscientious opinions", against the death penalty was not error.

State v. Sack, 210 Or App 552 (1956). The Court held that where there is no indication that the defendant exhausted his peremptory challenges or that any challenge for cause was denied, the defendant was simply entitled to a fair jury, not to have any particular jurors selected.

Leishman v. Taylor, 199 Or App 546 (1953). The Court held that where defendant had admitted ownership of a truck involved in alleged collision with plaintiff's automobile, and had admitted that driver of truck at time of alleged collision was his employee, and was acting within course of employment, questions put to prospective juror in presence of other jurors by plaintiff's counsel during voir dire involving prospective juror's liability insurance for acts of his employees which gave inference that defendant also had liability insurance, were prejudicial, and trial court's refusal to grant defendant's motion for mistrial based upon such questions was an abuse of discretion.

State v. Leland,190 Or App 598 (1951), *aff'd sub nom. Leland v. State of Or.*, 343 U.S. 790 (1952). The Court held that it was improper for the lower court, during voir dire, to comment on the possibility of a parole in the case of a sentence of life imprisonment, but that any harm that might have been done was cured when the court told the jury in its charge that they should assume that "life imprisonment means imprisonment for life."

State v. Nagel, 185 Or App 486 (1949). The Court held that where counsel for the defendant chose not to examine the jury or to exercise any challenge, either peremptory or for cause, and even expressly declined when the suggestion was made by the district attorney, in order to avoid waiver of their rights by putting themselves in the position of accepting the jury, waiver cannot be implied from the act of challenging jurors any more than it could be from the vigorous defense made before the jury which was selected.

Jones v. Imperial Garages, 174 Or App 49 (1944). The court held that when a juror gives a false answer relevant to the controversy, he is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge and thus, that reversible error was committed by the trial court in overruling defendants' motion to set aside the verdict and grant a new trial on the ground of misconduct of the juror.

State v. Layton, 174 Or App 217 (1944). The Court held that if there was any error in denying defendant's challenge of cause of two jurors on their voir dire, it was cured by defendant's exercise of 8 of his 12 peremptory challenges.

Haltom v. Fellows, 157 Or App 514 (1937). The Court held that a statement of plaintiff's attorney, while examining veniremen on voir dire, that attorneys for defendant worked by day and did not care how much time they put in, although unwarranted and improper, was not objectionable as implying that defendants were insured, and that defendant's attorneys were employed by insurance company, nor was it reversible error.

Tauscher v. Doernbecher Mfg. Co., 153 Or App 152 (1936). The Court held that defendants were not entitled to a new trial on ground of false answer of juror on voir dire examination that he was not acquainted with defendants, where defendants knew that juror was testifying falsely at time he was accepted and raised no objection to his qualifications until after an adverse verdict.

State v. Stigers, 122 Or App 113 (1927). The Court held that the fact of juror's previous service in prosecution of offense growing out of the same transaction is not evidence per se of disqualification and the decision of trier of challenge of juror for actual bias will not be disturbed save for abuse of discretion.

Lidfors v. Pflaum, 115 Or App 142 (1925). The Court held there was no error in the trial court's overruling of defendant's objection to plaintiff's counsel inquiring as to potential juror's insurance

company career when the inquiry was made in good faith and not with a view to getting before jury fact that result of an adverse verdict will fall on an insurance company and not on defendant.

State v. Brumfield, 104 Or App 506 (1922). The Court held that if the trial court is satisfied, from an appropriate examination of the juror, that he can conscientiously disregard a preconceived opinion, and hear and determine the case impartially upon the facts and the law as given at the trial, the challenge for cause may be properly denied.

Askay v. Maloney, 92 Or App 566 (1917). The Court held that where an insurance company was a proper party defendant, no error was committed in permitting persons called as jurors to state, over objection and exception, upon their voir dire that they were not and never had been interested in indemnity security companies.

Hinkel v. Oregon Chair Co., 80 Or App 404 (1916). The Court held that where the falsity of a juror's testimony on his preliminary examination as to material matters is shown by competent evidence, a new trial should be granted upon the motion of the defeated party. (Affidavits of jurors are not competent evidence on motion for new trial to prove misconduct of member of jury, who while body was deliberating, stated he knew plaintiff, had seen him previously injured, and that present litigation was a scheme to get money out of the defendant for the former injury when juror stated under oath during voir dire that he did not know plaintiff.

Vasquez v. Pettit, 74 Or App 496 (1915). The Court held that it is an error for the plaintiff's attorney, in examining jurors on their voir dire, to ask questions which imply that an insurance company is defending the case.

Twitchell v. Thompson, 78 Or App 285 (1915). The Court held that where the trial court wrongfully overrules a challenge to a juror for cause, but the objecting party peremptory challenges such juror, the error was cured.

Nelson v. St. Helens Timber Co., 66 Or App 570 (1913). The Court held that a party cannot obtain review of errors in the voir dire examination of jurors, when no exceptions were taken thereto, and the objection was first made on the motion for new trial.

Putnam v. P. Mthly. Co., 68 Or App 36 (1913), modified on reh'g, 136 P. 835 (Or. 1913), *holding modified by White v. Milner Hotels, Inc.,* 518 P.2d 631 (Or. 1974) The Court held that a party has the right to inquire into the interest of a prospective juror in the case on voir dire, but it is error to allow questions to be asked in a case against an employer for the death of an employee where the employer is insured against such losses, which tend to prejudice the jury on that ground.

State v. Humphrey, 63 Or App 540 (1912). The Court held that although the trial court may have erred in overruling a challenge for cause, the error is cured by the exercise of a peremptory challenge

against the juror in question and until a defendant's peremptory challenges are exhausted, he cannot complain of the overruling of his challenge for cause.

State v. Seeley, 51 Or App 131 (1908). The Court held that the fact that a juror had served as juror in the trial of a codefendant for a previous murder did not necessarily disqualify him from sitting in the trial of the present defendant for riot as the examination of the juror on his voir dire indicated that he could try the case fairly and impartially and that he entertained no opinion as to the merits which would disqualify him.

State v. Megorden, 49 Or App 259 (1907). The Court held that "the erroneous overruling of a good challenge for cause, thereby compelling the use of a peremptory challenge, is not prejudicial error where it does not appear that the challenger was compelled to accept an objectionable juror."

Schwarz v. Lee Gon, 46 Or App 219 (1905). The Court held that where a juror stated on his voir dire examination that he did not know either of the parties and knew nothing about the case; that it would be hard to say whether in such a litigation he had any sympathy for one as against the other, but that he guessed he was in sympathy with the farmer, because he had had more dealings with farmers, that no bias was shown rendering the juror incompetent.

State v. Miller, 46 Or App 485 (1905). The Court held that in a prosecution for murder, a juror who testified that he was present in court at a former trial, heard part of the testimony, and talked with some of the witnesses, and formed a fixed opinion, which it would require a good deal of evidence to alter, and a juror who had talked with jurors and witnesses from the previous trial, and who stated that he had formed an opinion which it would require strong testimony to overthrow, was incompetent for actual bias, under B. & C.Comp. §§ 121, 123, ORS 17.135, 17.145 and a new trial was ordered.

State v. Lauth, 46 Or App 342 (1905). The Court held that the trial court's determination as to a juror's qualification will not be disturbed in the absence of an abuse of discretion, unless they may result in obvious injustice.

State v. Armstrong, 43 Or App 207 (1903). The Court held that fan opinion formed or expressed by a juror upon the merits of the cause from what he may have heard from his neighbors, together with newspaper reports, is not, of itself, sufficient to sustain a challenge

State v. McDaniel, 39 Or App 161 (1901). The Court held that where a juror testified that he had heard the crime talked about, and had expressed an opinion, but finally came to the conclusion that he did not know anything about it, and that, while he had formed no fixed opinion, it would require some evidence to remove his previous opinion, but that it would not interfere with his determination of the case, it was not error to overrule a challenge for cause.

State v. Savage, 36 Or App 191 (1900). The Court held that the action of the trial court in accepting a juror who stated during voir dire that he had read and heard about the defendant's examination, but would base his verdict entirely on the testimony at trial, will not be disturbed.

State v. Olberman, 33 Or App 556 (1899). The Court held that the fact that proposed jurors stated on their voir dire that they had read an account of the inquest held over the body of the person for whose murder the defendant was on trial, which purported to give the testimony of witnesses before the coroner's jury, and the verdict of such jury, and that they had heard the matter discussed, and, from what they had read and heard, had formed some opinion as to the guilt or innocence of defendant, would not disqualify them if it appears that the opinion was not of a fixed and determined character.

State v. Steeves, 29 Or App 85 (1896). The Court held where a codefendant had been tried and convicted and the defendant Steeves was denied the right to ask the jurors on voir dire if they had an opinion about the guilt of Kelly, this was an error.

State v. Brown, 28 Or App 147 (1895). The Court held that where a juror has formed an opinion as to the merits of a case based on what he has heard and read it is not sufficient to sustain a challenge, unless the court is satisfied from all the circumstances that the juror cannot disregard such opinion and try the case impartially, and a clear abuse of discretion in allowing one to act as juror who has stated that he has formed an opinion must be shown, to procure a reversal of the judgment on that ground.

State v. Kelly, 28 Or App 225 (1895). The Court held that where, upon examination of the jurors challenged on voir dire, that each of them testified that he had read what purported to be the facts of the case in the newspapers; that, from such reading and what he heard, he had formed and expressed some opinion upon the merits; but that it was not fixed, and would not influence his verdict if taken as a juror, there was no reversible error in overruling the challenge.

State v. Ingram, 23 Or App 434 (1893). The Court held that there was no error in the lower court's overruling of a challenge for actual bias where a juror stated that he should form his opinion from the evidence, if he was taken as a juror, and that he had no opinion that would affect his judgment after hearing all the testimony despite having read a newspaper report of a previous trial.

Kumli v. S. Pac. Co., 21 Or App 505 (1892). The Court held that the challenge to a juror was properly overruled where on his voir dire he testified that he had a loose opinion formed from what he had read and heard on the matter in controversy which he could disregard, and try the case on the law and the evidence.

State v. Saunders, 14 Or App 300 (1886), ***overruled by State v. Marsh****,* 260 Or App 416 (1971). The Court held that the trial court did not abuse its discretion in overruling challenges to jurors where the jurors showed that they had, to some extent, formed an opinion as to the guilt or innocence of the

accused which they said would require evidence to remove, but thought they could try the case impartially.

State v. Powers, 10 Or App 145, 45 Am.Rep. 138 (1882). It was held that the objection to the juror's competence due to prior conviction of "crime of moral turpitude" was waived by the defendant's failure to challenge the juror on voir dire.

State v. Brown, 7 Or App 186 (1879). The Court held that (1) a challenge was properly overruled where a juror stated that he had a preconceived but not fixed opinion as to the defendant's guilt, and (2) where a juror who lived several miles from the court house was present at the morning session of the court, in a criminal case, as a bystander and was later summoned on a venire to the county, that after adjournment he was not a bystander and was of the body of the county.

Tangentially Related Cases

State v. Taylor, 364 Or App 364 (2019). The Court held that although there was significant and undisputed evidence of bias by an alternate juror that surfaced after the trial, there is no evidence that her bias affected the jury's verdict.

State v. Rogers, 352 Or App 510 (2012). The Court held that 1) the lower court may not empanel an anonymous jury based on "a generalized desire to protect the anonymity of all jurors in all cases in the interest of juror privacy" and 2) in so doing, the anonymous jury procedures were not harmless with respect to defendant's ability to effectively use *voir dire.*

"Kick Juror #4."

Jury Selection and Bull: Tips from the TV Program and Observations from a Practitioner, Daniel Edwards

"In the 2016-2017 television season, CBS introduced the program Bull, loosely based upon the early jury consultant work of Phil McGraw, PhD, known as Dr. Phil on TV."

"Of course, all you need to do to use Dr. Bull's system is have several million dollars to develop the 400+ factor analysis of each potential juror, to assemble a mirror jury to watch the trial and comment on the effectiveness of the narrative as it actually develops, and the willingness to have staff hack others' computers, trespass or burglarize others' businesses and residences, and steal others' property."

"We all utilize stereotypes, heuristics, and attitudes to make quick decisions during our journey through life. We are aware of some of these. We are not consciously aware of others. Implicit bias occurs at a level below conscious awareness and without intentional control. Implicit bias can arise from and be reinforced by many factors including social learning experience, personal experience, common cultural understanding, emotional learning, and fear conditioning. The key to defeating implicit bias is awareness. Increasing discussion about or contact with implicit bias can, at least in the short term, reduce the impact. Questions to jurors that bring to the forefront implicit biases may help to reduce their impact. Also, broaching the subjects may make some jurors more aware so that the issue is discussed during jury deliberations."

"One of the methods of getting jurors to talk is by telling them that there are no right or wrong answers. Tell the jurors that your questions will only be about topics relevant to the case and only concern the issues that they will have to determine. In my voir dire at the end of the introduction, I enumerate the topics for the jurors. "There are three topics I hope to discuss with you today. First . . . . Second . . . . Lastly . . . ." Putting the jurors at ease by demonstrating your promise that there are no right or wrong answers, that there will be no criticism, and by letting them know in advance the topics to be addressed will encourage them to answer your questions."

"Common Mistakes

The most common mistakes in jury selection are:

1. Not being nice. From the moment you leave the house in the morning until the verdict, be nice to everyone. Potential jurors are watching. They know when you have been naughty and they know when you have been nice.
2. Failing to prepare and organize. Know the courtroom procedure. Know the law.
3. Not letting the jurors know what you are going to ask them and why that topic is pertinent to this case.
4. Taking an adversarial role. Unlike any other part of trial, you are not an adversary to the jurors. You need the information. Bad answers are especially good for the information that they provide.
5. Talking down to jurors and not understanding that jurors perceive the case through their life experience, attitudes, beliefs, biases.
6. Not revealing who you are as an individual in your analogies.
7. Not giving jurors sufficient time to answer your questions.

8. Not calling upon jurors who wish to respond. Even if you are not going to let that juror answer a question, indicate that you are aware that the juror wanted to answer. “I also thank jurors (name or number) for offering to answer.” If you do not recognize the individual juror, that juror may no longer answer at all and other jurors will be discouraged from answering.
9. Failing to protect your record. Even if a juror interrupts someone else’s answer, state the juror’s name or number so the response is attributed to a particular juror.
10. And the biggest mistake: failing to listen. Listen to what the juror has to say. You can echo the response if it helps you. You can follow up on the answer to gain further information.”

Jury Selection and Social Science: A Historical Snapshot of 4 Cases, Jules Troyer, Ph.D.

“Attorney's are experts in litigation, trained in nuances of complex law and judiciary process. Psychologists and Social Scientists are experts in human behavior and decision making. Applying social science methodologies to assist in selecting juries is known as scientific jury selection.”

“The advent of social science methods to select jurors first was recorded in the early 1970s and the trial of the "Harrisburg Seven" (Hans & Vidmar, 1982; Strier, 1999; Wrightsman, 2001). Seven defendants were charged with conspiracy to pillage draft boards and kidnap Secretary of State Henry Kissinger. The defense team hired sociologist Jay Schulman, who subsequently administered a rigorous community survey to create profiles of desirable and undesirable jurors. The trial resulted in a hung jury and promoted the idea that the social sciences were very useful in litigation.”

THE UNSCIENTIFIC SCIENCE OF JURY SELECTION, Jane C. Hu

“Arias, like all defendants in the American court system, has the right to be tried by a jury of her peers. The assumption is that the collective wisdom of good, everyday citizens will result in a fair verdict. But this system was designed well before social psychologists discovered how pervasive humans’ biases are.”

“If you’re a lawyer, you hope that you end up with jurors with biases that help your client’s case. Some attorneys are taking a more proactive tactic: They are hiring outside consultants who create a plan for selecting an ideal jury, and figuring out how to sway those jurors toward their desired verdict. The process is called “scientific jury selection.” Some consultants run mock trials to see if jurors’ characteristics predict verdicts. Others survey potential jurors about their beliefs and background to identify jurors who are least sympathetic to their client’s side, and they coach attorneys on how to convince them. The creepiest consultants complete full “pre-trial investigations” on potential jurors, which include background checks, interviews with acquaintances, and drive-by observations of jurors’ homes.”

“The first trial consultants were social scientists who wanted to help defend Vietnam protesters in a 1972 case. Since then, consultants’ presence in the legal system has grown considerably; as of the early 2000s, trial consulting was a $400 million industry. Like most consultants, they are paid handsomely, as much as seven figures per case. They’re indispensable in high-profile suits: Dr. Phil rose to fame when his trial consulting company represented Oprah in a lawsuit worth $12 million. (The Arias case may also involve consultants, but we can’t be sure: Consultants are not required to disclose their participation.) Critics raise concerns that these high fees mean only corporations or wealthy individuals can afford consultants, which widens the gap between the rich and poor in the courtroom.”

“SO, TRIAL CONSULTANTS ARE getting paid big bucks to craft an optimal jury, but how does scientific jury selection actually work? “Not very well,” says Neil Kressel, professor of psychology at William Patterson University and co-author of Stack and Sway: The New Science of Jury Consulting. “A lot of conditions have to be met in order for it to work.””

“One of those conditions is whether jurors’ characteristics actually predict their decisions. Researchers have yet to identify consistent links between juror qualities and the outcome of a trial; it’s all highly contextual. “Figuring out who the jurors are is somewhat important, but research shows it matters less than the facts of the case,” Kressel says. Mock trials have found that scientific jury selection only works better than traditional jury selection when juror characteristics are highly related to a specific verdict—for instance, a person who has had a family member die in a car crash may be more partial to car crash victims.”

“Jo-Ellan Dimitrius, the trial consultant hired for O.J. Simpson’s trial, wrote that “reading people is neither a science nor an innate gift,” and that “intuition ... has always played a major part in my work.” A sixth sense for lying or biased jurors would be an asset, but research shows that people are actually pretty bad at reading others. One review of over 200 lie-detection studies found that, on average, people correctly identify only 47 percent of lies, and 61 percent of truths.”

Scientific jury selection (Wikipedia)

“Studies are mixed as to the effectiveness of the practice, though it is clear that the evidence presented at trial is the most important determiner of verdicts (the trial result) and that SJS is more likely to have an impact where that evidence is ambiguous.”

“Although most of the practice's roots are in criminal trials, modern jury consultants are more often involved in torts (civil litigation),[10] particularly where wealthy corporate defendants fear an enormous monetary judgment for the plaintiff, or where plaintiffs' attorneys have invested large sums of money in an important lawsuit. Since the 1980s, large jury and trial consulting firms have emerged, earning multi-million dollar revenues, mostly from such high-stakes civil litigation.”

“ Researcher Shari Diamond indicates that jury consultants primarily rely on two methods: telephone surveys and mock trials (trial simulations).[15] Telephone surveys are the practitioners' "primary research method". During a survey of the community where the trial is taking place, jury consultants ask about:

1. background characteristics of the jury pool such as race, sex, marital status, age, income, and job; and perhaps more specific questions that depend upon the case itself;
2. beliefs and attitudes likely associated with a favorable or unfavorable verdict; and
3. (after reading a summary of the facts of the case) which verdict the survey respondent would favor.

Diamond writes that jury consultants then compare the three data sets to determine which background characteristics correlate to favorable attitudes and verdicts, and which attitudes correlate to favorable verdicts"

"Research psychologists Kassin and Wrightsman indicate that the model employed (demographic factors predict attitudes that predict verdicts) has empirical weaknesses. That attitudes predict verdicts is taken for granted and rarely studied."

"Although advocates and practitioners of scientific jury selection claim the practice is overwhelmingly effective at choosing juries that will render the desired verdict, its true effect is often more difficult to discern."

"Some academic researchers argue that the actual efficacy of SJS is obscured by poor research methodology. Specifically, demographic characteristics used to predict juror attitudes and juror verdicts may not hold true across all types of cases. For example, men convict more frequently than women in some types of criminal trials but less frequently in others.[23] Besides this, demographic characteristics are often less predictive than the attitudes jurors hold; for example, attitudes towards rape are better verdict-predictors than gender in rape trials.[24]"

"The actual efficacy of jury consultants may not be very important because the demographic composition of the jury has little effect on the verdict it renders, usually causing only a 5%–15% variance in verdicts.[25][26] The evidence presented at trial has far more impact on what the verdict will be.[27] As Kressel and Kressel indicate, "when the evidence is strong, nothing else matters much" and even when the evidence is ambiguous, demographic characteristics of jurors are a relatively minor influence.[28]"

"The effectiveness of scientific jury selection has also been comparison tested against other methods, such as attorney folklore and intuition. For trial attorneys, justifying the expense of SJS is contingent upon an improvement over their own jury selection abilities. Several empirical studies of traditional jury selection (by attorneys acting alone) have indicated that it and SJS are about equally effective.[32][33]"

Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, David Suggs & Bruce D. Sales

"...the procedures used during voir dire and the psychological atmosphere in which it takes place are virtually guaranteed to inhibit rather than facilitate such self-disclosure."

“A study of a number of cases in a midwestern federal district court concludes that attorneys use about eighty percent of voir dire time indoctrinating the jury panel. The study adds, however, that such indoctrination attempts by the attorneys often do not appear to succeed.”

“Those who support the attorney-conducted voir dire argue that inquiry into the biases of jurors requires the interviewer to have a thorough knowledge of the legal issues involved in the case and of the evidence to be presented by both sides. Because the trial judge does not, and should not, have such knowledge at the time of voir dire, it has been argued that he is not as competent as the attorneys to question the jurors." In addition, some commentators argue that judges do not ask pressing or probing questions about the jurors' attitudes and that, "[e]ither because of institutional pressures to keep their calendars moving or because of their lack of sympathy to one or both of the litigants, many judges question prospective jurors without much interest or enthusiasm, hoping that a panel can be quickly assembled and that the trial can begin."”

“Even though some studies do show a statistically significant savings of time through the use of judge-conducted voir dire, the time differences are not dramatic when compared to the overall length of the trial”

“Common sense dictates that people prefer to talk to and will reveal more of themselves to warm and friendly people, than they will to those who are aloof and emotionally detached. This view is supported by a number of psychological studies.”

“...it has been shown that nonverbal stimuli, such as head-nodding and mmhmming which indicate interest in what the interviewee is saying stimulate longer speech.48 Increased eye contact, less physical distance, relaxed posture and a direct orientation of the interviewer's body toward the interviewee all serve to reinforce the interviewee and, thus, elicit more verbalization and presumably more self-disclosure from him.49 A word of caution is in order, however, in regard to eye contact. Another study indicates that a direct linear relationship between eye contact and intimacy appears to hold only for women subjects: males view continuous eye contact, especially from other males, as threatening." Other research reveals that increased body motion on the part of male therapeutic counselors generates more self-disclosure from subjects, while low levels of body motion on the part of female counselors enhances subject self-disclosure.”

“If the interviewer suspects that a juror is lying and is unable to confirm this through friendly questioning, resort to aggressive tactics may be called for. This tactic is supported by the results of a study on the effects of induced anxiety which concludes that individuals tend to regress in stressful situations and respond to stimuli as they have done in the past. 3 Thus, a prospective juror with long-held prejudices might be more likely to admit them in a stressful situation engineered by the attorney's aggressive questioning.”

“...communication research indicates he will almost surely convey these feelings to the jurors through nonverbal communication.”

“Both the group and the individual-within-a-group styles of questioning are grossly inadequate for producing honest self-disclosure because they engender conformity of responses.”

“Thus, even before the voir dire begins, there are sociopsychological factors at work which encourage group cohesiveness and conformity of response, thereby militating against honest self-disclosure”

“In one study on independence and conformity, it was found that when an individual was called upon to state his opinions in public after hearing the opinions stated by the majority of the group, over one-fourth of the minority individuals covertly changed their private opinions and stated their public opinions so that they matched those of the majority.71 When the individual was not required to state an opinion in front of the group, the degree of conformity was markedly lower.”

Other jurors may see what “happens to one who makes the "wrong" response. Thus, in an attempt to avoid such close scrutiny, they may alter their responses so as not to give "wrong" answers.”

“If the goal of voir dire is honest self-disclosure, the most effective way to facilitate the achievement of that goal is to interview prospective jurors out of the presence of their fellows, thus eliminating the conformity-generating aspects of group voir dire. Collective questioning is the method least likely to encourage self-disclosure and should be avoided whenever possible.”

“The self-disclosure studies find that when interviews are conducted at distances ranging from three to six feet, the interviewee feels more comfortable, speaks significantly more and reveals more of himself to the interviewer”

“If the interview distance is decreased to less than approximately three feet, the interviewee becomes anxious and self-disclosure decreases.”

“...the legal community takes the position that excessive casualness is an evil which must be guarded against in order to insure the integrity of the trial. The legal community should also be aware, however, that excessive formality during the voir dire will inhibit juror self-disclosure and thus hinder the exposition of bias and prejudice.”

“The courtrooms in which voir dire is conducted can typically be characterized as "hard" rooms. Empirical data from a counseling analogue demonstrates that subjects disclose significantly more in a "soft" rather than a "hard" room.”

“Thus, the voir dire situation needs to be tailored to facilitate selfdisclosure. Present voir dire practices are not designed to encourage self-disclosure and indeed seem almost intended to discourage open, honest self-revelation.”

“There are several specific recommendations for revising the procedures used in conducting voir dire which could encourage selfdisclosure among prospective jurors. First, emphasis should be placed on individual rather than group or individual-within-a-group questioning. Second, questioning should be conducted by attorneys rather than by the judge. Third, the interviewer should conduct the interview from a distance of three to six feet from the jurors. Fourth, the questioning should take place in a smaller room than is traditionally employed, but should not result in crowding. And finally, the room where voir dire takes place should have a warmer and more intimate atmosphere than that of the cold, hard, ritualistic settings where it is presently conducted. Essentially, these recommendations urge the legal system to de-emphasize the adversarial approach to voir dire and to transform it into a more relaxed proceeding where free and open self-disclosure can take place.”

“Once voir dire is moved to a more open setting, there are four other recommendations derived from the psychological literature which could be employed to facilitate disclosure. First, positive reinforcement should be given to the juror when he makes self-disclosing statements. Second, the interviewer should make self-disclosing statements about himself to the prospective juror. Third, a model of self-disclosure should be offered to the juror prior to the voir dire. And finally, jurors should be instructed to disclose information about themselves.”

“In a study in which the subjects witnessed an interview of a self-disclosing stooge and were then asked how much they would be willing to disclose in the interview, it was discovered that subjects exposed to high disclosing stooges are significantly more willing to disclose information about themselves than are those exposed to low disclosing stooges."4 There was no interaction between the interviewer and the subject or between the stooge and the subject, so that willingness to disclose in this instance must be a function of modeling rather than of a social exchange process. In addition, another study demonstrates that a model for self-disclosure on videotape can increase subject self-disclosure in subsequent interactions.”

Scientific Jury Selection: History, Practice, and Controversy

Audrey Cleary
Psychology
Villanova University

“...scientific jury selection has generated controversy in both the legal and social scientific communities. Some legal experts have argued against it by claiming that jury selection is an art rather than a science, and that the intuition of an experienced trial attorney is superior to any social scientific approach. Many social scientist critics have argued that, while approaches from their fields are likely no worse than reliance on lawyers’ instincts, whatever discoverable benefit of social scientific approaches may still not outweigh their cost (Stolle, Robbenolt & Wiener, 1996).”

Results from academic research laboratories have not supported SJS practices. Trial attorneys have not outperformed undergraduates in studies of jury selection, lending doubt to the credibility of lawyers’ instincts in deciding the suitability of jurors (Olczak, Kaplan, & Penrod, 1991).

“There do not appear to be any reliable predictive demographic variables – juror occupation, gender, income, religion and age have not been found to have consistent effects across cases (Greene et al., 2002) – and it has not been possible to identify a personality type or combination of types that can predict juror decisions across criminal or civil cases (Kressel & Kressel, 2002). General tendencies toward conviction among jurors have not been satisfactorily identified; only weak relationships have been found

between convictions across case types between hypothetical robbery, murder, rape and negligence trials (Penrod, 1990). In general, personality traits are not valid predictors of jurors' voting predispositions"

"Preconceived attitudes and biases may generate more accurate predictions than will personality types, but people are often able to conceal such biases, especially when they may reflect negatively on the bias-holder (Kressel & Kressel, 2002)."

"Yet another criticism of SJS on grounds of fairness is that trial consultants often advertise a misleading win-loss record that cannot be confirmed or disconfirmed (Strier, 2001)."

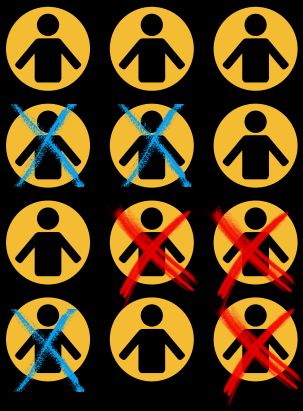
"The third major issue identified by Strier (1999) concerns the relative lack of standards unifying professionals in this field. He points out that many professions applying principles from academics, including law and psychology, are closely regulated to protect public interests. In addition, professional associations frequently mandate a code of behavior and ethics that all practitioners are bound to follow. However, there are no such checks on the field of trial consulting. Because there are no state licensing requirements, anyone can advertise and practice as a "trial consultant." The professional association in the field, the American Society of Trial Consultants (ASTC), has a Code of Professional Standards, which Strier calls "anemic" and much les strenuous than the standards set forth by the American Psychological Association (APA) (Strier, 2001, p. 71). It has even been suggested that some trial consultant practices violate APA standards (Herbsleb, Sales & Berman, 1979)."

"Some advocates of SJS argue that, despite the arguments of opponents, there *are* juror aspects that can predict subsequent verdicts. For one, juror attitudes can predict verdicts better than can personality traits. Results from various studies are thus summarized: attitudes toward women predicted verdicts in rape cases (Weir & Wrightsman, 1990); attitudes toward psychiatrists and the insanity defense predicted verdicts in criminal cases where the insanity defense was invoked (Cutler, Moran & Narby, 1992); a relationship was found between attitudes toward the death penalty and verdict in capital punishment cases (Nietzel, McCarthy & Kern, 1999), and attitudes toward torts and lawsuits affect the amount of damages awarded in civil suits (Kressel & Kressel, 2002). Some personality traits can predict juror decision-making fairly consistently. For example, the presence of an authoritarian personality, defined as a strong preference for order, for clearly articulated rules, and for powerful leadership, is modestly related to individuals' likelihood to vote for conviction in criminal cases (Narby, Cutler & Moran, 1993). In general, juror disposition appears to have a mixed effect on verdicts, and effects of attitudes generally vary from case to case (Penrod, 1990)."

"It appears that the influence of SJS is situational: it has a stronger effect at some times than at others. Kressel and Kressel (2002) have identified several instances in which SJS is more likely to have an effect on the outcome of a trial. Such instances include: when cases are publicized; when the evidence is ambiguous and does not favor one side more than the other; when juror views are

related to demographic characteristics and personality attributes that can be directly observed; when the predictors of juror voting are not immediately obvious to either attorney, even when they oppose lawyerly intuition; when attorneys are permitted to conduct a thorough voir dire; when the court is liberal in its allowance of peremptory challenges (attorneys are allowed to strike a limited number of jurors from the panel without having to give a reason. These allowances are referred to as *peremptory challenges*. Beyond that, attorneys are also allowed an unlimited number of *challenges for cause* – they may strike a juror, but must demonstrate that the prospective juror in question is biased or, based on some relationship to the case, is likely to be biased for or against one side); and when the budget for the trial allows for extensive pretrial research."

STRUCK JURY METHOD



Number of Jurors at Start:

 # Jurors Required for the Case Type
PLUS
 # Preemptory Challenges for Each Side (x2)

Jury is selected after preemptory challenges have been exercised by both parties.

JURY BOX METHOD

Number of Jurors at Start:
 # Jurors Required for the Case Type

Dismissed jurors are replaced with new jurors until both parties run out of peremptory challenges.