

GEORGE MASON AMERICAN INN OF COURT

“JUROR FEEDBACK”

October 16, 2013

Voir Dire and Jury Selection

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I. The Jury Panel in General

A. **Definitions**

As long as there have been courts and lawyers, there have been jury panels. The terms venire, veniremen, panel, and jurors have been used interchangeably by counsel; however, there is a distinct difference and each term has its own distinct definition as follows:

VENIRE: Consists of “veniremen” who are summoned to appear pursuant to Va. Code § 8.01-354. They are “potential” jurors in all cases.

PANEL: Consists of those persons called to sit for jury selection for particular case. They are “potential” jurors in a particular case.

JURORS: Consist of those persons selected to actually try the issues between or among parties and render a verdict.

B. **Right to Jury Trial**

1. Va. Code § 8.01-336 as well as Article I, Section 11 of the Constitution of Virginia gives each party the absolute right to a jury trial under most circumstances.
2. The court and counsel have the absolute right to conduct voir dire examination within the parameters as set forth by statute or within the discretion of the trial court. See. Va. Code § 8.01-358.
3. Amount of jurors in civil cases and how the jurors are selected is contained in Va. Code § 8.01-359.
 - a) Five jurors are to be impaneled to hear a case when the amount in controversy is less than \$25,000 (the jurisdictional limit of the General District Court).
Seven jurors are to be impaneled when on a case where money sought is in excess of \$25,000.
 - b) Pre-emptory strikes are ultimately taken between or among the parties.
If there is more than one defendant or if there is a third party defendant, all defendants and third party defendants **must** share their pre-emptory strikes.
 - c) If the parties cannot agree on the jurors to be struck, the Court may decide which jurors shall be stricken by lot.
 - d) A seldom used part of Va. Code § 8.01-359 entitles the parties to each agree to select one juror for the panel and have those two selected jurors select a third juror to hear the case; therefore, a jury trial can be had in Virginia where there is little as three jurors,

which consent of the parties which is much akin to an arbitration proceeding.

4. Va. Code § 8.01-360 permits the Court to impanel alternative jurors in cases where the litigation is expected to be protracted.

C. Who is Liable to Serve as a Juror

1. Va. Code § 8.01-337 permits anyone over the age of 18 years old who has resided in the Commonwealth of Virginia for more than one year and who has resided in the county or the city where the trial is to take place for at least six months, to serve as a juror.

D. Who Cannot Be On The Jury

1. Va. Code § 8.01-338 mandates that the following individuals may not serve on a jury panel:
 - a) Persons who are judged mentally incompetent (this must exclude 87% of all attorneys!).
 - b) Persons convicted of treason or felony.
 - c) Those persons who suffer from a disability as defined in Va. Code § 8.01-2.
 - (1) Infant
 - (2) Mentally retarded or mentally ill (the remaining 13% of all attorneys!)
 - (3) Drug Addict or Alcoholic
 - (4) Person of advanced age or who is in impaired health
2. A person who requests to be on jury duty during the term of court, shall not be allowed to serve as a juror during that term of court. See. Va. Code § 8.01-339.
3. A person who has a case pending in the jurisdiction where he/she is sitting as a juror during that term of court may not sit as a juror during that term. See. Va. Code § 8.01-340.

E. Persons Who are Exempt From Jury Duty

The following persons are exempt from serving as jurors at anytime as set forth in Va. Code § 8.01-341.

1. The President, Vice-President, Governor of Virginia or Lieutenant Governor of Virginia, and Attorney General of Virginia.
2. Members of Congress
3. Members of the General Assembly (when in session)
4. Licensed practicing attorneys
5. Judges, Magistrates, and Commissioners
6. State and Local Police
7. Superintendents of any penitentiary.

F. **Who May Claim Exemptions**

The following persons may ask to be exempt from jury duty upon proper application with the court or clerk pursuant to Va. Code § 8.01-341.1.

1. Mariners
2. A person who has the legal custody and who is responsible for a child(ren) under sixteen years old and who requires continuous care during normal court hours or in care of someone with a physical or mental impairment.
3. Persons over 70 years old.
4. A spouse of a person already summoned for jury duty during the same term of court.

II. **Do You Want a Jury?**

A. **Be Careful What You Ask For**

On the law side of the court and under certain instances on the chancery side of the court, either party may obtain a jury on all issues or certain issues simply by requesting of the court or clerk at the appropriate time prior to trial. However, one should attempt to avoid “the knee-jerk” demand for a jury trial. Selecting a case to be heard by a jury should be an intentional and deliberate strategic consideration. Keep in mind, however, it is always easier to ask for a jury be removed from a case and to have a court hear it, non-jury, than it is to ask at the last minute that a jury be impaneled to hear the issues to be tried.

B. **Deciding on a Jury Trial**

The following are considerations which must be kept in mind when deciding whether one wants his/her case heard by a jury.

1. **The Type of Case and The Issues Involved**. For example, in a lengthy contract dispute with multiple documents and “boring witnesses,” the parties may be better off having the case heard non-jury. On the other hand, a trial involving sexual discrimination or issues which will not “put a jury to sleep” may be better off being heard by a jury.
2. **Jury Appeal**. If one of the parties or issues in the case can evoke emotions and/or sympathy which will work in your client’s favor, then most certainly the consideration of a jury trial would be appropriate.
3. **Client and Witnesses**. Will the jury like your client? Will the jury like your witnesses? Will the jury like you?
4. **The Jurisdiction Where A Case Is Tried**.
 - a) A case where chiropractors may testify may have a negative affect upon jurors in Fairfax County. That same chiropractor may be well-known and more respected and treated more like a “doctor” in, for example Warren County.
 - b) An Arlington County jury may be more likely to be favorable to your client if he/she is Vietnamese or Hispanic as opposed to

outlying jurisdictions, which may be less accepting of testimony from immigrants or minority groups.

5. Do You Have a New Jury or Old Jury?

C. Jury Information Obtainable Before Trial

1. Background Designation

a) The clerk or designee should have background information of each potential juror on your case which is available for review before trial. Information which is generally provided consists of the following:

- (1) Name
- (2) Age
- (3) Address
- (4) Homeowner/Nonowner
- (5) Occupation and Employer
- (6) Martial Status
- (7) Spouse's occupation, if applicable

2. Jury List and Jury History

a) The clerk or designee should have available to you upon written request, a list of prospective jurors for your particular case prior to trial.

b) The clerk also has the "jury history" of prior cases during the term wherein the exact verdict reached by a particular group of jurors is recorded.

Obtain and review this thoroughly well ahead of trial.

c) Take it upon yourself to call the lawyers on the previous cases, specifically inquire about certain jurors' attitudes, especially in previous cases which resulted in "run away verdicts" or surprising verdict.

D. Jury Consultations

In larger cases where a lot of money may be at stake, it may be beneficial to employ a jury consultant, who are generally psychologists, to help you in jury selection or at least identify by way of stereotype, those type of jurors which should or should not be kept on the jury.

E. Logistics of Jury Selection

1. Prepare voir dire well in advance.
2. Prepare a jury box on a sheet of paper, transfer the information about each jury on that box as far in advance of trial as possible. This will enable you to not only have jury information distinctly in front of you but also allows direct eye ball contact with the jury at all times.
3. Get to know the bailiff, clerk, and court personnel prior to impaneling the jury.

- a) Find out what jurors sit where.
- b) Especially in smaller jurisdictions where there are very few jury trials during any one term, court personnel are more likely to remember the good, bad and “strange” jurors.
- c) Say “hello” to court personnel in front of the veniremen before the jury is impaneled and before the jury enters the court room. (Let the jurors know this is not your first time in the court room and that you are not a stranger to the court’s staff.)

F. Prepare Client For Potential Jury

Prepare the client that anyone he/she may meet or come across even before the trial starts may be a potential juror.

1. Don’t have your client telling jokes, laughing or taking the matter lightly at anytime while he/she is in the courthouse.
2. If at all possible, a client and his/her attorney shall refrain from smoking in sight of any potential juror.
3. Don’t “buddy up” to your opposing counsel. Remember in the eyes of the jury, you are “at war” with the other side. This is not to say that professionalism and civility should not be shown throughout the trial.

G. Types of Jurors

1. Leaders
2. Resisters
3. Shy, but deliberate
4. “Along for the ride”

H. Examination by a Judge

All judges will ask preliminary questions to the prospective jurors seeking whether any of the jurors should be excused from jury duty as a matter of law. Most courts will ask very few questions to the jurors and will allow counsel on voir dire, to conduct most of the examination. Most judges will ask questions in the following areas:

1. Whether any juror is related by blood or marriage to any party or counsel.
2. Whether any juror has heard anything or read anything about the case which is before the panel.
3. Whether there is any other reason why a jury panel could not render a fair verdict.

I. Examination by Counsel

1. Va. Code § 8.01-358 and case law gives counsel an absolute right to conduct voir dire examination.
2. Questions may and should aim towards biases that may affect your client’s case.

3. The Court has broad discretion in limiting questions of counsel that are too far afield of the issues or which are repetitious in nature.

J. **Strikes for Cause**

1. Strikes for cause come from the court, not counsel.
 - a) Make sure the jury knows this. It is not you asking the jury be struck, but rather the judge.
2. Some judges will strike a jury for cause without a motion of one of the parties if it appears warranted and obvious that a juror cannot be fair and unbiased. However, many judges still will not strike a juror for cause unless a motion is made by one of the parties. There is no limitation on the number of jurors that may be stricken for cause.

K. **Pre-emptory Strikes**

1. Each side alternates in taking the strikes.
2. Don't necessarily strike the jurors in order or priority. Your opponent may strike a questionable juror for you allowing you an "extra" strike.

L. **"Batson" Type Challenges**

Recent case law involving alleged racial discrimination in jury selection process has made voir dire examination and jury selection a matter of imperative public importance both in Virginia and surrounding jurisdictions. In the case of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 16 (1986), the United States Supreme Court ruled where a minority is a defendant in a criminal case, a prosecutor who strikes a minority from the jury panel without a "racially neutral basis", violates the Equal Protection Clause of the Constitution.

It should be noted, however, that although Batson is the lead case cited where discrimination and jury selection is alleged, this is not a new concept in our court system. In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1955), the Supreme Court ruled some 20 years earlier than Batson, that purposeful or deliberate exclusions of blacks from jury participation, violates the Equal Protection Clause. In Swain, however, the Court indicated that the defendant challenging the exclusion of such minority jurors, must show further that such exclusion by the State was a result of a systematic process used by the prosecutor. The Batson decision overruled this aspect of Swain and found that in any case in which a minority juror is excluded where a minority is on trial, may represent a "prima facie" showing of discrimination.

Under Batson, a criminal defendant may establish a prima facie case of racial discrimination by showing that he is a member of a cognizable racial group, that the prosecution exercised pre-emptory challenges to remove from the venire members of the defendant's race and that these facts raised an inference that the prosecutor used that practice to exclude the veniremen from the jury on the

basis of race. Once the defendant establishes a prima facie case of discrimination, the burden shifts to the prosecutor to come forward with a “racially neutral explanation” for removing persons of the defendant’s race from the panel. The Batson Gray v. Commonwealth, 233 Va. 313 (1987); Townes v. Commonwealth, 234 Va. 307 (1987); Spencer v. Commonwealth, 238 Va. 295 (1989); and Stockton v. Commonwealth, 241 Va. 192 (1991). In the 1992 case of Georgia v. McCollum, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the United States Supreme Court ruled that criminal defendants cannot use race as a basis for striking jurors. The Supreme Court found, therefore, that the Batson doctrine applied to criminal defendants as well as to the prosecution.

In 1991 the United States Supreme Court ruled that the Batson doctrine applied to jury selection in civil cases as well. See Edmonson v. Leesville Concrete Co., Inc., 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). The Batson doctrine was extended to civil cases in Virginia, in the case of Faison v. Hudson, Adm., 243 Va. 297 (1992), and more recently in the case of Hill v. Berry, 247 Va. 271 (1994).

In 1994 the United States Supreme Court extended the Batson doctrine to gender based cases finding that intentional discrimination by “state actors” on the basis of gender violates the Equal Protection Clause. See JEB v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994). Discrimination of jurors on the basis of gender has also extended to criminal cases in Virginia. See Robertson v. Commonwealth, 18 Va.App. 635 (1994).

M. General Type of Voir Dire Questions

1. Open Approach
2. Narrow Approach

N. Juror Rapport

It is of utmost importance that counsel develops “juror rapport” during voir dire.

1. This is your first impression of the juror and his/her first impression of you.
2. It is your only time to “talk” to the jury. You and the jurors may ask questions of each other and to each other.
3. Develop a dialogue with the jury. Voir Dire should never be just a monologue.
4. Make the panel members your friends and avoid making enemies.

O. Sensitive Issues With Jurors

1. Tell jurors up front that some of the questions that may be asked by you may touch an issue which is very sensitive to that particular juror.
2. Approach the bench with the juror in private if, in fact, there is an issue which is sensitive to that particular juror.

3. Take all precautions to prevent the embarrassment or the singling out of a juror on a very sensitive, emotional or delicate issue.

P. Rejection of Jurors

No juror wants to be rejected. Do not argue with juror or overtly point out to other jurors that a certain attitude or preconceived idea a juror may have should not be accepted or at least considered by the court and counsel.

Q. Should You Use A Juror As a Sounding Board?

1. Telegraph the positive reaction or response from one juror whenever possible so that the entire panel may be educated as to the single juror's outlook or attitude, if, of course, that outlook or attitude is favorable to your client's position.
2. Don't allow a single juror to "poison" the entire jury panel.
 - a) Know when not to ask a follow-up question.
 - b) Quickly move on to the next area topic of questioning.

R. Knowledge of the Law

Know the law before your trial begins.

1. Try to educate to the jurors in voir dire that they will have to follow the law that the judge gives them, even if a jury may have a philosophical problem with that particular area of law.
2. Know what issues will likely still be in the case after the conclusion of all the evidence.
3. Ask the court to rule, in limine, on certain issues which you feel may be asked by your opponent to the jury in voir dire which in your mind may be inadmissible and damaging to your client's image.

III. Philosophy of Jury Selection

A. The Purpose of Voir Dire Examination

Voir dire is one of the most overlooked parts of the trial by most litigators. We have all heard statistics that jurors make up their minds during opening statements and, in fact, studies have shown that after opening statements, 80% of all jurors have formed an opinion which is consistent with the final verdict. Whenever you read statistics such as this, you must always remember that voir dire takes place before there is an opening statement.

Voir dire examination is the very first time that you, as an attorney, will meet the persons who will determine the outcome of your client's case. In Virginia state courts, voir dire becomes an even more important aspect of trial since it is conducted by counsel, under most circumstances, and not the court. It is counsel's first chance to develop a rapport with the jury, to promote the theme of his/her case and to throw out those jurors who ought not to hear the case which is before them.

Know the following caveat:

The purpose of voir dire is not necessarily to select a jury, but rather to persuade a jury.

B. Relevant Questions to Ask Jurors

1. Clearly the questions in voir dire must be relevant. The questions must fall into the following categories:
 - a) Relationship to a party
 - b) Interest in the cause
 - c) Expression or formation of an opinion
 - d) Any bias or prejudice (Va. Code §8.01-358)
2. Remember that voir dire is not only your first opportunity to see the jury, but each juror's opportunity to first hear and see you. Treat them with courtesy and be professional in all of your questions and hopefully you will be treated the same as they listen to your case. By all means, smile appropriately and pleasantly, but never make light of the case for or against your client.
3. It is imperative not only to pay attention to the jurors, but also listen to what they say and watch what they do:
 - a) Are they evasive in answering your questions?
 - b) Do they frown at you, smile at you, laugh at you?
 - c) Do they look you, the attorney, in the eye when answering the questions you ask?
4. Know the "theme" of your case.
 - a) Theme and voir dire should be consistent with your theme during opening, presentation of the evidence and well into your closing statement.

C. Jurors Must Identify With Your Side

In addition to the jurors identifying with your side, the jurors must also:

1. Identify with your client
2. Identify with your client's cause
3. Identify with you as representing your client and his/her cause

D. "The First Hit"

A good voir dire should be a "mini" opening statement.

E. Greeting of Jurors

Welcome jurors to the "real world":

1. Avoid too much legal jargon.
2. Try to educate the jury panel as to the technical aspects of your case by asking specific questions of juror's understanding of the technical issues involved.

3. As in all questions to jury follow the world of “KISS” (Keep It Simple, Stupid!).

F. **Identifying Issues**

It is important to address all of the main issues which will be important throughout the duration of your case. This means asking questions that involved “the good, the bad and the ugly”.

G. **Concentrate on Questions**

Don’t worry so much about the answers. Be more concern about your questions.

H. **Attitudes of Jurors**

Remember that the attitudes, philosophies as well as the outlook of any certain juror is molded by those persons who are close to him/her. There is no one sure rule of which potential juror may be gauged. A person may seem to be of a certain mold, but a colleague, family member or friend or even an enemy who enters into that juror’s life, may affect that juror’s most vital views, desires and attitudes.

I. **Where to Stand**

Must you stay by the podium?

1. Don’t stand too close, don’t stand too far.
2. It can be quite effective to change the physical location in the courtroom when moving on to a new series of questioning on a new issue.

J. **Eye Contact**

It is important to maintain eye contact with each and every juror throughout the duration of voir dire.

K. **Movements of Jurors**

Note the body language of each particular juror. (They will note yours!)

L. **Addressing Jurors**

By certain to “ID” the jurors who respond to your questions individually by name.

1. It gives you the opportunity to personalize this juror.
2. Never refer to a juror as “juror number 1”.
3. Never address a juror by his/her name as this will appear to that juror you were being too casual and unprofessional.
4. A juror must be identified by name for the record in case of appeal.

M. **Use Follow-Up Questions**

Use follow-up questions to maintain rapport with a particular juror and to elicit further response in the hope of maintaining a dialogue and rapport with that

particular juror.

IV. Practical Tips of Jury Selection

A. **Be Yourself**

B. **Humanize Your Client**

Humanize your client in front of the jury and dehumanize your opposing party and counsel whenever possible.

C. **Questioning of Jurors**

Ask questions about the other side's lawyer if you think it is advantageous to your position. The tip is helpful in the following situations:

1. Big law firm versus small law firm.
2. If some of the jurors are familiar with you and your client and not familiar with the other side, elicit with the other lawyer his/her client and his/her cases, and elicit that knowledge or lack thereof from the jury.

D. **Attacking the Jury**

Do not attack or offend any juror under any circumstances.

E. **Prepare for Juror Questioning**

Be ready for tough questions from the jurors themselves. Remember a jury panel may have as many questions of you and your case, then you have of them.

F. **Don't be Stupid!**

Don't ask questions which you know will draw objections that will be sustained by the court. Don't ask questions so lengthy or that are so unorganized or rambling that you will draw an objection from counsel, or worse yet, the judge!

G. **Beginning and Ending of Questioning**

State with a powerful question and end with a thoughtful question.

H. **Control**

Most importantly, take control of the courtroom by precise, deliberate and delicate questioning.

I. **Addressing Issues**

Address specific problems with the jury. Don't ignore problematic areas which concern jurors.

1. Tort reform
2. "Whiplash" type injuries
3. Cost of health care
4. Insurance

- a) The deliberate interjection of insurance in a personal injury case is deemed to be reversible error and a basis for a mistrial. *Hope v. Windows v. Snyder*, 208 Va. 489 (1968). However, the issue of insurance coverage and settlement with insurance companies invariably creeps into voir dire responses with juror. One must be careful not to pry into the area of insurance in voir dire examination. If the issue comes up in response to one of your questions, try to move along to another question or to another juror as soon as possible. Improper questions to a jury on the issue of insurance coverage is the leading cause of mistrials during voir dire examination.

J. Objections During Voir Dire

Should you object during voir dire? My wife's husband has a general rule regarding objection during voir dire. Only object if a question is:

1. "Extremely prejudicial to your case"; or if,
2. You can get more mileage out of your objection; e.g., you can get the court to sustain your objection to your opponent's questioning at an early stage of voir dire which could affect the remaining questions your opponent may be asking and throw him/her "off balance."

K. When to Object

Va. Code §8.01-352(a) mandates that any objection to the irregularities of the jury list or the compilation of the jury panel prior to when the jury is being sworn, must be made before the jury is sworn. Any objection made thereafter may only be made with leave of court.

All attorneys should keep in mind that if an objection to a pre-emptory strike, e.g., a *Batson* strike, is not made in a timely fashion, the Court is likely to deem any objection you may have, waived. See *Gray v. Commonwealth*, 233 Va. 313 (1987). The question becomes: When must a party voice his objection to a "Batson" strike?

1. Must the objection be made when your opponent first strikes the juror from the voir dire list?
2. Should an objection be made after the parties have exercised all of their pre-emptory strikes?
3. Should an objection be made before the selected panel is sworn in?
4. Should the objection be made before the stricken juror is excused?

Apparently there is no uniformity among the circuit courts as to when such an objection should be made. In 1993 both the Virginia house and senate proposed legislation to clarify the matter. Those bills would have required that all objections to pre-emptory strikes were to be made before a juror is excused and before the jury is impaneled or such objection would be waived. However, both of the bills failed. A

prudent attorney should voice any objection to the pre-emptory strike at the earliest possible time; i.e. when the pre-emptory strike is first made. It would seem clear, however, that a party's failure to object to a pre-emptory strike before the stricken juror is excused and/or after the juror is impaneled and sworn, will likely result in waiver of any objection to the strike.