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Jury Selection in State Court: The Law and Practical Advice That You Can Use Immediately

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JURY SELECTION IN STATE COURT

THE LAW & PRACTICAL ADVICE THAT YOU CAN USE IMMEDIATELY

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I. THE LAW

A. RULES REGARDING JURY COMPOSITION

- A trial jury for a trial on an indictment consists of twelve jurors. C.P.L. § 270.05.
- A trial jury for a trial on an information consists of six jurors. C.P.L. § 360.10.
- The panel from which the jury is drawn is formed and selected as prescribed in the judiciary law. C.P.L. § 270.05.
- New York Judiciary Law, Article 16 governs the selection of juries. *See* §§ 500-527.
- The juror whose name was first drawn and called must be designated by the court as the foreperson. C.P.L. § 270.15(3).

B. THE OPPORTUNITY TO INQUIRE

1. GENERALLY

- Examination of prospective jurors is governed by C.P.L. § 270.15.
- The court describes the case and begins the questioning of prospective jurors. C.P.L. § 270.15(1)(b).
  - "The court ***shall*** initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of [the] case to all the prospective jurors. The court ***shall*** then put to the members of the panel who have been sworn pursuant to this subdivision and to any prospective jurors subsequently sworn, questions ***affecting their qualifications to serve as jurors in the action***." C.P.L. § 270.15(1)(b) (emphasis added).

- Both sides must be permitted an opportunity to examine the prospective jurors "individually or collectively, ***regarding their qualifications to serve as jurors***." C.P.L. § 270.15(1)(c).

- Each party ***shall be afforded a fair opportunity*** to question the prospective jurors as to any ***unexplored matter affecting their qualifications*** [.] C.P.L. § 270.15(1)(c).

- ***Questionnaires*** - The court has the discretion to require prospective jurors to complete a questionnaire concerning their ability to serve as fair and impartial jurors. C.P.L. § 270.15(1)(a).

- ***The court has broad discretion*** to restrict the scope of voir dire by counsel. *People v. Jean*, 75 N.Y.2d 744, 745 (1989).

- ***The court shall stop repetitive questioning.*** The court properly exercises its discretion when it precludes repetitive questioning of a prospective juror who had stated unequivocally that he was willing and able to serve as a fair and impartial juror. *People v. Mills*, 858 N.Y.S.2d 120 (1st Dept. 2008); *see also* C.P.L. § 270.15(1)(c) (" ***the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law***").

- ***Possibly improper forms of questioning*** --

  - Improper form of questions, hypothetical factual scenarios, and invitations to premature deliberations are reasons for the Court to restrict voir dire by the party. *People v. Salley*, 808 N.Y.S.2d 664 (1st Dept. 2006).

  - The court has broad discretion to supervise the scope of voir dire to preclude repetitive, irrelevant, or otherwise improper questioning, including questioning of jurors with regard to their knowledge of or attitude toward matters of law. *People v. Bennett*, 660 N.Y.S.2d 772 (4th Dept. 1997).

  - A court may properly exercise its discretion in restricting defendant's questioning of prospective jurors about their attitudes towards a psychiatric defense. *People v. Torres*, 702 N.Y.S.2d 24 (1st Dept. 2000). This opinion does not include an explanation of the rationale.

- ***The court can impose time limits.*** Where the court required each prospective juror to answer a detailed biographical questionnaire and clarified those answers where necessary, it was within the court's discretion to impose a time limit of 15 minutes on each attorney's voir dire in the first two rounds and 10 minutes for the third round. *People v. Jean*, 75 N.Y.2d 744 (1989).

    - ***Time limits in a multi-defendant case.*** The time limit to ask questions in a round of jury selection applies to all defense counsels in a multi-defendant case when defendants' counsel have shown that they ask the same questions, and not shown that they will not ask anything different. *People v. Carter*, 728 N.Y.S.2d 449 (1st Dept. 2001). Therefore, defendant failed to demonstrate that he was prejudiced by one codefendant's use of the entire voir dire time. *Id.*

- ***The court can dictate the structure and language of your questions as long as you still get a "fair opportunity" to ask about a relevant matter.*** The court may disallow a party to ask potential jurors how they might evaluate the credibility of police witnesses if it allows the party to ask "whether the association of particular jurors with police or other law enforcement officials would impair their ability to judge the case fairly and impartially." *People v. Bennett*, 660 N.Y.S.2d 772 (4th Dept. 1997).

2. AREAS WHERE THE COURT DOES NOT HAVE DISCRETION

- The defendant is entitled to explore the panelists' abilities to be impartial and to follow the court's instructions. *People v. Salley*, 808 N.Y.S.2d 664 (1st Dept. 2006).

- "Questions regarding how jurors would react to certain witnesses and whether they will accord the defendant a fair trial should be permitted during voir dire." *People v. Porter*, 641 N.Y.S.2d 283 (1st Dept. 1996).

- Reversal is also required based upon the court's improper curtailment of defense counsel's questioning of prospective jurors with respect to their ability to follow the court's instructions on the limited use of *Molineux* evidence. *People v. Harris*, 803 N.Y.S.2d 854 (4th Dept. 2005).

- It is not confusing to potential jurors to be asked if they would be

able to fairly assess the testimony of a witness with a criminal record but is a standard trial tactic of giving the panel a preview of the weaknesses in her case and gauging the reaction. To not allow the defendant to inquire about this is an abuse of discretion. *People v. Porter*, 641 N.Y.S.2d 283 (1st Dept. 1996).

- "Any restrictions imposed on voir dire, however, must nevertheless afford defense counsel a fair opportunity to question prospective jurors about relevant matters (*People v Boulware,* 29 NY2d [135], at 140)." *People v. Jean*, 75 N.Y.2d 744, 745 (1989).

- ***Permitting only one question of an entire panel is impermissible.*** *People v. Rampersant*, 581 N.Y.S.2d 784 (1st Dept. 1992).

- A court's general inquiry about critical topics is not enough to disallow counsel from asking questions about the topics. A court's general inquiry the jurors could promise to be impartial, fair-minded, decide the case on the evidence or lack of evidence, and apply the law as instructed does not address whether a juror would draw an adverse inference if defendant did not testify. *People v. Porter*, 641 N.Y.S.2d 283 (1st Dept. 1996).

3. ***SUMMARY - PRACTICE TIPS*** - Connecting your right to ask a question to statutes and case law

- To persuade the court to allow a question, your argument must explain why the question relates to your client's ***"fair opportunity"*** to inquire about a prospective juror's ***qualifications to serve as a fair and impartial jury in this case.***

- Explain why the question goes to whether the prospective juror ***can be fair.***

- Explain why the question goes to whether the prospective juror ***can follow the court's instruction.***

- Explain why the question goes to a ***relevant matter.***

- Explain why the question is new, *i.e.* ***not*** repetitious.

- Explain why the question is ***not*** about a juror's knowledge of a rule of law.

- If you lose the argument and it's important, make a record that you

object, about exactly what you would have asked, and why you should have been allowed to ask the question.

C. CAUSE CHALLENGES

- ***Reversible error where juror did not provide "unequivocal assurance" and cause challenge denied.*** It is reversible error to deny a challenge for cause based upon a potential juror's inability to be fair and impartial without obtaining "her unequivocal assurance" that her bias won't affect the verdict and that she can decide solely on the evidence. *People v. Harris*, 803 N.Y.S.2d 854 (4th Dept. 2005). In *Harris*, the prospective juror indicated that her assessment of defendant's guilt would be influenced by the number of complainants.

- "A challenge for cause of a prospective juror which is not made before he is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial." C.P.L. § 270.15(4).

- ***Grounds for cause challenges*** – A challenge for cause is an objection to a prospective juror and may be made only on the ground that:

  (a) He does not have the qualifications required by the judiciary law; or

  (b) He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial; or

  C ***Practice tip*** – subsection (b) is the basis for challenges relating to bias, inability of a prospective juror to unequivocally state she can follow the court's instructions, or inability of prospective juror to unequivocally state that he can put aside his expertise in an area relevant to the trial and decide the trial based only on the evidence presented.

  C "I think I could be impartial," falls short of the required unequivocal declaration of impartiality and establishes a prima facie case that a juror has a state of mind likely to preclude her from rendering an impartial verdict. *People v. Sumpter*, 654 N.Y.S.2d 817 (2d.Dept. 1997); *see also People v. Burdo*, 682 N.Y.S.2d 681 (3rd Dept. 1998); *People v. Butler*, 686 N.Y.S.2d 372 (1st Dept. 1999).

(c) He is related within the sixth degree by consanguinity or affinity to the defendant or to the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or that he is or was a party adverse to any such person in a civil action; or that he has complained against or been accused by any such person in a criminal action; *or that he bears some other relationship to any such person of such nature that it is likely to preclude him from rendering an impartial verdict*; or

(d) He was a witness at the preliminary examination or before the grand jury or is to be a witness at the trial; or

(e) He served on the grand jury which found the indictment in issue or served on a trial jury in a prior civil or criminal action involving the same incident charged in such indictment[.]

C.P.L. § 270.20(1) (emphasis added) (capital case provision excluded).

- ***To preserve the record on a denied cause challenge*** – "An erroneous ruling by the court denying a challenge for cause by the defendant does not constitute reversible error unless the defendant has exhausted his peremptory challenges at the time or, if he has not, he peremptorily challenges such prospective juror and his peremptory challenges are exhausted before the selection of the jury is complete." C.P.L. § 270.20(2).

D. PEREMPTORY CHALLENGES

- The government and the defendant get the same number. C.P.L. § 270.25.
  - A level felony = 20 for the regular jury and 2 per alternate
  - B or C = 15 for the regular jury and 2 per alternate
  - For all other felonies = 10 for the regular jury and 2 per alternate
  - 3 for a misdemeanor trial and one for all alternates (court may authorize 1 or 2 alternates in a misdemeanor trial). C.P.L. § 360.35.

- ***Multi-defendant cases*** – "When two or more defendants are tried jointly, the number of peremptory challenges prescribed in [270.25(2)] is not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed." C.P.L. § 270.25(3).

E. *BATSON* – A RESTRICTION ON PEREMPTORY CHALLENGES

1. THE RULE

- In *Batson v. Kentucky* the Supreme Court of the United States held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant. 476 U.S. 79 (1986).

- There is a 3-part test involved in a *Batson* challenge:

  - First, the defendant must make out a *prima facie* case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Id.* at 93-94.

  - Second, once the defendant has made out a *prima facie* case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. *Id.* at 94.

  - Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. *Id.* at 98.

2. A SAMPLE OF ADDITIONAL U.S. SUPREME COURT CASES RE: *BATSON*

- **Batson *applies to gender.*** *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.*, at 130-131.

- ***Unless clearly erroneous, a trial court's ruling on the issue of discriminatory intent must be sustained.*** *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008). *Snyder* involved the following holdings, comments and facts:

  - The best evidence of discriminatory intent often will be the demeanor of the attorney exercising the challenge because it involves an evaluation of the attorney's credibility.

  - Race-neutral reasons, on the other hand, invoke a juror's demeanor.

  - Holding - The trial court committed clear error in rejecting the *Batson* objection.

  - Facts - the prosecutor used a peremptory challenge on a black graduate student. The student, under questioning from the defense about his ability to serve, informed the court that he would miss class time which may detrimentally affect his ability to graduate. The court called the student's dean, who informed the court that missing one week would not be problematic, and that the dean would "work with" the student to assist him in making up any assignments. Upon hearing this, the student voiced no further concern about his studies if he served on the jury. The prosecutor stated his anticipation of a brief trial (which is what occurred, at only 1 week for both guilt and penalty phases combined). The prosecutor used a peremptory challenge based upon the student's concern about missing class, and second, that the student might try to rush deliberations by voting for a lesser-included offense. The court held that when the trial court upheld the peremptory strike using either reason, it committed clear error: the first because the concern was removed once the dean promised one week would not affect the student's performance, and the second because it was speculation. The jury may have voted for first degree murder right away, and, if the student acted the way the prosecutor envisioned, he too would vote for first degree murder to end the deliberations quickly.

- ***A white defendant has standing to raise a Sixth Amendment challenge to the exclusion of black jurors.*** *Holland v. Illinois*,

493 U.S. 474 (1990). "[T]he Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community." *Id.* at 476-477. The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does). *Id.* at 480-481. The Sixth Amendment does not prevent the prosecutor from striking jurors based on race. *Id.* at 487.

- ***A juror has a right not to be excluded from jury service based on her race.*** *Powers v. Ohio*, 499 U.S. 400 (1991).

  - A criminal defendant has standing to challenge a juror's equal protection right not to be excluded from the jury based upon race. *Id.* at 415.

  - "We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* at 409 (emphasis added).

- ***The first prong of the* Batson *test is not meant to be an "onerous" one for the defendant.*** *Johnson v. California*, 545 U.S. 162, 170 (2005).

  - "[I]n describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.*

- ***The* Batson *test was designed to prevent racial discrimination in the selection of juries.*** The Equal Protection Clause forbids a party from striking a juror for a racially discriminatory reason. It is no matter that there may be unarticulated and valid race-neutral reasons for excluding a juror; what matters is the reason used to strike a juror. *See Johnson v. California* , 545 U.S. 162, 172 (2005).

    - "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. *See Paulino v. Castro,* 371 F.3d 1083, 1090 (C.A.9 2004) ("[I]t does not matter that the prosecutor might have had good reasons ...[;] [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn,* 355 F.3d 707, 725 (C.A.3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike)." *Id.* at 172.

- **New York case law regarding *Batson*** - A *Batson* challenge in New York may be made on several grounds, from the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Supreme Court case law, Article I, §11 of the New York Constitution, New York Civil Rights Law §13, and N.Y. case law.

    - ***Adoption of the* Batson *test.*** Determining whether a party has exercised peremptory challenges to strike potential jurors for reasons that implicate equal protection concerns is described as a three-step process. First, the defendant must allege sufficient facts to raise an inference that the prosecution has exercised peremptory challenges for discriminatory purposes. Second, if the requisite showing has been made, the burden shifts to the prosecution to articulate a neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the proffered reasons are pretextual. *People v. Allen*, 86 N.Y.2d 101 (1995).

    - ***Jury service is a civil right.*** Jury service – a privilege and

duty of citizenship – is a civil right established by our Constitution (N.Y.Const., art. I, §§ 1, 11; Civil Rights Law § 13) and a fundamental means of participating in government. *Id.* at 108.

- ***Equal Protection Clause grounds.*** Elimination of a potential juror because of generalizatio ns based on race, gender or other status that implicates equal protection concerns is an abuse of peremptory strikes. *Id.* (citing *Batson*).

- ***Burdens of production and persuasion regarding the three-prong test.***

  - When the proffered explanations appear facially race-neutral, the trial court must then determine "whether the opponent of the strike [here, the People] has proved purposeful racial discrimination." The focus at this third step is whether the "race-neutral" explanation is a mere pretext for racial discrimination. The ultimate burden of persuasion at the third stage rests unalterably on the party objecting to the peremptory strikes – in these three cases, the People. *People v. Payne*, 88 N.Y.2d. 172 (1996)(citations omitted).

  - Thus, in the *Batson-Kern-Alle n* context, if the party asserting the peremptory strike puts forward race-neutral reasons and the other side says nothing more, the Trial Judge *may* nevertheless find purposeful discrimination – pretext – based on the court's founded and articulated rejection of the race-neutral reason. *Id.* at 957.

  - If the Court rules that the reason offered in the second step is not race-neutral when it plainly is, and then overrules the strike, it skips the third step and the defendant is entitled to a remand. "As with *People v. Jones* and in contrast to the circumstances and developments in *People v. Payne,* the trial court in *People v. Lowery* lapsed into a procedural error. When it erroneously ruled that the defendant's proffered reason for excluding juror Number Three was not race neutral, the court then entirely and

functionally eliminated step three from the *Allen* three-step protocol. Plainly, defendant's reason--that the juror was from Bay Ridge and a high school teacher--did not on its face implicate the juror's race. Importantly, the step two requirement is a burden of *production*. Defendant satisfied that burden here, but the trial court neither considered the People's burden of *persuasion* nor did it even rule on pretext. The flaw in this case reflects a complete gap in the interlocking procedural mechanism and safeguards this Court has promulgated." *Id.* at 958.

- ***Timing of a* Batson *challenge*** – A *Batson* claim may be made when the strikes are made, and do not have to come after jury selection is complete. *People v. Bolling*, 79 N.Y.2d 317 (1992).

- ***Batson* remedies**

  - The appropriate remedy where it is established during jury selection that a prospective juror has been excluded through a discriminatory peremptory challenge is not for the court to declare a mistrial. Ordinarily, when a defendant raises a contemporaneous *Batson* challenge to the prosecutor's alleged use of a racially-discriminatory peremptory challenge, the appropriate remedy is to strike the challenge and seat the juror. *People v. Luciano*, 44 A.D.3d 123 (1st Dept. 2007).

  - Other appropriate remedies include declaring a mistrial and beginning jury selection anew where the struck jurors are not available, granting the violated party an additional peremptory challenge, or where a finding of jury discrimination is not made until after the conclusion of the trial, reversal of the conviction. *Id.*

  - However, as the plain language of the peremptory strike statute requires that a party must be allowed the requisite number of strikes, forfeiture of the misused strikes is not an appropriate remedy. *Id.*

II. PRACTICAL ADVICE THAT YOU CAN USE IMMEDIATELY

A. GOALS OF *ATTORNEY-CONDUCTED* JURY SELECTION

1. THINGS THAT SHOULD BE IN YOUR MIND AS YOU STAND UP

- Listen & observe
    - These prospective jurors are the most important people in the world at this moment. Treat them that way. Be highly focused on listening to what they say and watching what they are doing.
    - Do not assume that you know what someone means by an unclear answer. Ask the person a follow-up question.
    - Do not cut off a prospective juror unless you ask the person's permission and give the person a reason for why you are doing it.
        - For example - "I'm sorry to interrupt you. I have only 15 minutes to talk to all 16 of you and I need to cover another topic. Is it okay with you if I move onto that topic?"
- You should already have placed each prospective juror in the panel in one of 3 categories:
    - Probably negative
    - Neutral or unknown
    - Probably positive
        - The prosecutor may see them largely the same way that you do.
        - *Usually*, most of your time should be focused on finding out more about the neutral or unknown jurors because those are the people most likely to end up on the jury.
            - Do not get sucked into going back to the prospective jurors who always volunteer and who like to talk, unless it is for a strategic reason.

- Leave time to develop "cause" challenges.
- Remember that it's "de-selection".

- Is there a prospective juror who is probably good for your client but who is already vulnerable to a "cause" challenge?
  - If so, is it worth trying to rehabilitate that person, so that the prosecutor will have to use a peremptory strike on the person?
  - If the person refuses to be rehabilitated, can the person be used to "educate" the panel about one of your key themes?
    - For example - innocent people get arrested and charged with crimes; the police lie; or some specific life experience that ties into a fact in the case.
- ***Enjoy the process. Be enthusiastic.***
- Get in the talk show host mindset. This is a discussion. You're asking questions. They are talking to you and to each other. You need to hear what people think, while directing the conversation. If you talk more than the prospective jurors, you have failed to take full advantage of the process.
- ***You need to be polite, authentic, sincere, understanding and non-judgmental in your presentation and in your comments and questions.***
- What was the most effective part of the prosecutor's voir dire and how can you turn it against her or respond to it?
  - For example, the wedding analogy or the CSI discussion in a case where you're likely to argue to the jury the lack of objective, corroborating evidence

2. CREATE A SAFE SPACE FOR PEOPLE TO ANSWER QUESTIONS

- Possible introduction comments
  - "There are no right or wrong answers. There are only answers about what each of you thinks. Any honest answer

you give is okay."

- "This is a conversation. It's a discussion and a conversation between each other. I'm asking questions, but you're doing the talking."

- "We're in this together. We have a job to do together. It's not easy. All of us are nervous and it's okay to be nervous."

- Create the safe space sincerely, but quickly and then move on to finding out what they think.

- When necessary, state the obvious in an authentic, non-judgmental way and, if appropriate, identify with the juror.

  - "Ms. Johnson, it seems to me like you're nervous about this question. I'm nervous too. Asking questions and speaking in front of people about your honest opinions is not easy. But, we both have a job to do together. Can I ask you to please explain what you meant when you said . . . . ?"

- Do not just accept an answer if it's something important. Go back at the prospective juror. *Affirm the person's statement, ask for the person's permission (where appropriate) and then try to clarify the answer and it's meaning.*

  - "Mr. Smith, you mentioned that your relationship with your girlfriend would influence how you view this kind of case. You said that your relationship is private and that you don't want to talk about it. I respect that. Would it be fair for me to assume then, that when you said your relationship would influence how you view the evidence that you meant you already have a feeling about whether this man is guilty or not guilty? And, that feeling is very personal and private for you? And, it's not one you could put aside even if the judge instructed you that you had to? Would I be right in assuming then that you could not be fair in this case because of something about the private nature of your relationship with your girlfriend?"

- If a prospective juror was highly uncomfortable about an area of questioning, but there is an insufficient basis for a cause challenge, ask the judge for an opportunity to conduct follow-up questioning

in the robing room.

- Strategic decision - ***Antommarchi*** waivers?
  - Depends on the case and depends on the client.
  - Will prospective jurors be more honest if your client is not present in the robing room?
  - Are you missing an opportunity to humanize your client?
  - How does your client appear?

3. GETTING THE PROSPECTIVE JURORS TO TALK

- Using open-ended questions is critical. Most of your questions should be open-ended because the prospective jurors should be talking a lot more than you should be.
- You must carefully prepare and think about the exact language you use in the questions that start your "chapters".
- Every answer is an opportunity for a follow-up question.
- Every answer is an opportunity to move to a potential juror who has yet to talk.

4. DEVELOPING CAUSE CHALLENGES

- Affirm the person's answer and let the person know why you're focusing on her for a follow-up question.
  - "Ms. George, I think I heard you say that you'd wonder why my client would choose not to tell his side of the story in this case. Thank you for telling us what you were thinking."
- Drill down with cross-examinatio n style questions to lock the person into a cause challenge.
- Pay attention to each prospective juror's employment background and answers to the court's general inquiry and use them as a basis for follow-up questions.

- Regarding employment, for example, watch for law enforcement officers, doctors, lawyers, etc. If you want to develop a cause challenge for that person, think of questions that go to the person's special expertise and where the answers could demonstrate that the person would be unable to put aside this expertise in considering the evidence in the case.

5. EDUCATING THEM ABOUT THE IMPORTANT THEMES & FACTS IN YOUR CASE

C Hopefully, by voir dire, you know your theory of the case and the most likely critical facts in the case

C Develop questions and areas of questions based on these considerations. *See* work product examples.

B. VARIOUS EXAMPLES OF JUDGES' RULES FOR QUESTIONING

1. Common judge rules

- No questions about rules of law
- No hypothetical questions
- No questions incorporating specific facts of the case

2. Adapting to these rules

- Incorporate a person's prior answer to make your question a follow-up one.
- Tie your question to a question that the prosecutor was allowed to ask.
- Have in mind an even more general, more open-ended question where the answer will provide you with an opportunity for a more specific follow-up question.
- Have in mind general questions that will naturally lead to prospective jurors talking about facts that are similar to those in your case.
  - "Have any of you ever seen a fight?"

- "What did you see?"
- "Were you there at the beginning of the fight? Who do you think started the fight? Why?"
- "Did the person who started the fight win the fight?"

C. VARIOUS TYPES OF QUESTIONING

1. Attacking the worst fact in your case with one critical question or statement. ***THIS IS PROBABLY THE MOST IMPORTANT QUESTION YOU CAN ASK AND THE ONE YOU SHOULD ASK FIRST.***
    - "It is possible that . . . ."
    - "Can you think of a reason that . . . ." (Sunwolf)
2. Open-ended questions
    - These should be the majority of your questions.
        - Why?
        - What did you mean when you said . . .?
3. Closed-ended or cross-examination style questions
    - These are used most frequently in trying to close out the record for a challenge for cause.
    - They can also be used, when necessary, to close out questioning with a specific person in order to summarize the move on to someone else.
4. A meaty introduction before a question to either establish a theme, tackle a bad fact, or make people feel comfortable.
    - From a prosecutor in a sex case where there was a delay in reporting - "We're going to talk about something really private. If you want to, please feel free to even close your eyes and think about your own experience as I talk about this. Think about the first time you ever had sex with another person. Do you remember

how emotional it was? Do you remember how it felt? Do you remember which part of it happened first? Now raise your hand if you if you'd feel comfortable telling this room of strangers about it?"

- Use these introductions for jumping off points for follow-up questions that cement your theme or incorporate facts of the case.
    - "Ms. White, why didn't you raise your hand?"

5. Hypotheticals/Co mmon experiences
    - Teammates support each other (Motive to Lie)
    - Children arguing and a parent listening to both sides (Burden of proof & 5th Amendment)

6. Getting beyond just a "yes" or "no" ("agree" or "disagree") answer
    - Questions that ask for an answer on a spectrum from 1-10
    - Asking people to rank factors from a list
    - Having your follow-up questions already prepared in writing

D. SAMPLE JURY SELECTION QUESTIONS FOR VARIOUS CASES & ISSUES

1. CHILD-SEX CASE
2. DRUG CASE
    a. Witness credibility
3. DWI CASE
4. IDENTIFICATION
5. FALSE CONFESSION

E. USING VISUAL AIDS

1. REASONS FOR ATTEMPTING TO USE THEM

- Each prospective juror has an opportunity to form an opinion before hearing other peoples' opinions.
- They can facilitate "polling" on a question and quickly make it clear who should be the focus of follow-up questions.
- They can help you crystallize the language of your key questions and plan follow-up questions.
- They can be visual anchors for your voir dire.
- You can display them again in closing to remind the jurors of the "contract" that was made during jury selection.

2. SAMPLE VISUAL AIDS & SUGGESTIONS FOR USING THEM

- *See* work product handouts

3. OVERCOMING OBJECTIONS TO VISUAL AIDS

- It is not demonstrative evidence or any other type of evidence. Nothing in jury selection is evidence.
- It is a visual aid to assist the prospective jurors in understanding the questions and determining whether they are qualified to be jurors.
- There will be documentary evidence in the case and prospective jurors' ability to read and understand English entitles me to use a visual aid.
- This will allow me to examine the prospective jurors more quickly and efficiently, which will allow me to make better use of my opportunity to examine the prospective jurors "individually or collectively, ***regarding their qualifications to serve as jurors***." C.P.L. § 270.15(1)(c).

F. JURY QUESTIONNAIRES

1. CASES WHERE A QUESTIONNAIRE WOULD BE APPROPRIATE

   - See article from *The Champion*

2. ISSUES TO CONSIDER WHEN PROPOSING AND DRAFTING A QUESTIONNAIRE

   - See article from *The Champion*

3. A SAMPLE JURY QUESTIONNAIRE

   - See article from *The Champion*

IT IS POSSIBLE

FOR AN UNDERCOVER POLICE OFFICER

TO LIE ABOUT A PERSON SELLING HIM CRACK,

EVEN WHERE THE UNDERCOVER OFFICER HAS CRACK

WHICH HE CLAIMS IS FROM THAT SALE

13
Agree

7

01
Disagree

IT IS POSSIBLE

FOR AN UNDERCOVER POLICE OFFICER

TO LIE ABOUT A PERSON SELLING HIM CRACK

13 7 01

Agree Disagree

SAMPLE VOIR DIRE

Fight case – client had minor injuries and the complainant had fairly serious wounds

É Ask only 1 question at a time & listen to the answers

É Personalize the questions

É Be enthusiastic

POSSIBLE THEMES/TOPICS

- JUST LOOKING AT THE INJURIES DOESN'T TELL YOU WHAT HAPPENED
  - JURORS
  - POLICE
  - FEELINGS ABOUT THE POLICE
- SELF-DEFENSE
- LANDLORDS & TENANTS
  - JURORS
  - POLICE
- HOW DO YOU DECIDE THAT SOMEONE IS LYING
  - CHANGING STORY
  - PHYSICAL EVIDENCE NOT MATCHING THE STORY
- WHY PEOPLE LIE
  - ANGRY
  - HIDING SOMETHING
  - HATE
  - TO GET SOMEONE IN TROUBLE
- BURDEN OF PROOF

- **JUST LOOKING AT THE INJURIES DOESN'T TELL YOU WHAT HAPPENED**

JURORS

- HAVE ANY OF YOU EVER SEEN A SITUATION WHERE THE PERSON WHO STARTS A FIGHT ACTU ALLY LOSES THE FIGHT?
- WHAT HAPPENED?
- HAS ANYONE ELSE SEEN THIS?
- NOW LET'S SAY YOU HADN'T SEEN THE FIGHT BETWEEN THE TWO PEOPLE ---ALL YOU SAW WAS HOW THE PEOPLE LOOKED AFTER THE FIGHT. DOES LOOKING AT THE PEOPLE AFTER THE FIGHT TELL YOU WHO STARTED THE FIGHT?
- WHO THINKS IT DOES?
- WHO THINKS IT DOESN'T?
- WHY?

POLICE & JURORS FEELINGS ABOUT THE POLICE

- NOW I WANT TO TALK ABOUT **HOW YOU THINK THE POLICE WORK IN THESE SITUATIONS**. A LOT OF TIMES, THE POLICE ONLY GET TO THE SCENE AFTER THE FIGHT IS OVER, RIGHT.
  - É HOW DO YOU THINK THE POLICE DECIDE WHO TO ARREST WHEN THEY GET TO THE SCENE AFTER A FIGHT HAS HAPPENED?
  - É DOES ANYONE HERE THINK THAT THE POLICE USUALLY DECIDE THIS BASED MOSTLY BY LOOKING AT WHO'S HURT WORSE?
  - É IS THAT FAIR?
- IS THERE ANYONE HERE WHO THINKS THAT YOU CAN TELL WHO STARTED A FIGHT BY LOOKING AT WHO IS MORE HURT AT THE END OF THE FIGHT?
- DOES ANYONE HERE THINK THAT BECAUSE THE POLICE ARREST SOMEONE AFTER THERE'S BEEN A FIGHT, THAT THE POLICE MUST HAVE GOTTEN THE RIGHT PERSON?

- SELF-DEFENSE

  - GOING TO ASK A QUESTI ON – WANT EACH OF YOU TO TAKE A FEW MOMENTS TO THINK ABOUT YOUR ANSWER, THEN I'LL ASK SOME OF YOU TO SHARE IT

  - WHEN DO YOU FEEL COMFORTABLE SAYING IT IS OKAY FOR A PERSON TO DEFEND HERSELF BY USING A KNIFE?

    - É STOP ATTACKER FROM **SLAPPING** HER
    - É STOP ATTACKER FROM **PUNCHING** HER
    - É STOP ATTACKER WHO HAS **CUT** HER W/ A KNIFE
    - É STOP ATTACKER FROM **BREAKING INTO HER HOUSE**
    - É STOP ATTACKER WHO **BROKE INTO HER HOUSE** & **CUT** HER W/ A KNIFE

      - DOES ANYONE HERE THINK IT'S NEVER OKAY FOR A PERSON TO DEFEND HERSELF WITH A KNIFE?
      - IS ANYONE UNCOMFORTABLE BEING A JUROR IN A CASE LIKE THIS?
      - WHY OR WHY NOT?

o LANDLORDS & TENANTS

IN THIS CASE – YOU'RE GOING TO HEAR A LOT ABOUT A LONG-RUNNING DISPUTE BETWEEN A LANDLORD AND A TENANT. SO, I'M GOING TO ASK YOU A COUPLE OF QUESTIONS ABOUT YOUR THOUGHTS ON LANDLORDS AND TENANTS OR RENTORS.

o JURORS

1ST QUESTION – SHOW HANDS, HOW MANY PEOPLE HERE HAVE BEEN TENANTS – BEEN PEOPLE WHO RENTED AN APARTMENT FROM A LANDLORD?

HAS ANYONE HERE EVER HAD A BAD EXPERIENCE WITH A LANDLORD?

2ND QUESTION – SHOW HANDS, HOW MANY PEOPLE BEEN LANDLORDS?

HAS ANYONE HERE EVER HAD A BAD EXPERIENCE WITH A TENANT

NOW, I'M GOING TO POSE A QUESTION TO YOU AND ASK YOU TO ANSWER ON A SCALE OF 1 TO 10 –

WHO ARE YOU MORE LIKELY TO BELIEVE A LANDLORD OR A TENANT?

DEFINITELY A LANDLORD — DEFINITELY A TENANT

1 ------ ------ ------ ------- ------- ---------- ------- -------- ----- 10

THINK OF THE NUMBER IN YOUR HEAD AND THEN I'M GOING TO ASK YOU WHAT YOUR NUMBER IS?

WHY?

WOULD IT MATTER TO YOU IF THE TENANT WAS ON **SECTION 8**?

WHY?

WOULD IT MATTER TO YOU IF THE LANDLORD HAD A MOTIVE TRY TO GET THE TENANT OUT OF THE HOUSE? WHY?

7 KIDS AND WORKED 2 JOBS

LANDLORD'S FRIENDS AND FAMILY HAD THREATENED THE TENANT

TENANT HAD A CRIMINAL RECORD

LANDLORD WAS TRYING TO SELL THE HOUSE

LANDLORD CALLED ACS ON THE TENANT AND ACS FOUND THAT THE COMPLAINT WAS UNFOUNDED

- **LET'S TALK ABOUT THE ISSUE OF HOW YOU DECIDE WHETHER SOMEONE IS TELLING THE TRUTH.**
- HAS ANYONE HERE EVER BEEN LIED TO?
- WHEN?
- HOW DID YOU FIGURE OUT THAT THE PERSON WAS LYING?
    - DO YOU THINK IT MATTERS IF A PERSON'S STORY CHANGED OVER TIME?
    - WHAT IF OTHER FACTS THAT YOU KNOW, DON'T MATCH THE PERSONS STORY

- USE CHART REGARDING "WITNESS TELLING TRUTH?"

CRIMINAL RECORD

- FOLLOW-UP: IN YOUR EXPERIENCE, WHY DO PEOPLE LIE
  - ANGRY
  - HIDING SOMETHING
  - HATE
  - REVENGE
  - TO GET SOMEONE IN TROUBLE
  - TO AVOID GETTING IN TROUBLE
  - TO MAKE MONEY

IT IS POSSIBLE

FOR A PERSON TO REFUSE TO TAKE A BREATH TEST

AND

TO BE NOT GUILTY OF

DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL

1 3
Agree

7

01
Disagree

IS THE WITNESS TELLING THE TRUTH?

DOES THE PERSON'S STORY MAKE SENSE?

DOES THE PERSON HAVE A MOTIVE TO LIE OR A BIAS?

HAS THE PERSON'S STORY CHANGED?

DOES THE STORY MATCH OTHER EVIDENCE?

IS THE PERSON'S BODY LANGUAGE IMPORTANT?

IS THERE SOMETHING ELSE THAT IS IMPORTANT?

IT IS POSSIBLE

FOR A PERSON TO CONFESS

TO A MURDER THAT HE DID NOT COMMIT

13 7 01

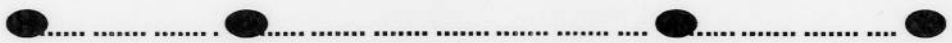
Agree Disagree

IT IS POSSIBLE

FOR AN 8-YEAR OLD GIRL

TO MAKE UP A LIE

THAT HER STEP-FATHER REPEATEDLY RAPED HER



1 3 7 01

Agree Disagree

IT IS POSSIBLE

FOR A CHILD TO MAKE UP A STORY THAT HER

STEP-FATHER RAPED HER

13 7 01

Agree Disagree

A PERSON CAN BE WRONG ABOUT AN IDENTIFICATION,

EVEN IF THE PERSON IS "CERTAIN" ABOUT BEING RIGHT

1 5 01

Agree Disagree

ACCURATE IDENTIFICATION?

1. W'S DESCRIPTION CHANGED OR STAYED THE SAME

2. W'S EMOTION

3. DURATION OF THE INCIDENT

4. W'S FOCUS

5. LIGHTING CONDITIONS

6. OTHER SUPPORTING EVIDENCE OR *THE LACK OF* OTHER SUPPORTING EVIDENCE

7. W'S CREDIBILITY

8. CROSS-RACIAL IDENTIFICATION

9. OTHER