FEDERAL COURTS LAW REVIEW -- 1998 Fed. Cts. L. Rev. 3

Civil Case Voir Dire and Jury Selection

by
Honorable David Baker
United States Magistrate Judge
Middle District of Florida

Abstract

[a.1] This article describes basic considerations in the jury selection process for civil cases in federal court with references to applicable rules and statutes. The second major part of the article discusses limitation on the exercise of peremptory challenges in civil cases, including recent leading cases. Tips for practitioners on effective trial preparation are included.

Table of Contents

1. Introduction

Stating the Obvious
Legal Framework

2. Frequently Encountered Issues

No Alternative Jurors
Challenges for Cause
Joint Peremptories
Extra Peremptories
Voir dire Requirements
Back Striking
Juror Questionaires

3. Batson: Limiting the Use of Peremptoriy Strikes

4. Tips for Procedural Success

1. Introduction[(1)]

[1.1] *Stating the Obvious:* The purpose of voir dire and the process of selecting a jury is to assure that the jury is free of prejudice and capable of rendering a free and fair verdict based on the trial proceedings. That is the *court's* purpose in implementing these processes. The *advocate's* purpose may, within limits, be more partisan. In trying to get the "fairest" jury, attorneys should recognize that the judge's goal in administering justice is slightly different from theirs. To have a chance of success, any deviation from neutral norms in jury selection must demonstrate a contribution toward fairness, not partiality.

[1.2] *Legal Framework:* The Federal Rules of Civil Procedure provide the starting point for jury selection:

Rule 47 -- Jurors

> (a) **Examination of Jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall

itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

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

(c) **Excuse.** The court may for good cause excuse a juror from service during trial or deliberation.

Rule 48 -- Number of Jurors -- Participation in Verdict

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate,

(1) the verdict shall be unanimous and

(2) no verdict shall be taken from a jury reduced in size to fewer than six members.

28 U.S.C. § 1870 provides:

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.

[1.3] The process of selection is familiar to all trial lawyers even though the methods of implementation vary widely from court to court and judge to judge. Prospective jurors are summoned and qualified generally.[(2)] Panels of suitable size are then sent to individual courtrooms for examination in particular cases. Through voir dire, jurors may reveal information resulting in their being excused (perhaps for some personal reason), challenged for cause (based on some specific disqualifying fact or circumstance), challenged peremptorily (based on a party's unspoken desire to eliminate a particular juror), or qualified for selection. Under recent Supreme Court cases the exercise of peremptories may itself be subject to challenge. *Batson v. Kentucky*, 476 U.S. 79 (1986).

[1.4] Each of these selection phases (excuse, cause, peremptory, *Batson* challenge) requires information from and about individual jurors. Deciding whether to excuse a juror or allow a challenge for cause requires specific information and grounds for exclusion. Exercise of peremptories involves no specific ground but still requires information for the application of judgment, instinct and hunches. A *Batson* challenge may compel the attorney to articulate the inarticulable and to rationalize the unreasonable.

[1.5] Within this general framework, case law (including the virtual absence of reversals) shows that the trial judge has nearly unreviewable discretion and control on all aspects of jury selection.[(3)] It is vital therefore to become familiar with the judge's preferences as well as any applicable local rules, customs and practices.

How large a panel will be summoned?[(4)]
Will background information about the entire panel be available?
If so, when?
How will voir dire be conducted?
Who will conduct voir dire?
If attorney voir dire is permitted, what latitude is proper?
How many jurors will be seated for the trial?
How should proposed voir dire questions be submitted?
How should objections to the other side's questions be raised?
How will peremptory strikes be exercised?
How many strikes will be allowed?

[1.6] Proper trial preparation includes knowing the answers to these questions *before* showing up for trial. Assuming you have previously come to some conclusions about the kind of juror you want and the kind you want to avoid, knowing the answers to these procedural questions should assist you in meeting your objectives. If nothing else, you'll be able to demonstrate to your client a mastery of the courtroom at the very beginning of the trial.

2. Frequently Encountered Issues

[2.1] *No Alternate Jurors:* Although use of alternate jurors was abolished in federal civil trials years ago, attorneys still come to final pretrial conferences or trials expecting to pick alternates with additional peremptory strikes. Under this no-longer-so-new Rule, all selected jurors remain to deliberate. Unless changed by the judge, only three peremptories are allowed per side regardless of the size of the jury to be seated. That size is likely to be determined by the length of the trial so as reasonably to assure at least six jurors remain to complete deliberations.

[2.2] *Challenges for Cause:* There are no hard and fast rules as to what constitutes grounds to excuse a juror for cause. The ultimate question is whether the juror can reasonably be found able to render a fair and impartial verdict even in light of some factor or characteristic that suggests possible bias or prejudice. Again, the issue will be decided by the trial judge, exercising broad discretion. If a prospective juror expresses doubt about her ability to be fair, she should be disqualified. Likewise, some sources of bias are too grave to permit a juror to continue even if she professes fair mindedness. For example, a juror with a financial interest in the litigation or a close family relation to one of the litigants would be disqualified.

[2.3] Beyond such obvious disqualifying characteristics, the case law is mostly helpful in identifying matters that do not compel (but may allow) disqualification. For example, exposure to

pretrial publicity is an appropriate area of inquiry. Even if prospective jurors have heard about a case and formed some opinions, they may not necessarily be excluded. If the court is satisfied through appropriate follow up questioning that the jurors can reach a fair verdict based the evidence at trial, there is no prejudice in proceeding with those jurors. The analysis is the same for other issues. Simply because a venireman was fired from a job does not make him ineligible to decide the facts in an employment discrimination case--provided the judge determines the juror can be fair. To that end, it is incumbent upon counsel to be prepared with follow up questions for further voir dire (by counsel or the court) specifically to assess the jurors' ability to be fair.

[2.4] *Joint Peremptories:* Co-parties aligned in interest are usually required to exercise their strikes jointly. *See* 28 U.S.C. § 1870. Even when separately represented, parties are not necessarily entitled to separate strikes. This can be an issue in employment cases if the case has been allowed to proceed against an individual defendant as well as a corporate employer.

[2.5] *Extra Peremptories:* In multi-party cases, extra peremptories may be allowed for parties not aligned in interest. For example, co-defendants with separate counsel and possibly antagonistic defenses or interests could be given separate peremptory challenges. Even if it is appropriate not to require joint exercise of peremptories, however, co-parties will not necessarily each be given three strikes. Often, a party opposed to multiple parties is given additional strikes to make the totals equal. The choices whether to require joint strikes or allow additional strikes are within the court's discretion. Arguments for more or separate strikes should feature practical considerations and common sense rather than precedent because there are few reported cases.

[2.6] *Voir Dire Required:* Unlike judges, prospective jurors are not presumed to be impartial. Thus, "at the least, some surface information regarding the prospective jurors" must be provided. *Kiernan v. Van Schaik,* 347 F.2d 775, 779 (3d Cir. 1965). As the rule indicates, however, voir dire *by attorneys* need not be provided. The precise amount of voir dire required to satisfy due process may be debated. Getting reversal of a jury verdict due to inadequate voir dire in a civil case is exceedingly rare. *Art Press Ltd. v. Western Printing Machinery Co.*, 791 F.2d 616 (7th Cir. 1986)[(5)] and *Feitzer v. Ford Motor Co.*, 622 F.2d 281 (7th Cir. 1980) may be the only recently reported examples. Thus, it is essential to be effective in urging the presiding judge to allow attorney voir dire or at least to use and follow up on well-crafted voir dire questions.

[2.7] *Back Striking:* The method for and limitations on the exercise of peremptory strikes is likewise controlled by the trial judge. Because the variations in seating, excusing and replacing jurors varies so widely, it is essential to understand the judge's method in advance.

[2.8] *Juror Questionnaires:* The use of written questionnaires is not mentioned in the Rules. Their use is permitted by some judges in some cases. One advantage to questionnaires is avoiding the more public discussion of personal information by jurors. Some individuals are likely to be more candid in a semi-confidential writing than in open court. The questionnaire would also reduce the possibility of an outburst that could infect an entire panel.

[2.9] Due to the invasive nature of the process, getting personal information from jurors must be justified by the needs of the case. A party's interest in manipulating sophisticated social science profiles and personality evaluations is not worthy of recognition. The selection of an impartial jury does not entail consideration of such matters. Systemic concerns about the appropriate treatment of citizens summoned for service mean personal questioning must be limited. Moreover, the practical consideration of avoiding possible juror resentment of invasive questioning counsels against going too far.

3. *Batson:* Limiting the Use of Peremptory Strikes

[3.1] In a series of cases the Supreme Court has held that the exercise of peremptory strikes is limited by principles of equal protection with respect to race and gender. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (government may not exclude racial minorities in criminal case); *Powers v. Ohio*, 499 U.S. 400 (1991) (white defendant may object to exclusion of minorities); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (principle of non-discrimination applies in civil cases); *Georgia v. McCollom*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (criminal defendants barred from using discriminatory challenges); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (gender based peremptories also prohibited).

[3.2] Although suggestions have been made to extend the principle of non-discrimination to other characteristics (*e.g.*, religion), race, ethnicity and gender are the three categories of peremptories subject to scrutiny. It is not necessary that the lawsuit have any racial or gender based issues or overtones for the *Batson* doctrine to apply. Nonetheless such cases, notably employment discrimination cases involving race or gender, will more frequently entail suspicions about the exercise of peremptory strikes. Interestingly, the paradigm for analyzing claims of discriminatory strikes relies on employment cases as a framework.

[3.3] The first stage in a *Batson* challenge is the assertion[(6)] by another party that one or more strikes has been improperly exercised. The challenging party must establish a *prima facie* case of discrimination based on all relevant circumstances, including whether there has been a pattern of strikes against members of the same group. Note that establishing a *prima facie* case may not be easy because the limited number of allowed strikes may not be enough to show a pattern. Particularly in a case not involving race or gender issues, the circumstances simply might not support an inference of discrimination.

[3.4] Relatively few civil cases have discussed exactly what constitutes a *prima facie* case of discriminatory use of peremptory strikes. Instead, many courts have simply gone on to the second step of the analysis, treating the *prima facie* case issue as moot. *See, e.g., Hernandez v. New York, 500 U.S. 352, 111S.Ct. 1859, 114 L.Ed.2d 395 (1991)*. Other cases seemingly disregard the requirement or treat the *prima facie* issue as uncontested. *See, e.g., Reynolds v. Benefield*, 931 F.2d 506 (8th Cir. 1991) and *Great Plains Equipment, Inc. v. Koch Gathering Systems, Inc., 45 F.3d 962* (5th Cir. 1995).

[3.5] In the second stage of analysis, if the trial judge is satisfied that an inference of discrimination could or should be drawn, the burden of production shifts to the proponent of the strike(s) to come forward with a neutral explanation. The trial court must then decide whether an improper basis for the strike has been proven. Even an implausible or silly explanation may suffice under this second step. *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). However, the reason must be "clear and reasonably specific" and be "related to the particular case to be tried." *Batson, supra,* 476 U.S., at 98. "[A] legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett,* 131 L.Ed.2d at 839. A number of cases with varying acceptable and unacceptable reasons are collected and discussed in *Batson, J.E.B., AND PURKETT; A Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S.Tex.L.Rev. 127 (1996).

[3.6] Though a rational explanation is not necessarily required, the more sensible the articulated basis for a challenge, the less likely is a finding of discriminatory intent. An overtly discriminatory explanation or one that is patently false[(7)] (as opposed to merely silly) will result in a finding of discrimination. Of course, if the stated ground were sufficiently justifiable, it might qualify as a challenge for cause, thereby saving a peremptory.

[3.7] At the third stage of a challenge, the challenger of the strike (who, like a discrimination plaintiff, bears the ultimate burden of persuasion) should be afforded an opportunity to argue against the proffered reason as a pretext. However, few judges are likely to allow extended proceedings at this point of a trial, so quickly stated arguments are best. Indeed, any *Batson* challenge must be promptly raised. Once the rest of the venire panel has been dismissed, a court is unlikely to entertain a challenge and will usually deem the objection waived.[(8)] *See, e.g., Morning v. Zapata Protein (USA), Inc., 128 F.3d 213 (4th Cir. 1997).*

[3.8] The appropriate remedy when a violation is found is not spelled out. The trial judge could treat the peremptory strike as waived or forfeited. Alternatively, the juror in question could be returned to the panel, with the offending party still permitted to use the peremptory against another juror. In some cases, a new jury pool or panel might be needed.

[3.9] The entire *Batson* process remains controversial and subject to criticism as an assault on the very notion of peremptory strikes.[(9)] The prospect of challenging or being challenged in the exercise of peremptory strikes runs counter to traditional notions of the nature of peremptory strikes. The loss of privacy and autonomy for attorneys in exercising strikes can be wrenching. Trial judges do not relish having to evaluate the sensibility and veracity of an attorney's stated reason for striking a juror. What is the rest of the trial going to be like after the judge has found the attorney's explanation not to be credible?

[3.10] The relative newness of *Batson's* application to civil cases along with the troublesome nature of raising the issue may explain the paucity of appellate cases discussing the issue. For better or worse, trial preparation now includes being ready to justify your peremptory strikes in some neutral way and, if appropriate, to challenge your adversary's strikes.

4. Tips for Procedural Success

[4.1] Due to the wide province of discretion, few cases are reversed based on a claim that the trial judge erred in jury selection. Accordingly, the only real opportunity to have an impact on the selection of the jury is getting favorable exercises of that discretion from the trial judge. This requires planning.

[4.2] First identify your objectives in the process. Find out what procedures the judge will employ. Do you want different procedures? If so how will you justify them? As an example, if you want to urge use of a juror questionnaire, you have a better chance of persuading the judge to use one if it is presented some time prior to 9:00 a.m. on the first day of trial. Indeed, if you doubt the judge has ever used a questionnaire, you should consider submitting the proposal well in advance of the final pretrial conference so objectionable questions can be deleted and the logistics ironed out. Waiting until later is a waste of time.

[4.3] Similarly, written requests for voir dire have a better chance of being used if they are submitted timely. The court will be justified in ignoring your request if it is tardy. Discussion and possible agreement with your adversary on some of these procedural issues should also be sought. Even though the time of final trial preparations is the tensest, it is still a good time to talk to the other side - - you might find that you agree on the use of a questionnaire or attorney voir dire. The judge is more likely to approve a joint proposal than one that reeks of partisanship.

[4.4] All of this is to say: if you want to persuade the judge to give you a break in jury selection, give the judge a basis for ruling in your favor at a time when it makes sense.

ENDNOTES

1. This essay is directed to civil litigators. Some of the issues and considerations discussed also apply in criminal trials. However, no attempt has been made to include decisions from criminal cases.

2. It is possible to challenge the entire summoning and selection process. 28 U.S.C. § 1867. Such action is rarely considered and is not discussed further herein.

3. The most recent Supreme Court decision on the scope of voir dire, *Mu'min v. Virginia*, 500 U.S. 415 (1991), lists some of the many of the cases illustrating this point. Even with a defendant's life at stake, the trial judge is given "wide latitude" in determining the extent to which a subject of inquiry must be "covered." Having done so, the "trial court's finding of juror impartiality may 'be overturned only for "manifest error."' [citations omitted] *Id.*, at 428.

4. There is a trend in federal court, spurred by space and cost constraints, to limit the size of courtrooms, the venire and the number of jurors. Local jury plans, cognizant of budgetary

concerns, call for smaller venire panels. This necessarily impacts the selection process. With fewer potential jurors to spare, a judge may be more grudging in granting excuses.

5. Even this victory was hollow: the appeal after remand shows that the plaintiff recovered several times the amount of the first verdict even though the defendant presumably had the benefit of a "fairer" jury. *Feitzer, supra,* 852 F.2d 276 (7th Cir. 1988).

6. Counsel wishing to raise a *Batson* challenge should not wait for or rely on the trial judge to ask if there are any such objections. Some judges may make a point of asking, but others will not.

7. A mistaken ground (stated in good faith) for exercise of a strike may suffice to negate an inference of discrimination. *Hurd v. Pittsburg State University, 109 F.3d 1540 (10th Cir. 1997*).

8. Raising untimeliness must also be done with dispatch. In *Garcia v. Excel Corp., 102 F.3d 758 (5th Cir. 1997)* the court reviewed a *Batson* on its merits because an assertion of untimeliness was itself not raised until the appeal.

9. There is a detailed and lengthy lament in *Minetos v. City University of New York,* 925 F. Supp. 177 (S.D.N.Y. 1996).