VOIR DIRE AND JURY SELECTION

By Daniel S. Bernheim, 3d, Esq.

WILENTZ
—ATTORNEYS AT LAW—
WILENTZ, GOLDMAN & SPITZER, P.A.

HISTORICAL PERSPECTIVE[1]

The Seventh Amendment guarantees a jury trial in civil cases at law in federal court. The Amendment traces its roots to English common law; some historians trace the origin of the English jury as far back as Ancient Greece. Sir William Blackstone, in his influential treatise on English common law, called the right "the glory of the English law" and necessary for "[t]he impartial administration of justice," which, if "entirely entrusted to the magistracy, a select body of men," would be subject "frequently [to] an involuntary bias towards those of their own rank and dignity."

From England, the colonists brought the right to a jury trial across the Atlantic. The civil jury played an important role during the colonial era. The colonies stoutly resisted the King of England's efforts to diminish this right, and the Declaration of Independence identified the denial of "the benefits of trial by jury" as one of the grievances that led to the American Revolution. Despite this right's prominence in Colonial America, however, a right to a civil jury trial was not included in the original draft of the Constitution.

Records of the Philadelphia Convention show that the delegates twice raised the issue of whether the Constitution should include a right to a jury trial. On September 12, 1787, toward the end of the Convention, Hugh Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." Some delegates expressed support for such a provision but observed that the diversity of state courts' practices in civil trials made it impossible to draft a suitable provision. This latter concern appears to have served as the basis for defeating a motion, brought by another delegate on September 15, 1787, to insert a clause in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases."

After the Convention, many opponents of the Constitution's ratification cited the omission of a right to a jury trial with such "urgency and zeal" that they almost prevented the states from ratifying the Constitution.

Some opponents of the Constitution claimed that the absence of a provision requiring civil jury trials in a Constitution that mandated jury trials in criminal cases implied that the use of a jury was abolished in civil cases. In the Federalist Papers, Alexander Hamilton refuted this assertion, expressing the view that the Constitution's silence on civil jury trials merely meant "that the institution [would] remain precisely in the same situation in which it is placed by the State constitutions."

In ratifying the Constitution, several states urged Congress to provide a right to a jury in civil cases as one of the amendments. The right was included in the list of amendments James Madison proposed to the First Congress, which adopted the right as one of the Bill of Rights. It does not appear that the proposed amendment's text or meaning was debated during its passage. The Seventh Amendment became effective as part of the Bill of Rights in 1791.

FUNDAMENTALS OF PENNSYLVANIA LAW

An excellent overview of Pennsylvania law as it pertains to the selection of juries under was set forth in the Pennsylvania Supreme Court case of *Shinal v. Toms*, 640 Pa.295, 162 A.3d 429 (2017). Before reaching the merits of the matter which concerned the likelihood of prejudice to the patient-plaintiff in a medical malpractice wherein a prospective jurors' allegedly held close financial and situational relationship with the defendant surgeon, the Court reviewed the role of jurors and the applicable law of challenging a prospective juror.

One of the most essential elements of a successful jury trial is an impartial jury." *Bruckshaw v. Frankford Hosp. of City of Phila.*, 619 Pa. 135, 58 A.3d 102, 109 (2012); see *Colosimo v. Pa. Elec. Co.*, 513 Pa. 155, 518 A.2d 1206, 1209 (1986). We protect that impartiality through the *voir dire* process, vetting potential jurors to discern bias or relationships to the parties, lawyers, or matters involved. *Bruckshaw*, 58 A.3d at 110; *Commonwealth v. Marrero*, 546 Pa. 596, 687 A.2d 1102, 1107 (1996) ("The purpose of *voir dire* is to ensure the empaneling of a fair and impartial jury capable of following the instructions of the trial court."); *Colosimo*, 518 A.2d at 1209; see Pa.R.C.P. 220.1–221 (pertaining to *voir dire* and the use of peremptory challenges). Importantly, it is not simply the fact of partiality, but also the appearance of partiality or bias, that the trial court must consider. See *Commonwealth v. Stewart*, 449 Pa. 50, 295 A.2d 303, 306 (1972) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.")).

Challenges for cause are essential means by which to obtain a jury that in all respects is impartial, unbiased, free from prejudice, and capable of judging a case based solely upon the facts presented and the governing law. At the trial of Aaron Burr, Chief Justice John Marshall explained the principle: Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice. *United States v. Burr*, 25 Fed. Cas. 49, 50 (C.C. D.Va. 1807).

At common law, for-cause challenges were divided into four classes: "*Propter honoris respectum*, out of respect of rank or honor; propter defectum, on account of some defect; propter delictum, on account of crime; and propter affectum, on account of affection or prejudice." Butler v. Greensboro Fire Ins. Co., 196 N.C. 203, 145 S.E. 3, 4 (1928) (emphasis added).7 Challenges propter affectum operated to bar the seating of a juror employed by a party to the litigation due to the appearance of partiality arising from the party's potential control over the juror. See Cummings v. Gann, 52 Pa. 484, 487 (1866) ("All the authorities seem to be, that where the objection is not on account of relationship, to require it to be shown as a ground of principal challenge *propter affectum*, as between the party and juror, that the former holds a position in which he might exercise a control over the latter.").8 As this Court explained long ago:

The law, in every case, is scrupulous to prevent even the possibility of undue bias; it does not deal with a juror as with a witness; admit him, though it doubts him; the slightest ground of prejudice is sufficient. The prejudice itself need not be made out; the probability of it is enough. One related, though by marriage only, as remotely as the ninth degree, to the defendant or the prosecutor, may be challenged off the jury for that cause. Any one, who, in any possible way, no matter how honestly, has been warped by any preconceived opinion which may affect his verdict, or has made up his mind what verdict he is to give, and declared it, is excluded. Nothing in the law can well be more extensive than this right of challenge *propter affectum.* *Lesher*, 1827 WL 2776, at *2.9 [3]

As a general matter, the test for determining whether a prospective juror is disqualified is "whether he or she is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor." *Commonwealth v. Colson*, 507 Pa. 440, 490 A.2d 811, 818 (Pa. 1985).10 The trial judge must determine whether the juror is able to put aside any biases or prejudices upon proper instruction from the court. *Commonwealth v. Bridges*, 563 Pa. 1, 757 A.2d 859, 873 (2001); *Colson*, 490 A.2d at 818; *Commonwealth v. Drew*, 500 Pa. 585, 459 A.2d 318 (1983).

Generally, "[t]he decision on whether to disqualify is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of

discretion." Commonwealth v. Koehler, 558 Pa. 334, 737 A.2d 225, 238 (1999) (quoting Commonwealth v. Wilson, 543 Pa. 429, 672 A.2d 293, 299 (1996)); see Colson, 490 A.2d at 818; Commonwealth v. Black, 474 Pa. 47, 376 A.2d 627 (1977). However, we have required the trial court to grant a challenge for cause in two scenarios: "when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses" or, alternatively, when the juror "demonstrates a likelihood of prejudice by his or her conduct and answers to questions." *Bridges*, 757 A.2d at 873; *see Wilson*, 672 A.2d at 299; *Colson*, 490 A.2d at 818.

Challenge of a prospective juror for cause may invoke bias that is either implied or actual. Implied bias is presumed as a matter of law based upon special circumstances, and "is attributable in law to the prospective juror regardless of actual partiality." *United States v. Wood*, 299 U.S. 123, 134, 57 S.Ct. 177, 81 L.Ed. 78 (1936). In such circumstances, we do not inquire into whether the juror is capable of being objective and rendering a fair and impartial decision. Rather, we require disqualification to avoid the mere appearance of partiality.

The Superior Court has explained that the standard of appellate review differs depending upon whether bias is presumed, as resulting from the juror's close familial, financial, or situational relationship with the parties, counsel, victims, or witnesses, or actual, as revealed by the juror through his or her conduct and answers. In the first scenario, where the presumption of prejudice arises from a prospective juror's close relationship with the parties, counsel, victims, or witnesses, the Superior Court has reviewed the trial court's determination as a question of law, subject to *de novo* review. *Cordes*, 87 A.3d at 834 (OISR, Wecht, J.); *id.* at 865 (OISR, Donohue, J.); *McHugh*, 776 A.2d at 270 & n.3 (holding that "the employer/employee relationship evokes a presumption of prejudice so significant as to warrant disqualification of employees of a party" as a matter of law, and overturning the trial court's refusal to dismiss for cause). By contrast, in the second scenario, where a juror's prejudice is revealed through his or her conduct or answers, the Superior Court has applied a deferential standard of review, reversing only when the trial court has abused its discretion. *McHugh*, 776 A.2d at 270.

The Court ultimately held.

The presumption of prejudice arises when a juror has a close familial, financial, or situational relationship with a participant in the litigation (i.e., the parties, counsel, victims, or witnesses). See Bridges, 757 A.2d at 873. The mere existence of some familial, financial, or situational relationship does not require dismissal in every case. "A remote relationship to an involved party is not a basis for disqualification where a prospective juror indicates during voir dire that he or she will not be prejudiced." Colson, 490 A.2d at 818.

In determining whether a juror's relationship to the litigation is so sufficiently close that it creates a presumption of prejudice, or so sufficiently remote that it does not, we cannot ignore the suspicions, and the distrust of the resulting jury verdicts, that may arise based upon the nature of the relationship. Jurors should be above suspicion. Close connections suggest bias due to the nature of the tie; if the relationship presents the appearance of impropriety, prejudice is presumed. "The moment the fact of relationship, favor, enmity, prejudice, bias, preconceived opinion, scruple, or interest of a sufficient nature, is made out it removes the juror; nothing further is necessary." *Gelfi*, 128 A. at 78

PREPARING VOIR DIRE

"Voir dire" refers to the process of questioning potential jurors by the judge and attorneys to determine if they are suitable to serve on a jury in a particular case, essentially allowing the lawyers to assess if a juror can be impartial and fair based on their background and potential biases; the phrase literally translates from French as "to speak the truth." Each court and judges within the same court will have their own process for conducting voir dire. Some Judges will actually ask the opening round of questions based upon a mixture of standard questions and those submitted by the parties subject to the opportunity to object in advance. If required, a second round of individual voir dire will be conducted by the lawyers. Other Judges permit the attorneys to conduct the entirety of voir dire under their supervision or with a court staff member in attendance who is to contact the Judge if there are issues which cannot be resolved. Consequently, checking the Judge's particular procedures well in advance of trial is important.

A standard set of questions seeks to ascertain if jurors know any of the parties, the witnesses, the attorneys or their law firms. Some judges will include inquiry as to whether jurors have previously served as a juror and whether they may possess a hardship which would impair their ability to serve. Again, different judges have a different tolerance as to that which will qualify as a hardship. Exemptions, however, are set forth by statute which provides:

42 Pa. C.S.A.§ 4503. Exemptions from jury duty.
(a) General rule.--No person shall be exempt or excused from jury duty except the following:
(1) Persons in active service of the armed forces of the United States or of the Commonwealth of Pennsylvania.
(2) Persons who have served within three years next preceding on any jury except a person who served as a juror for fewer than three days in any one year in which case the exemption period shall be one year.
(3) Persons demonstrating to the court undue hardship or extreme inconvenience may be excused permanently or for such period as the court determines is necessary, and if excused for a limited period shall, at the end of the period, be assigned to the next jury array.
(4) Spouses, children, siblings, parents, grandparents and grandchildren of victims of criminal homicide under 18 Pa.C.S. § 2501 (relating to criminal homicide).
(5) Persons who have previously served for a term of 18 months on a Statewide investigating grand jury, including any extensions thereof, who opt not to serve.
(6) Persons 75 years of age or older who request to be excused.
(7) Judges and magisterial district judges of the Commonwealth and judges of the United States as defined in 28 U.S.C. § 451 (relating to definitions).
(8) Breastfeeding women who request to be excused.

Prior to trial, consideration should be given to the preferred make-up of the jury. One should not stereotype, but as noted in the movie *Up in the Air*, "it is faster." Is age a factor, gender, race, nationality, education, employment, or religion as examples? There are many reasons for these are considerations albeit, especially in a criminal case, overt efforts to preclude or stack a jury with particular racial or ethnic traits may be subject to objection and appeal. Leaving such improper conduct aside, for example, a case which involves an understanding of social media and its multitude of outlays may be more appropriate for those in and around the Gen-Z generation as opposed to baby boomers who are still more comfortable with rotary phones and adjusting TV antennae. If a case involves witnesses or parties from foreign nationalities with heavy accents or involves different customs, aiming to have jurors more likely to align or understand those witnesses may be a goal. However, be careful of "conventional wisdom" such as female jurors are more sympathetic or low-income jurors are more likely to distrust police officers. Broad generalizations generally do not work. It is also important to understand how your own client comes across. No matter how much preparation you conduct, you will not change their personality and some traits are more appealing or less appealing to prospective jurors. Further, do not underestimate your own appeal – or lack thereof. Some lawyers are more comfortable before women than men, some prefer older jurors as opposed to younger. It is not the talisman for determining a preferred jury make-up, but it is a factor that should not be ignored.

OPENING STATEMENT – SORT OF

The jurors will receive an overview of the case, however, the manner in which this is delivered differs from court-to-court. Some Judges require the parties agree to a neutral statement which is read by the Court. Others allow the attorneys to speak, but generally only briefly and without interjecting argument. Remember this is actually your first opportunity to address the jurors and one only gets a single shot at making a first impression.

This is not the section of the trial wherein one wants to argue merits. Rather, it is the opportunity present yourself as seeking a fair and impartial jury so that your client receives a fair result. Aligning yourself with fairness and trustworthiness at the outset can permeate will beyond jury selection.

A well respected Philadelphia lawyer was known for addressing jurors and explaining that he was a die-hard Phillies fan. If asked to serve on a jury wherein one of the Phillies was a party he explained he would have difficulty not being inclined to side with the ballplayer. He would use this to note we all have built in biases and that it is part of human nature. He would then launch into a description of the case and the biases he was seeking to avoid. It was brilliant.

Pay attention to the jurors. Body language may not reveal any particular personality traits, but sometimes you can detect disengagement or displeasure. If a juror really does not want to be on the jury, you really do not want them on the jury. That discontent may arise and is a wild card which is preferable to avoid.

WHAT TO ASK AND HOW TO ASK IT

Recognize, that one does not select a jury – you deselect. The jury is already selected, you just weed out those who you do not believe will provide a fair and impartial jury in deference to the ones you want. If there is a jury of 12 with each side having 3 preemptory challenges, absent a prospective juror being dismissed for cause, within the first 18 people sits your jury. Focus on those who really count.

For the most part, the occasion that an attorney addresses an individual juror is when the issue of striking the juror for cause is presented. The benefit of striking a juror for cause rather than by use of a preemptory challenge is that there are no limits on for cause challenges and one need not exhaust their limited preemptory challenges. The United States Supreme Court in *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed. 2d 80 (1988) confronted an appeal of a criminal conviction based upon the assertion that the state court improperly denied a challenge for cause for a juror who admitted that if the defendant was guilty he would automatically seek to impose the death penalty. The Court held where a defendant uses a preemptory challenge to remove a juror who should have been removed for cause did not deprive the defendant of an impartial jury and the Court had to look at the jury as a whole. Not all states follow the *Ross* opinion. In Pennsylvania, "the decision on whether to disqualify [a juror] is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion." Commonwealth v. Koehler, 558 Pa. 334, 737 A. 2d 225 (1999).

Recognizing the nuisances of your case and all the variables which may impact a jury is fundamental. A hypothetical presented in Advanced Voir Dire & Jury Selection[2] helps highlight this point:

You are defending a premises liability action involving a personal injury to a business customer on commercial property who fell down a flight of stairs in a lobby of a building. One of the eyewitnesses to the accident is particularly important because she is the only person who actually saw the plaintiff before and during her fall, and her testimony is contradicted by other witnesses who said that they did not see the plaintiff fall, on the basis of which you argue that the fall did not happen. Given the overall makeup of the case, without the testimony of that witness, a jury verdict for the defense is likely. For this reason, the weight given by the jury to the testimony of that witness may control the outcome of the case.

Her credibility is a key issue. She is a member of a labor union that was picketing in the lobby of the building where the accident happened, and was one of the picketers. Her union was on strike because of a dispute with her employer, who is your client and the owner of the building, regarding random drug screening of employees.

In this example, issues are raised about how a potential juror's feelings about drug testing in the workplace, as well as about drug use generally, labor unions, visibility and judging credibility, become important topics of voir dire questioning, because these matters are central to how the jury will view the evidence and decide the case despite being totally unique to this particular slip-and-fall.

In asking questions designed to draw out biases, recognize many prospective jurors may be reluctant to make such admissions. Thus questions should be phrased to ease them into coming forth with a secondary purpose of being able to remind them of their promise of impartiality at the time of closing. For example, having represented banks in a number of matters it is recognized they may not be the most favorite of entities. Thus, I

have referenced that at one point in our history the industry that people seem to distrust the most were railroads. A young lawyer who made his mark representing railroads would confront this straight on when selecting juries, that lawyer, Abraham Lincoln, would reference the understanding that some dislike railroads, but just like anybody else they too are entitled to their fair day in court. So, in representing banks, I would seek if anybody was denied a loan, subject to foreclosure, disgruntled over a bank charge. At closing the jury was reminded of their commitment to be fair and impartial and that the bank was to be treated no different than the little old lady who comes across as everybody's grandmother and, at the risk of being melodramatic, this promise was not just to the parties, but is the foundation of our system of justice.

The manner in which the court permits voir dire to be conducted will influence the manner in which you ask questions. Some courts will bring jurors who, in a preliminary round of inquiry have signaled issues to be explored into a robing room for further voir dire. Other Judges will have the jurors come to side bar and stand there while the lawyers and court reporter huddle around. In the former setting it is less intimidating and there is more time to draw out the questions whereas standing at the bar of the court, time is limited and the need to artfully get to the point is required.

Some Courts require counsel to submit the voir dire in advance and do not permit one-on-one questioning. If voir dire for determining cause is required the Court, for the most part, conducts the questioning. A sample – and by no means an exhaustive list - of submitted questions includes:

- Are any of you members of a labor union?
- Do any of you own a firearm?
- Do any of you have bumper stickers on your cars? If so, what do they say?
- Do any of you belong to neighborhood watch programs?
- Do any of you actively serve on your neighborhood associations?
- Do any of you hold advanced degrees?
- Are you or any members of your family present or past members of the armed services?
- Have any of you volunteered to donate blood?
- Do any of you forbid your children from watching any popular television shows?
- Do any of you have experience with the Equal Employment Opportunities Commission?
- Do any of you have experience in drafting or interpreting written contracts?
- Do any of you have experience in health care or medicine?
- Have any of you had significant or important experiences with financial institutions, insurance companies, banks or credit unions?
- Have any of you been turned down for a loan?
- Do any of you have experience running a business?
- Do any of you have experience in politics, as a candidate or working on a campaign? (This is a notable exception to the general rule prohibiting inquiry into a juror's political affiliation).
- Are any of you active in the stock market?
- Do any of you believe that it is unpatriotic to purchase a foreign-made car?
- Are any of you particularly skilled with computers?
- Do any of you have experience operating heavy machinery?
- Have any of you been hospitalized for more than a week?
- Have any of you been a victim of crime?
- Have any of you been fired from a job or employment?

When your opponent sets up the dismissal of a juror for cause, you may seek to resurrect the juror because you want them on the jury or, at least, to cause your opponent to burn one of their preemptory challenges. In a case involving the alleged misappropriation of trade secrets, the plaintiff-employer established that a prospective juror who had been fired from his last employment was bound to keep his own experience in mind and thus would not be able to be impartial.

The attempt to rehabilitate the juror was as follows:

Q. Can I presume that if while on vacation you gave somebody you trusted the keys to your house in case of an emergency, you would prefer they not give the keys to somebody else absent your permission.

A. Of course.

Q. You understand that in this case the plaintiff claims that they gave the defendant the keys to their business by sharing the formula to the secret sauce and the defendant shred those keys with somebody else.

A. Yes.

Q. The defendant on the other hand asserts that after 35 years in the industry when he left the plaintiff's employ he only used his own knowledge and skills and did not need their keys.

A. Yes.

Q. Once the evidence is presented the decision to be made will require you to balance those competing positions fairly and decide whether the "keys" were improperly used or did the defendant simply use his own knowledge and skill. You agree your employment good-bad-or indifferent is not an issue in this trial.

A. Yes.

Your Honor Juror # 8 appears fine to me.

CONCLUSION

There is as much art in the selection of a jury as any other part of a trial. There is no one-size fits all set of instructions to follow and the varying methodologies by which different courts and judges conduct the process have a significant impact on what you can do and how you can do it. If there are any universal pointers, they start with preparation. One should think through the entire process before commencing jury selection. Procedurally, be prepared to take notes and develop a method of tracking answers from prospective jurors.

Secondly, know what aspects of your case drive the determination of the type of juror you are seeking and the issues of vulnerability that you want to flush out to potentially dismiss for cause. Third, be relaxed and do not lose sight of the jurors' prospective. For many this may be their first time in a courtroom and other than that which they see on television they have no experience whatsoever with the judicial process. Fourth, you are not there to win friends but, rather, to project yourself as one who is interested in finding a fair and impartial group to administer justice. Lastly, preserve the record. If there are any improprieties, place any objections on the record in a timely fashion.

References:

[1] This section has been edited from an article published by Cornell Law School , Legal Information Institute found at:
law.cornell.edu/constitution-conan/amendment-7/historical background.
[2] Article can be found at https://gojolaw.com/article-advanced-voir-dire-part-1

About the Author

Daniel S. Bernheim, 3d is the Managing Shareholder of the Philadelphia office at Wilentz, Goldman & Spitzer, P.A. He focuses his practice on complex commercial matters including shareholder oppression disputes, misappropriation of trade secrets, and wrongful discharge from employment.