27th Annual Litigation Institute and Retreat

Cosponsored by the Litigation Section

Friday, February 28, 2020
1 p.m.–5 p.m.
Saturday, February 29, 2020
8:25 a.m.–12:05 p.m.

3.5 Access to Justice credits and
3.5 General CLE credits
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SCHEDULE

Friday, February 28

10:30 Registration

11:00 New Lawyer Workshop—Effective Legal Writing and Editing
Kelly Zusman, U.S. Attorney’s Office, Portland

12:15 Workshop Adjourns

Noon Lunch

1:00 Desperately Seeking Association: Understanding the Science of Implicit Bias
T.K. Floyd Foutz, TK Floyd Consulting, Evans, Georgia

2:30 Don’t Judge a Book by Its Cover—Strategies for Representing Unsympathetic Clients from Intake to Trial
Whitney Boise, Boise Matthews LLP, Portland
Dana Sullivan, Buchanan Angeli Altschul & Sullivan LLP, Portland

3:30 Break

3:45 Ensuring a Level Playing Field
The Honorable Josephine Mooney, Oregon Court of Appeals, Salem
The Honorable Wells Ashby, Deschutes County Circuit Court, Bend
The Honorable Benjamin Souede, Multnomah County Circuit Court, Portland

5:00 Adjourn to Hosted Reception

6:30 Dinner and Presentation of the 23rd Owen M. Panner Professional Award to Clarence Belnavis, Fisher & Phillips LLP, Portland

Saturday, February 29

7:45 Late Registration and Breakfast Buffet

8:25 Welcome
The Honorable Chief Justice Martha Walters, Oregon Supreme Court, Salem

8:30 A Conversation with the Chief Justice: Thoughts from the Bench
The Honorable Chief Justice Martha Walters, Oregon Supreme Court, Salem
Yoona Park, Stoll Berne, Portland

9:00 The Risky Business of Implicit Bias: Mitigating the Impact of Implicit Associations in Litigation
T.K. Floyd Foutz, TK Floyd Consulting, Evans, Georgia

10:00 Break
   The Honorable Adrienne Nelson, Oregon Supreme Court, Salem
   Lisa Hay, Federal Public Defender’s Office, Portland
   Salvador Mungia, Gordon Thomas Honeywell, Tacoma

11:15 Becoming a Better Communicator at Trial: Know Your Audience
   John Horvick, DHM Research, Portland

12:00 Closing Comments
   The Honorable Chief Justice Martha Walters, Oregon Supreme Court, Salem

12:05 Adjourn
FACULTY

The Honorable Wells Ashby, Deschutes County Circuit Court, Bend. Judge Ashby has been a Deschutes County Circuit Court Judge since his election in 2010 and serves as the Presiding Judge. He previously was in private practice as a criminal defense attorney and also served as a prosecutor in both Idaho and Oregon.

Whitney Boise, Boise Matthews LLP, Portland. Mr. Boise is a criminal defense lawyer. He is a member of the American College of Trial Lawyers, the International Society of Barristers, the Metropolitan Public Defender board of directors, Oregon Criminal Defense Lawyers Association, the National Association of Criminal Defense Lawyers, the Multnomah Bar Association, the Gus J. Solomon Inn of Court, and the Federal Indigent Trust Fund Advisory Board. Mr. Boise served on the Oregon State Bar Board of Governors in 2018 and 2019. He is a frequent speaker on criminal defense topics.

T.K. Floyd Foutz, TK Floyd Consulting, Evans, Georgia. Ms. Floyd Foutz is a national speaker and writer on topics related to diversity and inclusion, including implicit bias in the legal profession. She has served as a director for the National Diversity Council and has facilitated the DiversityFirst™ Certified Diversity Professional certification program. She has taught multiple academic success courses and developed curricula and academic programming for students as a member of the faculty of the Law Success Program at St. Mary’s University School of Law in San Antonio, Texas. Ms. Floyd Foutz is actively involved in mentoring students at all levels (from elementary school to law school) and young professionals, and she offers bar exam coaching to recent law school graduates. She also serves her community by presenting seminars on estate planning, stress management, and faith.

Lisa Hay, Federal Public Defender’s Office, Portland. Ms. Hay has served as the federal public defender for Oregon since October 2014. She is a member of the Federal Bar Association and the Association of Federal Defense Attorneys.

John Horvick, DHM Research, Portland. Mr. Horvick is Director of Client Relations and Political Research at DHM Research. He manages complex projects for the firm, is an experienced focus group moderator, and serves as DHM’s political commentator. Mr. Horvick regularly presents to public officials, boards of directors, nonprofit groups, and regional and national conferences, and his commentary for DHM can be found in local media such as OPB, the Pamplin Media group, The Oregonian, and Willamette Week, as well as various national publications. Mr. Horvick holds a degree in sociology from the University of Minnesota.

The Honorable Josephine Mooney, Oregon Court of Appeals, Salem. Judge Mooney was appointed by Governor Kate Brown to the Oregon Court of Appeals in May 2019. She previously was a circuit court judge for Oregon’s Second Judicial District. Judge Mooney is past president of the Oregon Circuit Court Judges Association, a member of the Oregon State Bar Litigation Section Executive Committee, a member of OGALLA, and a member of the Lane County Bar Association. She mentors law students and new lawyers through law school and bar programs.

Salvador Mungia, Gordon Thomas Honeywell, Tacoma. Mr. Mungia represents individuals in personal injury lawsuits with an emphasis in medical malpractice, including nursing home negligence and wrongful death claims. He also represents businesses in commercial, real property, and contractual disputes and represents clients on a pro bono basis in both individual claims and class-action lawsuits. Mr. Mungia is a Fellow of the American Board of Trial Advocates and Litigation Counsel of America and past president of the Washington State Bar Association, the Western States Bar Conference, the Tacoma-Pierce County Bar Association, and Legal Aid for Washington. He was a member of the ACLU-W workgroup that submitted proposed GR 36, enacted as GR 37 by the Washington State Supreme Court in 2018. He is a regular speaker on the topic of racial and implicit bias.
The Honorable Adrienne Nelson, *Oregon Supreme Court, Salem*. Justice Nelson was appointed to the Oregon Supreme Court on January 2, 2018, making her the first African American to sit on the state’s highest court and on any appellate state court. In 2006, she was appointed as a trial judge on the Multnomah County Circuit Court, the second African American female judge in the state of Oregon. Judge Nelson sits on the American Bar Association Standing Committee on Public Education, is the Oregon delegate to the ABA House of Delegates, chairs the Lewis and Clark Law School Judge Roosevelt Robinson Scholarship Committee, and is vice president of the Owen M. Panner American Inn of Court. She is a frequent speaker on a number of topics including diversity, inclusion, equity, leadership and professional development. Among other honors, Justice Nelson is the recipient of the 2016 Multnomah Bar Association Award of Merit, the 2015 Oregon State Bar Diversity and Inclusion Award, and the 2003 Oregon Women Lawyers Judge Mercedes Diez Award.

Yoona Park, *Stoll Berne, Portland*. Ms. Park is a lawyer in Stoll Berne’s litigation group and serves on the firm’s Management Committee and as its Hiring Shareholder. She has a wide breadth of experience in complex litigation, securities law, class actions, and environmental litigation. With a background in public relations, Ms. Park particularly enjoys maneuvering media-sensitive and high-profile matters on behalf of her clients. Ms. Park serves as a Ninth Circuit Lawyer Representative for the District of Oregon.

The Honorable Benjamin Souede, *Multnomah County Circuit Court, Portland*. Judge Souede was appointed to the Multnomah County Circuit Court by Governor Brown on July 17, 2017, after serving as general counsel in the Office of the Governor. Prior to his work as Governor’s Office General Counsel, he was in private practice in Portland and before that in Washington, DC. Earlier in his legal career, he was Senior Advisor to Senator Hillary Rodham Clinton.

Dana Sullivan, *Buchanan Angeli Altschul & Sullivan LLP, Portland*. Ms. Sullivan represents individuals in employment and civil rights litigation. She regularly tries discrimination cases in both federal and state court and also devotes a significant part of her practice to advising executives in the negotiation of employment contracts and separation agreements. She is past president of both the Oregon Trial Lawyers Association and the Multnomah Bar Association, and she is a member of Oregon Women Lawyers, the National Employment Lawyers Association, and the Association of Trial Lawyers of America. Ms. Sullivan is a frequent speaker at continuing legal education programs and has served as a guest lecturer for classes at Portland State University and Lewis and Clark Law School. She is admitted to practice in Oregon, Washington, and California.

The Honorable Chief Justice Martha Walters, *Oregon Supreme Court, Salem*. Chief Justice Walters was elected by her colleagues as Oregon’s 44th Chief Justice and began service on July 1, 2018. Chief Justice Walters joined the Oregon Supreme Court as an Associate Justice in October 2006. Before joining the court, Chief Justice Walters practiced law for almost 30 years, emphasizing employment law and civil litigation as well as general civil practice. In 2007, Chief Justice Walters was elected to a two-year term as the first woman president of the National Conference of Commissioners on Uniform State Laws. Chief Justice Walters is a member and past president of Lane County Women Lawyers, a Fellow of the American College of Trial Lawyers and the American Bar Foundation, and a member of the American Law Institute, the Federal Bar Association, the National Employment Lawyers Association, and Oregon Women Lawyers. She has served in leadership positions and on many bar committees and task forces as well.
The Honorable Youlee You, *U.S. Magistrate Judge, U.S. District Court, District of Oregon, Portland.* Judge You is a United States Magistrate Judge for the District of Oregon. She received her undergraduate degree in Economics and Urban Planning from Wellesley College and her law degree from the University of Washington. Before her appointment to the federal bench in March 2016, she was a Multnomah County Circuit Court Judge for almost a decade. She was a staff attorney for the U.S. District Court for the Central District of California (Los Angeles), a Senior Assistant Attorney General in Oregon, and a deputy bureau chief in the District Attorney’s Office in Brooklyn, New York. Judge You actively mentors students and new attorneys and has received the Oregon State Bar Award for Judicial Excellence, the Multnomah Bar Association Award of Merit, and the National Asian Pacific American Bar Association Trailblazer Award.
Chapter 1

Presentation Slides: Desperately Seeking Association: Understanding the Science of Implicit Bias

T.K. FLOYD FOUTZ
TK Floyd Consulting
Evans, Georgia
Desperately Seeking Association:
Understanding the Science of Implicit Bias

T.K. Floyd Foutz
Principal, T.K. Floyd Consulting

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Objectives:
Why Are We Here?

(Other than earning CLE credits 😊)

Outline:
- Defining the Contours of Implicit Bias
- Describing the Consequences of Implicit Bias
Contours of Implicit Bias

Understanding our unconscious mind

What Is Implicit Bias?
Implicit Bias Defined

- “The *attitudes or stereotypes* that affect our understanding, actions, and *decisions* in an *unconscious* manner. Activated *involuntarily*, *without awareness* or intentional control. Can be either *positive or negative*. *Everyone is susceptible*."

  *Source: Kirwan Institute for the Study of Race and Ethnicity*

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Implicit Bias Defined (continued)

- “By definition, implicit biases are those we carry *without awareness or conscious direction*.”

- “We can think of implicit bias as a lens through which we view the world—a lens which *automatically filters* how we take in and *act on* information, a lens that is *always present*.”

- “Think of unconscious thought as the *snap judgments* we make every day.”

- “Implicit bias *differs from suppressed thoughts* that individuals may *conceal for social desirability purposes*.”

  *Source: Kirwan Institute*
Comparing Implicit Bias and Explicit Bias

Explicit bias
- Expressed directly
- Aware of bias / operates consciously
- Example – Sign in the window of an apartment building – “we don’t rent to ___”

Implicit bias
- Expressed indirectly
- Unaware of bias / operates sub-consciously
- Example – a property manager doing more criminal background checks on African Americans than whites.

“We can have implicit biases that do not align with our identities or explicit beliefs.” ~ Kirwan Institute

- **Explicit** biases = consciously accessible through introspection
- **Implicit** biases = exist beyond our conscious awareness
  - Not able to identify through introspection

Source: UCLA Implicit Bias Video Series

Contours of Implicit Bias

- Implicit biases are **NOT beliefs we conceal or suppress** in an effort to appear non-biased
  - By definition, **implicit biases operate outside of our conscious awareness**

- Implicit biases may be based on **inaccurate information** or **stereotypes**
  - For example, when faced with incomplete information or ambiguities, we rely on **associative memory** to fill in the gaps

Source: Kirwan Institute
Contours of Implicit Bias (continued)

- Actions and decisions resulting from our implicit biases can create **real-world barriers** to equity and opportunity.

- Bias can also be **institutional/structural**.
  - For example, **laws and the legal process** could be built on implicit biases.

---

**We ALL Have Implicit Biases**

- “Implicit biases are pervasive. **Everyone** possesses them, **even people with avowed commitments to impartiality such as judges.**”

- We all have a natural human tendency to **categorize** others as either **in-group** or **out-group**.
  
  Source: Kirwan Institute
Key Characteristics of Implicit Bias

- **Unconscious and Automatic** ~ activated without intention or control
- **Not always aligned with explicit beliefs**
- **Real-world effects on behavior** ~ impacts actions and decisions across domains (e.g., employment, education, healthcare, criminal justice, etc.)
- **Pervasive** ~ everyone has implicit biases, even people who claim to be “colorblind” or “impartial”
- **Malleable** ~ can be replaced with new associations

Source: Kirwan Institute

Unconscious Mind

- To understand the nature of implicit bias, we must first understand the *unconscious mind*
Your Brain On Autopilot

- On Your Drive to Work...
  - Do you take the same route each day?
  - If so, do you sometimes reach your office without remembering the drive?
  - What happens if you take a different route or you’re driving to someplace new?

How The Unconscious Mind Works

The Stroop Test ~ Part 1

Directions: As the colored words flash on the screen, say out loud the color that the word is printed in as quickly as you can.

- Do not read the word ~ just pronounce the color
- For example:

  GREEN = Red

  BLUE = Green
### How the Unconscious Mind Works

**The Stroop Test ~ Part 2!**

Same directions ~ **do not read the word, just say the color the word is printed in**

- Remember, go as fast as you can!
How the Unconscious Mind Works

The Stroop Test ~ Results?

◉ Which part was easier?
◉ Thoughts on why?
◉ How might this test relate to implicit bias?
Awareness Test

- [https://youtu.be/Ahg6qcgoay4](https://youtu.be/Ahg6qcgoay4)
- Shows we have **limited conscious processing capacity** (e.g., when we are hyper-focused on counting the number of passes among teammates)
- “**Intense focusing on a task can make people effectively blind**, even to stimuli that normally attract attention.”

*Source: Kahneman, “Thinking, Fast and Slow”*

Unconscious Mind

*Source: By AWeith - Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=51789188*
**Iceberg Analogy**

- Our conscious minds can handle 7 (+/-2) pieces of information at one time
- Our unconscious minds can handle unlimited pieces of information at one time
  - Source: Kirwan Institute
- “Our unconscious is a powerful force. But it’s fallible.”
  - Source: Gladwell, "Blink"

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**Two Decision Making Routes**

- **System 1**: Unconscious Emotion
  - Very Fast
  - Involuntary
  - Associative
  - Implicit Responses
- **System 2**: Conscious Thinking
  - Slow
  - Controlled
  - Rule Following
  - Explicit Responses

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**Two systems of thinking:**

- **System 1**: fast, intuitive, and impressionistic
- **System 2**: slow, deliberate, and systematic
  - Source: Korn Ferry Institute

Source: By AWeith - Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=51789188
Brain Functioning ~ System 1

“System 1 is *automatic and efficient*, but it’s in a hurry and *prone to mistakes*. It seeks to quickly identify patterns, a skill that has been key to human survival and evolution.”

“But in doing so, it *jumps to conclusions of causality based upon even the sketchiest of information*, and tries to interpret scant input by creating a narrative, however flawed it may be.”

Source: Korn Ferry Institute

Brain Functioning ~ System 1 (continued)

“System 1 *operates automatically and quickly*, with little or no effort and *no sense of voluntary control*.”

“Jumping to conclusions is efficient if the conclusions are likely to be correct and the costs of an occasional mistake acceptable, and if the jump saves much time and effort. *Jumping to conclusions is risky when the situation is unfamiliar, the stakes are high, and there is no time to collect more information*.”

Source: Kahneman, “Thinking, Fast and Slow”
Brain Functioning ~ System 2

- “System 2 thinking, on the other hand, seeks to test concepts and detect complexity and nuance.”
- “[It] articulates judgments and makes choices, but often endorses or rationalizes ideas and feelings that were generated by System 1.”
- “System 2 allocates attention to the effortful mental activities that demand it, including complex computations.”

Source: Korn Ferry Institute

How System 1 and System 2 Operate Together

- “System 1 continuously generates suggestions for System 2: impressions, intuitions, intentions, and feelings. If endorsed by System 2, impressions and intuitions turn into beliefs, and impulses turn into voluntary actions. When all goes smoothly, which is most of the time, System 2 adopts the suggestions of System 1 with little or no modification. You generally believe your impressions and act on your desires, and that is fine—usually.”

Source: Kahneman, “Thinking, Fast and Slow”
How System 1 and System 2 Operate Together (continued)

- Be careful not to “accept a superficially plausible answer that comes readily to mind.”
- Intuitions from System 1 are accepted, without check, by System 2, which reflects the laziness of System 2
- “[W]hen System 2 is otherwise engaged, we will believe almost anything. System 1 is gullible and biased to believe, System 2 is in charge of doubting and unbelieving, but System 2 is sometimes busy, and often lazy.”

Source: Kahneman, “Thinking, Fast and Slow”

Brain Functioning and Implicit Bias

- “Understanding two different systems of thinking helps explain where bias comes from and why it’s reluctant to go away. ... The fast, automatic system is responsible for biases.”

Source: Psychology Today
Consequences of Implicit Bias

Recognizing how our implicit biases impact our decisions and interactions with others

Key Characteristics of Implicit Bias ~ REVISITED

- Unconscious and Automatic
- Do not always align with explicit beliefs
- Have real-world effects on behavior
- Pervasive
- Malleable

Source: Kirwan Institute
We’re All Biased

- “Bias is a **natural phenomenon** in that our brains are constantly forming **automatic associations** as a way to better and more efficiently understand the world around us.”

Source: Kirwan Institute

We’re All Biased (continued)

- So, if I’m biased, *where did these implicit biases come from?*

- And *how do these biases manifest in my daily life*, as I interact with others?

Let’s discuss!
Sources of Implicit Bias

“Our implicit biases are the result of mental associations that have formed by the direct and indirect messaging we receive, often about different groups of people.”

Associations may be formed based on skewed, overgeneralized, or distorted stereotypes or beliefs

Associations develop as early as age 4

Source: Kirwan Institute

Sources of Implicit Bias (continued)

Possible sources of direct and indirect messaging:

- Past experiences
- Cultural norms
- Media and advertising

Repeated exposure to messaging can implicitly influence our thoughts and evaluations of others

Source: Kirwan Institute
Consequences of Messaging

“When we are constantly exposed to certain identity groups being paired with certain characteristics, we can begin to automatically and unconsciously associate the identity with the characteristics, whether or not that association aligns with reality.”

Source: Kirwan Institute

Possible Categories of Implicit Bias

Other Possible Categories:
- Physical Appearance
- Style of Dress
- Educational Attainment
- Marital Status
- Religion
- Gender Identity
Ways We Might Express Our Implicit Biases

- Selective Attention
- Diagnosis Bias
- Pattern Recognition
- Value Attribution
- Confirmation Bias
- Affinity Bias
- Priming Effect
- Commitment Confirmation
- Stereotype Threat
- Anchoring Bias
- Automatic Perception
- Micro-Aggressions

Source: Ross

Implicit Bias ~ Examples

- Micro-aggressions
  - “Micro-inequities (also called micro-aggressions) are **subtle**, sometimes **seemingly harmless**, comments or actions that **devalue others**.
  - “No matter how kind or aware we may consider ourselves to be, **we all have the capacity to harmfully impact others by practicing micro-inequities**.”
  - “The challenge with micro-inequities is they often are **not meant to intentionally cause hurt or harm**, and they arise from a semi-conscious state.”

Source: Mindfulness at Work
Explicit Bias ~ Examples

- Ways micro-aggressions may manifest:
  - Continuously mispronouncing or misspelling someone’s name
  - Rolling your eyes even when you think no one is looking
  - Cutting down ideas before they can be entertained
  - Sarcasm and disparaging jest
  - Interrupting or completing sentences for people
  - Acting disinterested in meetings

Source: Mindfulness at Work

Implicit Bias ~ Examples

- Writing Sample Study ~ Confirmation Bias
  - Researchers crafted a fictitious legal research memo that 60 law firm partners reviewed under the guise of a “writing analysis study”
  - Half of the memos listed the author as a third-year student at NYU who was African American; the other half noted a Caucasian author—both authors were named Thomas Meyer

Source: Reeves
Implicit Bias ~ Examples

- Writing Sample Study (continued)
  - *All of the memos were identical*, but the partners’ evaluation of the memo hinged on the perceived race of the memo author.
  - The partners found more errors and *rated the memo as lower quality* *(3.2/5.0) when the author was perceived to be African American* rather than Caucasian *(4.1/5.0)*

  *Source: Reeves*

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Implicit Bias ~ Examples

- Writing Sample Study (continued)
  - Evaluations of the Caucasian author included comments such as “has potential,” “good analytical skills,” and “generally good writer” but needs to work on X”
  - Evaluations of the African American author included comments such as “needs lots of work,” “average at best,” and “can’t believe he went to NYU”

  *Source: Reeves*
Implicit Bias ~ Examples

- Hiring Decisions ~ Affinity Bias
  - You’re conducting interviews with Sally and John.
  - John reminds you of yourself or someone you know and like—\textit{you feel a sense of familiarity with him.} You instantly like him. He’s visibly nervous, so you encourage him to relax.

  \textit{Source: Ross}

- Hiring Decisions ~ Affinity Bias (continued)
  - With Sally, \textit{there’s no real connection.} You don’t have any negative reactions towards her—you have a very “business-like” interaction. Sally is nervous too, but you don’t encourage her to relax.
  - You hire John—but \textit{you don’t realize that your affinity for John influenced your decision.}

  \textit{Source: Ross}
Implicit Bias ~ Examples

- Resume Examples ~ Automatic Perception
  - Candidate changed his name on his resume from José to Joe—he left the rest of his resume the same—and received more responses as Joe.
  - Resumes with “typically white” names received 50 percent more callbacks than those with “typically black” names, despite the resumes with “typically black” names reflecting more highly-skilled candidates.

Source: Ross

What examples of implicit bias would you add?

Source: Mushki Brichta [CC BY-SA (https://creativecommons.org/licenses/by-sa/4.0)]
Mitigating the Impact of Implicit Bias

Countering our biases and recognizing how implicit bias may influence litigation

TOMORROW! 😊

Countering Implicit Bias

“We’re not immune from implicit biases, but we can take steps to counter them.” ~ Jerry Kang

Source: UCLA Implicit Bias Video Series

The Implicit Association Test (IAT) can help us identify our biases

- Available through Project Implicit at https://implicit.harvard.edu/implicit/

- If time permits, please take a few of the available tests on the Project Implicit website before tomorrow’s session.
Sources

- Daniel Kahneman, “Thinking, Fast and Slow” (2011)
- Korn Ferry Institute, *Understanding Bias and the Brain* (2015)
- Howard Ross (Cook Ross, Inc.), *Exploring Unconscious Bias* (2008)
- Howard Ross (Cook Ross, Inc.), *Everyday Bias: Further Explorations into How the Unconscious Mind Shapes Our World at Work* (2014)
- UCLA Office of Equity, Diversity, & Inclusion, *Implicit Bias Video Series* (available at https://equity.ucla.edu/know/implicit-bias/)
Chapter 2

Don’t Judge a Book by Its Cover: Strategies for Representing Unsympathetic Clients from Intake to Trial

Whitney Boise
Boise Matthews LLP
Portland, Oregon

Dana Sullivan
Buchanan Angeli Altschul & Sullivan LLP
Portland, Oregon

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Chapter 2—Don’t Judge a Book by Its Cover

I. Understand What You Are Getting Yourself Into
   a. Early screening/evaluation is key
      i. Civil litigators need to evaluate whether the unsympathetic aspects of a
         prospective client’s case diminish the chances of prevailing to the point
         that you don’t want to take the case.
   b. Clients may be “unsympathetic” because of bad facts in their cases, aspects of
      their identities or personalities, or impediments to their ability to tell their stories
      in a compelling way at trial.
      i. The issue(s) that you expect may cause a jury to be unsympathetic towards
         your client, may also pose challenges in your relationship with the client.
   c. For plaintiff’s lawyers in particular, a robust intake process is critical, and should
      include:
      i. Conflict check
         ii. Information about prior bankruptcies, criminal history, prior litigation
         iii. Google search
         iv. Personnel file (if employment case)
         v. Medical records (if relevant or if mental health/capacity is an issue)
   d. Consider whether the potential client can clearly recount the facts.
   e. Are there possible witnesses and do they say what the potential client believes
      they will say?
   f. Assess whether your potential client has experienced trauma and, if so, consider:
      (1) how you should modify your interactions with the potential client maximize
         trust and to avoid triggering a harmful reaction; and (2) how the effects of trauma
         might impact the potential client’s ability to participate in the litigation process.
   g. If you take the case, work closely with your client’s mental health treatment
      provider or consider an expert witness.
   h. Don’t be afraid to decline a case because you have strong negative feelings
      towards the client.

II. Ensuring That Your Client Doesn’t Become Their Own Worst Enemy
   a. Educate the client about what they should and should not do as the case is
      pending.
      i. Consider providing them a written “New Client Do’s and Don’ts.”
      ii. Provide clear guidelines around social media, blogging, contacting
         witnesses, etc.
   b. Manage client expectations

III. Prepare for Trial in a Way That Will Help Your Client Help You
   a. Retain a trial consultant
      i. In civil cases, getting a trial consultant on board before your client is
         deposed can be key to helping frame the issues in the light most favorable
         to your client and to help clients communicate their testimony as
         effectively as possible
   b. Develop case themes that minimize the bad facts or, even better, turn them in your
      favor
IV. The question is not, “why do I find my client unsympathetic?” The question is “why might the prospective jury find my client unsympathetic?”

a. The answer to the question will almost certainly be different if you are trying your case in Harney County, rather than Multnomah County. This is because jurors come to court with their own set of opinions and beliefs. Their belief system will have been formed based on their life experiences and people in rural Oregon are likely to have a significantly different set of experiences and, therefore, probably, opinions than people from metropolitan Portland.

b. What kind of things should I be thinking about, which might make my client unsympathetic to a jury?
   i. The type of case being tried.
   ii. Specific facts in the case.
   iii. Race.
   iv. Client’s appearance and demeanor.
   v. Sexual orientation.
   vi. Economic status.
   vii. From my first review of the case until right before trial I create an ongoing list of facts and issues that “scare” me about the case.

c. File OEC 403 Motions In Limine To Exclude unfairly prejudicial Facts

d. Make Your Client More Sympathetic By Eliminating Those Jurors Biased Against Your Client

V. How Important Is Voir Dire. The O. J. Simpson Murder trial was won (or lost) in voir dire.

a. According to author Jeffrey Toobin, in his book about the trial, “The Run Of His Life”, the defense and prosecution learned before trial that African-Americans and whites viewed the case very differently, and both tried to choose a jury predisposed to their case.

b. The defense and prosecution both learned through jury consultants that African-American females were the most sympathetic race and gender to O.J. Simpson’s case.

c. Marcia Clark, the lead prosecutor for the state, believed that she could relate to African-American women, and what they learned from the focus groups could be disregarded. This belief was based on her experience with successfully prosecuting African-American men for sexual assault, with juries that were made up of African-American women.

d. So what do we know about the jury in the Simpson case?
   i. Don Vinson, the head of Litigation Sciences, assisting the prosecution in choosing a jury, was dismissed after one and a half days of jury selection.
   ii. Of the 24 jurors and alternates, 15 were African-American, six were white, and three were Hispanic. This was in a county, Toobin notes, “that is just 11 percent black”.
   iii. Ultimately there were 8 African-American females, one African-American male, one Hispanic male, and two Caucasian females who were on the jury that decided the case.
   iv. All of the 12 jurors who ultimately decided the case were democrats.
   v. Two of them graduated college.
vi. None read a newspaper regularly.

vii. Nine rented homes; three owned.

viii. Eight watched TV tabloid shows like “Hard Copy”. The defense research found that people who liked tabloids were more likely to think Simpson innocent.

ix. Nine jurors - three quarters of the jury - thought O.J. Simpson was less likely to have murdered his wife because he had excelled at football, Toobin wrote.

x. The African-American female members of the jury held a negative opinion of Ms. Clark, referring to her as the “castrating bitch”.

xi. The prosecution did not use all of its preemptory challenges.

VI. How can you determine what makes a client unsympathetic to a jury?

a. Talk to close friends and family. How does this hypothetical fact make you feel?

b. Hold your own mock jury.

i. Hire friends, family and friends of family. Pay them and have them sign a contract that you are hiring them to assist you in defending your client. Admonish them that they CANNOT speak with anyone about the case.

ii. I have found that 5 to 8 people on the jury is optimum. More than that and the dialog becomes muddled. Don’t let jurors learn anything about the case, except during the mock trial. If it is a violent or unsettling case, I let the prospective juror know the type of case so they have the opportunity to decline to participate.

iii. Before trial, give them a short jury questionnaire so you understand who they are and have a general idea of their belief system. Review the questionnaires before the mock trial. You need to understand what characteristics about prospective jurors make them favorable and unfavorable.

iv. If possible, have another lawyer from your office assist by giving an opening and a closing. I like to give the opening statement for the government to best try and understand the strengths and weaknesses of their case. I also like to summarize all of the testimony for the jury myself, because it focuses me on the strengths and weaknesses of the case.

v. Put the trial on over 2 and a half to 3 and a half hours, not including deliberations. If your trial lasts much longer than this, you will lose jurors attention. Take at least one break for the jurors.

vi. You will want your client there so they can understand what the evidence will be, the jury can watch client’s demeanor, and assess the client’s testimony. If you know the client will testify at trial, you will want to prepare them appropriately. I do not let my client speak to jurors at any time before, during or after the trial. I allow the mock jury to ask questions of my client if she testifies, as it helps me understand what they think is important. After closings, I excuse my client so the jury can speak freely about the case.

vii. I have someone call the case and read the Indictment. I give brief opening jury instructions and I choose the foreperson, who is someone I believe
can keep dialog going during deliberations. After closing, I hand out to the
jurors the most important jury instructions and read them to the jury.

viii. I condense each witness’s testimony down so it is manageable but
maintains the substance of the testimony. I will often say that this is what
the witness will say on direct and this is the anticipated cross examination.
Take your time in presenting the evidence, so you are sure the jurors are
digesting the evidence. Have all exhibits ready and make sure you can lay
a foundation. If there is evidence that you are uncertain will come in, do
not present it during the mock trial and wait until deliberations. Near the
end of deliberations, I say to the jury, would it make a difference if this
evidence comes in at trial.

ix. Watch the deliberations (don’t be a participant) for as long as possible, so
you are not interrupting. Take a lot of notes about jurors’ comments and
who made the comment. Towards the end of the deliberations I will have a
number of questions for the jurors about what they thought of specific
evidence and its importance. I am interested in what their verdict is but far
more important is why they came to that conclusion. I also want to know
how they felt about my client and I specifically ask each of them about the
things that most concern me about the case.

x. As part of their payment I often serve the mock jurors’ dinner, after
deliberations are over. The jurors will continue to talk about the case,
without your prompting. This is especially so if you give them a glass of
wine.

xi. Listen to what your mock jurors tell you. In the past I have told jurors
certain evidence is not important, only to later realize I was the one not
understanding the evidentiary importance.

xii. From the mock trial you will hopefully come away with ways to make
your client (more) sympathetic.

VII. The most important way to make your client more sympathetic to the jury is to
remove jurors who will not listen to your case.

a. You cannot win your trial in voir dire, but you can lose it. If you are unable to
identify and strike the individuals off of your panel who are unwilling to consider
acquitting your client, you have lost.

b. Voir dire is not about finding the people who you want to serve on the jury, rather
it is about identifying those prospective jurors whose life experiences, attitudes
and opinions would make it difficult if not impossible for them to return a verdict
of not guilty.

c. This process of deselecting the jurors can only be done by getting the potential
jurors to talk about their opinions and beliefs.

d. Use voir dire to disclose bad evidence in your case, and to explore areas of likely
bias against the defense.

e. Make a list of all the things that are most worrisome about your case.

i. Your client spit in a cop’s face and called him an asshole. You have to
find all of the “law and order jurors”.

ii. Your client is African-American. You must find all of the racist jurors.
iii. Your client is charged with sex abuse. You must find all of the jurors who have been the victim, or who have close friends or family members who are a victim, of a sex crime.

f. To find these prospective jurors, you have to draft a series of open ended questions, on each of the topics, designed to get the prospective jurors to talk about their opinions and beliefs. I have included example questions in the materials.

g. Certain jurors will be reluctant to speak. One way to try and open them up is to say, “Mr. Jones, you heard what Ms. Smith just said, do you agree with her position?” Another way is to ask jurors to raise their hand if they agree with a certain proposition and then ask them, “why do you feel this way?”

h. You cannot let the judge or prosecution ask the prospective juror “are you a fair person or can you be fair?” Almost all people believe themselves to be fair minded. The issue in voir dire must be whether this potential juror is appropriate for the case.

VIII. Go Try Some Cases
What motivates a lawyer to defend a Tsarnaev, a Castro or a Zimmerman?

_Abbe Smith is a professor of law and the director of the Criminal Defense & Prisoner Advocacy Clinic at Georgetown University and co-editor of the forthcoming “How Can You Represent Those People?”_

The trauma nurses who took care of Boston bombing suspect Dzhokhar Tsarnaev after his arrest have a straightforward explanation. “I don’t get to pick and choose my patients,” one told the _Boston Globe_.

The three public defenders assigned to Tsarnaev would have been similarly constrained. But what about the two prominent defense lawyers who have offered their services? Why choose to represent a man accused of turning the Boston Marathon finish line into a war zone?

Likewise, how can the lawyers representing _Cleveland’s Ariel Castro_ fight for a man who pleaded guilty on Friday to 937 counts related to the kidnapping, imprisonment and rape of three women? And what about the attorneys for the recently acquitted but still controversial _George Zimmerman_? Do they really believe he is completely innocent of any wrong-doing in shooting an unarmed teen?

I have been a criminal defense lawyer for more than 30 years, first as a public defender and now as a law professor running a criminal defense clinic. My clients have included a young man who gunned down his neighbor in front of her 5-year-old daughter while trying to steal her car, a man who beat a young woman to death for failing to alert drug associates that police were coming and a woman who smothered her baby for no apparent reason. These are the kinds of cases that prompt people to ask: “How can you represent those people?” All criminal defense lawyers are asked this; it’s such a part of the criminal defense experience that it’s simply known as “the question.”

Most of us have a repertoire of stock replies about how the system can’t work without good lawyers on both sides, or the harshness of punishment, or the excessive number of
people — especially minorities — locked up in this country. Capital defenders such as Tsarnaev lawyer Judy Clarke tend to cite their **opposition to the death penalty**.

But our motivations are usually personal and sometimes difficult to articulate. I often say I was inspired by “To Kill a Mockingbird.” There is no more compelling figure than Atticus Finch defending a wrongly accused poor black man. Innocence, though, is not a chief driver for me. To the contrary, I often call my life's work “the guilty project.” Criminal defense is, for the most part, defending the factually guilty — people who have done something wrong, though maybe not exactly what is alleged.

That works for me because, as it happens, I like guilty people. I prefer people who are flawed and complicated to those who are irreproachable. As legendary American lawyer Clarence Darrow put it more than 80 years ago: “Strange as it may seem, I grew to like to defend men and women charged with crime. . . . I became vitally interested in the causes of human conduct. . . . I was dealing with life, with its hopes and fears, its aspirations and despairs.”

Defense lawyers try to find the humanity in the people we represent, no matter what they may have done. We resist the phrase “those people” because it suggests too clear a line between us and them. Clarke has managed to do this with some of the most notorious criminals of the past two decades, including “Unabomber” Ted Kaczynski. “Even if it’s the smallest sliver of common ground, Judy’s going to be able to find that,” **said Kaczynski’s brother, David.** “There’s no doubt in my mind that Judy saw my brother’s humanity despite the terrible things he’d done.”

We may even come to develop affection for our clients — as did the Boston nurses, who caught themselves calling Tsarnaev “hon.” “There are very few clients I have had who I didn’t like,” **Miriam Conrad**, another Tsarnaev lawyer, has said.

Criminal lawyers are sometimes accused of investing all our sympathy in our clients and having none for victims. But we are human beings; we have feelings. Over the years there has been a handful of cases that tested me: sympathetic victims, unspeakably cruel crimes, clients who seemed to lack any conscience. I once represented a young man accused of an armed rape of a recent college graduate who was an AmeriCorps volunteer. She could have been me at that age — full of passionate idealism. It was hard to face her in court. I represented a man accused of child abuse who seemed to hate everyone, especially women. I admit I derived some satisfaction from the fact that his defense lawyer, prosecutor and judge were all women — even though I did everything I could on his behalf.
The people I have in mind when I say “I like guilty people” are not those who commit acts of such depravity that it’s painful to read news stories about them. I mean the vast majority of my clients, who, for a variety of reasons, have committed crimes but who are not evil.

My car-thief client was only 16 when he killed his neighbor. He was immature and impulsive, and he’d had a hard time fitting in. He’d never been in trouble with the law, but on that day he got in trouble at school and was trying to escape his dad’s wrath when he grabbed a gun to frighten his neighbor into giving him her car. Thirty years later, he still can’t believe he pulled the trigger. He has grown up in prison and is more than sorry for what he did. I’ve been trying to get him released on parole.

My baby-killing client has no recollection of harming her 18-month-old. She accepts that she must have done it and feels regret and shame. In prison for more than 26 years, she has shown herself to be a woman of faith and service, working in the prison hospital and the Catholic chaplain’s office. I took her case because she has served her sentence and been a model prisoner, yet she has been repeatedly denied parole.

My drug-dealing client knew the woman he killed — he once bought presents for her kids. He wishes he had made different choices on that day and at other points in his life. Released from prison after 20 years, he is grateful to have a second chance.

I realize this may be what every defender says: My clients, no matter what they may have done, aren’t wicked. They are damaged, deprived or in distress. Their crimes can be understood as the products of awful lives, or of being young, hot-headed and lacking in judgment, or of not having the mental wherewithal to know what they were doing. There is always a story. Castro lawyers Craig Weintraub and Jaye Schlachet were typical in insisting, after meeting with their client for several hours, that he isn’t the “monster” he had been made out to be.

If knowing our clients makes it too easy to explain how we can represent them, maybe it’s better to ask whether we would represent other people’s clients.

Defending Castro would be especially difficult for me. Although I have never turned down a court appointment based on the nature of the case, there are crimes I find especially abhorrent: child abductions that feature sexual abuse and hate crimes of all sorts. With its kidnapping, sexual assault and torture, Castro’s is exactly the kind of case I find hard to stomach. It’s distressing to read fiction about these kinds of crimes — such as Alice
Sebold’s “The Lovely Bones” or Emma Donoghue’s “Room” — let alone grapple with the real thing.

I don’t envy the lawyers representing Tsarnaev. He is young — I can understand why those nurses were instinctively kind to him — but there is overwhelming evidence that he killed, maimed and terrorized innocent people in the place where he grew up. I would want to say to him: “What the hell were you thinking?” But good defense lawyers resist the urge to pile on; it isn’t a useful way to form a relationship.

Still, there’s something about cases in which everyone is calling for blood that makes it easier to fight for people like Tsarnaev and Castro. Maybe there’s a contrarian streak in all good criminal lawyers. Frankly, the uproar over the image of Tsarnaev on the cover of Rolling Stone made me want to stand up for him — or at least for the editors of the magazine.

I confess that I gravitate more to Trayvon Martin — the young black man unfairly targeted — than neighborhood-watch volunteer Zimmerman. But that doesn’t mean I couldn’t have defended Zimmerman.

Prominent criminal lawyer Edward Bennett Williams once noted that he took on difficult cases for unpopular clients “not because of my own wishes, but because of the unwritten law that I might not refuse.” That unwritten law still motivates criminal lawyers, along with the knowledge that none of us would want to be defined by the very worst thing we ever did.

We represent “those people” because we can always find aspects of them that represent us.

I. For those of you who have previously sat as a potential juror, and have heard questioning by lawyers, you have heard many people say to the lawyers, “I can be fair.” The question of whether you should sit on this jury is not whether you are a “fair” person. I believe most people try to be fair to other people. The question is whether you are an appropriate juror for this case.

Everyone comes to court here today, with their own set of opinions and ideas which have formed from your own unique experiences. Today I don’t want to change those opinions or beliefs, I just want to talk about them. Those opinions and beliefs of yours don’t mean you are not a fair person, but they may mean you are not an appropriate juror for this case.

Example: A prospective juror, who had been seriously injured by a drunk driver, being asked to sit on a DUII trial.

Most people would agree that this life experience may make her not appropriate to sit on a DUII case.

II Race. Not only is Mr. Doe alleged to have assaulted the police, but he is also obviously a black man.

1. Do you think that prejudice against black people by white people is a thing of the past? Why or why not?

2. Do you think life in Portland is different for black people than it is for white people? In what ways?

3. Have you or any member of your immediate family had any direct experience with discrimination? If YES, please describe.

4. What do you think causes racial tension and conflict?

5. Everyone raise your hand if you agree that programs like affirmative action cause unfair treatment of white people.

6. In what other ways do you feel white people are unfairly discriminated against?

7. Do you think blacks are treated unfairly in employment? In higher education? In the courts?
8. Do you think that blacks are more likely to commit crimes than whites? Why?

9. Do any black children attend the schools your children go to or have attended? If YES, what contact have you had or do you have with their parents?

10. Do any black people belong to the clubs or organizations to which you belong?

11. Have you ever found it difficult to talk with people of other races? If YES, why do you think that was?

12. Have you ever felt hostility from black people? If YES, please describe the circumstances and how you felt.

13. Are there any black people living on your block? In your neighborhood?

14. Has the racial composition of your neighborhood changed since you’ve lived there? How has it changed? How do you feel about this?

15. Would you please describe your experience with black people.

III. Police. We are going to ask you to take a hard look at the police work in the case. The police are not on trial, but how they performed their job is. How do you feel about such a defense? Can you listen to it?

1. Are any of you related to a police officer, probation officer or prosecuting attorney?

2. Do you feel a police officer’s testimony will be more truthful or accurate than a civilian witness?

3. Do you believe police can jump to the wrong conclusion?

4. Do you believe police can have a stake in the outcome of a case, so they lose some of their objectivity?

5. Who feels the media is too hard on the police?

6. I think we’d all agree that the police have a tough job ... given that, is there anyone who will be offended if I vigorously cross examine the police?
7. If officer avoids questions or tries to slip information in, would that show that the officer is biased?

8. Would you want to hear of any mistakes made by the police or any shortcomings in their investigation? Is anyone familiar with the term “tunnel vision”? Think a police officer could become that way?

9. Do you think it is important to keep an open mind when conducting an investigation?

10. Do you think the police are subject to the same feelings and emotions about sex abuse as the rest of us?

11. Do you think these feelings and emotions could cause police to target a suspect before they had all the facts and had done a thorough investigation?

IV. Representing “Those People”.

1. Every day, we look in the papers, TV news, dominated by stories on crime. How many of you believe that the criminal justice system is just too soft on crime? Please raise your hand if you believe that people convicted of crime should serve longer sentences?
   a. Strongly held belief?
   b. What in your background makes you feel that way?

2. Inmates in prison get to watch TV, they get weights to lift in prison, they sue the prison and warden for not feeding them the right food ... Who here feels the criminal justice system goes too far in protecting the rights of people convicted of crime?
   a. Strongly held belief?
   b. What in your background makes you feel that way?

3. Consider the following statement: People who have nothing to hide should allow their homes or offices to be searched without a warrant. How do you feel about this statement?

4. Who here believes that a defendant who does not testify, does so because he is probably guilty?
   a. Constitutional right not to testify.
   b. Law says it can’t be held against him.
   c. Are we fooling ourselves?
Chapter 2—Don’t Judge a Book by Its Cover

d. Can you see if Mr. Doe testifies, the State will argue he is lying? On the other hand, if he doesn’t testify, there is the fear that jurors will hold that against him even though the law says it can’t. (Catch 22)

5. Everyone has at one time or another been driving along in a car and seen someone being arrested along side the road. They are up against their car and handcuffs are being put on them.
   a. When you have seen that, who here has thought to themselves, “Gee, I wonder what he allegedly did?”
   b. Are we fooling ourselves today here in court, to say that Mr. Doe is innocent until proven guilty?
   c. Why do you feel that way?
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff, No. [redacted]

v. MOTIONS IN LIMINE

[redacted], Oral Argument Requested

Defendant.

Defendant [redacted], through his attorneys, hereby submits the following motions in limine.

The Charges

Pursuant to a warrant, the State seized a MacBook laptop computer and a Geek Squad thumb drive from [redacted]’s residence. The State performed a forensic examination of the Geek Squad thumb drive and of the MacBook computer hard drive. In the examination, the State discovered 17 power point presentations on the thumb drive, and 2 power point presentations on the computer. The state alleges that the power point presentations are of a pornographic character, and several of the power point files contain slides with images depicting child sexual abuse.

The Indictment charges [Defendant] with Encouraging Child Sexual Abuse in the First Degree for duplicating child pornography. Each of the 30 counts states that [Defendant] “did unlawfully and knowingly duplicate a visual image . . . of sexually explicit conduct involving a child while knowing and being aware of and consciously disregarding the fact that creation of the visual...
image of sexually explicit conduct involved child abuse. . . .” Each count relates to an image or
collage of images contained in the power point presentation files existing on the thumb drive.

**Motion No. 1: Zombie Story**

Defendant moves to exclude the contents of the document file entitled “Zombie Story.”

The case agent, Detective [redacted], instructed the computer forensic examiner, Detective [redacted], to look for “documents” on the Geek Squad thumb drive and the MacBook

computer. Detective [redacted] located a document entitled “Zombie Story” on both
devices. Detective [redacted] reviewed the document properties and reportedly found

[redacted] listed as the document’s author. Evidence of the document’s contents should be

excluded as irrelevant.

The Oregon Court of Appeals has stated that, “[t]he general rule is that evidence is
admissible if it is relevant and if its probative value outweighs any prejudicial effect.” *State v. Ritchie*, 50 Or App 257, 260 (1981). “Relevant evidence” means “evidence having any tendency
to make the existence of any fact that is of consequence to the determination of the action more
probable or less probable than it would be without the evidence.” OEC Rule 401.

This case concerns images, not documents. [redacted] disputes his alleged
ownership of and possession of the thumb drive. Therefore, the fact that the devices share a
common file, and the fact that the file shows [redacted] as its author are relevant to the
alleged link between the thumb drive and the computer, and the alleged link to

[redacted].

However, the contents of the document are not relevant. The contents do not make any fact of
consequence more or less probable.

Moreover, the likelihood that the contents of the documents would confuse the issues
substantially outweighs any minimal relevance. OEC Rule 403. Relevant evidence may be
excluded if “its probative value is substantially outweighed by the danger of unfair prejudice,
confusion of the issues, or misleading the jury, or by considerations of undue delay or needless
presentation of cumulative evidence.” *Id.*

**PAGE 2 - DEFENDANT’S MOTIONS IN LIMINE**
Motion No. 2: Specific Instances of Conduct to Prove Character

Defendant moves to exclude extrinsic evidence of character to prove propensity to commit
the charged crime, including the way in which represented himself to others and his connection
to a “former student.” Evidence of other crimes, wrongs or acts is not admissible to prove the
character of a person in order to show that the person acted in conformity therewith. ORE 404.
ORS 40.170. Admission of extrinsic evidence of other acts carries the danger of being used
as evidence of bad character by the trier of fact to the clear disadvantage of the defendant.
However, it may be “admissible for other purposes, such as motive, opportunity, preparation, plan,
knowledge, identity, or absence of mistake or accident.” Id.

The defense anticipates that the state will seek to offer evidence of other acts by the
defendant that serve no purpose other than to prove defendant’s bad character and conformity.
First, Officer [redacted] reported that [redacted]’s friends told him that [redacted] spoke with a thick Irish accent, had grown up in Ireland and was in the IRA, but was deported to
the United States at age 18. Officer [redacted] conducted further investigation and learned
from “other people” that [redacted] grew up in Portland, changed his name, did not have
an Irish accent and had only visited Ireland once. Evidence regarding how [redacted]
represented himself to others in the past should be excluded as irrelevant evidence of bad
character to prove that [redacted] acted in conformity in this case. There is no permissible
purpose under OEC Rule 404(3) for which [redacted]’s accent and/or representations of
himself may be admitted.

Second, [redacted]’s then-girlfriend, [redacted], made the initial report to law
enforcement of finding child pornography on [redacted]’s computer. She explained that she
searched [redacted]’s cellular telephone and computer looking for evidence that he was
cheating on her with a “former student.” The description of the other woman as a “former student”
should be excluded as irrelevant evidence of bad character to show that he acted in conformity
therewith. The charges in this case do not involve any allegation that [redacted] committed
any sexual act, or more specifically, that he committed any sexual act with any minor student.

Whether □□□□□ maintained a relationship with a former student is irrelevant to the charges of Encouraging Child Sexual Abuse.

DATED September 13, 2011.
The Art of Jury Selection in Sex Crime Cases
By Whitney Boise

You cannot win your jury trial in voir dire, but you can lose it. If you are unable to identify and strike the individuals off your jury panel who are unwilling to consider acquitting your client, you have lost.

Despite being called jury selection, the process should be called jury de-selection.¹ Voir dire is not about finding the people who you want to serve on the jury, rather it is about identifying those jurors whose life experiences, attitudes and opinions would make it difficult if not impossible for them to return a verdict of not guilty. This is especially true in sex cases where potential jurors will have intense emotional feelings and predetermined beliefs about the facts of the case and your client.²

There are four main goals of voir dire: (1) identify jurors biased against your case, develop the themes of your case, (3) introduce the jury to the bad facts of your case; and (4) establish credibility and rapport with the jury. To do this effectively requires defense counsel to, first and foremost, be a good listener. In achieving each of these goals you are focused on the primary purpose of voir dire which is to identify biased jurors and to challenge them for cause. What you are not trying to do is identify those jurors who will be predisposed to your case because in doing so you are simply identifying them for the prosecutor to strike.

IDENTIFYING BIASED JURORS

Potential jurors come to the courtroom with their own set of opinions and beliefs based on their life experiences. It is highly unlikely that hearing from you, who they have never met and of whom they are most likely very suspicious, will change these opinions and attitudes. Attempting to convince jurors to change will only alienate them, stop dialog and encourage them to argue with you. For this reason, you are not looking to educate them about your belief in the case but to find those predisposed against your case and then to challenge them for cause. This process of de-selecting jurors can only be done by getting the potential jurors to talk about their opinions and beliefs.

Realize that most jurors have very strong feelings about allegations of any sex crime. From the moment the jurors are first seated and the judge reads the allegations against your client, you will feel a hush and tenseness-as if all of the air has been sucked from the courtroom. You will need to deal with and acknowledge these strong feelings at the outset. A good way to begin to defuse these feelings is for the attorney to acknowledge having these same types

¹ Sonia Chopra, a trial consultant for NJP Litigation Consulting, discussed the process of jury de-selection, in her article for Plaintiff, February 2014, The Art of Jury De-Selection.

² I wish to acknowledge OCDLA member Terri Wood of Eugene, from whom many of the ideas in this article were taken from her written materials and from a continuing legal education seminar at which she spoke on her Voir Dire from State v. Obremski, a notorious sex abuse case which resulted in an acquittal on all charges.
of feelings about the case as everyone else in the courtroom and asking whether anyone under these circumstances can get a fair trial? By self-disclosing, the attorney is creating an atmosphere which allows the jurors to open up and admit their own biases and prejudices. Rather than saying “I have those feelings,” try, “We all have those feelings.”

When a potential juror gives you a response in voir dire clearly indicating that she will be biased against your case or client, do not despair and try and change that person’s mind. Also, do not worry that the person sitting next to them is going to have their values changed by what the other juror is saying. People’s belief systems are not that easily altered. Rather when you get that negative response towards your case, your client or you, reward and encourage that person’s honesty by thanking them. That is the first step in setting up a challenge for cause. The other steps in setting up a challenge for cause are discussed later in this chapter.

**Practice Tip: When a juror expresses negative feelings about the defendant, defense counsel, or legal principles like beyond a reasonable doubt for sex offenses, you must take it in stride. An effective response to such a negative comment is “Yes, I know many people have that opinion. Could you tell me your reasons for feeling that way.” This is a much better approach than simply thanking them for being honest and moving as fast as you can to the next juror. Allowing that type of juror to vent can cause other jurors to question the validity of the hostile juror’s opinions, and also reaffirms your commitment to listen and be interested in what every juror has to say. A quick dodge and retreat by defense counsel can have the opposite effect.**

The greatest impediment to an open dialogue and an environment of disclosure arises when the judge is allowed to frame the issue in voir dire as whether a potential juror is a fair and impartial person. The issue must be framed by the defense attorney as whether the opinions and beliefs formed by a prospective juror, over their lifetime, predispose them to be biased against the defense’s case. The defense attorney must frame the issue in this way or she will never be able to identify jurors predisposed against her case and the jurors will simply parrot back to counsel and the court that they can be “fair and impartial.” The consequence of this scenario is that the defense attorney does not discover ammunition to challenge jurors for cause and may not even learn enough information to wisely make preemptory challenges.

The second greatest impediment to an open dialogue and an environment of disclosure arises from defense counsel’s inherent difficulty in functioning not as an advocate, but as a good listener, during this most important phase of the case. Attorneys are not trained to be good listeners. They are trained to think of questions, anticipate the answers, and think of the next question or response while the answer is being given, only partially listening to the answer and probably not looking directly at the person answering the entire time.

Becoming a good listener is a life skill, generally practiced by attorneys when they are NOT in the courtroom or engaged in their professional lives. Train yourself to use that skill to its fullest in voir dire. If you find yourself talking more than the prospective jurors, recognize you are lecturing, not listening, and change your approach fast.
DEVELOPING THE THEORIES OF YOUR CASE

Voir dire is the only time during the trial where the defense lawyer gets to go first. For that reason, she can begin framing the issues, or the themes, which will be important in the case. The attorney should not, however, try to educate the jurors through a lecture about an issue. Instead, the attorney allows the jurors to educate themselves about life experiences which are consistent with the theories in the case. The following are some statements and questions which are designed to locate jurors biased against your case but also have the effect of developing one of your defense theories.

1. The defense in this case is that Mr. did not sexually abuse this child. In other words, the child is not telling the truth. Are you willing to consider a defense of this nature?

2. Some people think that a child would never lie about something as serious as sexual abuse; others think children do lie about such serious topics. What do you think?

3. Did you teach your child to not lie? Were you successful?

4. Have you caught a child lying to you? How about have you suspected a child was lying to you?

5. How do you determine when someone is telling the truth, if they are a good liar?

6. Do you believe children can be motivated to lie to please adults?

From these questions, you can see that a theme in this case is that children may lie about serious issues, even those whose parents have tried to discourage such behavior. A second theme may be that some people are just good liars and the only way we can tell if they are telling the truth is if their story is consistent. The attorney is not lecturing the jurors about these themes but allowing the jurors who are open to your defense to educate the other potential jurors. At the same time, more importantly, the lawyer is achieving the primary goal of identifying biased jurors and then challenging them for cause.

Practice Tip: False accusations can also be the product of a child’s memory being confused, contaminated or manipulated. Consequently, depending on the facts of your case, you may want to ask potential jurors whether they believe these are possible explanations for a false allegation of child abuse. Regardless, to successfully defend a case of child abuse you must elicit facts during trial which present a coherent reason why the child has made the false allegation. Ideally, you are able to point to a specific reason, such as a child custody battle in which one parent is

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3 An excellent article on voir dire, which this author consulted prior to writing this article, is Developing the Theory of the Case in Voir Dire and Opening Statement, by Jeff Kearney, The Kearney Law Firm, written for the Criminal Defense Lawyers Project, October 4-5, 2001.
poisoning the child against the other parent. However, sometimes your reason is more nebulous like we know this child has a reputation for not being truthful and craves attention. It is imperative, however, to give the jury a reason to disbelieve the child’s allegation. If you fail to do this, it is unlikely you will win.

DISCUSSING THE BAD FACTS AND AREAS OF LIKELY BIAS AGAINST THE DEFENSE

Use voir dire to disclose the bad evidence in your case, and to explore areas of likely bias against the defense. As you are preparing for trial make a list of all the things that are most worrisome about the case. You should be asking yourself, what facts are you most afraid of the jury hearing and what conclusions will they draw when they hear this evidence? What things will the defense do that could cause a negative reaction by jurors? As discussed, your goal is to identify those potential jurors who will be predisposed against your case because of these facts and then strike them from the jury. The following questions are examples for beginning discussion of bad facts or other areas of concern:

1. We are going to ask you to take a hard look at the police work in this case. The police are not on trial, but how they performed their job is. How do you feel when you hear someone being critical of the police?

2. You will learn that [my client] Mr. _____ has previously been convicted of theft from a department store. Does that make you think he is probably guilty of the charges in this case? Why or why not?

3. As you can see, [my client] Mr. _____ is African American. Do you think that prejudice against African Americans is a thing of the past?

In a child sex abuse case, you need to prepare the jury that you are going to cross examine a very vulnerable child. Ask them if they will be offended if you do this. Ask them if they think it is fair and just that you be allowed to ask the child questions. Ask them if they think a just result could be reached in the trial if you were not allowed to ask the child questions. Again, you are disclosing to the jury those things that concern you about the defense, before the jury hears them in the case itself. You want jurors to talk openly; you are not trying to change anyone’s mind. While doing this, you are also identifying those jurors who are unwilling to listen to such a defense or who are unwilling to consider your client’s innocence given the specific facts of your case.

CREATING AN ENVIRONMENT OF DISCLOSURE

BEGINNING VOIR DIRE

Empathize with prospective jurors. They don’t want to be there and they don’t want to discuss personal matters with strangers or sound stupid when answering questions that are hard to understand. They don’t know or have any reason to like you or your client. They don’t apply
legal principles in their daily lives. Experience these feelings, then ask yourself, “What would I want to hear from the defense attorney?” that would change those feelings or make the difficult task of jury service less stressful. You want to conduct voir dire in a way that jurors begin to see you as trustworthy, knowledgeable about the law, and that you care about your client. Then you have the rest of the trial to prove that. You do this by being prepared to try the case, understanding the facts better than anyone else in the court room, treating the judge and opposing counsel with respect and interacting with your client like you genuinely like her.

As discussed earlier, the defense lawyer cannot simply allow jurors to say they are a fair person, in response to whether they can sit in judgment on a case. Most people perceive themselves as fair-versus prejudiced-and want to be fair to others. Yet, all potential jurors come to the courtroom with their own set of beliefs and opinions which have been formed over years from their personal experiences. It is these experiences and beliefs which may make jurors inappropriate to sit on your case.

I introduce this concept to potential jurors in the following way:

“Each of you come into this courtroom with your own set of opinions, beliefs and life experiences. I don’t want to change those opinions or beliefs—I just want to talk about them with you. I assume that each of you are a fair person. However, the opinions and beliefs you have formed from your life experience may cause you to not be an appropriate juror for this case.”

To illustrate this concept, you may use the example of a juror sitting on a Driving Under the Influence of Intoxicants (DUII) case, when that juror had previously been seriously injured in an automobile accident caused by a drunk driver. Most potential jurors will acknowledge that there is a very good chance a person in this position will be predisposed against a defendant charged with a DUII, and for that reason would not be an appropriate juror for that case.

Practice Tip: Tell the jury that “it is never easy to talk in front of a room full of strangers, but I ask you to be honest, be blunt in telling me what you think, and to know that there are no wrong answers. I may bungle a question, and if so, tell me you don’t understand.”

People are much more likely to agree that they should not sit on a case because it would not be an appropriate case for them, as opposed to because they are not a “fair person.”

ESTABLISHING CREDIBILITY AND RAPPORT

If a juror does not feel at ease with you, it will be difficult for the two of you to have an open conversation. There must be a level of trust and rapport for you to meaningfully share information. Lawyers who are opinionated, judgmental and try to change opinions will not have an open dialogue in voir dire and consequently will not identify and remove biased jurors.
Attorneys who listen to what jurors are saying, who follow up with open ended questions and who are genuinely interested in what the person has to say, will learn substantially more about the potential jurors. One way to develop such trust is through self-disclosure about attitudes, fears, feelings and life experiences. For example:

1. Standing before you today I am really nervous because I feel like I have [my client’s] Mr.______ life in my hands. How many of you feel an anxiety about sitting on this case?

2. Are we kidding ourselves when the judge instructed you to presume Mr.______ innocent as he sits before you today?

3. Or, as Detroit lawyer Steve Fishman says in voir dire, “when you pass by a police car with a motorist pulled over to the side of the road and out of the car, do you think, gee, I wonder what that guy is presumed innocent of?” Of course not, so are we kidding ourselves that as Ms.______ sits here today we presume her innocent?

On the other hand, when attorneys try to be too familiar with jurors, and go on and on about how grateful they are for the juror’s attendance, discuss how important they are to the system, and disclose awkward facts about themselves, it can be counterproductive and jurors may feel they are being manipulated by the defense attorney.

Talk to jurors like you do with a friend or neighbor. Get rid of lawyer words. We like people, and are more readily persuaded by them, when we can relate to them. Few jurors will relate to a lawyer who is obnoxious or condescending. If a prospective juror breaks down crying, you need to show empathy for their emotions, acknowledge the difficulty of their disclosure, give them a bit of time to recompose, and consider asking if the juror would like you to ask the Court for a brief recess. If a potential juror becomes angry at, or threatens you, or your client, thank them for their honesty, and make a strategy call as to whether to immediately start developing a challenge for cause (which is likely to give them the opportunity to continue venting to the panel), or to back off and ask for a show of hands as to others who feel the same way, then circle back to the hostile juror to make a challenge for cause.

Practice tip: Discuss the individual trial judge’s voir dire practices in advance. Seek the flexibility to address some questions to the panel as a whole, in addition to questioning jurors individually. And remember, challenging for cause will send a clear message to other potential jurors that they should not be as forthcoming in their answers, if they want to serve on the jury. For this reason you may want to wait until the conclusion of voir dire, to begin challenging potential jurors for cause.

OPEN-ENDED QUESTIONS

The way you ask your questions will affect the amount of information you learn from the jurors. Leading or closed-ended questions will only supply you with yes or no answers, while open
ended questions will get them talking and expressing their opinions. These opinions can then be expanded on by questions like the following:

Please tell me a little more about that.

Can you explain that for me?

Is there a particular reason you feel that way?

Can you give me an example?

How do you think that affected you?

I am not sure I understand; can you explain a little more?

Why do you think that is?

How many of you feel this way? Can you show me with your hands?

Use the phrase “how many of you” as opposed to “do any of you”, as it suggests that other people share the view and it is alright for the prospective juror to admit such a belief. If you find that you are doing most of the talking during voir dire and are not successfully finding out about jurors’ opinions and beliefs, it is most likely because you are not asking open-ended questions.

Be attuned to equivocal answers, which often require more direct, versus open-ended, questions to resolve. For example, if a juror responds to the question, “Have you, or any close friend or relative, ever been the victim of a sex crime?” with “I don’t think so,” don’t take that for “no.” You need to find out more. One approach is to tell the juror you are sorry, but you may be misunderstanding their answer, because it sounds like he is expressing some degree of uncertainty. Ask if the juror is hesitant to say yes or no, and would the juror help you understand why?

When open-ended questions are posed to the entire panel, often no one will respond. Such general questions will only get the most outspoken jurors to participate. It will be easy to draw out the opinions and beliefs of these individuals. Your goal is to get the other jurors to talk. It will be easier to draw information out of these individuals by specifically asking them open-ended questions. When you are prepared to move on to a new topic, it is then possible to ask the entire panel a question such as:

1. I would like to ask you as a group, how many of you agree with what Mr. Smith just said? Can all of you who agree raise your hand?

2. Are there any panel members who disagree with Mr. Smith on this issue?

Practice Tip: One method is to have a set of neutral but relevant questions to ask individual jurors, to get the less talkative ones over the fear of talking in public. For example, in a
child sex case, ask about the juror’s exposure to children in the same age bracket as the alleged victim or their interaction with children in that age bracket. Or ask if they have they ever been pulled over by police for a traffic infraction? Or formulate follow up questions from the individual’s written questionnaire, e.g., what did your husband do for a living before he retired? In other words, formulate questions that deal with everyday life experiences of the juror, without emotional implications, or that cause a person to fear that they may be giving “the wrong” answer.

POSITIVE FEEDBACK

Each time a prospective juror discloses a bias while displaying difficulty in making the disclosure, take a moment to acknowledge that. Reinforce that their honesty and willingness to meaningfully participate in the jury selection process is vital to our criminal justice system. This approach will facilitate further disclosures and help others to honestly discuss their beliefs. Jurors must believe that there is never a wrong answer to your questions, so they feel free to honestly answer them.

FORMULATING QUESTIONS TO USE IN VOIR DIRE

Because you are the one “breaking the ice” in getting prospective jurors to feel comfortable and start talking, it is usually best to start with neutral but germane topics that involve common experiences for most adults. For example, in a child sex abuse case involving a young teenager, start by discussing experience with children. Any one or two word responses from a juror should prompt you to ask conversational follow-up questions aimed at getting the juror to talk. Here are some sample questions:

1. Have you had much contact with young teenage girls?
2. Do you have knowledge or opinions about what teenage girls know about adult sexuality?
3. Do you think a child of 13-14 cares what their parents think, or are they independent-minded?

In preparing voir dire questions, start by listing every topic pertinent to the defense or prosecution about which people are likely to have personal experience or strong opinions. For example, does the case involve sex abuse, violence, domestic violence, drugs, alcohol, mental illness, firearms, felons, or race? Then draft a series of open-ended questions on each of those topics designed to get prospective jurors talking about their experiences and beliefs. For example, in a case where the defendant was intoxicated, draft a series of questions about alcohol that begin with the juror’s experience, before moving on to questions related to the theory of defense:

- Do you drink alcohol?
- How often do you drink?
- Have you drunk alcohol in the past?
- Is there a reason why you choose not to drink? Would you share that with me?
- Have you drunk to the point of intoxication?
• Have you heard about “alcoholic blackouts”?
• Do you have any specialized knowledge, education, or training in the field of alcohol abuse?

You must identify a theme or themes that are central to your theory of defense, and formulate voir dire questions designed to learn whether prospective jurors are open to considering your defense. Avoid questions that sound like you are trying to sell your theory of defense. And never use the words “theory of defense” in speaking with jurors. For example, in a case where the theory was the fallibility of human memory, the series of questions were as follows:

• Do you have any specialized knowledge, education or training about how human memory works?
• Who thinks that our memories are like video recordings of events, that what we accurately remember whatever we experience?
• Do you think a person’s memory of an event can change over time? What factors could cause that?
• Have you heard about memories being altered by exposure to the suggestions of other people?
• Have you ever discussed a past event with a friend or family member, and both of you are certain it happened a different way?
• Have you ever changed your opinion of a person based on what your family or friends said about the person—based on what you have heard from trusted sources, rather than your personal experience?
• Have you ever misjudged a person based on misinformation—bad information, or things that turned out to be untrue?

It is best to draft more questions on a given topic than what you end up asking jurors. This gives you flexibility in the courtroom, and ready alternatives if one or more of your questions regularly gets limited responses from jurors.

What follows are additional questions you may want to ask or modify for use in voir dire in sex cases:

1. We need to talk about a difficult topic, sex abuse. By just a show of hands, who here has been the victim of a sex crime, or has a family member that was a victim? Do you feel comfortable talking about this in front of the panel, or would you feel more comfortable discussing such matters outside the presence of the jury panel?

2. I would like to start with some general questions and ask for a show of hands. Has anyone been involved with a group or organization that deals with physical or sexual abuse?

3. Who here has any specialized knowledge relating to physical or sexual abuse, either by education, training, personal study, occupation or experience? This
would include investigating abuse, treating abuse victims, or any other way of gaining some degree of knowledge beyond that of the average person.

4. Who here has suspected that someone had been sexually abused? If so, what made you suspicious?

5. By just a show of hands, who here has had a close friend or relative who was the victim of sex abuse? Do you feel comfortable talking about this in front of the panel or would you like me to ask the judge to allow you to talk about it outside the presence of the other jurors.

6. Everyone is against child abuse. No one likes a child molester. The question I have is: Are you able to separate your feelings about child abuse from how you feel about Mr. _______ as he sits here today accused of the crime?
   a. How do you separate those feelings?
   b. How do you feel about Ms. _______ as she sits here?
   c. Would you agree that if you cannot honestly separate those feelings, you are prejudicing the case, and are prejudiced against Mr. _______?

7. Has anyone had a family member or close friend who was the victim of a serious non-sexual assault?

8. Has anyone here been the victim of a serious non-sexual assault?

9. Do you think you are usually able to tell when a child is lying?
   a. Do you think this ability to tell when a child is lying is different with a stranger, rather than your own child?
   b. What sorts of things do you look for to determine whether a child is lying?

10. Child sex abuse does happen. It has happened since the beginning of time. Understandably our culture abhors child sex abuse. Some groups advocate death penalty for such crimes. We, as a society, want to protect our children. To do so, we want to believe children when they make allegations of abuse. Yet, under such circumstances, can we give a person charged with such a crime a fair trial?

11. Mr. _______, do you feel that every allegation of sexual molestation should be considered true? Why or why not?
12. Have you ever promised your child that if they told you that a person did something bad to them, that you would believe them no matter what?

13. If an adult praises a child for reporting sex abuse and reinforces what the child says, what effect could that have on the child? Why?

14. Have you ever volunteered to work with children in the past?
   a. Given the number of false allegations, how do you feel about working with children now?
   b. Why?

INTRODUCE THE COURT STAFF

Most people act like the court staff are not in the room. These are important people who you must acknowledge. How the court staff feel about you will not go unnoticed by the jury. Introduce them by name and tell the jury a little bit about their duties. You cannot imagine how important this little kindness can be.

VOIR DIRE IN PRIVATE

Due to the sensitive nature of many of the questions that will be asked of jurors in sex cases, it is a good idea to ask the judge beforehand whether she will allow individual, sequestered voir dire if jurors feel uncomfortable discussing a topic in front of the entire panel. If so, before you begin asking questions, let the jurors know that you will be discussing topics that are private, sensitive or possibly embarrassing and, consequently, if they would like to answer some questions more privately, the judge will let the discussion on these topics be held in a more private setting.

Practice Tip: Many judges want to move the case along and will initially view a request for sequestered voir dire with hostility as a waste of time. If you think your judge would likely be in that camp, an alternative is to tell jurors, as part of the preface for explaining that you need to ask them very personal questions regarding experiences with sexual abuse, acknowledge the topic is likely to be emotionally difficult for those jurors with personal experiences, and say that if any of them feel the need to have the discussion on that topic occur in a more private forum, to alert you and you will seek the Court’s permission when the time comes. The judge is more likely to wait to see if the need arises with a particular juror, rather than to admonish you at the outset that it would never be allowed.

CHALLENGE FOR CAUSE

There are a number of reasons potential jurors can be challenged for cause under the Oregon Rules of Civil Procedure. For example, these include a person’s mental or physical defect which makes them incapable of performing the duties of a juror. ORCP 57D(1)(b). This article focuses on challenges for actual bias. “Actual bias is the existence of a state of mind
on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror
cannot try the issue impartially and without prejudice to the substantial rights of the party
challenging the juror.” ORCP 57D(1)(g).

When a juror is challenged for actual bias, “[t]he test of a juror’s disqualification is the
probability of bias or prejudice as determined by the court.” State v. Montez, 309 Or. 564,
(1977). This test guarantees voir dire in areas relevant to a juror’s qualifications, including
case specific issues and individual predispositions or biases. State v. Barnett, 251 Or. 234,
238, 445 P.2d 124 (1968). It is those individual predispositions and biases which the
attorney, ever so delicately and inoffensively, must probe.

When you have identified an individual whom you want to challenge for cause, this is the
one time during voir dire that you may want to use leading questions rather than open-
ended questions to get the jurors to admit their biases. At this point, you do not ask whether
they can be fair or impartial in this case. Instead, you say “I can only imagine how difficult
it would be for you to sit on a case of this nature.” If the juror is clearly upset and freely
agreeing with you, you may want to solidly lock in the challenge for cause with a statement
such as “from your previous answers, it sounds like you are saying you do not feel like this
would be an appropriate case for you to sit on ... because you do not feel like you can fairly
listen to the case and be impartial to Mr.______’s defense.”

If you intend to challenge a juror who is not being overtly hostile, there is one last question
to ask before telling the judge that “I challenge this juror for cause.” Ask the juror for
permission to have them excused:

      It sounds like you would like me to ask the judge to excuse you from the jury
because you do not believe you can be fair in this particular case. Is that
      correct?
(Upun affirmance by the juror) Thank you. Then your honor, I would
challenge for cause.

People who are the victims of sex abuse or the parents of victims of sex abuse will
understandably admit that they have very strong emotions about such abuse. They may
admit to still being angry or upset over what happened to them or their child. They will admit
that the abuse has changed their life forever and that of other family members. They will admit
that they have fears the abuse may happen to another member of their family. If you present
to abuse victims that these are all natural and understandable feelings, they will often agree
that their experiences prevent them from being an appropriate juror for this case. For those
victims who will not agree that they should not sit on this case, you will have to use a
peremptory challenge.

Practice tip: Know that the prosecutor and judge will have the opportunity to question the juror
you challenge for cause, and will invariably focus on the juror’s ability to follow the legal
principles the judge will instruct them to apply.
In many cases, trial courts confronted with biased and partial jurors use their significant discretion to try and rehabilitate jurors by asking a loaded question: After you hear the evidence and my charge on the law, and considering the oath you take as a juror, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not surprisingly, jurors confronted with this question from the Court almost always say “yes.” *Walls v. Kim*, 250 Ga. App. 259, 549 S.E. 2d 797, 799 (Ga. 2001).

In *Ivey v. State*, 258 Ga. App. 587, 574 S.E. 2d 663 (2002), the Georgia Court of Appeals found such an effort to “rehabilitate” a prospective juror improper and that the court abused its discretion in refusing to excuse the juror for cause because the record as a whole failed bias. *Id.* at 594.

“Where a prospective juror, who has been asked whether he or she can be fair and impartial in this case answers under oath a plain ‘No,’” and provides an explanation for the inability to be fair and impartial, the court should limit further questions to clarification of the answer.” *Id.* at 592. *Dell v. Miller*, 565 S.E. 2d. 407,411 (W. Va. 2002); See also *Montgomery v. Commonwealth*, 819 S.W. 713, 719 (Ky. 1991).

Where a prospective juror says they have a bias and explains the reason for that bias, the defense must object to any question from the court or prosecution that goes beyond simply asking the juror to clarify or expand on their statements and beliefs. The selection of an impartial jury is the cornerstone of a fair trial. The defense should object that empaneling a biased juror violates client’s due process right to a fair trial.

“[t]he purpose of rehabilitative questioning is investigation, not persuasion. It is to determine whether the juror is able and likely to set aside his views, not to persuade him to do so, or to elicit pro forma answers to leading questions. *Lane County v. Walker*, 30 Or. App. 715, 722, 568 P.2d 676 (1977).”

The defense should also object under the federal constitution that the seating of a bias juror violates the Sixth Amendment right to an impartial jury.

CONCLUSION

The difference between winning and losing a criminal trial is often determined by whether you (the lawyer) are able to locate and then remove potential jurors from the panel, whose opinions, beliefs and/or life experiences make them biased against your client’s case. To remove these negative jurors, you cannot let the prosecution and the judge frame the issue as whether these individuals are “fair people.” The issue in voir dire must be whether this potential juror is appropriate for this case.

Good luck and get out there and try some cases.

VOIR DIRE

I. This case involves two people who worked together in an office.

   a. Who here works in an office environment?

   b. Tell me about your office. How many people are on staff?

   c. Casual vs. formal culture?

   d. Has anyone here ever worked in a medical office? Known anyone who has?

   e. What types of interactions do you have with coworkers? Does the level of formality differ depending on whether clients or customers are around?

   f. Do you have lunch together? Do you socialize on breaks?

   g. How many of you text either at work or outside of work with your coworkers?
      
      i. How has texting changed how we communicate in society?

      ii. Have you noticed that people are different in text vs in person?

      iii. Do people say things in texts that they wouldn’t say in person?

      iv. Is there anything about texts that create a risk that they’ll be misinterpreted?

      v. Are there generational differences?

      vi. What is your texting style or personality?

I have a son in high school. He responds to my texts with one word responses. Often “K” Never ever used an
emoticon. My 12 year old daughter’s texts often have more emoticons or exclamation points than information

h. Has anyone here developed a personal friendship with someone they met at work? Tell me about that.

i. Friendship with your boss?

i. What about a mentor? Has anyone ever had someone they considered to be a mentor? Did you also consider that person to be your friend?

j. Are there ways that friendships with coworkers are different from friendships that you have outside your workplace?

i. What if your friend is your boss? Does that change anything?

k. Have you talked about personal stuff at work? What kinds of things do you talk about? (Kids? Spouse? Hobbies?)

l. Those of you who talk about personal stuff with people at work do you have a relationship outside of work?

m. Has anyone here been asked personal questions they’d rather not answer at work? If so, how did you deal with that?

i. HYPO: My niece just had her first baby and she told me that this male coworker kept asking her questions about her plans for a natural birth and her choices about breastfeeding once the baby was born. She felt really uncomfortable being asked those questions but didn’t want to be rude.

1. Any of the women in the group who’ve had similar experiences while pregnant?

2. What about the men? Anyone ever had a similar experience or know someone who has? Maybe someone who lost a lot of weight and people kept
commenting about it or had a coworker ask questions about their dating life?

ii. What if the person asking is someone whose opinion/relationship you want to preserve, such as a boss or client?

n. Those of you who were asked personal questions, did any of you complain to HR? Why or why not?

i. Should someone go to HR in a situation like that?

o. Does your workplace have policies about workplace communication?

p. Has anyone here seen anyone behave in an inappropriate way at work? Did the person get away with it? Why were they able to?

q. Has anyone here received unwanted attention from a coworker or known anyone who has?

r. Has anyone been in a relationship or friendship at work where the other person wanted to take it farther than you did? Know someone in this situation?

i. How did you address that?

ii. Once you took action, what were your expectations regarding the other person’s behavior?

s. Has anyone here had a personal relationship with a member of the opposite sex that was platonic?

t. Are there risks you run by sharing personal information with this person? How do you know when it crosses the line?

i. Is it fair to assume that if you share personal information you want to have a sexual relationship with this person?
I know a lot of teachers because I have a high school teacher in my family. One female teacher I know frequently gets requests to be Facebook friends with students. She accepts them. Another teacher friend, also a woman, accepts Facebook friend requests only from former students, not from students in her class. Then there’s a third, a male friend of mine, who declines to be Facebook friends with any students, current or former.

1. Juror # which of these approaches sounds like the one that you’d take. Why?

v. Anyone have someone in their life who has been a mentor? Did you seek them out to mentor you or did they take you under their wing and offer to help guide you?

w. What are reasons that people might seek out a mentor?

x. If you’re a woman launching a career, should you care about whether you find a male or female mentor? Are there reasons that you might seek out a male mentor? Does it depend on the field that you’re in?

II. This case involves a friendship between a doctor and a medical assistant.

a. Anyone here a doctor or have a doctor in their family?

b. Does that person work with medical assistants?

c. Does anyone know what a medical assistant does?

d. (For those of you who know or are a doctor…) What is the relationship like between doctors and medical assistants? Day to day?

e. Is there a rank/authority differential between a doctor and a medical assistant?

i. What if the assistant doesn’t actually work under the doctor?
f. **Does it matter if the doctor is a male and the medical assistant is a female?**

g. **How much time do you think a doctor and medical assistant would normally spend together on any given week?**

h. **Whose responsibility is it to enforce policies in the medical office?**

III. **In this case, the medical assistant applied to graduate school.**

a. **Anyone here ever applied to graduate school or professional training program? What was that process like?**

b. **Did you need a letter of recommendation? How did you decide whom to ask?**

c. **Anyone here ever attended graduate school?**

   i. **Small or large program?**

   ii. **What were your relationships with your teachers and other students like?**

   iii. **Did these relationships add value to your experience? Why?**

iv. **Was it different than undergraduate school?**

   v. **A woman I take a class with told me not long ago that she left academia because it was so incestuous as she called it. Everyone was in each other’s business. Anyone have that experience?**

IV. **As part of this case you’re going to hear about an accusation of harassment.**

a. **Is it possible for attention from someone to be welcome at first, and then become unwelcome later?**
b. How can that be? Isn’t it all or nothing? You’re either into it or you’re not?

c. What about the notion that someone who engages in flirtation is inviting whatever attention follows? Who agrees with that notion? Disagrees?

d. If you’re not into the attention that you’re getting from someone, how should you deal with that?

e. What constitutes harassment?

f. Does anyone here know someone who has been harassed?

g. Does anyone here know someone who has been falsely accused of harassment? Tell me about that.

h. Some people think harassment is a serious issue; others think it’s overblown.

i. Juror #— Which way do you lean?

i. Is it preferable to deal with sexual harassment yourself or to report it? How do you go about either of these?

j. At what point should someone who is being harassed report it? When is it just annoying and when does it cross the line?

k. Anyone know someone who was harassed and didn’t report it (not just sexual)? Why not report it?

l. Anyone know a woman who has been harassed but opted to make light of it or brush it off? Why might a woman do that?

m. Does any of you know a woman who didn’t state clearly that she was offended because she was worried that she might have misinterpreted what was being said or done or didn’t want to be rude? Do any of you think that happens sometimes?
n. How do you go about reporting sexual harassment? What if the person doing the harassment is the highest person in the organization/office? Who do you tell? What do you do? How do you know what to do?

o. What kinds of things might cause someone to hesitate in reporting harassment? If a person doesn’t report it right away, does that mean it didn’t happen? Why or why not?

p. Is it easier or harder to report harassment from someone who is important in an organization vs. someone who is a peer?

q. In harassment cases, like ones we see on TV, we think, “Why don’t these people just quit? Or leave? (Domestic violence)?” Why do you think that is?

r. Are there things harassers do to keep their victims quiet?

s. In child molestation cases, we hear the term ‘grooming.’ What does that mean? Is it possible that adults also use those techniques in harassment cases?

t. How does harassment affect the victim?

u. Are the emotional and psychological damages incurred from harassment real?

V. This case involves a false statement.

a. What does the word reputation mean?

b. How does one get a reputation?

c. Is there value in a good reputation? How do you measure it?

d. Is reputation an old-fashioned concept? Does anyone think that in the age of internet celebrities where scandals happen and seemingly blow over rather quickly the notion of reputation doesn’t matter as much as it used to?
e. How does your reputation affect your ability to be successful?

f. Does the size of the community matter? Is reputation any more important in a small community than in a large community?

g. Have you ever known anyone with a “bad” reputation? How did that come about? Was it deserved? What makes a bad reputation deserved or undeserved?

h. Once you’ve gotten a bad reputation, is there anything you can do to fix it?

i. Is there a difference between a lie and gossip?

j. Is gossip ever not true? Why is it out there if it’s not true?

k. How is gossip damaging?

l. Let’s say that someone tells a lie and they either didn’t know that it was a lie or they knew but regretted telling it?

   i. How does someone who’s in that position take back what they’ve said?

   ii. How can they find out how far the information has spread?

m. Has anyone here ever been lied about or known someone who has? How did that impact you? How easy is it to clear up the lies?

n. It’s obviously not nice to lie about people, but is it wrong? Why or why not?

   i. What about the situation where you get a call for a reference for a former employee who you didn’t think that highly of? Is it is lie to tell the potential employer that the

o. Does the reason for the lie make a difference?

   i. Let me change the scenario. Let’s say the person giving the reference tells the potential employer that the former
employee embezzled money from the company and that’s not true. Same conclusion? Okay to lie?

p. Does it depend on the severity of the lie?

i. Is there a difference between a girl telling her parent that her brother ate the last cookie versus her telling her parent that her brother shoplifted?

q. What about the potential consequences of the lie?

r. Let me give you another scenario. Your boss comes in and shows off a new tie that he just bought. He tells you it cost $100. You think the tie is hideous but you tell him it looks great.

s. Some would call that a lie. Some would say that it’s just good people skills. While way do you lean?

t. Let’s talk about the term manipulative.

i. Take a poll, raise your hand if you think the term manipulative is a bad thing. Anyone think it’s a good thing?

ii. What does the term manipulative mean to you?

u. Anyone heard of the term “maneater”? What does that term mean to you?

i. Hall & Oates song, “Oh Oh here she comes watch out boy she’ll chew you up”

ii. Implies a woman who is manipulative.

v. Can a man be manipulative?

w. Does the term have a different connotation for women?
VI. One of the themes you'll hear about a lot in this case is revenge.
   a. What is revenge? When is it appropriate, if ever?
   b. Why is revenge dangerous? Is it ever deserved?
   c. What is the difference between revenge and justice?
   d. Is it okay to take revenge on someone if you do not physically hurt or damage them (beat them up, for example)?
   e. Has anyone here ever wished to take revenge on someone but abstained? Why? Tell me about that.
   f. Have you ever been the victim of revenge? How so?
   g. What is the appropriate way to deal with grievances against someone?
   h. How do you know that your grievances are reasonable? Who gets to decide?
   i. Have you or anyone close to you opted to hire a lawyer to help you deal with someone who has wronged you?
   j. Have you or anyone close to you opted to hire a lawyer because of an issue related to their employment?
   k. Some people think that if an employee has an issue with their employer they should work it out directly and not involve a lawyer. Other people think that an employee is smart to hire a lawyer if they need help understanding what their rights are. Which way do you lean?

VII. Legal concepts that you’ll hear about in this case.
   a. I want to switch gears now and talk to you about some legal concepts that you’re going to hear about in this case.
b. The courts recognize something called spousal privilege, which basically means that conversations between spouses are confidential and one spouse doesn’t have to testify about discussions that they’ve had with one another.

c. In this case, both parties are asserting spousal privilege, so you won’t be hearing from their spouses.

d. As you know from our discussion, this case involves harassment issues. Is there anyone who feels that it’s unfair that you won’t be hearing the spouses’ perspectives on issues relating to a workplace friendship between a man and a woman where an allegation of harassment was made.

VIII. Preponderance/Money

a. “Who here has heard of, ‘Beyond a reasonable doubt?’”

b. “Where have you heard that? What does it mean?”

c. “What types of cases does it apply to? Why?”

d. “In civil cases, we have a different standard. It’s called, ‘Preponderance of the Evidence.’ Which is basically a fancy way of saying, ‘More likely than not.’”

e. “Some people think that’s unfair. They think that it makes it too easy on us. Some people think, if that’s the rules, that’s the rules. Which way do you lean?”

f. “Now just like criminal trials have a different standard, we also settle disputes differently. In criminal cases a person’s freedom is at risk. How do we decide disputes in civil cases?”

g. “Is money a reasonable way to decide disputes? Why or why not?”
IX. **DAMAGES**

a. In this case, we are going to be asking for $900,000 as compensation for the harm caused.
   i. If obvious reaction, “that’s a lot of money right?”

b. Some people say it doesn’t matter what you show me, I could never award that kind of money and others would say it all depends on what you show.
   i. Which way do you lean?

c. Is all loss monetary?

d. Is nonmonetary loss any less worthy of being compensated?

e. What if the person never went to a doctor or counselor?

f. What about compensation for harm that someone has suffered to their reputation? Is reputation something you can put on a scale and measure?

g. Anyone who have concerns about how you’d assess the degree of harm that someone has suffered to their reputation?

h. What we’re talking about deciding how much someone should pay someone else for doing something harmful, does it matter why someone did something as well as what they did?

*Thank you all so much for your thoughtful responses. I’ve really enjoyed our conversation and I appreciate you sharing your views with me this morning.*
New Client DOs and DON’Ts

Preserving Evidence

- You have a duty to preserve all evidence related to your potential legal claim. Do not discard any documents, cell phones or SIM cards, or delete any text messages, emails, computer files or social media posts.

- Do not write on or otherwise mark-up original documents. We may need to use them as exhibits.

- Tell us immediately if you have any documents (including emails) or property that belong to your current or former employer.

- Gather and provide to us at your earliest opportunity all documents (including electronic documents) related to your potential legal claim.

The Attorney-Client Privilege

Your communications with our firm are protected by the attorney-client privilege, meaning that your opponent in litigation will not have access to them. However, the privilege can be lost if our communications are shared with a third party.

- In order to protect attorney-client privilege, do not share our communications with anyone other than your spouse or registered domestic partner.

- Do not copy anyone (other than a spouse or registered domestic partner) on emails you write to us. Similarly, do not forward any email message from us to anyone other than your spouse or registered domestic partner.

- Do not call us from a work-issued phone or email us from your work email, work computer, or work issued laptop (even if using a personal email account).

Communicating With Other People about Your Employment

- Conversations, emails, texts, online posts or communications you have with other people about your case are not privileged. If you are in litigation, the other side can ask about, or get access to, these communications.

- It is a good idea to refrain from talking about your case to anyone other than your spouse or registered domestic partner.
• While we do not want to interfere with the therapeutic process, remember that things you tell your doctors and therapists may be written down, and your employer may gain access to those writings in litigation.

• Do not post any information or comments about your employer or your case online, including on Facebook.

• Change your privacy settings on Facebook and any other social media sites to ensure that only close friends can view anything you post.

Bankruptcy

• Tell us if you have ever filed for bankruptcy or are contemplating filing for bankruptcy. Filing a bankruptcy petition may affect your ability to pursue your legal claim, so please consult with us before taking this step.

Disability Benefits

• Tell us if you have ever applied for disability benefits or are contemplating applying for disability benefits.

Communicating with the Press

• Do not communicate with the press regarding your potential claims without first talking to us. If a reporter contacts you, the best approach is to provide him or her with your attorney’s name and number.

Looking for Work

• To recover lost wages from your former employer, you will need to demonstrate that you have taken reasonable steps to find another job. Start looking for another job and keep copies of any documents related to your job search (e.g. newspaper ads to which you responded, notes of telephone inquiries, copies of applications, cover letters and resumes).

Unemployment Benefits

• Do let us know if your application for unemployment benefits is denied.

Consult with Us First

• Do not take steps on your own that potentially impact your case without consulting us first. For example, do not contact any potential witnesses; make overtures to the other side; or apply for any kind of benefits without talking to us.
### TRAUMA ASSESSMENT: ASKING ABOUT CLIENT VULNERABILITIES

| IDENTITY | What name do you prefer?  
| Is there anything you want me to know about your gender or identity? |
| HOME/SLEEP | Where do you live? How long have you lived there? Where do you sleep?  
| Do you feel safe and clean where you sleep/live? |
| WELLNESS | Are you eating every day?  
| Are you able to get medical care/medicines you need? |
| COMMUNICATION | What is the best way to communicate with you?  
| (phone, mail, text, email)  
| Is it ok to leave you voice messages?  
| What are your safe phone numbers(addresses)? |
| EDUCATION | Are you able to read? In what language(s)? |
| FINANCIAL STATUS | How do you make money? Is it difficult work? How are you treated?  
| Do you have enough money to live comfortably – pay rent, get good, pay bills and phone, basic living? |
| Do you run out of money at the end of the month?  
| Do you receive any government assistance? (foodstamps, SNAP, disability)  
| Are there other ways you make extra money?  
| Do you depend on anyone else for income? |
| VIOLENCE | *We have special project/work with agencies to help clients who have experienced violence - including domestic violence, family violence, dating violence, sexual harassment, sexual abuse, and sexual assault or rape*  
| Have you experienced any kind of violence?  
| Have you been physically or emotionally hurt?  
| Has anyone hurt you or threatened to hurt you? (Has anyone – beaten, punched, pushed, stabbed, forced you to have sex, tried to touch you, made you feel uncomfortable?) |
| DISCRIMINATION | Have you experienced discrimination or mistreatment based on your accent, skin color, country of origin, gender, sexual orientation or for any reason?  
| Have you been treated badly by someone at work or at school? How were you discriminated against or treated? Why do you think you might have been treated differently? |
| RISK ENVIRONMENTS | Are you around chemicals or toxins you think are dangerous?  
| What kinds? How do they harm you? |
| IMMIGRATION STATUS | *We have helpful information about clients who might be worried about immigration (ICE or Border Patrol)*  
| Are you afraid because of your immigration status? |
| SUPPORT SYSTEM | Who in your family or of your friends helps you? |

**Presumed “Worthiness”**

Advocates could ask themselves -

- **if the client is likely to be considered by others as someone not to be trusted**
  because of aspects of their appearance, ethnicity, accent, addiction status, personality, or some other observable trait

- **if other people are likely to assume that the client deserves their plight in life or their legal trouble due to an observable trait**

**Trauma Informed Advocacy – OCTOBER 2018**
Don’t Judge a Book By Its Cover: Strategies for Representing Unsympathetic Clients from Intake to Trial

Presented by Dana Sullivan and Whitney Boise
Friday, February 28, 2020

STRATEGY:
A plan of action or policy designed to achieve a major or overall aim. -- Oxford
Know What You’re Getting Into

Evaluate Potential Clients
Will the client be difficult to work with?

CRITICAL: Robust Intake Process

- Conflict Check
- Prior Bankruptcies & Litigation
- Criminal History
- Google Search
- Personnel file (if employment case)
- Medical records (if relevant)
Can they recount the facts of their story?

Are there witnesses?
Chapter 2—Don’t Judge a Book by Its Cover

Work Closely with Client’s Mental Health Provider or Consider an Expert Witness
Don’t Be Afraid to Decline

Ensure Your Client Doesn’t Become Their Own Worst Enemy
Client Education (Do’s & Don’ts)

- Social Media
- Blogging
- Contacting Witnesses
- Speaking to the Media

Manage Expectations
You can't tell any kind of a story without having some kind of a theme, something to say between the lines.

– Robert Wise
Why the Jury Might Find My Client Unsympathetic

What Makes a Client Unsympathetic
Evidence to Include
(or Exclude)

The OJ Simpson Trial
Marcia Clark, Simpson Prosecutor

Facts about Jury from the Simpson Trial

Don Vinson, the head of Litigation Sciences, assisted the prosecution in choosing the jury, was dismissed after one and a half days of jury selection.
Facts about Jury from the Simpson Trial

Of the 24 jurors and alternates, 15 were African-American, 6 were white, and 3 were Hispanic. This was in a county, Toobin notes, “that is just 11% black”.

Facts about Jury from the Simpson Trial

Ultimately there were 8 African-American females, one African-American male, one Hispanic male, and two Caucasian females who were on the jury that decided the case.
Facts from the Simpson Trial

- All 12 jurors who decided case were Democrats
- Two jurors graduated college
- None read the newspaper regularly
- Nine rented homes; three owned

Eight watched TV tabloids like “Hard Copy.” The defense research found people who liked tabloids were more likely to think Simpson innocent.
Facts from the Simpson Trial

“Nine jurors – ¾ of the jury -- thought OJ Simpson less likely to murder his wife because he excelled at football,” Toobin wrote.

Facts from the Simpson Trial

African American female jurors held a negative opinion of Ms. Clark – referring to her as the “castrating bitch.”
Facts from the Simpson Trial

The prosecution didn’t use all of its preemptory challenges

Do a Mock Jury Trial
Chapter 2—Don’t Judge a Book by Its Cover

Remove Jurors Who Are Adverse

List Your Most Worrisome Facts
Chapter 3

Presentation Slides: Ensuring a Level Playing Field

**Moderator: The Honorable Youlee You**
U.S. Magistrate Judge
U.S. District Court, District of Oregon
Portland, Oregon

**The Honorable Josephine Mooney**
Oregon Court of Appeals
Salem, Oregon

**The Honorable Wells Ashby**
Deschutes County Circuit Court
Bend, Oregon

**The Honorable Benjamin Souede**
Multnomah County Circuit Court
Portland, Oregon
Ensuring a Level Playing Field

OREGON STATE BAR, LITIGATION INSTITUTE
FEBRUARY 28, 2020

Courts “are bound to do equal justice under law, to rich and poor alike.”

Pro Se Litigants – Scenario

Assume you are presiding over a case in which the plaintiff has filed a civil cause of action (non-family law) alleging both valid and invalid claims for relief.

Pro Se Litigants – Questions

1) Motion to dismiss for failure to state a claim.

How many times do you let the plaintiff file an amended complaint to cure the deficiencies? Once? Twice? More?

How much guidance do you give the plaintiff about how to draft a valid complaint?
Padilla v. Nevada Dep’t of Corr.,
510 F. App’x 629, 630–31 (9th Cir. 2013)

But the district court abused its discretion in not permitting one more amendment to the complaint because, after telling Plaintiff that he had failed to allege sufficient facts to state a claim for supervisory liability, the court gave him only a single opportunity to replead, and Plaintiff was pro se. See Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir.1980) (per curiam) (“[D]ismissal is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.”). With the help of counsel, Plaintiff may be able to plead a due process violation adequately.

Pro Se Litigants – Questions

2) Motion to dismiss for invalid service.

Assume the plaintiff has failed to properly serve the defendant and the defendant moves to dismiss.

If the statute of limitations has not elapsed, do you dismiss or give the plaintiff another opportunity to serve?

What if the case was filed in federal court and the 90 days under FRCP 4(m) has elapsed?
Pro Se Litigants – Questions

3) Discovery issues.

Assume the plaintiff has filed an untimely motion to compel after the discovery cut off has elapsed. Do you allow it?

What if the case was filed in federal court and the plaintiff has exceeded the 25 interrogatories allowed under FRCP 33?

What if the plaintiff contends that the defendant’s request for ediscovery is unduly expensive or burdensome?

Wheeler v. Terrible Herbst Inc.,
498 F. App’x 707, 709 (9th Cir. 2012)

To the extent that the district court dismissed Wheeler’s action with prejudice for failure to comply with a court order or a local rule, the district court abused its discretion because the court failed to consider less drastic alternatives. . . Moreover, Wheeler’s violations, such as filing his pro se opposition to the motion to dismiss five days late, did not prejudice defendant or impede the court's ability to manage its docket.
Pro Se Litigants – Questions

4) Motion for summary judgment.

Assume the plaintiff has failed to submit a sworn declaration/admissible evidence in response to the defendant’s motion for summary judgment and it is fatal to plaintiff’s case. After explaining the error at oral argument, do you allow the plaintiff to submit additional evidence? What if the plaintiff does not ask for leave to do so—do you suggest it as an option?

Pro Se Litigants – Questions

5) Trial.

Assume the plaintiff is having difficulty laying a proper foundation for evidence, such as a business record. Do you assist the plaintiff?

Assume the plaintiff has failed to object to evidence that is obviously inadmissible and fatal to the case. Do you say anything? Or do you allow the evidence to be admitted and watch the inevitable unfold?
Implicit Bias – Scenario

Plaintiff is a former employee of a financial services firm with offices in Central Oregon. Plaintiff is a 30-year-old, Caucasian female. She accuses her former employer of creating a hostile work environment, and claims her manager engaged in inappropriate sexual comments and conduct at the workplace. She claims she has been emotionally distraught since her termination and has been unable to find new employment. She seeks $5 million in economic and non-economic damages, plus punitive damages.

Plaintiff’s manager is an African American female. The manager contends that Plaintiff pursued a relationship with her and when the manager refused, plaintiff claimed harassment, filed a whistle-blower complaint, and left the company.

Implicit Bias – Scenario

A key witness in the case is a delivery man, who claims he saw the manager verbally assault plaintiff in the parking lot. The delivery man has a criminal past, including when he was a member of a white supremacists motorcycle gang. He has a swastika neck tattoo that is difficult to conceal, and that was visible during portions of his videotaped deposition presented in court on summary judgment.

Plaintiff has accompanied her lawyer to several pretrial hearings, and has worn clothing one would typically see in a nightclub—not in state court in Central Oregon.

The case has survived summary judgment and is set to go to trial. At summary judgment, the plaintiff presented compelling evidence supporting her claims, including credible testimony from the delivery man.
Implicit Bias – Questions

1) What are your reactions to identifying terms? Caucasian? African American?

2) What implicit bias issues do you anticipate in this trial? Should any of the “elephants in the room” be addressed by the court and counsel pretrial? How?

3) What can the parties do in anticipation of trial to reduce the risk of implicit bias impacting the outcome of trial?

Implicit Bias – Questions

4) What can the attorneys do to deal with implicit bias in voir dire? What can the court do?

5) What can the attorneys do in case presentation to reduce risks of implicit bias? What can the court do?

6) How can jury instructions be used to ensure that a decision is made on the merits and evidence, and not based upon implicit bias?

7) Does any of this matter on appeal? Why?
Corporate Bias – Scenario

Plaintiff is a registered nurse in her early 60s, who is suffering from mesothelioma, an invariably fatal disease caused by exposure to asbestos. Defendant is an enormous corporation that manufactures and sells a leading baby powder brand. Plaintiff’s theory is that she was exposed to asbestos through her daily use (both personally and with her patients) of Defendant’s talc-based baby powder over 50 years. Defendant vigorously denies that any of its talc products have ever contained any asbestos.

Corporate Bias – Scenario

During the early stages of voir dire (and before the attorneys have begun their questions), several members of the jury pool respond forcefully to the question whether they can impartially decide this case based on the evidence and on the law as it is provided by the Court. One very vocal potential juror states that, in her opinion, “corporations should be burned to the ground.” Another potential juror volunteers that he would have difficulty being fair because he believes that “fundamentally corporations are evil and they prey on people.” There are nods of agreement all around the room in response to both of these responses and to other similar comments from other potential jurors.
Corporate Bias – Scenario

When the attorneys begin to ask their questions of the potential jurors, the most vocal “anti-corporation” members of the venire continue to speak out, volunteering additional views on the same theme in answer to general, venire-wide questions. The lawyers for each side seek to examine these potential jurors, asking detailed questions about why they hold their opinions about corporations, whether they could set those opinions aside, and whether “people deserve more consideration than companies.”

Corporate Bias – Scenario

After the rather raucous jury selection is concluded, Plaintiff brings a motion in limine to prevent defense counsel from “humanizing” Defendant. From past trials, Plaintiff’s counsel is aware that Defendant’s lawyer uses phrases in opening statement, questions, and closing argument such as “the incredibly hard working-men and women, fathers and mothers” of the corporation, and “the thousands of hardworking employees of this company.” Defendant objects to the motion, arguing that the conduct at issue in this case (testing for asbestos, marketing the talc powder) was performed by people, and that it is thus perfectly fine to acknowledge that a corporation can only act through its human agents.
Corporate Bias – Questions

Should the trial judge seek to avoid tainting the venire by intervening early in voir dire to discourage the more bitter and abusive comments about corporations?

Should the trial judge encourage such comments so as to get the attorneys as much information as possible in making their jury selection decisions?

Should the trial judge stay out of it unless asked by a party to intervene? If asked to do something, what should the trial judge do?

Corporate Bias – Questions

Should the trial judge sua sponte limit the questioning of jurors who have already declared a disqualifying bias? Should the trial judge do so upon objection by opposing counsel?

Should Plaintiff’s motion in limine be granted? If so, to what extent?

Is the defendant entitled to any special “corporate fairness” jury instruction beyond the standard instruction stating that “all parties are equal before the law?”
Chapter 4

Presentation Slides: The Risky Business of Implicit Bias: Mitigating the Impact of Implicit Associations in Litigation

T.K. FLOYD FOUTZ
TK Floyd Consulting
Evans, Georgia
The Risky Business of Implicit Bias:
Mitigating the Impact of Implicit Associations in Litigation

T.K. Floyd Foutz
Principal, T.K. Floyd Consulting

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Outline:
- Delineating Ways to Reduce the *Impact* of Implicit Bias
- Detailing the *Influence* of Implicit Bias in Litigation

Reducing the *Impact* of Implicit Bias

*Recognizing and countering our biases*
Implicit Bias Defined ~ Revisited

“The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Activated involuntarily, without awareness or intentional control. Can be either positive or negative. Everyone is susceptible.”

Source: Kirwan Institute
Implicit Bias Defined (continued)

- “By definition, implicit biases are those we carry without awareness or conscious direction.”

- “We can think of implicit bias as a lens through which we view the world—a lens which automatically filters how we take in and act on information, a lens that is always present.”

- “Think of unconscious thought as the snap judgments we make every day.”

- “Implicit bias differs from suppressed thoughts that individuals may conceal for social desirability purposes.”

Source: Kirwan Institute

Key Characteristics of Implicit Bias

- **Unconscious and Automatic** ~ activated without intention or control

- **Not always aligned with explicit beliefs**

- **Real-world effects on behavior** ~ impacts actions and decisions across domains (e.g., employment, education, healthcare, criminal justice, etc.)

- **Pervasive** ~ everyone has implicit biases, even people who claim to be “colorblind” or “impartial”

- **Malleable** ~ can be replaced with new associations

Source: Kirwan Institute
We’re All Biased

“Bias is a natural phenomenon in that our brains are constantly forming automatic associations as a way to better and more efficiently understand the world around us.”

Source: Kirwan Institute

We’re All Biased (continued)

“If something is happening outside of awareness, how on earth do you fix it? The answer is that we are not helpless in the face of our first impressions. ... [J]ust because something is outside of awareness doesn’t mean it’s outside of control.”

Source: Gladwell, “Blink”
Is It Possible to Reduce the Impact of Implicit Bias?

- Yes! We have to become aware of our implicit biases and the conditions that foster those biases.

- One way to become aware of our implicit biases is by taking one or more versions of the Implicit Association Test—we cannot uncover our implicit biases through mere introspection.

Source: Kirwan Institute

Recognizing Our Implicit Biases

- The Implicit Association Test (IAT) can help us identify our biases.
  - Available through Project Implicit at https://implicit.harvard.edu/implicit/

- Did you take any of the tests? If so, which ones?
  - Were you surprised by the results?
Implicit Association Test

“[O]ur attitudes toward things like race or gender operate on two levels. First of all, we have our conscious attitudes. This is what we choose to believe. These are our stated values, which we use to direct our behavior deliberately. ... But the IAT measures something else. It measures our second level of attitude, our racial attitude on an unconscious level—the immediate, automatic associations that tumble out before we’ve even had time to think. We don’t deliberately choose our unconscious attitudes.”

Source: Gladwell, “Blink”

What Does the IAT Measure?

“The giant computer that is our unconscious silently crunches all the data it can from the experiences we’ve had, the people we’ve met, the lessons we’ve learned, the books we’ve read, the movies we’ve seen, and so on, and it forms an opinion. That’s what is coming out in the IAT.”

“We make connections much more quickly between pairs of ideas that are already related in our minds than we do between pairs of ideas that are unfamiliar to us.”

Source: Gladwell, “Blink”
What Does the IAT Measure (continued)

- IAT measures relative strength of associations between pairs of concepts
  
  Source: Kirwan Institute

- IAT helps to identify implicit biases by measuring reaction time
  - Sorting speed (how quickly we sort concepts and images) reflects how tightly we associate any two concepts
  - Quicker sorting = stronger associations
  
  Source: UCLA Implicit Bias Video Series

Implicit Association Test

- “The disturbing thing about the [IAT] is that it shows that our unconscious attitudes may be utterly incompatible with our stated conscious values.”

  Source: Gladwell, “Blink”
Conditions Fostering Expression of Our Implicit Biases

- Certain **emotional states**
- **Ambiguity**
- More easily accessible **social categories**
- **Low-effort cognitive processing**
- **Distracted or pressured decision-making circumstances**

*Source: National Center for State Courts*

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Conditions Fostering Expression of Our Implicit Biases (continued)

- **Limited exposure to those different from us** can **increase** likelihood of **reliance on stereotypes**, rather than experience, to make judgments

- **Overconfidence** in your ability to make objective or inclusive decisions may make it **hard to correct for prejudice or bias**

- When there is **cognitive strain**, “the lazy System 2 will adopt the suggestions of System 1 and march on”

*Source: Kahneman, “Thinking, Fast and Slow”*
Mitigating Implicit Bias

“Having biases doesn’t make you a bad person—it only makes you human. Fortunately, our implicit biases are not permanent; they can be changed.”

Take Action!

- “The key isn’t to feel guilty about our [implicit] biases—guilt tends toward inaction.”
- “It’s to become consciously aware of them, minimize them to the greatest extent possible, and constantly check in with ourselves to ensure we are acting based on a rational assessment of the situation rather than on stereotypes and prejudice.” ~ Neill Franklin

Source: Kirwan Institute

Mitigating Implicit Bias (continued)

Some strategies for reducing implicit bias:

- Become aware of your biases (e.g., take several IATs)
- Try to understand the perspective of others
- Have meaningful interactions with people who are different
- Monitor the information you take in (e.g., are you watching TV shows that reinforce stereotypes?)

Because we can have “illusions of remembering,” we should take notes during meetings/interviews (e.g., judges, jurors, and attorneys should take notes during trials/hearings)

Source: Kahneman, “Thinking, Fast and Slow”
Mitigating Implicit Bias (continued)

- View others from the various **dimensions of diversity**

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**Mitigating Implicit Bias ~ Practical Example**

- Micro-affirmations ~ opposite of micro-aggressions
  - “Micro-affirmations are tiny acts of *opening doors to opportunity, gestures of inclusion and caring*, and *graceful acts of listening.*”
  - “Many micro-inequities are not conscious—but **affirming others** can become a conscious as well as unconscious practice that prevents unconscious slights.”

  *Source: Mindfulness at Work*
Mitigating Implicit Bias ~ Practical Example (continued)

- Examples of micro-affirmations
  - Saying hello
  - Introducing people to each other
  - Listening without interrupting
  - Acknowledging and making sure you fully understand someone’s idea or opinion
  - Acknowledging someone’s good work to others

*Source: Mindfulness at Work*

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Models for Mitigating Implicit Bias

- **Mindset** = be humble; be mindful
- **Debiasing** = use counter-measures to scrub our brains of implicit biases, which are malleable
- **Decoupling** = breaking the causal link between bias and behavior

*Source: UCLA Implicit Bias Video Series*
Models for Mitigating Implicit Bias

- Raise awareness through training
- Acknowledge differences
  - Being “colorblind” does NOT address implicit biases
- Check your decisions and thoughts routinely
  - Do not rely solely on intuition/gut
- Eliminate stressors and distractions during the decision-making process
- Establish concrete standards before making decisions
- Increase your exposure to members of “out” groups
- Ask for feedback

Source: National Center for State Courts

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Models for Mitigating Implicit Bias

- I.N.C.A.S.E.
  - I = Increase knowledge ~ change implicit associations through education and exposure
  - N = Narrative guidance ~ debunk stereotypical myths
  - C = Cultural humility ~ seek self-awareness and recognize intersectionality of others
  - A = Active bystander ~ challenge bias against others
  - S = Safe space ~ be intentional to create safe spaces for critical conversations about race [and other dimensions of diversity]
  - E = Empowerment ~ recognize others as experts regarding their own worlds

Source: Kirwan Institute
Models for Mitigating Implicit Bias

- **P.A.U.S.E.**
  - **P** = *pay attention* to what’s actually happening, beneath the judgments and assessments
  - **A** = *acknowledge* your own reactions, interpretations, and judgments
  - **U** = *understand* the other possible reactions, interpretations, and judgments that may be possible
  - **S** = *search* for the most constructive, empowering, or productive way to deal with the situation
  - **E** = *execute* your action plan

*Source: Ross*
Implicit Bias in American Courts

- American Bar Association, *Hidden Injustice: Bias on the Bench*
  - [https://vimeo.com/165006635](https://vimeo.com/165006635)
- Additional ABA Videos (for review at your convenience)
  - *Hidden Injustice: The Prosecutor’s Paradox*
    - Available at [https://vimeo.com/176681786/5a69f94cf3](https://vimeo.com/176681786/5a69f94cf3)
  - *Hidden Injustice: Toward a Better Defense*
    - Available at [https://vimeo.com/175897153/891b9eacde](https://vimeo.com/175897153/891b9eacde)

Despite state court efforts to address racial and ethnic fairness, “public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread.”

- One explanation for this disconnect may be *implicit bias*.

*Source: National Center for State Courts*
Implicit Bias in American Courts (continued)

- Implicit bias “leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair.”

Source: National Center for State Courts

- Some judges, who “have worked hard to eliminate explicit bias in their own decisions and behaviors, assume that they do not allow racial prejudice to color their judgments.”

- “[W]hen judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”

- But they need more than motivation to be fair – they must take “concrete steps” to reduce the influence of implicit biases.

Source: National Center for State Courts
Implicit Bias in American Courts (continued)

- Implicit Bias Bench Card
  - Available at https://courts.michigan.gov/Administration/SCAO/Documents/General-Administrative/MN-ImplicitBias.pdf (Minnesota)
  - See also https://bostonbar.org/docs/default-document-library/combined-bench-cards.pdf?sfvrsn=2 (Massachusetts)
  - See also https://courts.illinois.gov/CivilJustice/Training_Education/Achieving_Fairness_Free_of_%20Unconcious_Bias.pdf (Illinois)

Final Suggestions for Reducing Implicit Bias in Litigation

- Educate judges, attorneys, jurors, and court staff on implicit bias
- Evaluate jury selection techniques
- Analyze litigation outcomes
  - Collect data and analyze trends
Chapter 4—Presentation Slides: Mitigating the Impact of Implicit Associations in Litigation

**Sources**

- Daniel Kahneman, “Thinking, Fast and Slow” (2011)
- Korn Ferry Institute, *Understanding Bias and the Brain* (2015)
- Howard Ross (Cook Ross, Inc.), *Exploring Unconscious Bias* (2008)
- Howard Ross (Cook Ross, Inc.), *Everyday Bias: Further Explorations into How the Unconscious Mind Shapes Our World at Work* (2014)
- UCLA Office of Equity, Diversity, & Inclusion, *Implicit Bias Video Series* (available at https://equity.ucla.edu/known/implicit-bias/)
Chapter 5

Techniques and Tips for Raising Implicit Bias with Juries: The Use of Model Jury Instructions, Implicit Bias Videos, and Other New Techniques in Oregon and Washington

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The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

Justice Thurgood Marshall

There are numerous adjectives that describe Justice Marshall: intelligent, wise, dedicated, articulate, insightful, well, you get the idea – the list is long. Another adjective is “prescient.” Justice Marshall accurately foresaw that the rule set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986) would not be effective in combatting racial bias that is part of the jury exclusion process. (I don’t like using the term “jury selection” as it is both inaccurate and misleading.)

The Washington State Supreme Court not only took a major step, but indeed an historic one, in addressing the ineffectiveness of *Batson* by adopting General Rule 37 on April 5, 2018. GR 37 will substantially change the rules attorneys operate under to exclude people from serving on juries.

While Justice Marshall would have eliminated the use of peremptory challenges altogether (indeed two of Washington State Supreme Court justice have expressed the same view) GR 37 does not eliminate peremptory challenges. However, it does limit in how peremptory strikes can be used.

This new general rule affects all lawyers, civil and criminal, who try jury trials in municipal, district, and superior courts.


If you are well-versed in *Batson* then you can skip this next section. However, for the rest of us, a review of *Batson* may be helpful in gaining some understanding of why the new rule was necessary and why it contains certain provisions.

In *Batson* the prosecutor used his peremptory challenges to strike all four Black prospective jurors resulting in a jury composed only of White jurors. *Batson*, 476 U.S. at 83. Batson’s attorney objected. The trial court overruled the objection stating that a party may use peremptory challenges “to strike anybody they want to.” *Id.* Batson was convicted. The Kentucky Supreme Court upheld Batson’s conviction. The U.S. Supreme Court granted certiorari.

The Supreme Court started its analysis by holding that while criminal defendants do not have the right to a certain racial composition of the jury, they do have the constitutional guarantee, through the Equal Protection Clause, that the government will not exclude members of their race from jury on account of the potential juror’s race. *Id.* at 85 - 86. The Court recognized that
when a potential juror is excluded from serving on a jury because of their race, it harms not only the defendant but in fact undermines the public’s confidence in the fairness of the justice system itself. *Id.* at 87.

The Court noted that peremptory challenges certainly provide the vehicle for attorneys to engage in racial discrimination if they so want:

> Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” *Avery v. Georgia*, 345 U.S. at 562, 73 S.Ct., at 892.

*Id.* at 96.

The Court then articulated the three-step process that has become known at the *Batson* rule.

First, the defendant must clear the hurdle of showing an inference of a discriminatory purpose, aka the *prima facia* showing. The Court stated that a defendant could meet this requirement by showing a pattern of strikes against Black jurors. *Id.* at 97. In addition to a prior pattern, the Court stated that questions and statements during voir dire examination may show an inference of discriminatory purpose. *Id.* at 97. The Court did not elaborate on what questions or statements short of “Black people shouldn’t be on juries” would raise an inference of discriminatory purpose. Instead, the Court just said that it was confident that trial judges would be able to decide if the facts and circumstances create a *prima facia* case.

If, and only if, the objecting party clears the first hurdle does the second step come into play. If there is a *prima facia* showing of discriminatory intent then the striking party must give a race-neutral reason for exercising the peremptory challenge. You can't simply say “I did not use my peremptory because of the potential juror’s race.” The Court made it clear that response won’t work. *Id.* at 98. If for some reason you said the reason you used the peremptory challenge was that the prospective juror will be partial because she is the same race as the opposing party then the challenge will be sustained. *Id.* at 97. Short of providing one of those two responses the race-neutral reason is not a high hurdle to clear.

The highest hurdle occurs at step three: once the striking party has provided a race-neutral reason for using the peremptory challenge the trial court, in order to sustain the *Batson* challenge, must find that the moving party met the burden of establishing purposeful discrimination. This is sometimes known as the “racial animus” requirement. “You intended to racially discriminate” is the finding that the trial court must make in order to sustain the *Batson* challenge.

**B. Justice Marshall foretold that the rule was not going to work.**

Justice Marshall, while concurring in the opinion, foresaw problems. First, the defendant must clear the *prima facia* hurdle. The only clear way of doing that is by showing a pattern of strikes
against Black prospective jurors. In other words, Justice Marshall noted that as long as the striking party kept their peremptory challenges to some sort of acceptable level, e.g., two or three, they could use their strikes in a discriminatory manner. *Id.* at 105.

Second, Justice Marshall foresaw that to sustain a *Batson* challenge the trial court must assess the prosecutor’s motives – an extremely difficult task.

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor’s statement that he struck a juror because the juror had a son about the same age as defendant, see *People v. Hall*, 35 Cal.3d 161, 197 Cal.Rptr 71, 672 P.2d 854 (1983), or seemed “uncommunicative,” *King, supra*, at 498, or “never cracked a smile” and, therefore “did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case,” *Hall, supra*, at 165, 197 Cal.Rptr at 73, 672 P.2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor’s obligations to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

*Id.* at 106.

Third Justice Marshall recognized that the rule being announced in *Batson* would not address unconscious bias.

> Nor is outright prevarication by prosecutors the only danger here. “[It] is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.” *King, supra*, at 502. A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.

*Id.* at 106

Justice Marshall’s fears became all too true.

**C. *Batson* didn’t, and doesn’t, work.**

As Michigan State University law professors Catherine M. Grosso and Barbara O’Brien wrote in their article about racial bias in the jury exclusion process:

> Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place.
Their review noted a study where North Carolina prosecutors used 60 percent of their peremptory challenges to strike black jurors, who made up only 32 percent of potential jury members. The study found that defense attorney used 87 percent of their strikes against white jurors, who made up 68 percent of the jury pool.

Some reasons parties have offered for excluding prospective Black jurors from serving on juries: They were young or old, single or divorced, religious or not, failed to make eye contact, lived in a poor part of town, had served in the military, had a hyphenated last name, displayed bad posture, were sullen, disrespectful or talkative, had long hair, wore a beard.

As was stated in the Washington Post:

> Studies and experience have concluded that only the most incompetent lawyer will fail to come up with a justification that a judge can accept.

**D. The Washington State Supreme Court recognized that Batson isn’t working: race discrimination in the jury exclusion process is “rampant.”**

> Twenty-six years after Batson, a growing body of evidence shows that racial discrimination remains rampant in jury selection,” Justice Wiggins wrote for the Washington State Supreme Court in State v. Saintcalle, 178 Wn.2d 34, 35 309 P.3d 326 (2013). “In part, this is because Batson recognizes only ‘purposeful discrimination,’ whereas racism is often unintentional, institutional or unconscious.” Justice Wiggins continued:

> However, we also take this opportunity to examine whether our Batson procedures are robust enough to effectively combat race discrimination in the selection of juries. We conclude that they are not. Twenty-six years after Batson, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because Batson recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our Batson procedures must change and that we must strengthen Batson to recognize these more prevalent forms of discrimination.

Id. at 35-36.

On April 5, 2018 the Washington State Supreme Court squarely addressed the ineffectiveness of the Batson rule.

**E. Washington General Court Rule 37 makes it much more difficult to exclude potential jurors from serving on the jury because of their race or ethnicity.**

General Rule 37’s purpose “is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.” This was the goal of Batson but one that the Batson rule was ill-equipped to achieve.
The new general rule eliminated two basic problems with *Batson*. First, an objecting party need not make a showing of an inference of discriminatory intent – other than a pattern of peremptory challenges against prospective jurors of color it is difficult to know what constitutes a *prima facie* showing. Under *GR 37*, any party, including the judge, may raise a *GR 37* objection:

(c) **Objection.** A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

As with *Batson*, the non-moving party must then state why they used a peremptory challenge against that particular prospective juror.

The most significant change occurs in the last step. The objecting party no longer needs to accuse the striking party with intending to use the peremptory strike because of the potential juror’s race. The trial court need no longer make a finding that the striking party had the intent to racially discriminate. Instead, the trial court need only conclude that an “objective observer” looking at the use of the peremptory challenge could view race or ethnicity as a factor in its use.

(e) **Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

*GR 37(f)* defines “objective observer.” “For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”

The new rule provides guidance to the trial court as to circumstances the trial court should consider in making its determination. *GR 37(g)*. The new rule lists presumptively invalid bases for using a peremptory challenge because those reasons historically have been used to justify excluding people of color from serving on juries. *GR 37(h)*. Finally, the new rule provides that if a party is going to use a peremptory challenge and give as a reason that the potential juror was sleeping, inattentive, or engaging in some sort of inappropriate behavior, then the striking party must first raise that issue to the court, and other parties, so that the inappropriate conduct can be verified. *GR 37(i)*.
It’s time to do away with the illusion.

For the past 32 years we have been living under an illusion: Batson prevented racial bias from infecting the jury exclusion process. But as legal scholars, commentators, and courts have universally recognized, Batson doesn’t work. As Justice Marshall feared, the remedy in Batson would just be an illusion.

The Washington State Supreme Court has taken the needed step of ridding us of this illusion and grounding us in reality. The reality of living in a society where not just explicit bias exists, but unconscious bias as well. The reality of having a justice system where parties are allowed to exclude potential jurors because of their race or ethnicity. GR 37 is a step in the right direction. It’s a step we all need to take to give the parties who rely on the courts, and all potential jurors who appear in courts, the assurance that a person will not be excluded from serving as a juror because of the color of their skin or because of their ethnicity.

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ii Id. at 1539.

iii Id.

iv Id.

General Rules

GR 37
JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]
IMPANELING THE JURY

The jury venire should be brought in and seated in the spectators’ section.

Court Officer: Hear ye. Hear ye. Hear ye. All persons having business before the Honorable, the Justices of the ___________ District Court, draw near, give your attendance and you shall be heard. God save the Commonwealth of Massachusetts. Please be seated.

Clerk: In the matter of the Commonwealth of Massachusetts versus _______________: will the defendant(s) please stand. You are placed at the bar for trial and these good jurors whom I shall call are to pass between the Commonwealth and you upon your trial. If you should object to any of the jurors, you will do so after their numbers are called and before they are sworn. You have the right to challenge two of the jurors without giving any reason therefor, and as many more as you have good cause to challenge. The Commonwealth has the right to challenge an equivalent number of jurors. You may be seated.

The judge should direct the clerk on how jurors are to be seated. They may be seated in the jury box in numeric order at this stage, or when the individual or panel voir dire process is begun.

In a case to be tried to a jury of six persons, seven jurors must be impanelled although a lesser number may be impaneled upon a finding of cause. G.L. c. 234A, § 68. In the case of a juvenile being tried as a youthful offender to a jury of twelve persons, fourteen jurors must be impanelled, G.L. c. 119, § 56(e); G.L.c. 234A,§ 68. Six jurors are required for a charge of delinquency. G.L. c. 119, § 56(e). As in a District Court trial, at least seven jurors must be impanelled. Alternate jurors should not be identified until immediately prior to jury deliberations. G.L. c. 234A, § 68.
At a trial with multiple defendants, “the Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.” Mass. R. Crim. P. 20(c)(1).

Will all potential jurors please rise and raise your right hands.

Do each of you solemnly swear or affirm under the pains and penalties of perjury that you will make true answers to such questions as shall be put to you by the Court in the matter now pending, so help you God? Please be seated.

If a member of the venire prefers to omit reference to the Deity, he or she may be sworn by substituting the words “under the penalties of perjury” for the words “so help you God.” See G.L. c. 233, § 19.

Judge: Ladies and gentlemen, we are about to choose a jury for the trial of the defendant(s) __________ who [is (are) pleading] [has (have) pled] not guilty to the charge of __________. To assist you in planning, I will say that we expect to recess by 4:30 today. If the trial does not conclude today, anyone chosen to be a juror must return tomorrow. We usually take a lunch break between 1 and 2 o’clock and shorter recesses during the day as necessary or convenient.

Would the prosecutor please stand and introduce himself (herself) to the jury panel? Thank you.

Would the defendant’s attorney please stand with his (her) client and introduce each of you to the jury panel? Thank you.
Will the potential witness(es) stand when I call your name(s): ____________

and home towns] ____________.


Best Practice: A judge should swear in witnesses individually when they are called to the stand to testify. If witnesses are sworn as a group, jurors may speculate as to why one or more of them did not ultimately testify, and a witness who was not present may be mistakenly allowed to testify without being sworn.

[If witnesses are to be sworn at this time:]

Do you solemnly swear and/or affirm under the pains and penalties of perjury that the testimony you shall give in this matter now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God? Thank you. You may be seated.

Best Practice: The judge may provide a brief description of the nature of the case after conferring with counsel.

[OPTIONAL: If there is to be an attorney or party conducted voir dire, the judge may choose to instruct the jury on the elements of all, or of the most serious, offense(s) at this point.]

The defendant is charged with ____________.

To prove the offense of ____________, the Commonwealth must prove ___ things beyond a reasonable doubt:

[If there are offenses for which the judge does not list the elements, continue here.]

I will instruct you later as to what the Commonwealth must prove for the other offense(s).
At the outset, I instruct you that all parties stand as equals before the bar of justice. All parties are entitled to a fair and impartial jury, that is, jurors who will: (1) fairly evaluate the evidence; (2) follow the law as instructed; and (3) render a fair and just verdict based solely on the evidence presented at this trial.

Jurors, of course, are expected to bring their own life experiences, thoughts, opinions, beliefs, and common sense to this court and the deliberation room. Everyone, including me, makes assumptions and forms opinions arising from our own personal backgrounds and experiences. These biases or assumptions may have to do with any number of things, including an individual’s race, color, nationality, ethnicity, age, disability, socio-economic status, religious beliefs, gender, or sexual orientation. I instruct you that a verdict must not be based on any such bias, including conscious or subconscious bias.

Bias, whether it is conscious or subconscious, can affect how we evaluate information and make decisions. It can impact what we see and hear, how we remember what we see and hear, how we make important decisions, and may even cause us to make generalizations or to pre-judge.

While each of you brings your unique life experience with you to court today, as jurors, you must be alert to recognize whether any potential bias
might impact your ability to fairly and impartially evaluate the evidence in this case, follow my instructions, and render a fair and just verdict that is based solely on the evidence presented in this case.

I am now going to ask you to respond to some questions that will assist us in obtaining a fair and impartial jury. If your answer to any of my questions is “yes,” please hold up your juror card and the court officer will read your juror number out loud. At the end of my questions, you may be called up to the judge’s bench one at a time so that I can talk to you.

[1.] There are four fundamental principles which you must follow in this case.

The first principle is that the defendant is presumed to be innocent.

The second principle is that the Commonwealth must prove the defendant’s guilt beyond a reasonable doubt; if it does not, the jury must find the defendant not guilty.

The third principle is that a defendant has no burden to present any evidence and has an absolute right not to testify. If a defendant does not testify, you may not use it against him (her) in deciding the case.

The fourth principle is that the jury must follow the law as the judge explains it.

Is there anyone here who does not understand or agree to follow these
four fundamental principles?

[2.] Do any of you know or are you related to the defendant?

[3.] Do you know or are you related to (either) (any) of the lawyers, or any of the witnesses in this case?

[4.] Have you read or heard anything about this case?

[5.] Do you have an interest that would be affected by the outcome of this case?

[6.] Have you expressed or formed any opinions about this case?

[7.] Are you aware of any bias or prejudice you have towards either the defendant or the prosecution?

[8.] Do you know of any reason why you would not be fair and impartial in this case, or be able to render a true and just verdict, based solely on the evidence and the law?

[9.] Is there any reason [for example, personal concerns, difficulty with English, physical or medical concerns, or religious or ethical beliefs] which might make it difficult for you to be a juror?
[INQUIRIES 10-21 ARE OPTIONAL]

Given the potential for some of the following questions to cause jurors to feel discomfort or embarrassment if having to answer in front of others, consideration should be given to permitting potential jurors to disclose their answers at sidebar rather than having them raise their card to sensitive questions.

[10.] [POLICE] Would you believe the testimony of a police (law enforcement) officer either more or less than the testimony of other witness, simply because the person is a police (law enforcement) officer?

[11.] [EMPLOYMENT] Are you, a close member of your family, or a close friend employed in an area related to law enforcement or criminal defense?

[12.] Do you believe that if a person is arrested or charged with a crime, he or she must be guilty?

[13.] [OUI] It is not a crime to consume alcohol and then drive, but it is a crime to drive if one is under the influence of alcohol. Would personal, religious or other beliefs about alcohol make it difficult for you to follow the law as I just explained it?

[14.] [OUI] Have you, a close family member or close friend been involved in self-help programs such as Alcoholics Anonymous, Al-Anon, or Narcotics Anonymous or with a group that is active on issues related to alcohol and driving such as Mothers Against Drunk Driving (known as MADD) and Students Against Destructive Decisions (known as SADD)?
[15.] [PERSONAL EXPERIENCES] Within the past 10 years, have you, a close family member, or a close friend been charged with [_____________] [a crime involving a motor vehicle accident] [a crime of violence] [a crime involving dishonesty] [a crime involving sexual misconduct] [a crime similar to that (any of those) in this case], or been a witness in, or affected personally by a matter wherein an individual was so charged?

[16.] [DOMESTIC] Have you, a close family member, or close friend been involved in a situation with domestic abuse or violence, or with a related court matter such as a Chapter 209A abuse prevention order?

[17.] [VIOLENCE/SEX] Have you, a close family member, or close friend ever been employed by, or affiliated with, any organization that counsels or gives assistance to victims of: [violent crimes] [sexual assaults]?

[18.] [DRUGS] Have you, a close family member, or close friend had any contact with or concern about prescribed or illegal drugs which would affect your ability to be fair and impartial or to follow my instructions on the law?

[19.] [HIGH PROFILE] Have you ever read, seen or heard anything about this case, the defendant or the alleged victim(s) in the news media (that is, newspapers, radio or TV), or from any other source?
[20.] Would the use of a ________ interpreter either make it difficult for you to concentrate on the witnesses and the content of their testimony or give rise to any bias or prejudice on your part?

[21.] [TYPE OF CASE] Is there anything about the charge(s) in this case which would make it difficult for you to be fair and impartial?

[FINAl. ] Do you know of any reason why you would not be fair and impartial in this case, or be able to render a true and just verdict, based solely on the evidence and the law?

Would counsel [and the defendant] please approach the sidebar?

The judge should make a record if a defendant waived his or her right to be present at the sidebar.

General Laws c. 234A, § 67A, requires Questions 1-7 to be posed to the venire upon motion of either party. It also directs that inquiry be made as to any extraneous issues that might affect impartiality including community attitudes, prejudicial material, and preconceived opinions toward the credibility of certain classes of persons. In addition, Mass. R. Crim. P. 20(b)(1) appears to require the court to pose Questions 1-7 sua sponte, even without request by the parties. The final question is recommended as a final, summarizing question, but is not required.

As to when individual voir dire of prospective jurors, instead of collective inquiry of the entire venire, is required, see note 3, infra.

The judge must then follow-up on any affirmative responses from any of the jurors, and any other questions thought appropriate on voir dire may be asked either by the judge (see Section A below) or, if conducting attorney participated voir dire, the attorneys (see Sections B and C below). Regardless of the method used, it is strongly recommended that each potential juror be brought to the sidebar prior to being seated including jurors who did not affirmatively respond to a question and regardless of the voir dire procedure employed. A brief individual check-in often reveals significant issues not revealed by the statutory questions including, for example, hearing deficits or previously unidentified language issues.

Continue with either Section A (Judge voir dire without attorney participation), Section B (Individual voir dire with attorney participation at page 12), or Section C (Panel voir dire at page 14).
OPTION A. JUDGE VOIR DIRE WITHOUT ATTORNEY PARTICIPATION

[After inquiring as to the statutory questions and any others deemed appropriate, challenges for cause are to be made at this time.]

**Best Practice:** After conducting an individual voir dire, the judge should hear and act on challenges for cause, make a finding that the jurors are indifferent, and then proceed to peremptory challenges. Challenges for cause should be made out of earshot of the juror.

**At sidebar:** Please keep your voices down so that the jury does not overhear.

Are there any challenges for cause?

At this point the Commonwealth should exercise any challenges for cause. If any seated juror is excused, that juror should be replaced with the next numbered juror. When the Commonwealth is satisfied, the defendant should then exercise any challenges for cause. The judge should hear any additional challenges for cause as potential jurors are excused and replaced. Once all challenges for cause have been resolved, the judge should make a finding that the panel is indifferent. The parties may then exercise their peremptory challenges.

Massachusetts R. Crim. P. 20(c)(1) provides that in a case to be tried to a jury of six persons, each defendant is entitled to two peremptory challenges. In the case of a juvenile charged with delinquency in which the Commonwealth has proceeded by indictment, the juvenile is entitled to a jury of twelve persons, G.L. c. 119, § 56(e), and each accused juvenile is entitled to four peremptory challenges (or in the case of a life felony, twelve peremptory challenges plus one additional challenge for each alternate juror impaneled). It is undecided whether a judge may discretionarily allow additional peremptory challenges. See Commonwealth v. Lattimore, 396 Mass. 446, 450 (1985).

**Best Practice:** Do not require the parties to exercise peremptories until an indifferent panel has been seated. Although not required, the Court should direct the Commonwealth to use its peremptory challenges first and until it is content with the panel. The Court should then require the Defendant to exercise his (her) peremptory challenges. When the defendant is content, return to the Commonwealth to exercise any remaining challenges, but only as to jurors who have been seated subsequent to the Commonwealth’s last challenge. Continue until all parties are satisfied or all peremptories have been used. Once a party is satisfied, that party may not later challenge a juror with whom he (she) was previously satisfied.

I find the panel stands indifferent.

Does the Commonwealth have any peremptory challenges?

Here the Commonwealth should exercise its peremptory challenges, and any challenged jurors should be replaced. “The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.” Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:

Does the defendant have any peremptory challenges?

Here the defense should exercise its peremptory challenges, and any challenged jurors should be replaced.
If any jurors have been excused upon the defendant's challenge and replacements seated:

Is the Commonwealth content with the new jurors who have been chosen?

It is common practice that the Commonwealth may challenge only the newly-drawn jurors. If the Commonwealth does so and is satisfied:

Is the defendant content with the new jurors who have been chosen?

It is common practice that the defendant may challenge only the newly-drawn jurors. If the defendant does so and is satisfied:

This alternating procedure should be continued until both parties are content or have exhausted their peremptory challenges.

[Continue on page 16.]
OPTION B. INDIVIDUAL VOIR DIRE WITH ATTORNEY PARTICIPATION

After inquiring as to any responses a juror had to the judge’s questions of the entire venire, the judge should permit the attorneys to ask questions of each juror at the sidebar in accordance with District Court Standing Order 1-18: Voir Dire Protocol and Addendum A (Panel Voir Dire) regarding best practices. Each juror not excused for cause should be seated in the jury box.

Best Practice: After an individual voir dire of a juror or jurors, the judge should hear and act on challenges for cause, make a finding that the jurors are indifferent, and then proceed to peremptory challenges. Challenges for cause should be made out of earshot of the juror.

At sidebar: Please keep your voices down so that the jury does not overhear.

Are there any challenges for cause?

At this point the Commonwealth should exercise any challenges for cause. If any seated juror is excused, that juror should be replaced with the next numbered juror. When the Commonwealth is satisfied, the defendant should then exercise any challenges for cause. The judge should hear any additional challenges for cause as potential jurors are excused and replaced. Once all challenges for cause have been resolved, the judge should make a finding that the panel is indifferent. The parties may then exercise their peremptory challenges.

Massachusetts R. Crim. P. 20(c)(1) provides that in a case to be tried to a jury of six persons, each defendant is entitled to two peremptory challenges. In the case of a juvenile charged with delinquency in which the Commonwealth has proceeded by indictment, the juvenile is entitled to a jury of twelve persons, G.L. c. 119, § 56(e), and each accused juvenile is entitled to four peremptory challenges (or in the case of a life felony, twelve peremptory challenges plus one additional challenge for each alternate juror impanelled). It is undecided whether a judge may discretionarily allow additional peremptory challenges. See Commonwealth v. Lattimore, 396 Mass. 446, 450, 486 N.E.2d 723, 726 (1985).

Best Practice: Do not require the parties to exercise peremptories until an indifferent panel has been seated. Although not required, the Court should direct the Commonwealth to use its peremptory challenges first and until it is content with the panel. The Court should then require the Defendant to exercise his (her) peremptory challenges. When the defendant is content, return to the Commonwealth to exercise any remaining challenges, but only as to jurors who have been seated subsequent to the Commonwealth’s last challenge. Continue until all parties are satisfied or all peremptories have been used. Once a party is satisfied, that party may not later challenge a juror with whom he (she) was previously satisfied.

If a seated juror is challenged, the judge and attorneys should engage in an individual voir dire of the juror with the next number in sequence and continue the process until all challenges for cause have been addressed. After completing the voir dire with individual jurors and filling the jury box, the judge should make a finding.

I find the panel stands indifferent.

Does the Commonwealth have any peremptory challenges?

Here the Commonwealth should exercise its peremptory challenges, and any challenged jurors should be replaced. “The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.” Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:
Does the defendant have any peremptory challenges?

*Here the defense should exercise its peremptory challenges; challenged jurors should be replaced.*

*If any jurors have been excused upon the defendant's challenge:*

**Is the Commonwealth content with the new jurors who have been chosen?**

*It is common practice that the Commonwealth may challenge only the newly-drawn jurors. If the Commonwealth does so and is satisfied:*

**Is the defendant content with the new jurors who have been chosen?**

*Here the defendant may challenge only the newly-drawn jurors.*

*This alternating procedure should be continued until both parties are content or have exhausted their peremptory challenges.*

[Continue on page 16.]
OPTION C. INDIVIDUAL VOIR DIRE FOLLOWED BY PANEL VOIR DIRE

The judge should invite the attorneys to the sidebar for the judge’s inquiry of jurors who responded affirmatively to the judge’s questions to the entire venire. A juror not excused for cause should be seated in the jury box. The judge should then initiate the panel voir dire process. See District Court Standing Order 1-18: Voir Dire Protocol and Addendum A (Panel Voir Dire). This may include seating additional members of the venire near the jury box provided there is space and a microphone that will record their responses.

At this time, the attorneys may ask questions of you individually or as a group. We will begin with the Assistant District Attorney followed by the defendant’s (defendants’) attorney(s). They will refer to you by your juror number, so please hold your juror number card in front of you so the attorneys can see it. If you want to answer a particular question confidentially, indicate that to the attorney or the Court and you will be asked to come to the judge’s bench to provide your answer.

The potential jurors in the back of the room are instructed not to comment at all, even to one another, about anything that happens during this process. However, please listen carefully because you may be asked to answer the same questions later.

Counsel, you may proceed.

Best Practice: After panel voir dire of the jurors, the judge should hear and act on challenges for cause, make a finding that the jurors are indifferent, and then proceed to peremptory challenges. Challenges for cause should be made out of earshot of the juror.

As the party with the burden, the Commonwealth goes first. Jurors are to be referred to by their juror or seat number. The judge should have already addressed any limits as to time, the number of questions, and/or subject matter. When
questioning is complete, the attorneys should approach the sidebar to address any challenges for cause. At this point the Commonwealth should exercise any challenges for cause. When the Commonwealth is satisfied, the defendant should then exercise any challenges for cause. The judge should hear any additional challenges for cause as potential jurors are excused and replaced. Once all challenges for cause have been resolved, the judge should make a finding that the panel is indifferent. The parties may then exercise their peremptory challenges.

Are there any challenges for cause?

[If a seated juror is challenged and excused, the procedure should continue until there are no further challenges for cause.]

I find the panel stands indifferent.

Does the Commonwealth have any peremptory challenges?

Here the Commonwealth should exercise its peremptory challenges. “The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.” Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:

Does the defendant have any peremptory challenges?

Here the defense should exercise its peremptory challenges.

If too few jurors remain after jurors are excused for cause or by the use of peremptories, the judge may direct that additional jurors be questioned individually at the sidebar or may add a new panel. See District Court SANDING Order 1-18: Voir Dire Protocol and Addendum A (Panel Voir Dire).

Are there any challenges for cause?

I find the [juror] [panel] indifferent.

Does the Commonwealth have any peremptory challenges?

When the Commonwealth ceased to challenge:

Does the defendant have any peremptory challenges?

This alternating procedure should be continued with the next numbered juror until both parties are content or have exhausted their peremptory challenges.
Optional Final Question to Seated Jurors

Of the jurors now seated in the jury box, I ask: is there anything that has come to mind since we began this discussion that you now realize might affect your ability to perform the duties of an impartial juror in this case?

[A juror responding affirmatively to this inquiry should be brought to the sidebar for further inquiry. If no hands are raised, the jurors should be sworn.]

We have a jury whose members stand indifferent. The rest of the jurors may return to the jury pool with the thanks of the Court and the parties.

Clerk: Members of the jury, please rise and raise your right hands.

Do you swear or affirm under the pains and penalties of perjury that you shall well and truly try the issue between the Commonwealth and the defendant, according to the evidence, so help you God? Please be seated.

If a juror prefers to omit reference to the Deity, he or she may be sworn by substituting the words: “under the penalties of perjury” for the words: “so help you God.” See G.L. c. 233, § 19.

Clerk: Members of the jury, hearken to the complaint.

Here read the complaint.

In reading the complaint, the clerk must not disclose to the jury: (1) the potential penalties for any offense, see Commonwealth v. Bart B., 424 Mass. 911, 913 (1997); Commonwealth v. Smallwood, 379 Mass. 878, 882-83 (1980); Commonwealth v. Buckley, 17 Mass. App. Ct. 373, 375-77 (1984); (2) that the defendant is charged as a subsequent offender, G.L. c. 278, § 11A; (3) that there are alternate ways of committing the offense that are charged in the complaint but inapplicable to the case being tried, Commonwealth v. Johnson, 45 Mass. App. Ct. 473, 477 n.3 (1998); or (4) any alias that is unconnected to the offense and unnecessary to establish the defendant’s identity as the perpetrator, Commonwealth v. Martin, 57 Mass. App. Ct. 272, 275 (2003).

To this complaint the defendant pleads that he (she) is not guilty, and for trial places himself (herself) upon the country, which country you are.
Chapter 5—Techniques and Tips for Raising Implicit Bias with Juries

You are now sworn to try the issue. If he (she) is guilty, you will say so. If he (she) is not guilty, you will say so and no more. Members of the jury, hearken to the evidence.

Best Practice: The judge should precharge the jury at this point. See Instructions 1.120 or 1.140.

After the precharge, the prosecutor shall present an opening statement unless waived. Defense counsel has the option offer an opening statement after the prosecutor’s, after the close of the Commonwealth’s case, or not at all.

NOTES:

1. Repeal of G.L. c. 234. In 2016, the Legislature repealed G.L. c. 234, entitled “Juries,” and incorporated those provisions into G.L. c. 234A. Case law prior to the 2014 amendment will cite to G.L. c. 234. These notes have been updated to reflect where the new provisions can be found in G.L. c. 234A.


3. Individual voir dire of prospective jurors. General Laws c. 234A, § 67 provides that, in the following circumstances, a collective examination of the venire is insufficient and that venire members must be examined individually and outside the presence of other jurors:

“If it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror[s] may not stand indifferent.”

To require the judge to conduct an individual voir dire of jurors, “[t]he defendant must show that there is some basis for finding that a substantial risk of extraneous influences on the jury exists, and that there is a substantial risk that jurors would be influenced by such considerations.” Commonwealth v. Ashman, 430 Mass. 736, 739 (2000). Such a request may be communicated by counsel, and the judge need not conduct a colloquy with the defendant personally. Commonwealth v. Flebotte, 417 Mass. 348, 353-56 (1994). On request, the judge must examine potential jurors individually about possible racial or ethnic prejudice.

“Under [G.L. c. 234A, § 67A], the judge must examine the jurors individually when it appears that issues extraneous to the case might affect the jury’s impartiality. Ordinarily, it is for the judge to determine whether the jury might be influenced by an extraneous issue.” Commonwealth v. Grice, 410 Mass. 586, 588 (1991). There are four exceptions, where the Supreme Judicial Court has held that, as a matter of law, the judge must question potential jurors individually if the defense so requests:

- in cases involving sexual offenses against minors, on request the judge must question each potential juror individually as to whether that juror was the victim of a childhood sexual offense. Commonwealth v. Flebotte, 417 Mass. 348, 353-56 (1994).

- in cases involving interracial sexual offenses against minors, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. Commonwealth v. Hobbs, 385 Mass. 863, 873 (1982).
• in cases involving **interracial rape**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Sanders*, 383 Mass. 637, 640-41 (1981).

• in cases involving **interracial murder**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Young*, 401 Mass. 390, 398 (1987).

Some other common situations include:

- **Lack of criminal responsibility (insanity defense).** Where the defendant indicates that his or her lack of criminal responsibility may be placed in issue and so requests, the judge must inquire individually of each potential juror “whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible. It will be in the judge’s discretion whether to ask more detailed questions concerning a juror’s views of the defense of insanity.” *Commonwealth v. Seguin*, 421 Mass. 243, 248-49 & n.6 (1995), cert. denied, 516 U.S. 1180 (1996). For additional information, see the notes to Instruction 9.200 (Lack of Criminal Responsibility).

- **Mental impairment short of insanity.** Individual voir dire is in the judge’s discretion, and is not automatically required, when there will be evidence of mental illness or impairment but no claim of lack of criminal responsibility. *Commonwealth v. Ashman*, 430 Mass. 736, 738-740 (2000). For additional information, see the note to Instruction 9.220 (Mental Impairment Short of Insanity).

- **Racial bias.** Questions to prospective jurors designed to discover possible racial prejudice are not constitutionally required in every case where the defendant is of a minority race, but only where there are factors that make the defendant a “special target for racial prejudice.” *Commonwealth v. Ross*, 363 Mass. 665 (1973), cert. denied, 414 U.S. 1080 (1973). Determining this is usually in the judge’s discretion except in the three situations, *supra*, where the Supreme Judicial Court has held that individual voir dire is required on request as a matter of law (interracial sexual offenses against children, interracial rape and interracial murder). However, the Court has repeatedly stated that “a motion to have jurors asked about racial bias should usually be granted.” *Commonwealth v. Robertson*, 480 Mass. 383, 389 (2018) (quoting *Commonwealth v. Ramirez*, 407 Mass. 553, 555 (1990)).

- **Sexual orientation bias.** Where there is a possibility of bias against a defendant or a victim based on sexual orientation, the matter “requires careful attention” and the better practice is to conduct an individual voir dire of each potential juror. *Commonwealth v. Plunkett*, 422 Mass. 634, 640-41 (1996). “When faced with a question designed to detect such bias, a judge should make a brief examination of the facts of the case to determine if the question is relevant and important and whether sufficient prejudice is manifested to warrant such an inquiry. A judge may also assume that the party who desires the inquiry has evaluated the risk that the inquiry may activate latent bias in some jurors and insult others without uncovering bias in those jurors who refuse to acknowledge their bias. The ultimate decision as to whether the question should be asked lies within the judge’s sound discretion, but the judge must be assisted in this decision by the party seeking the inquiry. That party bears the burden of demonstrating the importance and relevance of the question and the risk of prejudice inuring from its omission by furnishing the judge with a brief summary of the evidence to be presented, and an affidavit or other means indicating the manner and means by which the subject will be introduced or play a role in the case. If the judge determines that the question should be asked, the judge may then inquire of the jury collectively, individually, or may simply cover the matter by incorporating the subject into his or her preliminary statement about the case before asking prospective jurors the mandated question about bias or prejudice under [G.L. c. 234A, § 67A] . . . .” *Toney v. Zarynoff’s, Inc.*, 52 Mass. App. Ct. 554, 556-61 (2001) (wrongful death action).

- **Victim of violent crime.** The Confidential Juror Questionnaire completed by prospective jurors asks them to “[d]escribe briefly any involvement (past or present) as a party or a victim in a civil or criminal case by you or any member of your immediate family.” In a case that involves a crime of violence, the Supreme Judicial Court “would expect” judges on request additionally to ask the venire collectively whether they or
a member of their immediate family had ever been the victim of a violent crime. “[A]lthough not required, it has long been common practice to do so on request.” Commonwealth v. Lopes, 440 Mass. 731, 735-38 & n.9 (2004).

When individual voir dire is required, G.L. c. 234A, § 67A mandates that it be done individually and outside the presence of other impaneled or prospective jurors. Posing questions collectively to the venire and then individually interrogating jurors who come forward is insufficient. Individual voir dire may be done at the side bar if other jurors cannot overhear, but it is preferable to question jurors individually outside the presence of impaneled jurors and other venire members. Commonwealth v. Shelley, 381 Mass. 340, 353 n.12 (1980).

4. Police witnesses. “[O]rdinarily a trial judge should comply with a defendant’s request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony,” but a judge is required to do so only there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as “preconceived opinions toward the credibility of certain classes of persons.” Commonwealth v. Sheline, 391 Mass. 279, 291 (1983).


6. Jurors’ criminal records. The CORI law (G.L. c. 6, § 167) permits a prosecutor to check the criminal records of jurors or prospective jurors. If the prosecutor checks potential jurors’ criminal records prior to trial pursuant to G.L. c. 234A, § 67, the results must be disclosed to defense counsel at the start of impanelment. If the prosecutor does so at the start of trial, the results must be shared immediately. Defense counsel may use such information only in connection with the case and must return it to the court after impanelment. Commonwealth v. Cousin, 449 Mass. 809, 815-19 (2007). “After the jury are sworn, unless the prosecutor has reserved an entitlement to conduct such a check, any check of CORI records or other inquiry into juror misconduct, whether sought by the prosecution or the defendant, may be done only with the approval of the trial judge. We add that the same procedure applies to any investigation of jurors that may be conducted by the defense.” Commonwealth v. Hampton, 457 Mass. 152, 171 (2010).

7. Verdict of fewer than six jurors. The Court may take a verdict from fewer than six jurors if all parties agree by stipulation. G.L. c. 234A, § 68.
GR 9 COVER SHEET
Suggested Change to the
GENERAL RULES
Rule 36 – Jury Selection

Submitted by the American Civil Liberties Union of Washington

A. **Name of Proponent:** American Civil Liberties Union of Washington

B. **Spokesperson:** Sal Mungia, Gordon Honeywell and Thomas and ACLU-WA Cooperating Attorney; and La Rond Baker, ACLU-WA Staff Attorney.

C. **Purpose:** Proposed General Rule 36 (“GR 36”) is a new rule meant to protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of juries.

In *State v. Saintcalle*, the Washington State Supreme Court expressed concerns that the federal *Batson v. Kentucky* test provides insufficient protections to potential jurors of color from biased use of peremptory challenges.1 *Batson* created a standard under which a court can only sustain a challenge to a peremptory strike after three conditions are satisfied: (1) “the person challenging the peremptory 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’”; (2) the striking party must “come forward with a [race-]neutral explanation’ for the challenge”; and (3) the court must “determine if the defendant has established purposeful discrimination.”2 *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013) (citations omitted) (alteration in original) (emphasis added).

*Batson* was the United States Supreme Court’s solution to the failures of the previous test for determining whether a peremptory strike was invalid because of bias. However, over the years it has become evident that *Batson* fails to adequately protect potential jurors and the justice system from biased use of peremptories.3 This is because *Batson* requires parties to meet an extremely high bar to show that a peremptory challenge was motivated by bias. *Batson* requires attorneys

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to allege, and judges to find, purposeful discrimination and fails to acknowledge that bias can be subtle, institutional, or inadvertent.\(^4\) The Washington State Supreme Court in Saintcalle explained that “it is evident that Batson, like Swain before it, is failing us.”\(^5\) The Court recognized there was ample data demonstrating that racial bias in the jury selection process remained “rampant”:

Twenty-six years after Batson, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because Batson recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our Batson procedures must change and that we must strengthen Batson to recognize these more prevalent forms of discrimination.

Saintcalle, 178 Wn.2d at 36.

The Saintcalle court based its concerns on “[a] growing body of evidence . . . that Batson has done very little to make juries more diverse.”\(^6\) This evidence included empirical studies that indicate that discriminatory jury selection is a problem nationwide.\(^7\) It also included the fact that “[i]n over 40 cases since Batson, Washington appellate courts have never reversed a conviction based on a trial court’s erroneous denial of a Batson challenge.”\(^8\)

Legal scholars have also long noted Batson’s failure to effectively eradicate discrimination in peremptory challenges.\(^9\) This failure is especially pressing when one considers issues of unconscious racism.\(^10, 11\)

\(^4\) Saintcalle, 178 Wn.2d at 46-49, fn. 3 (“It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them.” (citing Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. Rev. 465, 471 (2010))).

\(^5\) Id. at 44.

\(^6\) Id.


\(^8\) Saintcalle, 178 Wn.2d at 45-46.

GR 36 addresses this problem by employing a test that utilizes an objective-observer standard. Under GR 36, the trial court would find a peremptory strike invalid if an objective observer could find that race or ethnicity was a factor for a peremptory challenge. GR 36 also gives trial courts the necessary latitude to protect the justice system from bias by granting courts the freedom to raise objections to a peremptory strike \textit{sua sponte}. It would also bring greater diversity to juries, so that juries in Washington are more representative of the communities they serve.\footnote{The absence of non-white jurors matters, as studies indicate that diverse juries tend to consider more perspectives and spend more time deliberating than all-white juries. Samuel R. Sommers, \textit{On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation}, 90 J. Personality and Soc. Psych. 597, 609 (2006).} The rule would also improve the appearance of fairness and promote the administration of justice.


GR 36 preserves the use of peremptory challenges as part of the right to a jury trial while at the same time addressing racial bias in jury selection.\footnote{Saintcalle, 178 Wn.2d at 50. See also \textit{Powers v. Ohio}, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).} The comment section provides guidance to the judiciary and attorneys about how to apply the rule. By adopting this rule, Washington will ensure that its justice system is not improperly tainted by bias, protect Washingtonians from discrimination, ensure diversity in juries, and address systemic, institutional, and unintentional racism in jury selection.

\textbf{D. Hearing:} A hearing is not requested.

\textbf{E. Expedited Consideration:} Expedited consideration is not requested.
Chapter 5—Techniques and Tips for Raising Implicit Bias with Juries

OREGON UNCONSCIOUS BIAS JURY INSTRUCTION
(These instructions are based on the Ninth Circuit Model Instructions. Additions are highlighted in yellow.)

1.1 DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you. Perform these duties fairly and impartially. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person’s race, color, religion, national ancestry, or gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community. Finally, you should make an effort to be aware of your unconscious biases and what effect those may have on your decision-making.

You may recall during jury selection, [the attorneys/I] asked the panel if any of you had ever heard the term “unconscious bias.” That term is one used by social scientists to describe the reality that everyone[, including me,]¹ has feelings, assumptions, perceptions, fears, and stereotypes, that is, “unconscious biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions.

¹ The court can omit reference to “including me.”
3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person’s race, color, religion, national ancestry, or gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community. You will recall that you took an oath promising to do so at the beginning of the case. Finally, you should make an effort to be aware of your unconscious biases and what effect those may have on your decision-making.

You may recall at the beginning of this trial during jury selection, [the attorneys/I] asked the panel if any of you had ever heard the term “unconscious bias.” That term is one used by social scientists to describe the reality that everyone[, including me,]² has feelings, assumptions, perceptions, fears, and stereotypes, that is, “unconscious biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions. Because you are making very important decisions in this case, you should evaluate the evidence carefully and resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

² The court can omit reference to “including me.”
In *People v. Wheeler* (1978) 22 Cal.3d 258, this court held that racial discrimination in the exercise of peremptory challenges is unconstitutional — a conclusion subsequently embraced by the United States Supreme Court in *Batson v. Kentucky* (1986) 476 U.S. 79. Racial discrimination in the selection of jurors, *Batson* said, “harms not only the accused whose life or liberty they are summoned to try,” but also “the excluded juror” who is denied an important opportunity to participate in civic life, as well as “the entire community” upon whose confidence the fairness of our justice system depends. This principle, which also applies to civil cases and extends to other forms of invidious discrimination, has been repeatedly affirmed by the high court and this court.

For more than 30 years, courts have applied the legal framework set forth in *Batson/Wheeler* for ferreting out impermissible discrimination in the use of peremptory challenges. In recent years, some states have adopted or begun to consider additional measures designed to address perceived shortcomings in the practical application of the *Batson* framework and to better ensure that juries represent a cross-section of their communities. Today we join this dialogue with the creation of the California Jury Selection Work Group.

The purpose of this work group is to undertake a thoughtful, inclusive study of how *Batson/Wheeler* operates in practice in California and whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection. Key questions include but are not limited to the following:

- In light of the goal of eliminating improper discrimination in jury selection, does a purposeful discrimination standard impose an appropriate burden on litigants who attempt to show that a peremptory challenge was motivated by improper considerations or on advocates called upon to explain the basis for their peremptory challenges? What are the pros and cons of possible alternatives?

- To what extent does unconscious bias affect the jury selection process? Can this unconscious bias be effectively addressed in jury selection, and if so, how?
• Does allowing peremptory challenges based on a prospective juror’s negative experiences or views of law enforcement or the justice system result in disproportionate exclusion of jurors of certain backgrounds? Does accepting other facially neutral grounds for peremptory challenges have such an effect? If so, how if at all should these practices be addressed?

• Do current standards of appellate review of peremptory challenges in California adequately serve the goals of *Batson/Wheeler* jurisprudence?

• Are there other impediments to eliminating impermissible discrimination in jury selection and better ensuring that juries represent a cross-section of their communities? If so, how can these impediments be addressed?

• What kinds of training or guidance would assist advocates and judges in promoting fairness in this area and in making a record that facilitates sound appellate review?

• Should the standard jury instructions that address bias be modified or supplemented to provide more guidance to jurors in addressing bias during the deliberation process?

In the coming weeks, the Chief Justice will appoint a diverse work group of stakeholders from across the state — including judges, prosecutors, defense counsel, and other practitioners in criminal and civil litigation — to study these questions through an inclusive process with opportunities for public input and participation.
Chapter 5—Techniques and Tips for Raising Implicit Bias with Juries

Resources

**ABA Diversity and Inclusion 360 Commission Toolkit Introduction**
https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/implicitbias_toolkit.pdf

**ABA Achieving an Impartial Jury (AIJ) Toolbox**
https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voiredire_toolchest.pdf

**“Implicit Bias: A Primer for Courts,” Jerry Kang, National Center for State Courts, August 2009**
https://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx
Chapter 6

Presentation Slides: Knowing Your Audience—Jurors’ Confidence in Their Truth Telling Abilities

JOHN HORVICK
DHM Research
Portland, Oregon
Knowing Your Audience
Jurors Confidence in Their Truth Telling Abilities

Oregon State Bar
27th Annual Litigation Institute

February 2020

Past OBA presentations

2017: Demographics and Attitudes about Jury Service
2018: Jury Nullification
2020: Truth Telling
Methods

Survey of Oregon adults

Conducted January 2020

Conducted online from a randomly recruited panel of Oregonians

N=552; margin of error ±4.1%

Mood
Is Oregon headed in the right direction?

DHM Research

Is Oregon headed in the right direction?
Democrat / Republican

DHM Research
Most important issue for local leaders to address

<table>
<thead>
<tr>
<th>Issue</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homelessness</td>
<td>25%</td>
</tr>
<tr>
<td>Taxes</td>
<td>6%</td>
</tr>
<tr>
<td>Politics - general</td>
<td>6%</td>
</tr>
<tr>
<td>Climate change</td>
<td>6%</td>
</tr>
<tr>
<td>Education quality/funding</td>
<td>6%</td>
</tr>
<tr>
<td>Healthcare</td>
<td>5%</td>
</tr>
<tr>
<td>Housing affordability</td>
<td>4%</td>
</tr>
<tr>
<td>Roads</td>
<td>3%</td>
</tr>
<tr>
<td>Environment</td>
<td>3%</td>
</tr>
<tr>
<td>Poor leadership</td>
<td>2%</td>
</tr>
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December 2019

Perceptions of the justice system
Oregonians’ Confidence in the Justice System

<table>
<thead>
<tr>
<th></th>
<th>Very/Somewhat confident</th>
<th>Not too/Not at all confident</th>
<th>Don’t know</th>
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</thead>
<tbody>
<tr>
<td><strong>Juries</strong></td>
<td>15%</td>
<td>49%</td>
<td>24% 10%</td>
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<tr>
<td><strong>Local police department</strong></td>
<td>30%</td>
<td>44%</td>
<td>15% 8%</td>
</tr>
<tr>
<td><strong>Federal Bureau of Investigation</strong></td>
<td>15%</td>
<td>52%</td>
<td>20% 11%</td>
</tr>
<tr>
<td><strong>DAs in your community</strong></td>
<td>13%</td>
<td>46%</td>
<td>20% 12%</td>
</tr>
<tr>
<td><strong>Defense attorneys</strong></td>
<td>7%</td>
<td>48%</td>
<td>28% 9%</td>
</tr>
<tr>
<td><strong>United States Supreme Court</strong></td>
<td>12%</td>
<td>40%</td>
<td>31% 15%</td>
</tr>
</tbody>
</table>

DHM Research

Juries

- 2017: 76%
- 2018: 70%
- 2019: 66%
- 2020: 64%

FBI

- 2017: 60%
- 2018: 64%
- 2019: 68%
- 2020: 65%

Supreme Court

- 2017: 67%
- 2018: 60%
- 2019: 63%
- 2020: 54%

DHM Research
Chapter 6—Presentation Slides: Knowing Your Audience

Is American jury system is working?

In civil disputes

<table>
<thead>
<tr>
<th>Year</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>58%</td>
<td>43%</td>
<td>48%</td>
<td>52%</td>
<td></td>
</tr>
</tbody>
</table>

In criminal cases

<table>
<thead>
<tr>
<th>Year</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>61%</td>
<td>49%</td>
<td>46%</td>
<td>47%</td>
<td></td>
</tr>
</tbody>
</table>

DHM Research
Responsibility of Jury Members

...always follow the letter of the law, even when they believe that it will result in an unjust outcome.

...achieve the most just outcome, even if it means not following the letter of the law.

Responsibility of Jury Members: Achieve Just Outcome

<table>
<thead>
<tr>
<th></th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
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</thead>
<tbody>
<tr>
<td>Oregon</td>
<td>49%</td>
<td>38%</td>
<td>45%</td>
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<td>Democrats</td>
<td>45%</td>
<td>55%</td>
<td>49%</td>
<td>53%</td>
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<tr>
<td>Republicans</td>
<td>40%</td>
<td>53%</td>
<td>45%</td>
<td>49%</td>
</tr>
<tr>
<td>Liberals</td>
<td>60%</td>
<td>55%</td>
<td>49%</td>
<td>53%</td>
</tr>
<tr>
<td>Conservatives</td>
<td>64%</td>
<td>55%</td>
<td>53%</td>
<td>49%</td>
</tr>
<tr>
<td>Men</td>
<td>60%</td>
<td>53%</td>
<td>49%</td>
<td>45%</td>
</tr>
<tr>
<td>Women</td>
<td>47%</td>
<td>53%</td>
<td>49%</td>
<td>45%</td>
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</table>

DHM Research
Judge of Character

### How good or poor judges of character are

<table>
<thead>
<tr>
<th></th>
<th>very</th>
<th>somewhat</th>
<th>not too</th>
<th>not at all</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yourself</td>
<td>18%</td>
<td>76%</td>
<td>4%</td>
<td>1%</td>
</tr>
<tr>
<td>Closest friend</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Police officers</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Average American</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

DHM Research
How good or poor judges of character are_____

very / somewhat / not too / not at all

<table>
<thead>
<tr>
<th></th>
<th>very / %</th>
<th>somewhat / %</th>
<th>not too / %</th>
<th>not at all / %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yourself</td>
<td>18%</td>
<td>76%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Closest friend</td>
<td>17%</td>
<td>66%</td>
<td>10%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>12%</td>
<td>55%</td>
<td>20%</td>
<td>0%</td>
</tr>
<tr>
<td>Police officers</td>
<td>9%</td>
<td>56%</td>
<td>19%</td>
<td>8%</td>
</tr>
<tr>
<td>Average American</td>
<td>49%</td>
<td>42%</td>
<td>5%</td>
<td></td>
</tr>
</tbody>
</table>

DHM Research
**Good judges of character**
*letter of the law / just outcome*

- **Yourself**: 96% / 91%
- **Closest friend**: 88% / 78%
- **Average American**: 60% / 44%
- **Police officers**: 74% / 57%
- **Judges**: 80% / 61%

**16-19 points**

---

**Truth Telling**
Chapter 6—Presentation Slides: Knowing Your Audience

How good are you at knowing if someone is telling the truth?

- Good: 82%
- Somewhat: 70%
- Poor: 14%
- Don't know: 4%

18-44 (very): 25%
College grad: 24%

How confident are that you can tell if _____ is telling the truth?

- Closest friend: 52% very / 44% somewhat
- Real estate agent
- Used car salesman
- Elected official
- Defendant on trial
- Prosecuting attorney

DHM Research
How confident are that you can tell if _______ is telling the truth?

very / somewhat / not too / not at all

<table>
<thead>
<tr>
<th>Role</th>
<th>Very</th>
<th>Somewhat</th>
<th>Not Too</th>
<th>Not at All</th>
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</thead>
<tbody>
<tr>
<td>Closest friend</td>
<td>52%</td>
<td>44%</td>
<td>5%</td>
<td>1%</td>
</tr>
<tr>
<td>Real estate agent</td>
<td>15%</td>
<td>48%</td>
<td>28%</td>
<td>7%</td>
</tr>
<tr>
<td>Used car salesman</td>
<td>17%</td>
<td>40%</td>
<td>24%</td>
<td>18%</td>
</tr>
<tr>
<td>Elected official</td>
<td>5%</td>
<td>47%</td>
<td>34%</td>
<td>12%</td>
</tr>
<tr>
<td>Defendant on trial</td>
<td>5%</td>
<td>58%</td>
<td>22%</td>
<td>7%</td>
</tr>
<tr>
<td>Prosecuting attorney</td>
<td>5%</td>
<td>55%</td>
<td>31%</td>
<td>6%</td>
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DHM Research
How confident are that you can tell if a **DEFENDANT ON TRIAL** is telling the truth?

<table>
<thead>
<tr>
<th>Party</th>
<th>Democrat</th>
<th>Republican</th>
<th>NAV</th>
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<tbody>
<tr>
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<td>57%</td>
<td>79%</td>
<td>57%</td>
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<table>
<thead>
<tr>
<th>Education</th>
<th>High school</th>
<th>Some college</th>
<th>College grad</th>
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<tbody>
<tr>
<td></td>
<td>71%</td>
<td>63%</td>
<td>61%</td>
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</tbody>
</table>

DHM Research

How confident are that you can tell if a **PROSECUTING ATTORNEY** is telling the truth?

<table>
<thead>
<tr>
<th>Party</th>
<th>Democrat</th>
<th>Republican</th>
<th>NAV</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>49%</td>
<td>69%</td>
<td>67%</td>
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<table>
<thead>
<tr>
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<th>High school</th>
<th>Some college</th>
<th>College grad</th>
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<tbody>
<tr>
<td></td>
<td>32%</td>
<td>66%</td>
<td>61%</td>
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DHM Research
Confidence in ability to determine truthfulness: letter of the law / just outcome

- Closest friend: 96% / 95%
- Real estate agent: 68% / 58%
- Elected official: 61% / 50%
- Defendant: 76% / 59%
- Used car salesman: 67% / 49%
- Prosecuting Attorney: 71% / 53%

DHM Research

17-18 points

I can tell if someone is lying by_________

strongly agree / somewhat agree / somewhat disagree / strongly disagree

- Verbal ticks: 14% / 59% / 18% / 3%
- Body language: 15% / 61% / 18% / 3%

DHM Research
I can tell if someone is lying by their body language

**Party**
- Dem: 65%
- Rep: 89%
- NAV: 84%

**Age**
- 18-44: 77%
- 45-54: 81%
- 55+: 70%

**Education**
- HS: 74%
- Some: 83%
- College: 67%

I can tell if someone is lying by_________

**Options:**
- completely fair
- somewhat fair
- somewhat unfair
- completely unfair

**Friends**
- 6%
- 42%
- 32%
- 19%
I can tell if someone is lying by________

**completely fair / somewhat fair / somewhat unfair / completely unfair**

<table>
<thead>
<tr>
<th>Attribute</th>
<th>Completely Fair</th>
<th>Somewhat Fair</th>
<th>Somewhat Unfair</th>
<th>Completely Unfair</th>
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<td>Clothes</td>
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<tr>
<td>Race</td>
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DHM Research
I can tell if someone is lying by_________

Democrat / Republican

<table>
<thead>
<tr>
<th></th>
<th>65%</th>
<th>47%</th>
<th>44%</th>
<th>28%</th>
<th>31%</th>
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<th>8%</th>
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DHM Research

I can tell if someone is lying by_________

high school / some college / College degree

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<th>57%</th>
<th>37%</th>
<th>30%</th>
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<tr>
<td>Race</td>
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DHM Research
Who is more likely to be untruthful?

Race

- White person: 3%
- Black person: 3%
- No difference: 94%

DHM Research

Who is more likely to be untruthful?

Education

- High school degree: 5%
- Graduate degree: 5%
- No difference: 90%

DHM Research

DHM Research

94%

White 2%
POC 14%

3%

3%

90%

High school 0%
Some college 5%
College degree 9%
Who is more likely to be untruthful?

### Gender

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Man</td>
<td>15%</td>
</tr>
<tr>
<td>Woman</td>
<td>7%</td>
</tr>
<tr>
<td>No difference</td>
<td>78%</td>
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### Class

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<tbody>
<tr>
<td>Poor person</td>
<td>5%</td>
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<tr>
<td>Rich person</td>
<td>21%</td>
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<tr>
<td>No difference</td>
<td>75%</td>
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DHM Research
Who is more likely to be untruthful?

**Religion**

- Believes in God: 20%
- Atheist: 8%
- No difference: 72%

DHM Research

**Age**

- Young person: 26%
- Old person: 9%
- No difference: 65%

DHM Research
Who is more likely to be untruthful?

- Defense attorney: 24%
- Prosecuting attorney: 11%
- No difference: 65%

Male 17%
Female 34%

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