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SELECTING A JURY is frequently compared to selecting a wife. By the time you learn whether or not you made the right choice it is too late to do anything about it.

It is probably no exaggeration to state that many cases are won or lost on the jury selection. Every lawyer is familiar with cases that were tried through to a jury verdict and following a motion or appeal, were retried to a different jury, with opposite results being reached. In many of these cases the witnesses, the testimony, and all of the facts remain the same—the only difference being in the jury and the result. Thus, the importance of the jury selection cannot be overestimated.

Method of Examination

Although it may appear presumptuous for one lawyer to attempt to advise another in the art of selecting a jury, there are nevertheless certain ground rules and basic fundamentals that can be pointed out.

The examination to determine the qualifications and competency of prospective jurors is known as the *voir dire,* or voir dire examination. Voir dire is defined as meaning "to speak the truth."[1] Under a law enacted in 1957,[2] the prospective jurors are placed under oath before the voir dire examination is commenced.

Jurors in municipal courts are required to be impaneled in the same manner as in the Common Pleas Court. The procedure in Federal Court, with respect to the right of counsel to examine the jurors, differs somewhat from Ohio practice. In *Pointer v. United States,*[3] and *St. Clair v. United States,*[4] it was held that

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[1] Black's Law Dictionary, 1746 (4th ed., 1951).

[2] R. C. 2313.42. Before the passing of this provision it was suggested by Judge Zimmerman in Maggio v. Cleveland, 151 Ohio St. 136 (1949), that as a matter of sound public policy the trial court should place the prospective jurors under oath before the voir dire. Notwithstanding the requirement of R. C. 2313.42, it was held in Thormyer v. Rauch, 108 Ohio App. 432, 162 N. E. 2d 190 (1958), that failure to swear the jury panel does not constitute prejudicial error when no request was made to swear the panel, no exception was taken for failure to do so, no exception was noted to the manner of the selection of the jury and there was no suggestion of prejudice resulting from failure to swear the panel.

[3] 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894).

[4] 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936 (1894).

the impaneling of jurors is within the control of the United States courts by its rules. The Federal Rules of Civil Procedure provide as follows:

> The court may permit parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.[5]

Thus, counsel in Federal Court has no right to examine the jurors, it being in the discretion of the court whether to examine the jurors itself, permit counsel to submit questions direct to the jury, or require counsel to submit any additional questions to the court to relay to the jury. The practice varies, depending upon the judge.

The general procedure in the Ohio state courts is for the trial judge to interrogate the twelve members of the jury panel as a whole, and then turn the questioning over to trial counsel. The right of counsel to conduct its own examination, even though the court itself has examined the panel, is well recognized.[6]

Counsel for either party may question the jury as a group, and may pose questions to the prospective jurors individually. In attempting to impanel an impartial jury, the individual questioning of the prospective members can be of great value if properly used. The jury might well be individually interrogated concerning any important or unusual aspect of the plaintiff's or defendant's case.

Thus, if the case involves a malpractice claim, the jurors might be questioned individually to determine whether they have any strong feelings or sympathy pertaining to such a suit. If the case involves a suit between members of the same family, the jury should be individually questioned to discover any prejudice.

If the defense is relying heavily on contributory negligence, the defendant should individually question the jury to make certain they will apply the law on this point as they receive it from the court. Where there is a heavy sympathy element present, the defendant should ask each juror individually

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[5] Fed. Rules Civ. Proc. 47(a).

[6] Pavilonis v. Valentine, 120 Ohio St. 154, 165 N. E. 730 (1929). The right of counsel to interrogate the prospective jurors is guaranteed by statute in criminal cases, R. C. 2945.27.

whether this would influence his judgment. Frequently a juror will sit mute when the question is posed to the panel as a group, but will answer the question honestly when it is put to him individually.

Needless to say, the individual questioning of the jurors must be judiciously exercised. Endless repetition of the same stock questions has but little value and might well alienate an otherwise friendly juror.

Scope of Examination

There are two kinds of challenges—challenge for cause, and peremptory challenge—and the prospective jurors may be examined for the purpose of exercising either.[7] There is no limit to the number of challenges for cause a party may exercise, but these are ruled upon by the court and may be granted only by the court. The grounds for challenge for cause under state[8] and federal[9] practice are set forth by statute.

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[7] Eikenberry v. McFall, 33 O. L. A. 525, 36 N. E. 2d 27 (1941).

[8] R. C. 2313.42 sets forth grounds that are positive grounds for challenge for cause:

"Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications.

"The following are good causes for challenge to any person called as a juror:

"(A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;

"(B) That he has an interest in the cause;

"(C) That he has an action pending between him and either party;

"(D) That he formerly was a juror in the same cause;

"(E) That he is the employer, employee, or the spouse, parent, son or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

"(F) That he is subpoenaed in good faith as a witness in the cause;

"(G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;

"(H) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

"(I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;

"(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court."

In addition to the code section, R. C. 2313.43 sets forth grounds for which the court may sustain a challenge for cause:

"In addition to the causes listed under section 2313.42 of the Revised Code, any petit juror may be challenged on suspicion of prejudice

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As distinguished from a challenge for cause, a peremptory challenge is one made without assigning a reason therefor, and which the court must allow. The number of peremptory challenges allowed vary from state to state. Under Ohio law[10] each party[11] is entitled to four peremptory challenges. In the federal courts parties are entitled to only three peremptory challenges, although if there is more than one defendant the court may allow additional challenges.[12]

The extent to which counsel may examine the prospective jurors rests within the sound discretion of the trial court[13] and

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against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased."

If the court has any doubt as to the jurors being entirely unbiased, a challenge under this section should be sustained, Carle v. Courtright, 69 Ohio App. 69, 43 N. E. 2d 296 (1941).

9 71 Stat. 638 (1957) 28 U. S. C. A. 1861—"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) he has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty;
(2) He is unable to read, write or understand the English language;
(3) He is incapable, by reason of mental or physical infirmities, to render efficient jury service."

62 Stat. 953 (1948), 28 U. S. C. 1869: "In any district court a petit juror may be challenged on the ground that he has been summoned and attended such court as a petit juror at any term held within one year prior to the challenge."

10 R. C. 2313.44. "In addition to the challenges for cause under sections 2313.42 and 2313.43 of the Revised Code, each party peremptorily may challenge four jurors."

11 Generally, "each party" allowed four peremptory challenges by statute refers to each side. When the interest of each defendant is adverse, however, and where separate defenses are raised, each defendant is allowed four peremptory challenges, Christoff v. Dugan, 39 Ohio App. 475, 177 N. E. 895 (1931).

12 73 Stat. 565 (1959), 28 U. S. C. A. Section 1870:

"In civil cases each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

"All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."

13 Pavilonis v. Valentine, 120 Ohio St. 154, 165 N. E. 730 (1929); Dowd-Feder v. Truesdell, 130 Ohio St. 530, 200 N. E. 762 (1936); Momenee v. Krupp, 1 O. L. A. 501 (1923); Lish v. Denny, 23 O. L. R. 229 (1925).

there is no ground for reversal in this respect unless it clearly appears that the trial court has abused its discretion.

The scope of the inquiry is not limited to the subjects which constitute grounds for sustaining a challenge for cause.[14]

The Ohio Supreme Court has stated:

> With reference to the qualification or disqualification of a prospective juror to serve in the trial of a given case, the questions that may be propounded necessarily vary with the varying issues, circumstances, and parties, as such issues, circumstances, and parties may operate to influence or bias particular jurors, as distinguished from jurors generally. Because of the great variety of such influences, the character and scope of the questions that may be propounded necessarily cannot become standard, but must be controlled by the court in the exercise of a sound discretion, the court having for its purpose the securing to every litigant an unbiased jury.
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> In practice, parties at the trial are confronted with jurors whom they have never seen, of whom they have never heard, and of whom they must learn upon the *voir dire* examination such pertinent facts and history as will enable them to form a conclusion whether they can or cannot expect from the so-examined juror a fair and impartial trial.[15]

It is obvious that a broad scope must be given trial counsel in questioning the jury panel, and this is customarily done by the court.

It is incumbent upon trial counsel to use diligence in questioning prospective jurors to determine whether they are qualified to decide the case. Unless diligence is exercised to ascertain the facts, the objections to the jurors are waived.[16] Thus, the refusal of a trial court to set aside a verdict because of the deafness of a juror would not be reversed where counsel failed to discover this fact on the voir dire.[17]

In *Moody v. Vickers*[18] it developed on the second day after the trial began, that one of the jurors was acquainted with the defendant and that the juror and the defendant lived in the same

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[14] Eikenberry v. McFall, 33 O. L. A. 526, 36 N. E. 2d 27 (1941).

[15] Pavilonis v. Valentine, 120 Ohio St. 154, 157, 165 N. E. 730 (1936).

[16] Hayward v. Calhoun, 2 Ohio St. 164 (1853); Eastman v. Wright, 4 Ohio St. 156 (1854); Kenrick v. Reppard, 23 Ohio St. 333 (1872); Watts v. Ruth, 30 Ohio St. 32 (1876).

[17] Alm v. Andrews Bros. Co., 9 C. C. 59 (1895).

[18] 79 Ohio App. 218, 72 N. E. 2d 218 (1947).

neighborhood. The record does not show that the juror was interrogated on that matter during voir dire examination. The plaintiff attempted to exercise a peremptory challenge and also challenged the juror for cause. It was held by the Court of Appeals that a peremptory challenge and a challenge for cause were properly overruled at that stage of the case; further, the trial court did not abuse its discretion in refusing to declare a mistrial.

Thus, counsel must ask the pertinent questions on voir dire, or forever hold his peace.

It is customary in personal injury litigation to inquire of the prospective jurors whether they, or any member of their families have ever made a claim or filed a lawsuit as a result of any personal injuries sustained by them. If the jurors remain silent and it subsequently develops that one of the jurors had, in fact, made such a claim, a new trial may be granted.[19]

The mere fact that a juror has formed an opinion is not automatically grounds for disqualification. The issue is whether the opinions so formed would interfere with his rendering an impartial verdict.[20] If a prospective juror stated that he has an opinion, he should not be asked what that opinion is. Rather, he should be asked "without stating what that opinion is, is it one that would take evidence to overcome." Failure to include the warning against stating his opinion might result in the juror stating loud and clear that he knows all about the case and that your client is absolutely in the wrong.

One of the major battlegrounds concerns the right of counsel to interrogate a prospective juror as to any possible interest in a casualty insurance company. Under the present rule, in negligence cases involving personal injury or property damage, a party may ask the prospective jurors whether they have any connection with or interest in a casualty insurance company. If a juror answers the question in the affirmative, he may be asked the nature of the connection, the name of the company, or his interest therein.[21] The prospective jurors may also be interrogated concerning whether they are engaged in the casualty

[19] Cleveland Railway Co. v. Myers, 50 Ohio App. 224, 197 N. E. 803 (1935); Maggio v. City of Cleveland, 151 Ohio St. 136 (1949).

[20] Dew v. McDivitt, 31 Ohio St. 139 (1876).

[21] Dowd-Feder, Inc. v. Truesdell, 130 Ohio St. 530, 200 N. E. 762 (1936). [Modifying the previous syllabi in Pavilonis v. Valentine, 120 Ohio St. 154, 165 N. E. 730 (1929) and Vega v. Evans, 128 Ohio St. 535].

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insurance business,[22] whether they are employed by,[23] stockholders in,[24] adjusters or attorneys for,[25] or interested in[26] a casualty or liability insurance company. They may also be asked whether any members of their immediate families are engaged in the casualty insurance business.[27]

The examination of prospective jurors relative to their interest in casualty insurance companies has even been permitted where defense counsel advised the court and opposing counsel, not in the presence of the jury, that the defendant carried no indemnity insurance.[28]

The Supreme Court has stated that such examination must be conducted in good faith,[29] but the reported decisions shed but little light on what constitutes good faith or lack thereof.

In spite of the fact that it is practically impossible for the trial court to determine whether plaintiff's counsel is interrogating the jury in "good faith" or merely attempting to advise them that the defendant is insured, there is not much doubt but that the majority of the courts will follow this rule.[30]

It would be difficult, if not impossible, to list all of the factors a lawyer might take into consideration in determining whether to accept or reject a given juror. Furthermore, these factors vary greatly from case to case, depending upon the facts, parties and the myriad details that go into civil litigation. There is certain information, however, that trial counsel should get from each juror in order that he might make his selection as intelligently

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191 N. E. 757, 95 A. L. R. 381 (1934); Morrow v. Hume, 131 Ohio St. 319, 3 N. E. 2d 39 (1936) reh. den. July 15, 1936; Salerno v. Oppman, 52 Ohio App. 416, 3 N. E. 2d 801 (1936); Hangen v. Hadfield, 61 Ohio App. 93, 22 N. E. 2d 419, aff'd. 135 Ohio St. 281, 20 N. E. 2d 715 (1939).

There are many decisions premised on the rule of the Vega case, 128 Ohio St. 535 (1934) supra, and earlier decisions which are not consistent with the Dowd-Feder case. These decisions are in effect overruled by the Dowd-Feder case.

22 Salerno v. Oppman, 52 Ohio App. 416, 3 N. E. 2d 801 (1936).

23 Smith v. Robinson, 7 O. L. A. 469 (1928).

24 Cohen v. Smith, 26 Ohio App. 32, 159 N. E. 329 (1927).

25 Woolworth Co. v. Kenney, 7 O. L. A. 572, aff'd. 121 Ohio St. 462, 169 N. E. 562 (1929).

26 Barge v. House, 94 Ohio App. 515, 110 N. E. 2d 425 (1952).

27 Salerno v. Oppman, 52 Ohio App. 416, 3 N. E. 2d 801 (1936).

28 Barge v. House, 94 Ohio App. 515, 110 N. E. 2d 425 (1952).

29 Dowd-Feder, Inc. v. Truesdell, 130 Ohio St. 530, 200 N. E. 762 (1936).

30 56 A. L. R. 1454, 74 A. L. R. 860, 95 A. L. R. 404, 105 A. L. R. 1330, 4 A. L. R. 2d 792.

as possible. Thus he should learn the names, addresses and occupations of the jurors and their spouses. Prior to commencing the voir dire, the bailiff normally gives counsel a sheet of paper on which this information is set forth. The approximate age of the jurors can be determined by observation. The length of time the juror has worked at his present employment should be determined. As a general rule, if a person has worked for one employer a large number of years, a certain amount of stability is indicated. Information concerning prior jury service should be elicited. The jurors serve for two weeks and if a prospective juror is reaching the end of this period, it is quite possible that he has already served on the trial of another case. Normally trial lawyers are aware of the result of other cases that have been tried for the few weeks preceding the trial of his own case. If he feels that a jury in one of these preceding cases reached an unreasonable result and he then finds one of these jurors on his panel, he might well want to take this factor into consideration in deciding whether to exercise a challenge.

The jury should be given an approximation of the length of time the trial will take. Certainly if the case is going to take one or two weeks to try, any jurors who are approaching the end of their two-week service should be advised of this fact and inquiry should be made to determine whether it would be an undue hardship on them to remain for the additional period of time. If a juror finds himself in a case which is running long past the date when he should have been back at his regular employment, it is quite probable that he will not give the case the attention and consideration it deserves. If this fact is brought out on the voir dire, the court will normally excuse such jurors. If a juror had previously served in a criminal case, plaintiff's counsel would want to inform him of the difference in the burden of proof required in civil as opposed to criminal trials and would want to make certain that the juror would not require the plaintiff in civil litigation to prove his case beyond a reasonable doubt.

The prospective jurors should be asked whether or not they know either party, their counsel or whether they had ever read or heard anything about the facts giving rise to the litigation. The names of possible fact and medical witnesses should be read to the jury to determine whether they are known to any of the prospective jurors. This is particularly important where there will be a dispute in the medical testimony. Counsel will some-

times go to great lengths to determine that the jurors know either party or any one from the law firm representing the plaintiff or the defendant only to lose the case because one of the jurors knows one of the testifying doctors. The doctor will invariably have treated the juror, someone in the juror's family or a close friend of the juror. He is always a brilliant surgeon and the juror would believe him if he were to say that black is white.

It is important to learn whether any juror or any member of his immediate family has ever been a plaintiff or a defendant in a lawsuit of the type under consideration. The most objective juror will be swayed by such a factor.

Some factors are better determined by observation and analysis of the available data rather than by direct questioning. Examples of this are the juror's race and religious or ethnic background. These factors may or may not be of significance in a given lawsuit but counsel should be prepared to take them into consideration if he should deem it necessary.

Before exercising any peremptory challenge, counsel should look at the jury list, the next few prospective jurors and ask himself if he will better his position by exercising a challenge. There is nothing to be gained by exchanging a slightly unacceptable juror for one who is even more unacceptable.

The fourth peremptory challenge should not be exercised unless it is absolutely imperative. The only time the fourth challenge should be used is when a juror is so completely unacceptable that a challenge for cause almost but not quite lies and it is impossible to get a more acceptable juror. Invariably if a lawyer exercises his fourth challenge the next juror will know the other party, will know opposing counsel and know something about the lawsuit. Notwithstanding this, he will assure all and sundry that he can be completely impartial and will not be influenced in the slightest degree by these facts. Thus a challenge for cause will not lie and a juror who under normal circumstances would have been excused at once will be seated on the panel.

Everyone has a certain amount of bias, prejudice and preconceived ideas. Jurors are called upon to lay all of these aside during their term of service and determine the case on its merits. The fact that they invariably do so speaks highly indeed of the jury system. By the proper conducting of the voir dire examination, the trial lawyer can do a great deal to make certain that his case is tried to a fair and impartial jury and that a proper and just verdict results.