

PURPOSES OF JURY SELECTION

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Jury selection affords counsel the opportunity to speak directly with the jury. Unlike the other parts of trial, where counsel speak “at” or “to” the jurors, the selection process allows counsel to “break the ice”¹ and personalize themselves and hopefully their clients. Unquestionably, the goal of jury selection is straight forward: Find six jurors to vote in favor of your client. While this is easier said than done, it is the purpose of the attached outline to assist you in achieving that goal.

I: JURY SELECTION

- a) Where to begin?
- b) Begin at the end. Look first to the pattern jury instructions
- c) Know the applicable law
- d) Don’t even consider addressing the jury without a complete understanding of the strengths and weaknesses of your case

II. ESTABLISH YOUR CREDIBILITY

- a) Make the jury trust you
- b) Make the jury want to believe you
- c) Sincerity
- d) Treat every juror with dignity and courtesy - NO exceptions
- e) Don’t waste jurors’ time
- f) Be prepared
- g) Avoid petty arguments with adversary

III. GATHERING INFORMATION ABOUT THE JURORS

- a) Learning about the people who will decide the case
- b) Identifying relevant biases and prejudices
- c) Form of Question

1. Avoid the pure leading question
2. Avoid beginning the question with the following words:

¹ For an excellent discussion of jury selection see Judge Douglas E. McKeon’s treatise, Personal Injury Practice in New York [Bensel, Frank, McKeon, Chapter 9, West; New York Practice Series, 1997]; See Also, outline of D. Carl Lustig III, Road map to Jury Selection in an Automobile Case, on file with N.Y.S.T.L.A., and Devon Scott Reiff’s article, Reiff’s Road Map to Jury Selection, Trial Lawyers Quarter by Vol.24, No.3 Spring, 1994

- Q. Did?
- Q. Were?
- Q. Have?
- Q. Had?
- Q. So?

If a responsive answer is received, the most information you will receive is a short “yes” or “no”

- 3. Force the narrative
- 4. Begin the question with the following words:

- Q. Tell us about...
- Q. Explain...
- Q. Elaborate...
- Q. Describe...
- Q. What do you think of ...
- Q. How do you feel about...

IV: BE MINDFUL OF TIME LIMITATIONS

- a) Make sure you find out time limitations before stepping into selection room
- b) Prioritize issues in advance
- c) Use juror questionnaires effectively and efficiently

V: AVOID EMBARRASSING A POTENTIAL JUROR

- a) No legalese
- b) Simple, common words and easy to understand explanations
- c) If the question might tend to embarrass a juror, consider asking the question outside the presence of other jurors

VI: EDUCATING THE JURY

- a) A succinct statement of your contentions
- b) Role of jury
- c) Role of Judge
- d) Dual role of attorney:
 - 1. Advocate for client
 - 2. Officer of the court

VII: DEALING WITH PROBLEM ISSUES

- a) First, consider the Motion In Limine
 - b) Danger in ignoring problem issues
 - c) Better to admit weakness and meet issues head on
 - d) Deal with problem issues calmly and forthrightly
1. Attempt to identify jurors who will place undue or conclusive weight on evidence of problem issues
 2. Attempt to convey that fairness and oath as jurors requires that all relevant evidence be considered
- e) Dealing with sample problem areas such as:
 1. Criminal records
 2. Drug abuse
 3. Alcohol abuse
 4. Suit brought against family member
 5. Lawyer for a client

VIII: HOW TO DEAL WITH LIABILITY ISSUES

- Comparative fault
- Facts that seemingly fault your client
- Assumption of risk

IX: HOW TO DEAL WITH DAMAGES ISSUES

- a) Jurors role with respect to damages
- b) Monetary compensation as only remedy
- c) Use of open ended question to explore jurors feelings of:
 1. Pain and suffering
 2. Loss of enjoyment of life
 3. Pecuniary damages
 4. Special damages
 5. Mitigation of damages
 6. Sympathy
 7. Cynicism

X: USE OF LEADING QUESTIONS

- a) As mandated by CPLR i.e. Insurance question (CPLR 4110)
- b) To educate other jurors

While there is no one correct way to select a jury, often times the individual Judge's rules for selection will dictate how counsel must proceed. Prior to the start of jury selection, make sure you know which rules govern. Although there has been a movement to unify the process, too often individual Court's have their own modification of the rules. The attached Appendix explores various selection

rules.

WHITE'S RULES FOR JURY SELECTION

- (1) **General questions to panel:** Counsel first ask general questions to all jurors in the room to determine whether any prospective juror has any knowledge of the subject matter, the parties, attorneys, or prospective witnesses. Counsel may question jurors individually where a response from a juror requires further elaboration. A challenge for cause may be exercised at this time. [22 NYCRR § 202.33]

- (2) **“Questioning of jurors in rounds”:** After the general questioning of the group of prospective jurors, the questioning then proceeds in “rounds” beginning with the seating of six prospective jurors. Where undesignated alternates are used, the number of jurors seated is six plus the number of alternate jurors that will be seated. For example, if two alternate jurors will be seated, the number of jurors seated in the round will be eight. Each round consists of the following:
 - Seating prospective jurors in the jury box:
 - Questioning of prospective jurors;
 - Removal of seated prospective jurors upon challenges.[22 NYCRR § 202.33]

- (a) **Challenges for cause:** Jurors removed for cause are immediately replaced during each round. Challenges for cause must be made as soon as the reason for the challenge becomes apparent and prior to the exercise of peremptory challenges. [22 NYCRR § 202.33]

- (b) **Order of questioning by counsel:** Plaintiff’s counsel questions the prospective jurors first, followed by counsel for the remaining parties in the order that they appear in the caption. Counsel are permitted to ask follow-up questions. Questioning reverts to plaintiff’s counsel when a juror is removed for cause and replaced by another prospective juror. [22 NYCRR § 202.33]

- (c) **Peremptory challenges:** Peremptory challenges are

exercised after the questioning and the exercise of challenges for cause. [22 NYCRR § 202.33]

- 1) **Alternating challenges:** Peremptory challenges are exercised one at a time alternatively. [22 NYCRR § 202.33]
- 2) **First round:** In the order that they appear in the caption, the attorneys for each side exercise one peremptory challenge by removing the prospective juror's name from a "board" passed between counsel. Counsel may waive making a peremptory challenge. A second peremptory challenge can be made within this round after the attorneys for the other side have been given a chance to exercise their first peremptory challenge. The board circulates back and forth until no other peremptory challenges are made. Note, counsel last able to exercise a peremptory in a round is not confined to one single challenge, but may then exercise one or more peremptory challenges, if any remain [22 NYCRR § 202.33]
 - a) **Waiving a challenge:** If counsel waives a peremptory challenge he cannot exercise a peremptory challenge after the waiver in that round. Counsel can exercise his remaining peremptory challenges in subsequent rounds. [22 NYCRR § 202.33]
- 3) **Subsequent rounds:** The exercise of peremptory challenges in subsequent rounds alternates from side to side.
 - a) **Multiple parties on the same side:** Where there are multiple parties on the same side, the exercise of peremptories will depend on how the parties have allocated that side's challenges among themselves, or how the court has allocated them. [CPLR 4109]
 - (d) **Seating of jurors:** Jurors who are unchallenged at the end of each round are sworn and removed from the jury room. [22 NYCRR § 202.33]
 - (e) **Replacement of challenged jurors:** The challenged jurors are replaced and a new round of questioning begins. [22 NYCRR § 202.33]

- (f) **Selection of designated alternate jurors:**
Designated alternate jurors are selected after the six jurors are selected, in the same manner as the regular jurors. [22 NYCRR § 202.33]
- 1) **Peremptory challenges to designated alternates:** The order of the exercise of peremptory challenges to the alternate jurors continues as the next round following the last round of challenges to the regular jurors.
- 2) **Compare -Nondesignated alternate jurors:**
Nondesignated alternate jurors are chosen and drawn at the same time as the alternate jurors. The number of peremptory challenges is the sum that would have been available to challenge both jurors and designated alternates. [22 NYCRR § 202.33]

ANOTHER VERSION OF
WHITE'S RULES FOR JURY SELECTION (1991 VERSION)

Civil juries in IAS Part 40 shall be drawn in accordance with the following procedure:

1. Each attorney may state generally the contentions of his or her client, and the names of the parties, attorneys and the witnesses likely to be called. However, counsel may not read any of the pleadings in the action during voir dire, nor may the potential jurors be informed of the amount of money at issue.
2. Questions will then be directed by counsel to the panel as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. All questions which may be asked of the panel as a whole – for example, whether any of the prospective jurors owns stock in a casualty insurance company - must be asked generally. A response from a juror which requires further elaboration may be the subject of further questioning on an individual basis.
3. Questions which assume the existence of disputed facts or the applicability of specific principles of law shall be avoided. No hypothetical questions or illustrative examples are permitted.
4. All challenges shall be taken in front of the panel unless counsel agree beforehand to exercise their challenges outside the hearing of the prospective jurors.
5. Colloquy by counsel shall be restricted to the period when counsel are introducing themselves and stating their contentions. Thereafter, all remarks to the jurors are to be in question form.
6. Comments of a personal nature are to be avoided. Counsel's back problems, vacation plans or other life experiences are not relevant to the selection of an impartial jury.
7. Counsel are to remain behind the counsel table while addressing the prospective jurors.
8. A challenge for cause must be made as soon as reason therefor becomes apparent. If it is not, the challenge is deemed waived. Similarly, objections to remarks made by opposing counsel must be brought to the attention of the court immediately, if not resolved among the attorneys, or the objection shall be deemed waived. Under no circumstances are counsel to air any disputes between themselves before the prospective jurors.
9. If alternate jurors are to be used, their selection will take place after selection of the first six member jurors. Challenges to alternate jurors are "per seat."
10. Counsel are to report to the Courtroom of IAS Part 40 after jury selection. At that time, the Clerk of IAS Part 40 should be advised as to the need for special equipment (if available), or special

assistance, such as an interpreter needed for the trial. If an interpreter is requested, please advise the court personnel if a particular dialect is involved.

11. Counsel are not to mention or imply anything about the duration of the cases to the prospective jurors, and may not ask a prospective juror whether he or she would rather sit on another case.

12. If another attorney, while speaking to the panel, makes a remark or asks a question which you deem objectionable or inappropriate, you are to simply say “objection” then ask the other attorneys to step out of the room. If the matter cannot be resolved amicably among counsel, obtain a ruling. As indicated in #8, there is to be no colloquy about the dispute before panel.

13. Discussions of legal concepts such as “burden of proof” are the province of the Court and are to be avoided by counsel.

14. The selection process shall be conducted as follows:

(a) Upon completion of questioning by all attorneys, peremptory challenges shall be exercised singly and alternately, by rounds, as provided herein. The first round challenge is to be commenced by the party which has the right to make the first opening statement during the trial, and continue in like order until no party wishes to exercise any further challenges in that round. A party will be deemed to have consented to the jurors remaining at the end of a round when his or her counsel does not exercise any further challenges. A party will have waived a peremptory challenge to any juror who was seated in a prior round when during the prior round such party failed to exercise a challenge.

(b) The plaintiff shall be the first to question the jury in each and every round.

(c) In exercising the challenges in the second round, the party with the right to make the second opening statement shall commence the challenges; and in the third round, the party with the right to make the third opening statement shall commence the challenges; and in the third round, the party with the right to make the third opening statement shall commence the challenges; and so on.

(d) After each challenge is exercised, the “challenge board” is passed to opposing counsel and rotated. As long as a party wishes to continue to make challenges in a round, the Board must be returned to him or her, provided said counsel has not exhausted all challenges.

(e) At the conclusion of each round of challenges, those jurors remaining shall be sworn and excused from the jury room.

(f) When a juror is removed, either for cause or on content, said seat is not refilled until the end of each round.

(g) If any attorney has a question as to the methodology of the jury selection process in this part, counsel should consult a member of the jury staff or IAS Part 40 for clarification.

STRUCK METHOD

Under the “Struck Method” jury selection is made from an initial panel of 25 prospective jurors who are randomly seated. The size of the panel may be decreased if fewer prospective jurors are needed, due to the use of designated alternate jurors or for any other reason. The jurors are questioned en masse rather than in small groups. The order of seating is maintained throughout the voir dire. [22 NYCRR § 202.33]

- (1) **General questions to panel:** Counsel first pose general questions to the group of prospective jurors to determine whether any prospective juror has knowledge of the subject matter, the parties, or the attorneys. Counsel may question any prospective juror individually where a response from a juror requires further elaboration. Challenges for cause can be exercised at this point. [22 NYCRR § 202.33]
- (2) **Order of questioning of jurors:** After the general questions to the panel are completed, plaintiff’s counsel proceeds with his questions to the prospective jurors, followed by defense counsel. Follow-up questions may be asked. [22 NYCRR § 202.33]
 - (a) **Multiple parties:** In cases where there are multiple Parties, questioning by counsel proceeds in order in which the parties’ names appear in the caption. [22 NYCRR § 202.33]
- (3) **Challenges for cause:** A challenge for cause should be made as soon as the reason for the challenge becomes apparent. All challenges for cause to any prospective juror must be made at the end of the questioning period. [22 NYCRR § 202.33]
- (4) **Adding jurors to the panel -“jury panel number”:** Additional jurors are added to the panel if, after the challenges for cause are exercised, the number of remaining prospective jurors including any alternates where non-designated alternates are being used, is less than the “jury panel number.” The “jury panel number” is the total number of jurors to be selected plus the maximum number of peremptory challenges allowed.

Jurors are added until the number of prospective jurors not subject to challenge for cause equals or exceeds the “jury panel number.” The replacement jurors are then questioned by counsel in the same order and in the same manner as the original jurors. [22 NYCRR § 202.33]

- (5) **Peremptory challenges:** Peremptory challenges are made after all the prospective jurors in the panel have been questioned and after all challenges for cause have been made. [22 NYCRR § 202.33]
 - (a) **Order of peremptory challenges:** Beginning with plaintiff’s counsel, peremptory challenges are being made one at a time by counsel for each side by alternately striking a single juror’s name from a list or ballot passed back and forth until all challenges are exhausted or waived. [22 NYCRR § 202.33]
 - 1) **Multiple parties:** In cases where there are multiple parties, peremptory challenges are exercised depending upon the allocation made by the parties on a particular side, or the allocation made by the court, where the court allocates a side’s peremptory challenges.
 - (b) **Waiver of peremptory challenges:** A peremptory challenge cannot be made after counsel has waived a peremptory challenge. [22 NYCRR § 202.33]
 - (c) **Resolving “Batson objections”:** Any Batson objections must be resolved by the court before the struck jurors are dismissed. [22 NYCRR § 202.33]
 - (6) **Selecting jurors:** Trial jurors, including non-designated alternates when they are used, are selected after all peremptory challenges have been made. The jurors are selected from the prospective jurors remaining on the panel in the order in which they have been seated. [22 NYCRR § 202.33]
- (7) **Selecting designated alternate jurors:** If designated alternate jurors are being used, they are selected after the selection of the six regular jurors in

the same manner as the regular jurors. However, unless otherwise directed by the court, the initial panel consists of 10 prospective alternates. [22 NYCRR § 202.33]

- (a) **“Jury panel number”**: The “jury panel number” for designated alternate jurors is the number of alternates plus the maximum number of peremptory challenges allowed. [22 NYCRR § 202.33]
- (b) **Peremptory challenges**: Each side is allowed one peremptory challenge for every two alternate jurors.
- (c) **“Strike and replace method”**: The strike and replace method can be used only in those districts where the specifics of the method have been submitted to the Chief Administrator for the district. [22 NYCRR § 202.33]