Chapter 2
Jury Selection

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§ 2:1 Introduction

§ 2:1.1 Roles of Judge and Counsel

Approaches to jury selection vary widely, as do opinions of the efficacy of the process. The general procedure of asking questions of prospective jurors is handled in different ways by courts, failing into three patterns, with much local variation:

1. **Federal mode (traditional):** The trial judge does *all* of the jury selection questioning, counsel participating only through submission of written questions for the judge's consideration.
2. **State mode (common):** Counsel has the principal opportunity to ask questions of the veniremen, often after the briefest of general questions are asked by the judge.
3. **Mixed questioning:** More and more federal judges are sharing the opportunity to question jurors, conducting a set of preliminary general questions and giving counsel the chance to ask general or specific questions of the panel and individual jurors, sometimes under a time limit.

Under all of these procedures, counsel will be juggling several concerns:

(1) whether each prospective juror is fitted to serve impartially, or is subject to challenge for cause due to some relationship to the parties or the transactions;

(2) what the juror is like (will the attorney be understood, share common expressions and values with the juror);

(3) toward which side (if any) the juror will likely be most sympathetic; and

(4) whether the questioning process can communicate something of the nature of the suit and this side's view of it.

§ 2:1.2 Outlines of Two Common Procedures

The exercise of challenges to excuse potential jurors is also subject to considerable local variation. The most common approach calls for preliminary seating of a small group of possible jurors, selected at random from the larger prospective panel brought to the courtroom by the jury clerk or bailiff. If thirty persons are brought to the courtroom, perhaps fourteen will be placed in the jury box (assuming a twelve-person jury and two alternates are to be selected).

After completion of questioning, each counsel is given a "pass" at the list of jurors seated preliminarily. If any juror is stricken, a new person is seated in the box in the vacated seat and is questioned. Thereafter another pass is made, giving counsel another opportunity to strike a juror; and any vacancies are filled with jurors who must then be questioned. After all peremptory challenges are exhausted and challenges for cause disposed of by the court, the jury is ready. An alternative procedure calls for the seating of a large number of veniremen (perhaps twenty-five) in numerical order as randomly pulled by the clerk, with all questioning of the panel and individuals to be completed before any challenges are exercised. Under this approach, when the questioning is over and any challenges for cause ruled upon, each side may exercise its peremptory challenges against any of the persons seated in the venire panel. The lowest numbered jurors not struck become the jury (for example, a six-man jury would be made up of the six jurors with the lowest numbers who were not struck by either side).

[A] Typical Jury Selection Process

1. Clerk telephones jury room to order a venire panel from the larger roster of jurors notified to appear at the court on that day.
2. Clerk swears the assembled panel, and places their jury cards into the hopper (wheel) for random pulling.

3. Clerk admonishes the assembled panel to heed the questions.
4. Clerk calls first six panelists by pulling name cards from the wheel and placing them on a chart or board (paddle) found in the courtroom.
5. Judge delivers preliminary voir dire questions, addressing remarks to the six in the box *and* remaining veniremen.
6. Judge questions first panelists individually.
7. Judge excuses those obviously unsuited for service.
8. Challenges for cause are discussed at the bench.
9. Judge excuses any jurors successfully challenged for cause.
10. First wave "pass" to counsel for peremptory challenges (paddle passed to each side; court practice will dictate whether they exercise one, two, or three challenges each on the first pass).
11. Replacements for excused jurors are pulled, seated, and questioned.
12. Second pass of the paddle to counsel for challenges.
13. Replacements seated, more questions, challenges, until exhausted.
14. Alternates seated, questioned, challenged, replaced, in same manner.
15. Remaining veniremen are excused, directed to central jury, with their jury cards.
16. Clerk swears the selected jurors and the alternates.

[B] Alternative "Struck Jury" Procedure for Jury Selection

1. Clerk telephones jury room to order a venire panel.
2. Clerk swears the assembled panel and places their jury cards into the wheel for random pulling.
3. Clerk admonishes the panel to heed court comments and questions.
4. Clerk calls predetermined number of jurors from the wheel, giving each a number in order. The number ranges from around twenty to thirty-five, and is adopted based on the number of challenges in the case.
5. A list of the jurors called is made by the clerk.
6. Prospective jurors who are called sit in jury box and rows of chairs or benches near the box; remainder of venire panel waits behind the rail.

7. Judge delivers preliminary voir dire questions, addressing remarks to all jurors whose numbers are called.
8. Panel members who were called are then questioned individually by the court.
9. Judge excuses those obviously unsuited for service.
10. Challenges for cause are discussed with counsel at the bench.
11. The roster sheet of the called jurors is passed back and forth between counsel (who exercise one, two, or three challenges each time it is handed to them, as per court direction) until each side has exhausted its challenges or waives further challenge.
12. Clerk asks permission of court to read the names of *lowest numbered* (six) or (twelve) unchallenged jurors. "_____, you are Juror No. 1, please have a seat in the box; _____, you are Juror No. 2," etc.
13. Clerk directs selected jurors to seats in the box.
14. After court permission, clerk reads names of next two unchallenged jurors (or any number, if alternates are desired) and seats them.
15. Remaining jurors pulled from the box and all veniremen who have been waiting behind the rail are excused.
16. Clerk swears the selected jurors and alternates.

Proper management of either of these processes requires constant attention to the answers given and to the procedures of the court. Of paramount importance is the procedure by which vacant seats on the panel will be filled (for example, will previously questioned prospective jurors be "moved up" into the seat of an excused venireman, or will a new member of the venire be placed into the seat for initial questioning).

§ 2:2 Federal Statutes and Rules

Section 1870 of 28 U.S.C. provides:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> [Note: In criminal cases the government has six peremptory challenges, the defendant ten.]
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

Rule 47 provides:

> (a) EXAMINING JURORS. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.
>
> (b) PEREMPTORY CHALLENGES. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.
>
> (c) EXCUSING A JUROR. During trial or deliberation, the court may excuse a juror for good cause.

Provisions concerning the number of jurors are set forth in Rule 48:

> (a) NUMBER OF JURORS. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).
>
> (b) VERDICT. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.
>
> (c) POLLING. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

"Alternates" abolished. Current Rule 47, set forth above, reflects the fact that in federal civil juries the former practice with respect to alternate jurors has been abolished. Alternates were long used because of the assumption that a jury would consist of exactly twelve members. Under that regime, additional jurors were often selected to be used as substitutes for members of the panel who are for any reason were excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

Under the current system reflected in Rules 47 and 48, the court will seat a jury of six to twelve persons, and the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial. Sickness, family emergency, or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. (It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.)

It appears that the minimum size of a jury consistent with the Seventh Amendment is six.[1] If the parties agree to trial before a smaller jury, a verdict can be taken, but the drafters of the current rules have indicated in advisory notes that parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished under Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

The Advisory Committee has stated that in exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in the Supreme Court's decision in *Ballew v. Georgia*.

§ 2:3 Conduct of the Questioning

When counsel are allowed under the prevailing court rules to participate in the jury selection questioning, there are several goals:

- To acquaint the jury with the case, parties, and counsel.
- To ascertain any bias or other grounds for dismissal for cause.
- To probe for more subtle factors that would influence a juror to favor one side or the other.
- To indoctrinate the jury into a mentality of fairness, open-mindedness, and obedience to the court's instructions.

There are several categories of information that logically suggest themselves to counsel in framing questions to achieve these goals. They include:

- ❑ Relationship to parties, whether by blood, marriage, employment, or other financial tie, such as stock ownership in a corporation involved.
- ❑ Relationship to counsel.
- ❑ Relationship to witnesses that might affect impartiality.

- ❑ Socio-economic background to the extent that it is thought to bear on favoritism in the case at hand.
- ❑ Racial or ethnic prejudices of the potential juror.
- ❑ Exposure of the juror to pretrial publicity or other information about the case.

All questioning of potential jurors should be conducted politely, and an introduction should be given to explain the necessity for questions that might seem to pry into private affairs. Counsel should strive to convey the aura of an objective inquiry looking for neutrality in the jurors, without suggesting that those who are not selected are bad. The jury selection presentation should be outlined well in advance. Here is a partial outline for use in simple cases:

§ 2:3.1 Sample Notes for Voir Dire

1. Introduce self and others at table
2. Explain that you are going to ask questions
   - I don't intend to offend
   - Not out of personal curiosity
   - Not looking for good persons or bad persons
   - Just trying to see if there is anything in each of backgrounds that will affect the ability to weigh the evidence impartially for both sides
3. Tell the array that you are going to describe the topics that are involved in this case to let them decide better if there is any reason why they should not sit; describe case in thirty seconds
4. General questions for the group as a whole:
   - If anyone has a question or a problem, or if you think the question applies to you, *please raise your hand*

(Now Addressing the Entire Venire)

1. Can each of you read, write, speak, and understand the English language?
2. Can you hear and see well?
3. Is there any juror who will be unduly burdened with financial, business, or family problems if the trial of this case goes late into the night or requires as much as _____ days to try?
4. Do you think that you know anything about this case? Have you read anything about it or have you heard any discussions concerning it?

5. If any of you has previously served on a jury of any kind, in either state or federal court, and in either a civil or criminal trial, would you please raise your hand and tell us where and when and the kind of case.
6. The plaintiff in this case is:

(Ask Plaintiff to Stand)

The defendants in this case are:

(Name Defendants if Corporations, Stand if Individuals)

7. Do you or any of your close friends or relatives work or have any business connection with any of the parties to this action?

   (If so, would that fact influence you in any way in reaching a fair and impartial verdict in this case?)
8. The plaintiff in this case is represented by_____

   Of the law firm of _____

(Ask Attorney(s) to Stand)

9. The defendant(s) in this case are represented by _____

   _____

   Of the law firm of _____

(Ask Attorney(s) to Stand)

10. Has any of you ever been represented in any legal matters by any attorney connected with this case or by the law firm with which these attorneys are associated?
11. To your knowledge, has the firm for which you work ever been represented by any of the attorneys connected with this case or by the law firms with which these attorneys are associated?

    (If so, would that fact influence you in any way in reaching a fair and impartial verdict in this case?)
12. Would the fact that this case involves a claim by an individual against a company so influence you that you could not be fair and impartial in deciding the issues involved in this case?
13. In connection with your employment, do you have anything to do with the adjustment of claims or the settlement of claims for damages?
14. Have you or any member of your immediate family ever had a claim against anyone for damages?
15. Has anyone ever had a claim for damages against you or a member of your immediate family?

(If so, what kind of claim? What did it involve? Was that claim compromised or settled out of court, or did the matter go to trial? Would that fact influence you in any way in reaching a verdict in this case? Were you satisfied with the outcome of that claim?)

16. Has any member of the jury ever incurred personal injuries as a result of an accident?
17. Do you know any of the following persons who may be called to testify in this case?

(Read Witness List from Pretrial Order)

18. Have you or any member of your immediate family ever been employed as a _____?

    (If so, would that fact so influence you that you would not be fair and impartial in reaching a verdict in this case?)
19. Have you ever been, or are you now, associated in any way with the _____ industry?

    (If so, would that fact so influence you that you would not be fair and impartial in reaching a verdict in this case?)
20. If you are selected as a juror in this case you will be required to put aside any feeling of passion or prejudice and decide this case solely on the evidence introduced during the trial and the instructions that the court will give you concerning the law. Will you do that?
21. Does any of you know of any reason why you think that you could not sit in this case and render a just, fair, honest, and impartial verdict?
22. The judge will instruct you at the close of the case on the legal rules which you will apply. Is there anyone here who will not be able to follow these instructions? If your own view is that the law should be different, would anyone here not follow the court's direction anyway?
23. Has anyone had any experience that makes them unhappy or uncomfortable sitting as a juror in this case?
24. Is there anything else any of you thinks we should know about you as we get ready to begin this case?

5. Questions for Individual Veniremen

   Name?

   Address? How long there? Type of dwelling?

   Married?

Children? Ages? Names? Occupations? Employed? Where? How long? Tell us what you do [did]? *[looking for details concerning whether job requires careful checking; also, for special knowledge or expertise.]*

Do you drive a car?

Hobbies [draw the juror out; what does he or she like; how is time spent; can you relate to juror?]

6. Thank you [Ladies] [and] [Gentlemen].

§ 2:4 The Jury Chart for Counsel

The only mechanical aid of proven utility in selecting jurors is to construct and duplicate on a large sheet of paper a simple chart along the lines shown here:

7	8	9	10	11	12		
1	2	3	4	5	6		

Such a chart can be prepared in advance and sufficient copies made to allow counsel to run through numerous prospective jurors during an extended voir dire. Without such a chart it is exceedingly difficult to keep accurate notes and to avoid needless repetition in questions.

§ 2:5 Sources of Information

In most jurisdictions jurors complete a questionnaire, either at the time the clerk qualifies them for inclusion in the master jury list, or at the time they are notified of a period of jury duty. Usually those response forms are available for inspection by counsel during regular business hours prior to the date of trial. At a minimum counsel will obtain the correct spelling of names, and often addresses and employment information as well. Some states and federal districts utilize elaborate survey instruments for prospective jurors to fill out, which will set forth a detailed life history of the jurors.

In metropolitan court districts in many parts of the country there are jury information services which provide a synopsis of available information about the entire venire summoned for a particular time period. While there are serious risks associated with private investigation of jurors, some counsel make use of discreet inquiries by an investigator where the scope or nature of the case warrants and where no statute or local court rule prohibits such inquiries.

§ 2:6 Objections to the Adversary's Voir Dire

Considerable deference is accorded by most trial lawyers to the jury selection style of the adversary. Where the opposing lawyer violates basic principles, however, an objection should be made. Reference to inadmissible matter, for example, should not be permitted. A catalog of possible grounds for objections during the opponent's jury selection questioning is as follows:

OBJECTIONS IN JURY SELECTION

- ❑ Asks juror to prejudge evidence
- ❑ Cross-examination barred
- ❑ Form of question improper
- ❑ Humiliates or embarrasses juror
- ❑ Hypothetical question misused
- ❑ Insurance overly stressed
- ❑ Indoctrinating on law or facts
- ❑ Knowledge of law being tested
- ❑ Misstates the law
- ❑ Not related to any challenge for cause
- ❑ Prejudicial or inflammatory
- ❑ Protracted examination

§ 2:7 Pitfalls to Avoid in Jury Selection

Analysis of hundreds of jury selection efforts by inexperienced lawyers reveals a wide variety of styles and many approaches that have questionable utility. On the other hand, meaningful tests of the results are not available. These major defects, however, are recognized:

- Failure to give a few seconds of introduction to set the context of the questioning and put the jurors at ease about personal privacy.
- Failure to make use of general questions to the entire panel before turning to more repetitive questions of individual veniremen.
- Misuse of names of jurors or parties. Mispronouncing the name of a prospective juror can be taken as offensive, at least once it has been pronounced correctly in open court.
- Failure to take sufficient notes to avoid repetition and to permit good use of challenges.

- Failure to keep sufficient eye contact with jury to enable counsel to detect comments or gestures.
- Failure to follow up leads, both those suggesting a basis for removal and conversational leads that would permit counsel to draw out and befriend the juror (for example, hobbies, work problems).
- Failure to identify obvious sources of prejudice in the panel or a particular venireman.

Note to Chapter 2

1. *See* Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law).