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Thank and Excuse: Five Steps Toward Improving Jury Selection

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Editor Note: Yet another indication that the civil jury system is likely not dying. A deeply felt piece on why peremptory strikes and jury selection processes are so important for justice.

Periodically over the years there have been calls to eliminate peremptory challenges, the challenges that attorneys use to strike jurors they believe will be unfavorable toward their cases. The main arguments given for removing the peremptory challenge are that the challenges can be used to discriminate against a particular protected class (e.g., minorities, women) or that they can unfairly stack a jury in favor of one side over the other.

The elimination of peremptory challenges would, in fact, harm the rights of the parties to obtain a fair and impartial jury and is a wrong-headed solution to a very real problem that does exist in today's jury selections across the country.

Most of the existing problems in the court system today related to jury selection stem from the fact that we have a poorly understood definition of juror bias as it truly exists, and poorly implemented procedures to investigate and discover if a juror has a bias that would impair his or her ability to be fair and impartial in how they listen to the evidence. In the court system, we do not really make distinctions between biases, prejudices, habits, preferences, inclinations, or even impressions. These distinctions are important in discerning whether a particular attitude or belief might impair the neutral, objective evaluation of the evidence by a juror. Some jurors may have biases against minority groups simply because they have not interacted with these groups in day to day life, while others may have very strong feelings against a particular group and blame them for the social and economic ills in this country. Bias is perception with innumerable variables and colors.

Courts, for the most part, only recognize explicit bias, a bias that the juror himself or herself recognizes and acknowledges. On the rare occasions a juror does identify an experience or attitude that may affect their ability to be fair and impartial, the courts simply asks the juror whether they can "set it aside". Most jurors dutifully answer in the affirmative. Compounding this problem is the fact that attorneys and judges traditionally ask closed-ended Yes/No questions about biases without giving the juror the opportunity to explain. So, if a prospective

juror identifies a bad experience they had with a doctor when being selected for a medical malpractice case, they are usually just asked whether they can "set that experience aside", and are forced to only answer yes or no. While some judges may dismiss the juror for cause if they express a particularly hostile attitude, many judges will seat the juror if they say they can set it aside, no matter how bad their experience.

Additionally, many attorneys still believe they should spend their time in voir dire inculcating or priming the jury about the themes of their case. Judges typically hate this and this behavior is a primary reason that voir dire time has been so drastically reduced in recent years. It creates a focus on the case rather than the juror, with attorneys and judges exacting a series of promises from jurors about open-mindedness and ability to follow the law that they don't know if they can keep, rather than exploring potential issues and areas of bias.

The net result is that the attorneys are left with little or scant information about jurors. They then resort to stereotypes and biases, implicit or explicit, when making their peremptory strikes, which can in fact result in a Batson situation where strikes are being discriminatorily used based on demographic information.

What's missing from this process is a frank and candid discussion with jurors during voir dire about *how* their experiences and attitudes might affect their ability to listen to the case or deliberate to a verdict. If the judge is inclined to even allow attorneys to inquire about bias (which can be rare, particularly in Federal Court), the courts mistakenly believe that the main job of jury selection is to identify and neutralize biases rather than take a serious look at how biases affect a juror's thought and decision making process. It is not the *presence* and *acknowledgement* of a bias that automatically creates an inability to be fair and impartial, it is whether that bias is significant enough to *impair* the ability of a juror to fairly and impartially judge the case. So in a personal injury case involving a car accident, it is not whether a juror believes there are too many reckless drivers, but a juror's own personal rules of the road when they drive that will steer their collection of evidence: do they always signal a lane change? Do they drive at or above the speed limit? Do they use a cell phone in the car?

But with the lack of skill in asking questions that elicit a juror's true feelings, the lack of skill in identifying bias, and the limited time and questioning the courts now allow, attorneys resort to their own demographic formulas in selecting juries. Do I want men or women on this panel? Old or young? Educated or uneducated? Blue collar or white collar? Attorneys then exhibit their own biases by forming rules about whom they do and don't select. Civil defense attorneys are often suspicious of teachers and union members. Plaintiff attorneys often don't like engineers, bankers, and executives. Criminal defense lawyers don't like Republicans. And it has been shown, that in some trials and even jurisdictions, prosecutors have used peremptory challenges to systematically try and eliminate African-Americans from juries.

But that doesn't mean we should eliminate peremptory challenges; instead we should reform the voir dire process and ensure peremptory challenges are being used properly. The concept of peremptory challenges has been in place since Roman times when each side would choose one hundred jurors and then eliminate fifty from their opposing side's ranks, leaving a panel of one hundred jurors. English common law originally allowed for thirty-five peremptory challenges before Parliament finally eliminated the prosecutorial right to challenges in 1305 and eliminated peremptories for the defense in 1988. While there is no explicit Constitutional right to peremptory strikes in this country, we do have a right to an impartial jury. These days, jurors have knowledge of (or at least access to via the internet) a broad range of topics that directly relate to the cases we try. Opinion often accompanies knowledge, which can affect impartiality.

Better procedures can be implemented that allow both the judge and the attorneys to a have fuller understanding of a juror's potential biases so they can make more informed choices about cause and peremptory challenges. These procedures can be remarkably efficient and even time saving as long as the judge and litigants agree that the purpose of jury selection is to get to really know the jurors on the panel: to understand if and how their experiences, attitudes, and temperament may affect how they listen to and decide the case. Please note that some of the recommendations below are completely counterintuitive to how attorneys and judges are trained.

1. Each side identifies all the issues in their case that they believe may give rise to a bias or negative impression of their case or client. This requires attorneys to step into opposing counsel's shoes. It also requires planning and time when attorneys are usually focused on opening statements and first witnesses.

2. Formulate open-ended questions about that bias or impression. These include questions like, "How do you feel about…?" or "How do you think about…?" or "What's your opinion about…?" Which question would yield better information about whether a juror could be fair and impartial in a criminal case? "Will you agree to treat a police officer's testimony the same as any other witness?" or "How do you feel about law enforcement?". There is a world of difference in the quality of responses to these questions, and only one of these questions truly reveals a potential bias. This is counterintuitive to attorney training as sometimes vague or ambiguous questions are the best voir dire. They invite the jurors to impose their interpretation of the question, giving the attorneys and the judge more of a juror's genuine feelings and beliefs. Please note that asking *whether* they have an opinion provides an excuse for jurors not to speak.

3. Ask follow-up questions. Given the foreign and intimating environment of a courtroom, jurors are naturally reluctant to speak candidly about their opinions on difficult subjects. Their first responses don't always express their true feelings. By making follow-up questions like "What else?" or "Tell me more about that", a juror is prompted to reveal deeper or more meaningful attitudes he or she may have on specific case issues.

4. Ask hard questions. Cases involve tough issues and jurors have to make tough decisions. Jurors don't always have quick and ready responses to questions about the death penalty or antitrust laws. While, some jurors don't believe in the death penalty or in anticompetitive business conduct, many jurors do not know how they themselves feel about these complex and difficult issues. So, in an employment case, a question like, "How do you feel about race relations in this country?" may bring a considered pause as the juror reaches inside to look at how he or she really feels and to figure out the best (and most socially desirable) response. Leave room for their silence. That struggle, by itself, can tell the attorneys and judge a great deal about the juror.

5. Be open-minded and curious. In the legal profession, lawyers and judges are used to controlling and judging information, but it is much more useful in jury selection to forego judging a juror's response and just follow their train of thought. This will tell you the full extent of their attitudes and whether their response is an impression or a full-blown bias. If the attorney (and the judge) is open minded, curious and non-judgmental, jurors will be more candid in their responses. With good questioning, jurors should spend 80% of voir dire speaking, while the attorneys or judge should only spend 20%.

The reason these steps are so important is because jurors are not naturally impartial. We all form impressions and opinions very quickly. Sometimes those attitudes are deeply embedded below conscious awareness. The courts have started recognizing the role of this "implicit bias" and how it drives decision-making, so it takes real cognitive effort to achieve the neutral objectivity the courts expect of jurors. This effort is even heavier lifting when we already have preconceived beliefs or habits borne of years of driving cars, working in various employment situations, or using products and now they are sitting on a jury in a lawsuit with those same issues. Trials are decided by people with their own sensibilities and preferences, and the courts instruct them not to abandon their common sense, so during voir dire we should find out the composition of their common sense.

As for charges that attorneys use peremptory strikes to somehow "stack" a jury in their favor, this is true with one important caveat. Of course each side wants a more favorable jury for their case. That is advocacy. But each side has an equal ability to ask questions and exercise challenges, thus both have equal opportunity to "manipulate" the jury composition. If there a great juror that one side wants to have on the jury, no doubt the other side sees this and will use a peremptory strike to eliminate that juror. Thus, these challenges provide balance to one side's supposed manipulations.

In 1965, our Supreme Court ruled that peremptory challenges didn't need to be justified (*Swain v. Alabama*), opening the door to the discriminatory use of strikes. This was modified more than twenty years later in *Batson v. Kentucky* and *J.E.B. v. Alabama ex rel T.B.*where the Supreme Court explicitly prohibited the use of peremptory challenges for excluding jurors based on race or gender. If a judge finds a prima facie case of potential misuse of challenges, counsel has to justify why they struck a particular juror. With better quality information about a juror, it would be much easier for a judge to conclude whether counsel had good reasons for their strikes.

In jury selection, the overall goal should be to improve the quality of information that attorneys and judges use to exercise cause and peremptory challenges. Instead of eliminating peremptory challenges, it would be wiser to ensure this important procedure is used properly to secure a fair and impartial jury. Education should always precede elimination. We seek to fully understand and improve this important procedural safeguard before we decide to get rid of it.

Richard Gabriel is a former President of the American Society of Trial Consultants and author of the book Acquittal: An Insider Reveals the Stories and Strategies Behind Today's Most Infamous Verdicts (Berkley Press) as well as the co-author of Jury Selection: Strategy and Science (Thomson West). Mr. Gabriel is a frequent commentator on high profile trials for CNN.