

CHAPTER 29

JURY SELECTION

by
The Honorable David Hittner
and
Eric J.R. Nichols

Table of Sections

- 29.1 Scope Note.
- 29.2 The Composition of the Venire.
 - (a) The Jury Selection and Service Act of 1968
 - (1) The Venire Selection Plan.
 - (2) Statutory Exemptions from Service.
 - (3) Statutory Qualifications for Service.
 - (b) The Act as Applied.
 - (c) Challenges to Adherence to the Act or a Venire Selection Plan.
 - (d) Challenges to the Array.
 - (1) Procedural Requirements.
 - (2) Substance of Challenges.
 - (e) Jury Shuffle.
 - (f) Court Alteration of Panel Selection.
 - (g) Budgetary Constraints on Panel Selection.
- 29.3 The Court's Administration of Voir Dire.
 - (a) The Court's Discretion.
 - (b) Convincing the Court to Allow Attorney Voir Dire.
 - (c) Juror Information Forms.
 - (d) Juror Questionnaires.
 - (e) Preparation for Voir Dire by Court.
 - (f) Content of Voir Dire by Court.
 - (g) Voir Dire by United States Magistrate Judges.
- 29.4 Limitations on Voir Dire by Judges and Attorneys.
 - (a) Limitations by Trial Court Generally.
 - (b) Prohibited Areas of Examination.
 - (c) Remarks by Panelists During Voir Dire.
 - (d) Time Limitations on Attorney Voir Dire.
- 29.5 Goals for Attorney Voir Dire.
 - (a) General Goals.
 - (1) Revealing Grounds for Cause Challenges.
 - (2) Introducing the Panel to the Case.
 - (3) Introducing the Lawyers to the Panel.
 - (4) Introducing the Clients to the Panel.
 - (5) Obtaining Commitments from the Panel.
 - (6) Arguing Merits.
 - (b) Checklist of Areas to Cover in Business Litigation Voir Dire Examination.
- 29.6 Techniques in Attorney Voir Dire.
 - (a) Advocacy Techniques.
 - (1) Preparation for Attorney Voir Dire.
 - (2) Getting the Panelists to Talk.

- (3) What to Look for During Voir Dire.
- (b) Jury Selection Aids.
- (c) Checklist of Jury Selection Issues to Cover with Court at Pretrial Conference.
- 29.7 The Size of the Jury.
- 29.8 Challenges for Cause.
 - (a) Format.
 - (1) Mechanism for Use.
 - (2) Entitlement to Panelist Honesty.
 - (b) Grounds for Challenges for Cause.
 - (1) The Court's Discretion.
 - (2) Particular Grounds for Exercising.
 - (c) Grounds on Which Excuses for Cause May Be Contested.
 - (1) The Jury Selection and Service Act as Grounds for Challenge.
 - (2) Other Statutes.
 - (d) Preserving Error.
- 29.9 Peremptory Challenges.
 - (a) General Format.
 - (b) Number of Strikes.
 - (c) Preserving Error on Equalization.
- 29.10 Restrictions on the Use of Peremptory Strikes.
 - (a) *Batson* and Its Scope.
 - (1) Elimination of Racial Identity Requirement.
 - (2) *Batson's* Extension to Civil Cases.
 - (3) *Batson's* Extension to Strikes by Criminal Defense Counsel.
 - (4) *Batson's* Extension to Gender-Based Strikes.
 - (5) *Batson's* Extension to Strikes on the Basis of Religious Affiliation.
 - (6) Ability of Corporate Parties to Raise *Batson* Challenges.
 - (7) The Striking of White Jurors as Basis for *Batson* Challenges.
 - (8) Strikes Made on the Basis of "Political Statement."
 - (b) Procedure Under *Batson*.
 - (1) Timing of *Batson* Challenge.
 - (2) Format of *Batson* Hearing.
 - (3) Prima Facie Case Under *Batson*.
 - (4) Nondiscriminatory Explanations.
 - (5) Showing of Pretext.
 - (c) Legal Standards for Judging *Batson* Challenges.
 - (1) Panelist Hostility or Sympathy.
 - (2) Relationship to or Affiliation with a Party or Witness.
 - (3) Prior Dealings with Subject Matter.
 - (4) Inattentiveness or Unwillingness to Follow Evidence or Law.
 - (5) Lack of Forthrightness.
 - (6) Background, Employment, and Education.
 - (7) Prior Jury Experience.
 - (8) Panelist Time Conflicts.
 - (9) Physical Characteristics and Youth.
 - (10) Demeanor and Dress.
 - (11) Intuitive Assumptions.
 - (12) Mistake as to Characteristic.
 - (d) Remedy for *Batson* Violations.
 - (e) Preserving Error for Appeal.
 - (f) Standard of Review on Appeal.
 - (g) Status of Peremptory Challenges.
- 29.11 Exercising Challenges for Cause and Peremptory Strikes.

- (a) Exercising Strikes Under the "Struck Jury" Method.
 - (b) Exercising Strikes Under the "Jury Box" Method.
 - (c) Comparing the "Struck Jury" and "Jury Box" Methods.
 - (d) Altering Strike Process by Agreement.
 - (e) Empanelling Alternates.
- 29.12 Conclusion.
- 29.13 Forms.
- (a) Juror Qualification Questionnaire.
 - (b) Sample Juror Questionnaire.
 - (c) Sample Challenge Sheet.
 - (d) Excerpt from Judge's Procedure Manual.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide preceding the Summary of Contents.

§ 29.1 Scope Note

Commentators have described jury selection alternatively as an art, a science, and a guessing game.¹ Experienced trial lawyers view jury selection as a highly tactical, yet always mysterious, exercise in which cases are often won or lost. The various statutes and rules governing jury administration in federal cases are designed to take out at least some of the guesswork in the jury selection process. Those statutes and rules leave a substantial degree of discretion in the hands of the federal district court, however. In fact, the district court has so many options in administering jury selection that a practitioner often encounters a new overall selection process almost every time he or she steps into trial in an unfamiliar federal court.

This chapter sets out those aspects of jury selection that are common to most federal district courts: the method of composing the venire, the judge's administration of challenges for cause, and limitations on voir dire examination by attorneys and the court. This chapter will also discuss the various ways in which federal trial judges exercise their discretion in administering voir dire, structuring the jury, empanelling jurors, and allocating peremptory strikes in multi-party litigation. The discussion of the empanelment of jurors considers the effects over the last 10 years of significant amendments to the Federal Rules of Civil Procedure regarding jury selection. Next, this chapter covers an aspect of federal civil jury selection that the United States Supreme Court continues to develop and make more uniform: the application of constitutional limitations on the use of peremptory strikes. The chapter discusses the applications of the principles of *Batson v. Kentucky*² in the civil context, and considers the scope of *Batson* challenges in federal civil litigation.

§ 29.1

1. Eugene I. Pavalon, *Jury Selection Theories: Art? Science? Guessing Game?*, Trial, June 1987, at 26.

2. 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

and the procedures used by various district courts when conducting *Batson* hearings.

Finally, the chapter offers practice pointers with regard to preparation for the voir dire and the jury selection process, and with regard to actual courtroom jury selection practice.

This chapter is roughly organized in the same way as the jury selection process itself: the composition of the venire from which the federal jury is drawn, the voir dire process, the sizing of the jury, and the exercise of challenges for cause and peremptory strikes.

With the broad discretion afforded federal district courts in administering jury selection, there are few fixed stars to guide a litigant unfamiliar with a particular court's practices. The federal courts have created fairly uniform methods of composing venires under the Jury Selection and Service Act. The relevant statutes and cases have fairly delineated the grounds on which an attorney might successfully base a challenge for cause, and courts, ever fearful of time pressures and "runs" on the jury from panelists seeking to avoid service, tend to construe these grounds strictly. The elimination of the institution of the alternate juror, through amendments to the Federal Rules of Civil Procedure, have further simplified the jury selection process. Case law sets minimum standards for voir dire examination by a court and limits the questioning by courts and attorneys to some degree. Some circuits have found further constitutional limitations on the use of peremptory challenges.

The nuts and bolts of jury selection, however, have been left to each court's discretion. The individual judge may or may not allow the attorneys to conduct voir dire examination. The scope of the voir dire examination that a judge performs or permits is left largely to his or her discretion. Courts have various methods of equalizing peremptory strikes in multi-party litigation—methods that are also subject to review only for abuses of discretion. Finally, even the method of physically empanelling a jury varies from court to court.

Before commencing jury selection in an unfamiliar court, an attorney should check the local rules for the district in which he or she will appear for any applicable rules.³ The attorney might also determine whether the judge has published a procedures manual that contains more precise information on the court's jury selection process.⁴ The attorney might also turn for advice to an invaluable resource: his or her colleagues.

Some preliminary investigation is necessary. If jury selection is, as most experienced trial attorneys believe, not strictly a guessing game, an attorney's failure to understand a court's method of selecting a jury could be devastating to his or her prosecution or defense of a commercial case.

3. See, e.g., C.D. Cal. Local Rule 13.1, reprinted in 1 Federal Local Court Rules (providing for six-member civil juries).

4. See, e.g. *infra*, § 29.13(d) Procedures Manual for Judge David Hittner at 10.

Library References:

West's Key No. Digests, Jury ☞ 1-8, 9-37, 38-56, 57-82(4), 83-142.
 Wright & Miller, Federal Practice and Procedure: Civil 2d §§ 2481-2492.

§ 29.2 The Composition of the Venire

Every experienced trial lawyer knows that when he or she goes to pick a jury in federal court, the jury panel will be made up of persons who reside in the state or, if the state is subdivided into federal districts and/or divisions, the district or division in which the case is pending.¹ But even an experienced trial lawyer may not be familiar with the process by which that panel was composed. Over the last 30 years, beginning with the passage of the Jury Selection and Service Act of 1968, federal courts have developed relatively standard procedures for assembling venires from what were previously, ad hoc procedures developed by various district clerk's offices.

(a) The Jury Selection and Service Act of 1968

In reporting on a draft of a bill that would later become the Jury Selection and Service Act of 1968, a committee of federal judges observed in 1967 that "even judges are often not fully aware of the [venire] selection methods employed because they delegated broad powers to the court clerk or jury commission; and in practice these officials operate independently of the judges so as not to impose additional burdens on already too busy courts."² Judges, as well as the general public, began to take notice of venire selection methods in the 1960s. The use of such venire selection methods as the "key man" system, in which leaders of the community would suggest to jury commissioners the names of suitable jury candidates, gave rise to justifiable concerns that minorities and members of low income groups were being excluded from service.³

In part to dispel the "mystery and ignorance" surrounding venire selection methods,⁴ Congress passed the Jury Selection and Service Act of 1968 ("the Act"). The legislation represented an attempt to standardize venire selection to a large extent, so as to eliminate such disfavored practices as the key man system. The Act explicitly condemns exclusions from jury service based on race, color, religion, sex, national origin, or

§ 29.2

1. For a list of districts and divisions throughout the United States (codified alphabetically by state, and then broken down by districts and divisions, if applicable, and then listing the counties or parishes in each division and/or district), see 28 U.S.C.A. §§ 81-131 (West 1993).

2. Irving R. Kaufman, *Report of the Committee on the Operation of the Jury System* (Mar. 30-31, 1967), reprinted in 42 F.R.D. 353, 359 (1967) (hereinafter 1967 Report).

3. 1967 Report, at 361; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991) (citing Jury Selection and Service Act of 1968 as representing congressional mandate that "[r]acial discrimination has no place in the courtroom"); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580 n. 19 (1990) (noting that the Jury Selection and Service Act's provisions "are designed to eliminate illegal discrimination in the [jury] selection process").

4. 1967 Report, at 363.

economic status.⁵ The Act mandates generally that trial juries are to be selected from a “fair cross section” of the community.⁶

(1) The Venire Selection Plan

The Act provides for management of the venire selection process by the clerk of the district court or a jury commission appointed by the district court.⁷ The Act calls upon each district court to create a venire selection plan that meets the following requisites:

(a) The venire selection plan should ordinarily draw prospective jurors from voter registration lists or from the lists of actual voters.⁸ A plan may permissibly draw from *either* voter registration lists or lists of actual voters.⁹ The plan may draw from a wider group of individuals “where necessary to foster the policy and protect the rights” established by the Act.¹⁰ Although the vast majority of district courts base their jury pools on voter registration lists, many districts have at least discussed the possibility of drawing jury panels from a more expansive pool, such as from a list of licensed drivers residing in the district, and some district courts have in fact implemented such a plan.¹¹

(b) The venire selection plan should provide for a “master jury wheel” into which the venire administrator places the names of randomly selected prospective jurors.¹² In the ordinary case, the venire selection plan provides for some method of randomly selecting jurors (proportionately from each political subdivision within the district) for placement in the master jury wheel.¹³ That master jury wheel is then emptied and refilled, through the same random selection process, after a specified period that is not to exceed four years.¹⁴

(c) The plan should provide for some procedure by which the venire administrator then selects the actual jury panelists.¹⁵ In some cases, panelists will be drawn directly from the master jury wheel.¹⁶ In many cases, the court clerk sends questionnaires to the persons listed in the

5. 28 U.S.C.A. § 1862 (West 1994 & Supp. 1997).

6. 28 U.S.C.A. § 1861 (West 1994 & Supp. 1997); *Mitchell v. Morgan*, 844 F.Supp. 398, 401 (M.D.Tenn.), *aff'd*, 41 F.3d 1508 (6th Cir.1994).

7. 28 U.S.C.A. § 1863(b)(1) (West 1994 & Supp. 1997).

8. 28 U.S.C.A. § 1863(b)(3) (West 1994 & Supp. 1997).

9. *United States v. Lewis*, 10 F.3d 1086, 1090 (4th Cir.1993); *United States v. Douglas*, 964 F.2d 738, 742 (8th Cir.1992); *United States v. Grisham*, 841 F.Supp. 1138, 1141 (N.D.Ala.1994), *aff'd*, 63 F.3d 1074 (11th Cir.1995), and *cert. denied*, 516 U.S. 1084, 116 S.Ct. 798, 133 L.Ed.2d 746 (1996).

10. *See Douglas*, 964 F.2d at 742.

11. *See, e.g., United States v. McKinney*, 53 F.3d 664, 669-70 (5th Cir.), *cert. denied*, 516 U.S. 901, 116 S.Ct. 261, 133 L.Ed.2d 184 (1995).

12. 28 U.S.C.A. § 1863(b)(3), (4) (West 1994 & Supp. 1997). The jury “wheel” was historically a metal drum, rotating on an axis, from which slips of paper with prospective jurors’ names would be drawn. With the advent of computer technology, the metal “wheel” was replaced by software.

13. *See, e.g., Grisham*, 63 F.3d at 1077-78.

14. 28 U.S.C.A. § 1863(b)(4).

15. 28 U.S.C.A. §§ 1863(b)(8), 1864(a) (West 1994 & Supp. 1997).

16. 28 U.S.C.A. §§ 1864, 1866(a) (West 1994 & Supp. 1997).

master jury wheel. Those persons determined to be eligible, based on the responses to the questionnaires, are placed in a qualified jury wheel.¹⁷

(2) Statutory Exemptions from Service

The Act provides that members of the federal armed forces, members of police and fire departments, and state or federal “public officers ... actively engaged in the performance of official duties” are barred from jury service.¹⁸ The language sets out a mandatory bar to jury service; according to the statute, those members of the statutorily exempt classes who wish to serve on juries may not do so. Those persons designated as exempt should identify themselves as such in response to a qualification questionnaire from the court. As discussed below, the Act also allows a venire selection plan to designate additional categories of persons or occupational classes whose members may be excused upon individual request because of “undue hardship or extreme inconvenience.”¹⁹

(3) Statutory Qualifications for Service

The Act provides that a potential juror must possess certain minimum qualifications, including:

- (a) United States citizenship;
- (b) An ability to speak English, and to “read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form”;
- (c) A lack of any mental or physical infirmity that would prevent a person from “render[ing] satisfactory jury service”;
- (d) A lack of convictions, or pending charges, for state or federal felony offenses.²⁰

Like the Section 1863(b)(6) exemptions for specified categories of persons, a failure to meet these minimum qualifications is a mandatory bar to jury service.²¹ Those potential jurors who do not possess these minimum qualifications are barred from service.

A panelist need not speak and write English as a first language to be found competent to serve as a juror under Section 1865(b). As long as a court is satisfied that a juror can adequately (not necessarily fluently) communicate in English, it may find that panelist competent to serve.²²

(b) The Act as Applied

The Act leaves the precise details of venire selection plans to each

17. See, e.g., Grisham, 63 F.3d at 1078.
 18. 28 U.S.C.A. § 1863(b)(6) (West 1994).
 19. 28 U.S.C.A. § 1863(b)(5)(A) (West 1994).
 20. 28 U.S.C.A. § 1865(b) (West 1994 & Supp. 1997).
 21. See United States v. Greene, 995 F.2d 793, 795 (8th Cir.1993).
 22. See, e.g., Jackson Int'l Co. v. Jackson Nat'l Life Ins. Co., 812 F.Supp. 966, 972-80 (D.Neb.1993), *aff'd*, 19 F.3d 431 (8th Cir.1994).

