2015 YLD
Bridge the Gap Seminar

Jury Selection

11:00 a.m.-11:30 a.m.

Presented by:
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JURY SELECTION—Bridge the Gap
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I. Jury Selection—Introduction

A. Focus of this presentation: Iowa state court jury selection with an emphasis on civil/personal injury cases from the plaintiff's perspective.

B. No one right way to do it: There are as many different ways to conduct voir dire as there are attorneys. Even more so than other aspects of a trial, there is no right or wrong way examine jurors. Some lawyers are minimalist; some will end up knowing the jurors better than most people know their friends. Some focus almost entirely on issues clearly related to the case, some seem to converse with jurors about any topic but the case.

C. Easiest and hardest part of a trial—you need to be flexible.

D. Know where you are. Knowing the demographics and makeup of the county your trial is in can be invaluable. In a low-population county, for example, many of your potential jurors will know the plaintiff or defendant; maybe both. You will not succeed in striking everyone who knows each other. In a larger county, on the other hand, since almost no one will know anyone else, potential jurors may find it unfair if one of the final jurors knows a party.

E. Report or not? Now parties must waive reporting, usually signed by both attorney and client. Iowa R. Civ. P. 1.903 (2)(b).

II. Pre-trial preparation

A. Get juror questionnaires as soon as possible. The sooner you have the names, the more time you have to prepare. At a minimum, you want to compile a list of the names and distribute to your firm and client to review. Despite what we like to think, many potential jurors will not recall the name of the lawyer or law firm that represented them in a previous action!

B. Unless you are able to memorize sixteen names almost instantly, you will probably want some sort of seating chart. This will allow you to address the jurors by name, which at a minimum is appropriately respectful, and can help build a bond between you and the jury. See also part IV, below.

C. Supplemental Questionnaires: typically used in bigger cases, or in cases where there is a unique issue that may make many jurors unable to be impartial. I am not aware of any rule specifically permitting or prohibiting supplemental questionnaires, but so long as you have a good reason, and act in a timely fashion, most judges will be amenable.

D. Know layout/Judge's preferences. Many jury boxes do not hold sixteen people; know where (and in what order) the jurors will be seated, so when you are making your chart (see B. above), you know where to write the names. Some judges do fairly extensive background questioning of jurors before handing it over to the attorneys. Others do very little. If you do not know your judge's preference, you need to be prepared for anything.

E. Google/internet research? Given the large number of names on most jury lists provided prior to the day of trial, there is probably not enough time to justify Googling every potential juror, and you are generally not given enough time after you get the list of sixteen to do it then. If there are particular potential jurors, though, that you are concerned about, it is worth a few minutes to review their online presence.

III. Different General Approaches:

Many lawyers have had great success with widely varying methods. A major element is what is comfortable for you, but you should also be open to modifying your approach depending on the type of case you are trying. Most lawyers incorporate both sides of the following spectrums to some extent, so it is not necessarily an either/or, but you should give the issues thought when preparing.

A. Stalwart guide v. fellow cynic: Who are you? One school of thought says you must be the truth-teller, the jury's intrepid guide through the minefields of the legal system. You must demonstrate absolute credibility on your part so your client can prevail. The opposite school holds that jurors are cynics, and accept that lawyers will say anything to advance their client's cause. Make a conscious choice about which attitude you choose to adopt, as it should impact your approach throughout the trial—for example, the "truth-teller" will likely want to limit objections, as the jury may see that as the lawyer trying to hide something. The approach will also influence the types of questions you ask, as well as how you ask them. See below.

B. Commitments v. spectrum: again, two different schools of thought. The first says you get commitments from jurors during voir dire (e.g., "Mr. Jones, will you be willing award my client a large verdict for pain and suffering if that is what the evidence shows?"). Then in your closing argument you can remind the jurors of the various commitments each of them made to you in voir dire. Another approach is to present a spectrum, and ask the juror where he or she falls on that spectrum (e.g., "Mr. Jones, some people think there are too many people suing doctors; others think if a patient is harmed by a mistake made by a doctor, they should be allowed to recover. Where do you fall on that spectrum?"). These are obviously not exclusive.

C. "I'm afraid of this . . . ." Every case has something you are afraid of: your client's prior back injuries; your client's appearance; a long gap in medical treatment; a subsequent injury. Give thought ahead of time to how you want to approach the issue. You can look at it from the perspective of talking about it will only highlight to the jury how important it is. Another approach is to be direct with the jurors—"I'm afraid of X, and here's why." The latter gets the issue out in the open, and tells the jurors you are not afraid to confront the issue. Obviously the choice of approach is heavily fact-dependant.

IV. Organization

A. Many approaches—Styrofoam; poster board; manila folder; note cards, post-it notes. Make sure you can quickly find each juror's name and information. Pay attention to what system the other lawyer uses—you may find a great new system.

B. Stickers—Can use for names, especially if you have poor handwriting. Has the benefit of being able to overlay new sticker if juror is excused or stricken for cause.

C. Computer—I have never used a computer in voir dire, but that certainly doesn't mean it can be done.

D. Client as note-taker? Yes, in most cases. Oftentimes we are not able to justify having a member of our office staff at trial, much less a second chair. Your client can take notes (of course this depends on the client!) and act as a second set of eyes—for example, seeing other juror's reactions when you are speaking with one juror.

V. General Voir Dire Questions

A. Getting to know you—I like to start by sharing some information about myself and my client, and tell the jurors it is only fair, since I'll be asking them about themselves. I also often take a few minutes at the start and have each juror introduce themselves to the group, telling some basic biographical material as well as a favorite hobby, TV show, etc. In addition to putting jurors at ease, frequently you can get to know a juror better when they are choosing what they talk about, rather than when they are responding to your direct question.

B. Juror experiences/knowledge: You need to know if the jurors know parties, counsel, witnesses, etc.; whether they have any specialized training in areas that are at issue in your trial; and whether they have ever been in a situation similar to plaintiff or defendant. A question that sometimes gets forgotten is whether any of the sixteen jurors know each other; if one juror has

some sort of supervisory capacity, say, over another juror, you want to know that, too.

C. The insurance question: you are allowed to ask, to the panel as a whole, "whether you, or any members of your family, hold the position of an officer, employee, or agent of any casualty insurance company, or own stock in any casualty insurance company." This is often the only time the "I-word" comes up at trial.

D. Housekeeping: I have a number of matters I routinely talk about with jurors that don't really have anything to do with their impartiality, but address issues that tends to come up in juror's minds. These included explanations of why we won't stop and chat with them outside the courthouse during trial; the fact that opposing counsel may chat and joke around at the end of the day does not mean we are colluding; etc.

E. Burden of proof: While you are not allowed to discuss the law in detail, you can talk briefly with the jurors about the burden of proof. It is a difficult concept for many jurors, who are more comfortable with certainties, and by broaching the topic in voir dire, you will have three chances to imprint the burden of proof on the jurors.

F. Negligence: again, many people's experience with the legal system involves criminal law. It is good to let the jurors know again that no one is going to jail as a result of the trial, or even that the defendant did anything wrong on purpose. The claim is that the defendant was negligent.

G. See Exhibit 1 at the end of this outline—it is a basic outline of general voir dire questions—a good place to start.

VI. Case-specific questions

A. Selling your case? Jurors with expertise

B. Commitments from jurors

C. Laying your groundwork?

D. Talk numbers?

E. Non-economic damages

F. Awkward issues

G. Too many lawsuits?

VII. Jury Selection in Expedited Civil Cases

A. Effective January 1, 2015, Iowa Rule of Civil Procedure 1.281 established a new option of having a suit identified as an "expedited civil action." This sets up a middle ground between small claims (jurisdictional limit of $5000) and district court, for cases where the damages will not exceed $75,000.

B. In addition to a number of other rules that are outside the scope of this presentation, Rule 1.281 alters the way a jury trial is conducted in these cases. Rule 1.281(4) governs trials of expedited civil cases.

C. 1.281(4)(a): unless a valid jury demand is made, expedited cases will be tried to the court.

D. 1.281(4)(d): the jury in an expedited civil case consists of 6 jurors (as opposed to 8) selected from a panel of 12 (as opposed to 16). Each side strikes three from the panel. After three hours of deliberation, the jury can render a verdict by a five-juror majority.

E. 1.281(4)(f): it is anticipated the expedited trial will take two days or less. Each side is allowed no more than six hours to complete their case, *including jury selection.*

F. While it is routine for the author to spend two or more hours on jury selection, even in a routine case, clearly one is not advised to spend half of your allotted trial time on voir dire.

VIII. While the other lawyer is talking

A. Chance to watch and listen to jurors

B. Good time to swipe questions for future cases

IX. Challenges for Cause

A. Iowa R. Civil P. 1.915(6): "A juror may be challenged by a party for any of the following causes:

   a. Conviction of a felony.
   b. Want of any statutory qualification required to make that person a competent juror.

c. Physical or mental defects rendering the person incapable of performing the duties of a juror.
d. Consanguinity or affinity within the ninth degree to the adverse party.
e. Being a conservator, guardian, ward, employer, employee, agent, landlord, tenant, family member, or member of the household of the adverse party.
f. Being a client of the firm of any attorney engaged in the cause.
g. Being a party adverse to the challenging party in any civil action; or having complained of or been accused by the challenging party in a criminal prosecution.
h. Having already sat upon a trial of the same issues.
i. Having served as a grand or trial juror in a criminal case based on the same transaction.
j. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy; or shows a state of mind which will prevent the juror from rendering a just verdict.
k. Being interested in an issue like the one being tried.
l. Having requested, directly, or indirectly, that the person's name be returned as a juror.

Exemption from jury service is not a ground of challenge, but the privilege of the person exempt."

B. Error preservation:

1. This can be a highly problematic area. First, there is the matter of whether voir dire is reported (see above). In the event it is not, counsel will need to prepare a bill of exception (IRCP 1.1001).

2. By passing on the entire panel for cause, a party fails to preserve error on the issue of juror bias. Hillrichs v. Avco Corp., 514 N.W.2d 94, 99 (Iowa 1994);

3. The Martinez-Salazar Catch-22: Even if you do succeed in preserving error, you face a nearly impossible dilemma: When a court errs by failing to excuse a potential juror for cause, counsel can only show it was prejudiced as a result of that error by not striking that juror; if counsel uses a peremptory strike on the juror, the court views that as curing the error. United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). In other words, even though the party is required to "waste" a strike to get rid of an improper juror, unless it can show that the juror it would have stricken was also unfairly biased (good luck!), the party cannot show prejudice. Similarly, the Iowa Supreme Court has held that "in order to obtain relief under a legal theory that a juror is not impartial it must be shown that that juror actually

served in the case. When that juror does not serve in the case, it must be shown that the jury that did serve was not impartial." State v. Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993).

X. Peremptory Strikes

A. Mechanics: Sixteen potential jurors are questioned; each side strikes four. Typically the bailiff will pass a clipboard with the jury list back and forth as the parties take turns striking jurors. Complications arise when there are more than two parties.

1. IRCP 1.915(7): "Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional of jurors to be impaneled and strikes to be exercised."

2. When deciding whether to allow additional strikes to one "side" the trial court will often look at whether the different parties' interests are so closely aligned that they should be considered one party for purposes of additional strikes. A classic example would be the owner and operator defendants in a motor vehicle case. The trial court has been held to have acted within its discretion, however, where it gave four strikes each to a defendant doctor and defendant hospital in a medical malpractice case. Morales v. Miller, 797 N.W.2d 621, 2011 WL 222527 (Iowa Ct. App. Jan. 20, 2011) (the court held that the different theories of liability "arising from different sets of alleged acts and omissions" were a sufficient basis for additional strikes.

3. The aggrieved party again faces an uphill battle if the trial court improperly allows the opposing party excessive peremptory challenges, an issue in Wilson v. Ceretti, 210 N.W.2d 643 (Iowa 1973). In Wilson, the appellate court agreed that defendants were allowed excessive peremptory challenges, but plaintiff never claimed prejudice, only that the errors denied her a fair and impartial trial. Id. at 646. The Iowa Supreme Court first sounded like it would not require prejudice, stating "it would be manifestly unjust to compel the other side to prove actual prejudice resulted therefrom. It would usually impose an impossible burden upon the complainant." Id. The court, however, goes on to establish the new standard: a showing of "(1) actual resultant prejudice, or (2) a clear and convincing probability of resultant prejudice." Id. The court did not elaborate on how that standard could be met, but did specifically note that "a verdict adverse to the complaining party does not, without more, demonstrate either prejudice or clear and convincing proof of probably prejudice." Id. at 647.

B. "ideal juror"?

C. Consultants: there are many. Caveat emptor.

D. Batson objection: In the event one party appears to strike jurors based on race, it must be prepared to provide permissible bases for striking those jurors. Kiray v. Hy-Vee, Inc., 716 N.W.2d 193, 205-206 (Iowa Ct. App. 2006).

XI. Miscellaneous Iowa case law on voir dire

A. The trial court has almost unlimited discretion in conduct of jury selection. "We refuse to interfere with the trial court's limitations on voir dire absent bad faith on the part of examining counsel or a manifest abuse of discretion by the trial court. This is especially true when the court limits voir dire to prevent counsel from injecting prejudicial matter into the minds of the jurors." Hutchinson v. American Family Ins. Co., 514 N.W.2d 882, 891 (Iowa 1994) (citations omitted).

B. The trial court, however, should not permit counsel to read the law to the jury pool, and should not allow "counsel to turn voir dire into an opening statement or argument. Sauer v. Scott, 238 N.W.2d 339, 344 (Iowa 1976) (note, however, that the appellate court found that although the voir dire was improper there was no prejudice because the law was correctly read and argued).

C. The trial court is entirely within its discretion to allow a reopening of voir dire examination. Moser v. Brown, 249 N.W.2d 612, 615 (Iowa 1977) (counsel for plaintiff, who neglected to ask "insurance question" was allowed to reopen questioning after defense counsel to ask that one question).

EXHIBIT 1: Sample Voir Dire Outline

Source: Riley & Riley, *Iowa Practice: Civil Litigation Handbook 2015*

(reproduced with permission of the author)

instructions regarding pain and suffering, there should be nothing improper about following that up with a request for commitment along the lines of: "In other words, assuming the plaintiff proves the defendant was at fault and that the fault caused the plaintiff to have pain and suffering, does that mean that you would be willing to compensate in a reasonable amount for that pain and suffering under the court's instruction as to the law? Can we all rely on that?"

II. INTRODUCTION TO STANDARD OUTLINE

Years ago, your author prepared a basic outline that can be used as a starting point in virtually every jury trial. Obviously, it is just that—a starting point. Since cases get settled or bumped, there can be a lengthy stretch of time between jury trials for even the most active practitioner. Having an already prepared generic outline as a starting point has, over the years, saved many hours of time.

Note: The questions should include spouses or others "near and dear to you" whenever appropriate.

III. BASIC VOIR DIRE OUTLINE

I. **Thumbnail Sketch of the Case:** To enable the jury:
   (a) To know if they've heard of the case before, and
   (b) To answer questions about experiences with regard to such a case

II. **Knowledge:**
   (a) Heard of the case before;
   (b) Know any of the parties or their families;
   (c) Know any of the attorneys or other members of their firm, including non-lawyer employees, and spouses of all firm personnel
   (d) Know any of the witnesses that will be called

III. **Experience:**
   (a) Lawsuit (as a juror, or a party, or a witness (witness either at a trial or to a similar event, such as an automobile accident if that be the case))
   (b) Special training
      1. Law lawyer, legal secretary, legal assistant, policeman, sheriff, patrolman, F.B.I., security or auxiliary police, etc.
      2. Medicine: medical doctor, osteopath, nurse, medical or lab technician, nursing home staff, chiropractor, podiatrist, etc.
      3. Other: engineer, scientist, CPA (or other specialty that may bear on the circumstances of the case)

(c) Drivers license: chauffeur, motorcycle, suspended, etc.(violation)
(d) Physical health:
1. Personal injuries (requiring hospitalization) or sickness
2. Disability (physical)
a. general
b. similar, i.e. if a back case, ask about back cases
3. Loss of loved one
(e) Use of alcohol, if appropriate to the case
(f) The insurance question: Do you or any members of your family, or those near or dear to you, hold the position of an officer, employee or agent of any casualty insurance company or own stock in any casualty insurance company

IV. Occupation Background:
(1) Occupation
(a) Education (high school, college, commercial college or business college)
(b) Military service
(c) Worked as an investigator, adjuster, etc. for an insurance company or for a railroad, etc.
(d) Political preference (It is better to obtain that information from the voter lists but, if not available or not obtained, consider asking whether the juror tends to vote for one party's candidates more often than not since a direct question may be deemed by some jurors to be an invasion of privacy). Moreover, political party affiliation is of dubious value alongside the other criteria that influence a juror.

V. Stock Questions (the use being dependent on the case, of course):
1. The difference between the preponderance of evidence and reasonable doubt (use of tipping the scale slightly in describing the civil standard and moving the scale all the way down in referring to the criminal standard).
2. The approval of a system that make a wrongdoer accountable to a person that has been injured. Better than the Hatfield/McCoy method.
3. The mere fact the plaintiff is sued does not mean he is entitled to anything—realize anyone can file a lawsuit by simply paying the Clerk a modest filing fee.
4. Realize the plaintiff has to prove his/her case—we don't have to prove anything.

5. Any hesitancy at awarding $500,000 or $1 million if we prove our case and that is a reasonable amount under the court's instructions. I'm not asking you to prejudge the case. I just want to know if there is a ceiling on damages beyond which you will not go no matter how strong the evidence is.
6. Agree that pain is real—agree that the only system we have to compensate a person is by money damages or award.
7. The plaintiff suffered serious injuries and we all have sympathy for someone in that position:
   (a) Can you put aside your natural feelings of sympathy for someone who has been hurt and decide the case solely on the facts and the merits and not on sympathy?
   (b) If plaintiff fails to prove that my client was at fault (or that his fault was greater than the plaintiff's) will you return a verdict for my client despite the sympathy you might have as a result of the plaintiff's injuries?
8. The court will instruct you as to the law governing the case. Will you follow each and every instruction regardless of how you feel about the particular law in question?
9. Is there anything that I haven't asked you that you can think of that might, in this particular case as opposed to some other lawsuit, make it better if you stood aside and let someone else decide the case?