

## MANAGING JURY SELECTION EFFECTIVELY

### Module #2: Ruling on For-Cause and Peremptory Challenges

[1.5 hours]

#### Learning Objectives:

After this session, the participants will be able to:

1. List the major tools for obtaining relevant background information from prospective jurors;
2. Describe the standards by which to rule on challenges for cause.
3. Narrate the three-part *Batson* test for ruling on a constitutional challenge to the use of peremptory strikes; and
4. Describe several ways to remove prospective jurors from the venire panel after the successful exercise of for-cause or peremptory strikes.

#### Learning Activities:

1. **Opening and mini-lecture:** The lead instructor begins by reviewing legal principles for receiving and ruling upon motions to challenge prospective jurors for cause and monitoring peremptory strikes. (10 minutes)
2. **Group exercise (re: for-cause challenges):** With designated class members and faculty playing the roles of trial counsel and trial judge, the role-players dramatize several motions-to-strike-for-cause vignettes using clips of information revealed through questioning of prospective jurors. Class participants use forms to make their own rulings on the motions to strike for cause. These dramatizations and participant rulings raise issues with respect to: (1) the significance of self-reported juror confidence in maintaining impartiality, (2) judicial/lawyer rehabilitation of problematic jurors, (3) standards for ruling on motions to challenge for cause, and (4) the adequacy of customary questioning of prospective jurors. (25 minutes).
3. **Discussion:** Class members critique the methods and outcomes of the motions challenging jurors for cause. (10 minutes).
4. **Group exercise (re: peremptory strikes):** Faculty members play the roles of trial counsel and judge. Two or three short, factual scenarios are distributed in hard copy or are displayed on an overhead screen. The scenarios depict a changed gender or race composition of the venire caused by the exercise of peremptory strikes. The role players demonstrate judicial actions or inaction with respect to: (1) the three-part *Batson* process for ruling on claims of impermissible use of peremptories, (2) the judicial evaluation of a challenged party's justifications for striking a juror, and (3) the exercise of judicial initiative to enforce the *Batson* doctrine. (25 minutes)
5. **Discussion:** Class members critique the methods used to comply with the *Batson* doctrine. (10 minutes).

6. **Closing:** The instructor shares practices for striking prospective jurors and highlights available resources for improving the removal of unfit prospective jurors. Special attention is given to Principle 11 of the ABA *Principles for Juries & Jury Trials*, (10 minutes).

## Materials:

1. For use during class: case hypotheticals, audience participation forms, Principle 11 of the ABA *Principles for Juries & Jury Trials*, the American Bar Foundation “for cause” research vignettes, peremptory-strike vignettes, and PowerPoint slides.
2. Reference materials
  - a. Annotated bibliography. Local instructor will add any state-specific reference materials that would be helpful for the participants (e.g., bench books, case law, statutes, court rules, etc.)
  - b. Sample courtroom forms and checklists.

## Bibliography

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## **CHALLENGES-FOR-CAUSE EXERCISE** **(For use in Module #2)**

### Background & Introduction:

The American Bar Foundation recently completed research on the challenge for cause process in voir dire. The work was an initial foray into an area that has received little academic attention. Although many people have written on the peremptory challenge, researchers have not investigated this other component of jury selection.

You are engaging in an exercise similar to one given to several hundred judges, lawyers and former jurors in several Midwestern and Southern states.

The faculty will dramatize several motions-to-strike-for-cause vignettes using clips of information revealed through the questioning of prospective jurors. In forms provided for each vignette, please evaluate the likelihood or not of a prospective juror being fair and impartial in the case. You will also be asked to indicate how you would rule on the motions to strike for cause.

This exercise is designed to: (1) help us gain a better understanding of the dynamics at play when a prospective juror is challenged for cause, and (2) sharpen our judicial skills in ruling fairly and efficiently on motions to strike for cause.

## #1

The moderator describes the case situation: The defendant is charged with armed robbery. By means of a pre-voir dire questionnaire, we learn a juror in the case does not know the assistant district attorney prosecuting the case; however, she has seen his boss, the elected district attorney, at the church they both attend. The juror says that the church is large and that the two of them have never spoken.

Role-play begins with dramatization of these interchanges during voir dire:

- The judge asks if the fact that she sees the elected district attorney at church would affect her ability to be fair and impartial in this case, and she says it would not.
- In response to an attorney's questioning, the juror says the church is large and she has never spoken to the district attorney.
- The juror is asked if she would tend to give more weight to the prosecution's case because of her connection to prosecutor's office, and the juror says "No," that she would listen to all the evidence before making a decision. When asked, the juror affirms that she can follow the judge's instructions and can be fair to both sides.
- Finally, the judge asks if she knows of any reason why she could not be a fair and impartial juror in this case, and the juror says, "No, I can be fair."

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney's request*, \_\_\_\_\_ *Obtain more info.*

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

## #2

The moderator describes the case situation: The defendant is charged with drug trafficking in a large metropolis. A pre-voir dire questionnaire discloses that one of the jurors is a veteran police officer on the same large police department as three testifying officers, none of whom has ever worked in the juror's precinct. The juror knows of the case because of his work on the police force.

Role-play begins with dramatization of these interchanges during voir dire:

- The judge asks whether the juror will be able to set aside the information he has learned about the case and decide only by the evidence he hears in court. The juror tells the judge that he would do his best.
- The juror is further asked whether it would be difficult to hear testimony from a fellow officer and to judge this witness's credibility as he would any other witness. The juror says, "I'm sure I can."
- The prosecutor asks whether, given his loose affiliation the police witnesses, he could be a fair and impartial juror. The juror says, as a cop, he took an oath to uphold the law. "I think I could be truly fair."

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *The defense attorney asks the judge in the case to excuse this juror for cause, what do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney's request*, \_\_\_\_\_ *Obtain more info*

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

### #3

The moderator describes the case situation: A black defendant is charged with capital murder, rape and attempted murder in the stabbing of two white children, a brother and a sister. The young girl was raped and killed; the brother received multiple stab wounds but survived the attack. A pre-voir dire questionnaire reveals that a prospective juror has two children the same ages as the victims, and his children attend the same school as the one attended by the victims. The juror is white.

Role-play begins with dramatization of these interchanges during voir dire:

- The juror says he has “some ideas” regarding the defendant’s guilt, but he has not made up his mind.
- When asked if he could listen to the case with an open mind, the juror says, “Yes.”
- The defense attorney asks if the juror believes that he will concern himself with the fact that his children are the same ages as the victims. The juror replies, “No, I don’t think so.”
- The prosecutor asks if the juror is able to decide the case on the facts and evidence and not on anything else. The juror responds, “I certainly would try.”

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney’s request*, \_\_\_\_\_ *Obtain more info.*

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

#### #4

The moderator describes the case situation: The defendant is charged with the murder of a guard during a prison riot. A pre-voir dire questionnaire reveals that one of the prospective jurors is a public transit bus driver whose bus route serves the prison.

Role-play begins with dramatization of these interchanges during voir dire:

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- When asked about his familiarity with the prison, the juror says that many prison employees and visitors take his bus to the prison.
- The juror is asked if he would be able to keep an open mind and follow the law as it is given to him, and he confidently says, “Yes, I can.”
- The juror is asked if the prison riot affected him in any way. He says it only caused him to adjust his route and take a detour away from the prison for about a week.
- Finally, the prosecutor asks the juror whether he would be able to listen to the evidence presented by both sides and base his verdict only on the evidence, and he says, “I’m sure I could be fair.”

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney’s request*, \_\_\_\_\_ *Obtain more info*.

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

#5

The moderator describes the case situation: The defendant is charged with sodomy and illicit sexual contact with a child; he is accused of abusing his 11 year-old stepdaughter. During voir dire, a prospective juror states that a family member had sexually molested her daughter.

Role-play begins with dramatization of these interchanges during voir dire:

- The defense lawyer asks whether the juror would have difficulty being fair and impartial in this case. The juror responds, "I'm sure I could be fair."
- The judge asks the juror if she can follow the law in this case, and the juror confidently says she believes she can follow the law.
- The judge explains that if the juror is selected for the case, she will have to take an oath and swear that she will base her decision only on the evidence. The judge asks her whether she can do that. She says, "Yes, yes I can."

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney's request*, \_\_\_\_\_ *Obtain more info.*

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

## #6

The moderator describes the case situation: The defendant is charged with driving under the influence of alcohol. One of the jurors joined MADD (Mothers Against Drunk Driving) two years ago after a drunk driver killed his niece.

Role-play begins with dramatization of these interchanges during voir dire:

- The judge asks the juror if he formed an opinion about the guilt or innocence of the driver who killed his niece. He states that he believed that the intoxicated driver in his niece's case was guilty before the driver was tried, although he knows that he shouldn't have formed a position at that time.
- When asked by the prosecutor if he would be able to avoid forming that same type of opinion in this case until all the evidence was presented, the juror says that he learned his lesson and now thinks he would be able to avoid doing so.
- The defense attorney asks whether he would be comfortable being tried by a jury made up of people with the juror's frame of mind. The juror replies, "I think I would."
- Finally, the judge asks the juror whether he thought that any of this – that is, his niece's death or his membership in MADD – would affect the juror's ability to be objective and to give both sides a fair trial. The juror says, "I would listen to both sides."

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney's request*, \_\_\_\_\_ *Obtain more info*.

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

#7

The moderator describes the case situation: A defendant is charged with involuntary manslaughter in a highway accident that caused the deaths of nine people. A man sitting as a prospective juror works as a retired civil engineer now teaching at the local community college. He only had an affirmative response to only one of the several open court questions from the judge. Namely, the citizen had a yes response to the question asking whether serving on this case would present a substantial hardship for any juror.

Role-play begins with dramatization of these interchanges during voir dire:

- In response to the judge’s follow-up inquiry, the juror says, “I just do not want to be here.”
- When the judge asks further if the juror understands that jury service is also a civic duty, the citizen responds, “I have got classes to teach. That is fulfilling my civic duty.”
- The judge next asks the juror if he will be able to get a substitute teacher if he is chosen to serve on this jury, the juror reluctantly says, “I think so.”

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney’s request*, \_\_\_\_\_ *Obtain more info.*

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

#8

The moderator describes the case situation: The defendant is charged with rape. By means of a pre-voir-dire questionnaire, one of the prospective jurors was raped 40 years ago.

Role-play begins with dramatization of these interchanges during voir dire:

- When asked about the experience, she becomes emotional, saying that she wished she had killed her attacker.
- She is asked whether she could be a fair juror in this case. She responds that she could; she believes she could judge more fairly because she's "been through it." She feels that her experience would help her in being able to tell if someone were speaking truthfully or not.
- The judge asks whether she could put this experience out of her mind and listen to this case fairly. She says that she thinks she could.
- Next, when the judge asks if she can base her decision solely upon what she heard in the courtroom, listen to the instructions, and apply the law to the facts as the sole basis for her decision, she says, "Yes, I believe I can."
- Finally she is asked whether, in deciding the case, she could avoid both empathy and prejudice. She says, "Yes."

Stepping out of role-play, the moderator asks the audience to make a quick ranking (on a simple form asking the following question):

1. *How likely is it that this juror will be fair and impartial in this case?*

1	2	3	4	5	6	7
very unlikely						very likely

Returning to role-play, the defense gives reasons why the judge should excuse the juror for cause.

Stepping out of role-play, the moderator asks the audience to make their own rulings (on the simple form) to the motion to strike for cause:

2. *What do you think the judge should do?*

\_\_\_\_\_ *Excuse the juror*, \_\_\_\_\_ *Deny the attorney's request*, \_\_\_\_\_ *Obtain more info*.

After a brief time, the moderator asks for a show of hands from the audience for each option and seeks an explanation for each choice category from one volunteer in each category.

Returning to role-play, the judge gives his/her ruling with explanation.

## **PEREMPTORY STRIKES EXERCISE**

### **(For use in Module #2)**

#### Introduction:

This exercise is designed to: (1) help us gain a better understanding of the dynamics at play during the peremptory-strikes stage of jury selection, and (2) sharpen our judicial skills in enforcing the *Batson* doctrine.

Faculty will dramatize several 3-part, *Batson* hearings arising in the following real-case vignettes. Each dramatization occurs at the stage in jury selection **after** the court has made for-cause strikes. The following factual scenarios describe the composition of the venire created by the parties' exercise of their allotted peremptory challenges.

#### #1

**Moderator reads:** In an assault-with-intent-to-kill prosecution of a 19-year old black male, the voir dire yields a venire panel of 37 eligible citizens. The gender/race composition looks like this: 19 males+18 females, 25 whites+12 blacks (evenly divided by gender). The prosecutor uses 6 of his 10 peremptory strikes to strike all six black females (9 out of 10 to strike females). The defense makes a *Batson* challenge after both sides exhaust all of their peremptory strikes.

**Role-Play:** The court denies the motion, without hearing from the prosecutor, giving this rationale: "It is my belief legally that there's not a suspect category of black females or black males or white males or white females. *Batson* prohibits the exercise of peremptory challenges based on race, based on gender and maybe certain other suspect factors, but when you consolidate the factors, it conflates the suspect factors in a way to make it impossible to determine if it's a race neutral reason. I see it this way: the prosecutor has not exercised strikes against black males, so it is not a racial issue. He has not struck any white females, so gender is not an issue. And he struck an equal number of blacks and females.

#### #2

**Moderator:** In a capital/homicide prosecution of a black female, there are only 20 black citizens in an eligible venire panel of 108 citizens. Nine of

them are struck for cause, 10 are struck by the state prosecutor's use of peremptories, leaving only one black sitting on the final jury.

**Role-play:** The defense moves to strike the panel and start all over. He argues, "During voir dire, the prosecutor struck two black veniremen who each stated that the possibility of rehabilitation in prison might affect his or her willingness to favor life in prison over a death penalty. Upon close examination of the record, the prosecutor did not strike non-black citizens who communicated similar sentiments. In addition the record reflects that the prosecutor did not question non-blacks as thoroughly as blacks."

The prosecutor responds, "We did not strike those 2 black veniremen because of their views on rehabilitation. Each had a sibling who had been convicted of crimes by our office."

### **#3**

**Moderator:** In a medical malpractice case, plaintiff is the personal representative of a deceased 75-year old black female. Defendants are the decedent's treating physician and hospital. Plaintiff's attorney used her maximum 3 peremptory strikes to remove the only whites on the 14-member venire panel. An all black jury resulted.

**Role-play:** Defense counsel raises a Batson challenge noting, in particular, that plaintiff removed a white 26-year old venire member who was never asked a follow-up question after open-court questioning while failing to strike a black 26-year old panel member who also was not asked any questions.

In response to the challenge, plaintiff's counsel justifies her three strikes saying, "With respect to struck juror #1, the 26-year old white female, is too young to relate to the plight of the 75-year old decedent. Also, my client did not like the way she answered the questions. She gave us a strange look."

Plaintiff's counsel justifies striking juror #2 because of #2's association with a hospital management company. Counsel explains the striking of juror #3 because she is a nurse and would likely substitute her training and skill for opinion of plaintiff's experts.

The judge promptly denies the motion because the numbers were so small that a statistical analysis cannot be applied.