***VOIR DIRE*—Basic Understanding and Rules For Jury Selection in New York State Supreme Court**

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1. **Right to a Jury Trial—**
   The United States Constitution guarantees a litigant the right to a trial by jury. U.S. Constit. amend. VI (criminal) and VII (civil).

   a. To get a jury trial in a civil case, you must demand it at the time you file your Note of Issue, which places the matter on the trial calendar or it will be deemed waived. C.P.L.R. §4102.

      > "Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed within fifteen days after service of the note of issue. . . If no party shall demand a trial by jury as provided herein, the right to trial by jury shall be deemed waived by all parties."

   CPLR §4102.[1]

2. **Settlement Conference—**
   Prior to jury selection, the court will attempt to settle the case. This pre-*voir dire* settlement conference is mandated by the Uniform Rules of Court. 22 NYCRR §202.33(b).

3. **Fundamentals of Jury Selection—**
   In a civil case in New York State Supreme Court, generally six (6) jurors are selected to preside over your trial, plus two alternate jurors. CPLR

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[1] In federal court, you must demand a trial by jury at the outset of the litigation and file that demand with the court. Rule 38, Fed. R. Civ. Proc. Therefore, the prudent trial attorney will indorse the demand upon the pleadings. *Id.* Failure to demand a jury trial and file the same in court within ten (10) days after service of the last pleading, constitutes a waiver of trial by jury. *Id.* **CAVEAT:** Plaintiff has 10 days from service of notice of removal to file a Rule 38, Fed. R. Civ. Proc., demand for jury trial. If plaintiff fails to file a demand within 10 days of removal, plaintiff has waived his/her right to a trial by jury. Rule 81(c), Fed. R. Civ. Proc.

§4105 and 22 NYCRR §202.33 at Appendix E (A)(2).[2] The jury selection process begins when you are directed by the Central Calendar Part (CCP)/Trial Assignment Part (TAP) to put in a "slip". At this point you are assigned to a jury selection room or, depending upon the particular county where you are selecting, an actual courtroom.

a. The venire or panel of prospective jurors from whom you will select will be sent by the jury clerk to this room. With jury selection under White's Method (*see* ¶5, *infra*, either the clerk or the attorneys will seat the first six (6) prospective jurors at random. Once six people have been selected as jurors in your case, then "alternate jurors" are selected. Under the Struck Method of jury selection, a jury is selected from among an initial panel of 25 randomly seated prospective jurors (*see* ¶5, *infra*).
b. Usually only one (1) to two (2) "alternate jurors" are selected. CPLR §4106. *See also* 22 NYCRR §202.33 at Appendix E (A)(2)The court has the discretion to provide for additional alternate in number. *Id.* They are selected randomly from the same venire and in the same manner as regular jurors. *Id.* "Alternate jurors" replace regular jurors who, for whatever reason, are unable to perform their duty (i.e., sickness, death). *Id.* "Alternate jurors" take the same oath as a regular juror and sit in the same jury box along with the regular jurors. *Id.* The only difference is that at the end of the case, if one or more of the "alternate jurors" are not used, they are discharged. *Id.* CAVEAT: Most personal injury cases in the Second Department are bifurcated (*see* ¶ 6, *infra*). Therefore, at the end of the liability case, do not have the court dismiss the "alternate jurors" if you will be trying the damage's case before the same jury.
c. The parties can consent to have nondesignated alternate jurors selected. 22 NYCRR §220.1. Therefore, when you select your jury panel, eight (8) people will be chosen at random; none of whom will, at this time, be designated alternate jurors. Once both sides rest, the court clerk will randomly select six (6) of the jurors to deliberate and discharge the remainder. *Id.*
d. You can request that a judge preside over jury selection. CPLR 4107. A judge must preside over the commencement of *voir dire* and open the *voir dire* proceeding. 22 NYCRR §202.33(e).
e. The court will establish time limitations for questioning jurors. 22 NYCRR §202.33(d).
f. Before you begin to question prospective jurors, collect and review their background questionnaire. All prospective jurors are required to complete this questionnaire. 22 NYCRR §202.33 Appendix E at (A)(3). A sample jury questionnaire is attached. It provides

[2] In federal court, the regular jury consists of eight (8) persons who shall each deliberate and render a verdict.

information about, *inter alia*, the prospective juror's age, years at present residence, education, employment, family members, prior jury service, prior criminal history and hobbies.

4. Stipulations and Challenges—

The parties can stipulate to discharge a prospective juror. Otherwise, they will have to exercise "challenges for cause" and/or "peremptory challenges". Peremptory challenges must be made outside the presence of the jury. 22 NYCRR §202.33 at Appendix E (A)(5). Challenges for cause can be made either in or out of the presence of the venire.

a. Challenges for cause and challenges to the entire panel or array of jurors are made to the judge who decides whether or not to grant it. CPLR §4108.
b. Challenges for cause are unlimited in number, but limited in definition by CPLR §4110.

> "The fact that a juror is in the employ of a party to the action; or if a party to the action is a corporation, that he is a shareholder or a stockholder therein; or, in an action for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property; shall constitute a ground for a challenge to the favor [challenge for cause] as to such juror. The act that a juror is a resident of, or liable to pay taxes in, a city, village, town or county which is a party to the action shall not constitute a ground for challenge to the favor as to such juror."

Moreover, if a person is "related within the sixth degree by consanguinity or affinity to a party", that person is disqualified from sitting as a juror on the basis of that relationship. CPLR §4110(b). You have until six (6) months after a verdict has been rendered to raise that objection. *Id.*

c. Peremptory challenges are limited in number to three (3) **per side**, "plus one peremptory challenge for every two alternate jurors." CPLR §4109. Defendants and third-party defendants each get their own set of three (3) peremptory challenges. *Id.* A peremptory challenge can be exercised to bounce a prospective juror for any reason, except for an unconstitutional reason. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)(equal protection violation to exercise peremptory challenges in a criminal proceeding for racially discriminatory motive). *See also Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)(*Batson*'s requirement that peremptory challenges be racially neutral applies to civil cases). *Batson* also

held applicable to peremptory challenges exercised for religious discriminatory motive. *U.S. v. Somerstein*, 959 F.Supp. 592 (E.D.N.Y. 1997). A *Batson* challenge is timely if made at any time during jury selection, but before the jury is sworn. *Caston v. Costello*, 74 F.Supp.2d 262, 268 (E.D.N.Y. 1999); *see also People v. Bolling*, 79 N.Y.2d 317, 321, 582 N.Y.S.2d 950, 953, 591 N.E.2d 1136, 1139 (1992). Under *Batson*, the movant need only raise an inference of a racially discriminatory motive to shift the burden on the respondent to provide a race-neutral explanation for the exercise of the peremptory challenges in issue. If you have a *Batson* challenge, insist that it be made on the record.

(i) If additional peremptory challenges are required, (i.e., multiple parties on one side whose interests are diverse or hostile), the court has the discretion to grant an equal number of additional challenges to each side. CPLR §4109. The time to request additional challenges is before jury selection begins. *Id.* After selection has started, it is too late to request additional challenges. *Id.* The court also has the discretion to allocate challenges among multiple parties on either side. *Id.*

5. **Conduct of Jury Selection under White's Method or the Struck Method—**Depending upon the county in which you are selecting, you will pick a jury under either White's or the Struck Method. The Uniform Rules of Court spell out, in detail, each of these jury selection methods at Appendix E to 22 NYCRR §202.33. Rule 202.33 is reproduced below in its entirety.

"**22 NYCRR §202.33 Conduct of the voir dire**

a. Trial judge. All references to the trial judge in this section shall include any judge designated by the administrative judge in those instances where the case processing system or other logistical considerations do not permit the trial judge to perform the acts set forth in this section.

b. Pre-voir dire settlement conference. Where the court has directed that jury selection begin, the trial judge shall meet prior to the actual commencement of jury selection with counsel who will be conducting the voir dire and shall attempt to bring about a disposition of the action.

c. Method of jury selection. The trial judge shall direct the method of jury selection that shall be used for the voir dire from among the methods specified in subdivision (f) of this section.

d. Time limitations. The trial judge shall establish time limitations for the questioning of prospective jurors during the voir dire. At the discretion of the judge, the limits established may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of panels of jurors or individual jurors.

e. Presence of judge at the voir dire. In order to ensure an efficient and dignified selection process, the trial judge shall preside at the commencement of the voir dire and open the voir dire proceeding. The trial judge shall determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, preside over part of or all of the remainder of the voir dire.

f. Methods of jury selection. Counsel shall select prospective jurors in accordance with the general principles applicable to jury selection set forth in subdivision (g) of this section and using the method designated by the judge pursuant to subdivision (c). The methods that may be selected are:

1. "White's method," as set forth in subdivision (g) of this section;
2. "Struck method," as set forth in subdivision (g) of this section;
3. "Strike and replace method," in districts where the specifics of that method have been submitted to the Chief Administrator by the Administrative Judge and approved by the Chief Administrator for that district. The strike and replace method shall be approved only in those districts where the Chief Administrator, in his or her discretion, has determined that experience with the method in the district has resulted in an efficient and orderly selection process; or
4. Other methods that may be submitted to the Chief Administrator for use on an experimental basis by the appropriate Administrative Judge and approved by the Chief Administrator.

g. Procedures for questioning, challenging and selecting jurors authorized by section 202.33 of the Rules of the Chief Administrator of the Courts.

APPENDIX E

Procedures for questioning, challenging and selecting jurors authorized by section 202.33 of the Rules of the Chief Administrator of the Courts.

A. General principles applicable to jury selection. Selection of jurors pursuant to any of the methods authorized by section 202.33(e) of the Rules of the Chief Administrator shall be governed by the following:

(1) If for any reason jury selection cannot proceed immediately, counsel shall return promptly to the courtroom of the assigned trial judge or the Trial Assignment Part or any other designated location for further instructions.

(2) Generally, a total of eight jurors, including two alternates, shall be selected. The court may permit a greater number of alternates if a lengthy trial is expected or for any appropriate reason. Counsel may consent to the use of "nondesignated" alternate jurors, in which event no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates.

(3) All prospective jurors shall complete a background questionnaire supplied by the court in a form approved by the Chief Administrator. Prior to the commencement of jury selection, completed questionnaires shall be made available to counsel. Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy. With Court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case.

(4) During the voir dire each attorney may state generally the contentions of his or her client, and identify the parties, attorneys and the witnesses likely to be called. However, counsel may not read from any of the pleadings in the action or inform potential jurors of the amount of money at issue.

(5) Counsel shall exercise peremptory challenges outside of the presence of the panel of prospective jurors.

(6) Counsel shall avoid discussing legal concepts such as burden of proof, which are the province of the court.

(7) If an unusual delay or a lengthy trial is anticipated, counsel may so advise prospective jurors.

(8) If counsel objects to anything said or done by any other counsel during the selection process, the objecting counsel shall unobtrusively request that all counsel step outside of the juror's presence, and counsel shall make a determined effort to resolve the problem. Should that effort fail, counsel shall immediately bring the problem to the attention of the assigned trial judge, the Trial Assignment Part judge or any other designated judge.

(9) After jury selection is completed, counsel shall advise the clerk of the assigned Trial Part or of the Trial Assignment Part or other designated part. If counsel anticipates the need during trial of special equipment (if available) or special assistance, such as an interpreter, counsel shall so inform the clerk at that time.

B. "White's Method"

(1) Prior to the identification of the prospective jurors to be seated in the jury box, counsel shall ask questions generally to all of the jurors in the room to determine whether any prospective juror in the room has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(2) After general questions have been asked to the group of prospective jurors, jury selection shall continue in rounds, with each round to consist of the following: (1) seating prospective jurors in the jury box; (2) questioning of seated prospective jurors; and (3) removal of seated prospective jurors upon exercise of challenges. Jurors removed for cause shall immediately be replaced during each round. The first round shall begin initially with the seating of six prospective jurors (where undesignated alternates are used, additional prospective jurors equal to the number of alternate jurors shall be seated as well).

(3) In each round, the questioning of the seated prospective jurors shall be conducted first by counsel for the plaintiff, followed by counsel for the remaining parties in the order in which their names appear in the caption. Counsel may be permitted to ask follow-up questions. Within each round, challenges for cause shall be exercised by any party prior to the exercise of peremptory challenges and as soon as the reason therefor becomes apparent. Upon replacement of a prospective juror removed for cause, questioning shall revert to the plantiff.

(4) Following questioning and the exercise of challenges for cause, peremptory challenge shall be exercised one at a time and alternately as follows: In the first round, in caption order, each attorney shall exercise one peremptory challenge by removing a prospective juror's name from a "board" passed back and forth between or among counsel. An attorney alternatively may waive the making of a peremptory challenge. An attorney may exercise a second, single peremptory challenge within the round only after all other attorneys have either exercised or waived their first peremptory challenges. The board shall continue to circulate among the attorneys until no other peremptory challenges are exercised. An attorney who waives a challenge may not thereafter exercise a peremptory challenge within the round, but may exercise remaining peremptory challenges in subsequent rounds. The counsel last able to exercise a peremptory challenge in a round is not confined to the exercise of a single challenge but may then exercise one or more peremptory challenges.

(5) In subsequent rounds, the first exercise of peremptory challenges shall alternate from side to side. Where a side consists of multiple parties, commencement of the exercise of peremptory challenges in subsequent rounds shall rotate among the parties within the side. In each such round, before the board is to be passed to the other side, the board must be passed to all remaining parties within the side, in caption order, starting from the first party in the rotation for that round.

(6) At the end of each round, those seated jurors who remain unchallenged shall be sworn and removed from the room. The challenged jurors shall be replaced, and a new round shall commence.

(7) The selection of designted alternate jurors shall take place after the selection of the six jurors. Designated alternate jurors shall be selected in the same manner as described above, with the order of exercise of peremptory challenges continuing as the next round following the last completed round of challenges to regular jurors. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

C. "Struck Method"

(1) Unless otherwise ordered by the Court, selection of jurors shall be made from an initial panel of 25 prospective jurors, who shall be seated randomly and who shall maintain the order of seating

throughout the voir dire. If fewer prospective jurors are needed due to the use of designated alternate jurors or for any other reason, the size of the panel may be decreased.

(2) Counsel first shall ask questions generally to the prospective jurors as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(3) After the general questioning has been completed, in an action with one plaintiff and one defandant, counsel for the plantiff initially shall question the prospective jurors, followed by questioning by the defandant's counsel. Counsel may be permitted to ask follow-up questions. In cases with multiple parties, questioning shall be undertaken by counsel in the order in which the parties' names appear in the caption. A challenge for cause may be made by counsel to any party as soon as the reason therefor becomes apparent. At the end of the period, all challenges for cause to any prosepctive juror on the panel must have been exercised by the respective counsel.

(4) After challenges for cause are exercised, the number of prospective jurors remaining shall be counted. If that number is less than the total number of jurors to be selected (including alternates, where nondesignated alternates are being used) plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties (such sum shall be referred to as the "jury panel number"), additional prospective jurors shall be added until the number of prospective jurors not subject to challenge for cause equals or exceeds the jury panel number. Counsel for each party then shall question each replacement juror pursuant to the procedure set forth in paragraph (3).

(5) After all prospective jurors in the panel have been questioned, and all challenges for cause have been made, counsel for each party, one at a time beginning with cousel for the plantiff, shall then exercise allowable peremptory challenges by alternately striking a single juror's name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties' names appear in the caption, unless following that order would, in the opinion of the court, unduly favor a side. In

> that event, the court, after consulting with the parties, shall specify the order in which the peremptory challenges shall be exercised in a manner that shall balance the interest of the parties.
>
> An attornery who waives a challenge may not thereafter exercise a peremptory challenge. Any Batson or other objections shall be resolved by the court before any of the struck jurors are dismissed.
>
> (6) After all peremptory challenges have been made, the trial jurors (including alternates when non-designated alternates are used) then shall be selected in the order in which they have been seated from those prospective jurors remaining on the panel.
>
> (7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Counsel shall select designated alternates in the same manner set forth in these rules, but with an initial panel of not more than 10 prospective alternates unless otherwise directed by the court. The jury panel number for designated alternate jurors shall be equal to the number of alternates plus the maximum number of peremptory challenges allowed by the court or by the statute that may be exercised by the parties. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat."

22 NYCRR §202.33 (emphasis added).

6. Bifurcated Trials—

The Second Department bifurcates personal injury trials, 22 NYCRR §202.42, except for wrongful death and medical malpractice cases. Therefore, liability is tried prior to and separate from damages. *Id.* "During the voir dire conducted prior to the liability phase of the trial, if the damage phase of the trial is to be conducted before the same jury, counsel may question the prospective jurors with respect to the issue of damages in the same manner as if the trial were not bifurcated."

7. Generic Questioning of Prospective Jurors—

The rule of thumb is that you are seeking a juror who can be fair and impartial. If the prospective juror cannot be fair and impartial, you have a challenge for cause as to that particular person. Give the jury a brief overview about your case so that they can determine if they can be fair and impartial in a case such as yours. Remember, although you may think that you are selecting a jury, the individual prospective juror is actually determining whether he or she wants to be selected. You, on the other hand are actually deselecting those who will not be good for your case. Questions should be open-ended, direct rather than leading, to elicit as much information from a prospective juror to allow you to determine

whether or not this person would be an appropriate juror for your particular case.

> "During the voir dire each attorney may **state generally the contentions** of his or her client, and **identify the parties**, **attorneys and the witnesses** likely to be called. However, counsel may not read from any of the pleadings in the action or inform potential jurors of the amount of money at issue."

22 NYCRR §202.33 Appendix E (A)(4)(emphasis added).

> "Counsel shall **avoid discussing** legal concepts such as **burden of proof**, which are the province of the court."

22 NYCRR §202.33 Appendix E (A)(6)(emphasis added).

> "If an **unusual delay or a lengthy trial** is anticipated, counsel may so advise prospective jurors."

22 NYCRR §202.33 Appendix E (A)(7)(emphasis added).

Anticipate what your adversary will say to deflate the impact that it will have on the jury. Defendants almost always question the jury about sympathy for the plaintiff. Plaintiff's counsel, since he/she speaks first to the jury, should state that "plaintiff is not looking for sympathy".

Use your discussion about sympathy having no place in a trial to segue into the jurors' bias/prejudices. Ask the jury if they believe that this case should be decided on the merits, not on negative TV ads about negligence cases. Inquire into what they have heard about tort reform and what feelings they have about it. Emphasize the positive by asking if they agree that laws are made by our elected officials, that changing the system in the jury room during jury deliberations, is just as improper as deciding the case based on sympathy and not on the merits. Ask them how they feel about this.

Identify prospective jurors who believe that there should be a cap on damages.

Identify and confront any concerns that a prospective juror has directly.

Please note that in federal actions, *voir dire* is normally conducted by the court, not the attorneys. Attorneys are generally required to submit proposed *voir dire* questions to the federal judge. Attached is a copy of the proposed *voir dire* questions in a federal action, which are similar to what would be asked directly by plaintiff's attorney in a New York State Supreme Court action.