

# The Jury Expert™

*For Excellence in Jury Selection, Communication & Persuasion*

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## Corporate Defense in a Skeptical Age: A Model for Crafting Your Message

By Persuasion Strategies

**Juror:** Umm, you know, going into this trial I knew very little about [this large corporation], very little, and like I say, I would be predisposed against “Corporate America” and would go that way. But now, I think I have a better feeling about [this corporation].

**Interviewer:** So what did [this corporation] do during trial to change your mind?

**Juror:** They laid out a general system of quality control and corporate structure. That didn’t impress me that much, but it certainly made me feel better about them.

**Interviewer:** Okay.

**Juror:** You know, it wasn’t bullet-proof, obviously, but there was at least something there that I felt gave me a feeling that they recognized the importance of quality and the importance of a customer.

Persuasion Strategies conducted the preceding post-trial interview following the conclusion of a major product liability trial involving a large “household name” corporation. Jurors in this case returned very low damages after that company successfully built a positive image and took some responsibility during the trial for its own choices. The juror’s candor shows two things: First, it illustrates the extent of anti-corporate bias as a juror predisposition, and second, it shows that this predisposition can be overcome by crafting a specific positive message for your corporation.

This article draws from our experience on this case and hundreds of other cases across the nation, as well as two national surveys conducted in the past two years focusing on anti-corporate attitudes within the juror-eligible population.<sup>1</sup> Bringing this research and experience to bear, this article lays out a specific model designed to assist corporate executives, in-house counsel and trial counsel in crafting a “message” designed to first prevent litigation, and second to prevail in litigation when it becomes inevitable. By incorporating this “message” into corporate culture and communication, and by building it into every phase of trial preparation (briefing, witness statements, voir dire, opening statement, closing argument and media strategy), companies can maximize their own potential to convey a positive (and thus persuasive) message in a somewhat negative climate.

<sup>1</sup> Persuasion Strategies conducted a nationwide survey of 500 randomly selected jury-eligible respondents between April 28 and May 3, 2004. This survey constituted a retest as well as an expansion on a prior survey of 505 randomly selected jury-eligible respondents conducted February 3 through 5, 2003.

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The juror-eligible population across the country continues to have high demands and low expectations for corporate behavior. While the courtroom remains risky territory for corporate defendants, there are encouraging signs that the level of trust among potential jurors is moving toward a “post-Enron rebound.” The full extent and nuances of these findings are detailed in our most recent analysis of national survey findings published by the *Corporate Legal Times*.<sup>2</sup>

The following are among the most important findings:

- Corporate defendants face high demands in the courtroom, with clear majorities of the juror-eligible respondents reporting that corporations should be held to a higher standard and should bear a greater responsibility for ensuring fairness and clarity in agreements.
- Corporate defendants face low expectations with most juror-eligible respondents believing that executives lie if they can benefit from it, and cover up the harms they create.

<sup>2</sup>Burr, M. (2004, August). Re-channeling Juror Anger. *Corporate Legal Times*, 14:153, pp. 30-36.

- Jurors, however, continue to balance responsibilities by scrutinizing the actions and choices of those who do business with corporations, and by emphasizing the government regulators and the law (and not just corporate ethics) as important touchstones.

In light of this litigation climate, developing a clear and positive message for the corporate defendant is crucial. While the *Corporate Legal Times* report details and contextualizes this data, the present article goes beyond the descriptive level to identify the specific strategies that are key to developing a positive corporate image in these times. In our experience, effective corporate defense messages can be formed based on six specific steps, each building from the message elements that precede it.

### Six Steps to Creating Your Corporate Defense Message

#### Step 1. Embrace a Positive Persuasive Burden

The law teaches us that it is the plaintiff who bears the burden to prove, and the defense carries no burdens of its own. While legally correct, this view is persuasively naïve. In the current climate, any corporation who is hauled onto the docket to defend its actions carries a clear and significant obligation to

*The Jury Expert* is published monthly by the American Society of Trial Consultants, 1941 Greenspring Drive, Timonium, MD 21093. Phone (410) 560-7949; Fax (410) 560-2563; E-mail: [astcoffice@aol.com](mailto:astcoffice@aol.com); URL: [www.astcweb.org](http://www.astcweb.org). The annual subscription rate is \$99.95 and includes 12 monthly issues. Single copy price \$20. For subscription or renewal information, visit us online at [www.thejuryexpert.com](http://www.thejuryexpert.com), call (410) 560-7949, or use the order form on the back of this issue.

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**Associate Editors:** Gordon Livingston, M.D. and Kevin Bouly, M.A.

**Copy Editor:** Elise Christenson

**Marketing Director:** Ralph Mongeluzo, Esq.

**Typesetter:** Newsletters, Etc.

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effectively demonstrate that its actions were correct and right.

In our most recent survey, almost 50% strongly agreed that if someone sues a major corporation, the case must have some merit, and fully 65% of the juror eligible respondents felt corporations should be held to a higher standard of responsibility than individuals. Specifically, jurors viewed corporations as having the greater responsibility to ensure clarity in agreements between an individual and a corporation. Asked “In an agreement between a company and an individual, how would you assign responsibility to ensure that the terms of this agreement are clear?” the average responsibility level for the individual was 43% while the average responsibility for the company was 57%.

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In the immediate aftermath of the Enron scandals, our 2003 national survey indicated that more than three-quarters of respondents indicated that they would prioritize ethics over law in evaluating a corporation’s conduct. One of the more hopeful findings from our 2004 survey indicates that this supposed “Enron effect” may have been remarkably short lived: Those who would prioritize ethics over law fell from 76% post-Enron in 2003 to 41% in 2004. Yet we may be too hasty if we presume that we’re back to the good old days quite so quickly. A lingering result may still be with us in the form of greater salience for narratives of corporate wrongdoing, generally lowered expectations for corporate responsibility, and a persistence of the view among a still-solid portion of the national jury pool that it is more important to be ethically *right* than it is to be legally *safe*.

In view of these findings, the idea that the defense carries no burdens is a legal fiction. Corporate defendants need to convince jurors that they behave honestly, ethically, and responsibly and for that reason, they carry a positive persuasive burden to prove that they set and meet high standards. Corporate defendants who are successful before trial and during trial are those who embrace that burden as the foundation for their entire strategy. Assuming this *de facto* burden of persuasion and realizing that it is far greater than any legal burden of proof is an important step in overcoming jurors’ learned-distrust of today’s corporate litigants.

### **Step 2. Play to the “Tough Crowd”**

In addition to setting a higher standard, some jurors also begin with a presumption of corporate wrongdoing. Unfortunately, there aren’t enough peremptory strikes in the world to get rid of this “tough crowd.” The majority of our 2004 jury eligible respondents felt personally removed from corporate values, with 67% disagreeing or strongly disagreeing that “business executives share my values.” And the perception of what values corporations do hold is even more disturbing. More than three-quarters of potential jurors (77%) in our 2004 survey agreed or strongly agreed that if a major corporation could benefit financially by lying, it’s *probable* that it would do so. This is also consistent with the results from our 2003 national juror survey which found that 82% of jurors believed a major corporation would lie if it could benefit the corporation financially.

The reality is that many to most of your potential jurors will *begin* the trial believing that corporations (a) operate from a different values system than they do, (b) will try to cover up the harm jurors believe they inflict, and (c) will lie if they think they can get away with it. The fact that fully half of the juror eligible population in this survey is willing to *presume* that a case filed against a corporation must have merit is a strong indication of how low the expectations for corporate behavior have sunk. So as a result, it is not a matter of removing a few “bad apples” during jury selection, it is a matter of addressing the tough audience which constitutes a large portion of the “barrel.”

What characterizes the plaintiff-oriented juror is a notion that “values are king.” As a result, your corporate defense theme can no longer be addressed to those who are willing to assume you operated in good faith and require that the plaintiff prove their case. To gain the edge at trial, then, it is *critical* that corporate defendants aim their themes and arguments toward that tougher audience on the jury. It is no longer enough to say, “we followed the law.” Now corporate defendants have to go the extra defense mile and say, “we followed the law and it was the right thing to do.”

### Step 3. Find Your Best Yardstick

Corporate litigation by nature tends to pull jurors into an unfamiliar world. Any message to the effect of “we behaved well” is likely to meet the implicit response of “compared to what?” One beneficial result of the increasing media scrutiny of corporate behavior is that the well-informed citizen now has numerous *bad* examples to which to compare your company. But jurors need a positive standard, yardstick or litmus test.

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The most accessible yardstick is often found among government regulators. Mock trial and focus group research we have conducted in venues across the country over the last several years consistently demonstrates jurors look to government agencies to provide them with a clear sense of what a responsible company should have done in any specific case. In resources litigation, the Federal Energy Regulatory Commission (FERC) is sovereign, while in employment litigation, the Equal Employment Opportunity Commission (EEOC) carries great weight. According to both our 2003 and 2004 national surveys, potential jurors continue to hold a generally favorable view of government regulators. Still, you are best off viewing the regulations as a “necessary but not sufficient” test of corporate

behavior since fully 72% of our respondents believe that the government needs to do more to police corporations these days.

Despite this preference for greater policing, jurors’ trust in regulators can be a positive if corporate defendants are able to prove that they not only met, but *exceeded* regulatory standards. If jurors are convinced that a company goes “above and beyond,” then part of the positive credibility that attaches to the regulators and the regulations will carry over to the corporate defendant.

One additional yardstick may be found in the actions of other comparable businesses. With an overwhelming majority of jurors viewing trials as an effective way to police corporate conduct, today’s corporate defendant needs to be aware that jurors are evaluating not only *its* conduct, but its conduct vis-à-vis corporate America. Jurors are asking not only “what did this company do well?” They’re asking “how does this company stack up to the others?”

### Step 4. Combine the Best of All Three Worlds (Ethics, Law, and Good Business)

Despite what your high school football coach may have said, the best defense is truly a “defense.” Defense requires a simple but clear focus on “what you did well.” One potential “silver lining” to these results may be that a company that is able to prove that they followed a pattern of ethical and honest behavior will make an impression. An interesting result in our 2004 survey is that a majority of respondents (67%) would give greater weight to a company’s ethics in evaluating a company, yet a majority (55%) feel that when ethics and the law conflict, it is the law that should be followed. The respondents who, with apparent inconsistency, are going with the majority on *both* of those questions may represent the ambivalence seen in many defense-oriented jurors who *want* to hold companies to high ethical standards but, when push comes to shove, realize that it is the law that needs to be the litmus test. The smart corporate defense theme, of course, emphasizes both: we did things right by doing the right thing.

But one additional component is also sometimes necessary. In this new climate of heightened expectations and heightened skepticism, it is not



enough to be legally correct, but it may not be enough to be ethically righteous either. Potential jurors *want* to believe that companies and executives did the right and the legal thing, but may have a much easier time of it when they believe that ethics and the law coincide with good business. In other words, it is too much to ask jurors to believe in an altruistic motivation. If, on the other hand, the profit-motive, the desire to compete and to sell products and services, is consistent with legal and ethical conduct, then jurors have a much easier time explaining to themselves and others why the company acted legally and ethically.

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One of the best ways to evaluate a case is to observe mock jurors deliberate case issues during a research exercise. Contrary to what many might assume about jurors, they generally *do* take their roles very seriously and try their best to understand and apply the law. But being human, jurors (and we might add, judges too) can't resist filtering the arguments, witnesses and evidence through their own senses of fairness, as well as their own view of how business usually operates. For that reason, the best theme is one that is able to explain a business's actions by showing that what it did was (a) the right thing to do, (b) consistent with a business-oriented motivation, and (c) consistent with the law.

#### **Step 5. Take Responsibility (Without Necessarily Admitting Fault)**

The juror interview which began this essay related to a case involving a large corporate defendant facing a series of similar claims. Initially attempting a "scorched earth" deny-everything type of defense, the company found themselves losing, and losing badly. Based on the results of several mock trials,

however, the company found that they could dramatically reverse their fortunes in court by simply and sincerely owning up to some small measure of responsibility. Obviously, this isn't a legally sound strategy in every case – it depends absolutely on the facts. But our experience across the country is that *where* corporations can honestly admit a reasonable and controllable amount of fault, the dividend from the jury is most often greater credibility, greater trust, and much smaller damages. Jurors refuse to accept that *any* party in the case is completely above reproach. A corporation shows it is only human by admitting a safe level of fault. An apology also provides a productive opportunity for defusing an emotionally charged situation.

If the plaintiffs have had enough opportunity to dig, then there is almost always something that exists that any corporation would prefer *not* to own up to. However, when jurors perceive that they're witnessing a corporate game of "hiding the ball," then it becomes much more likely that they will want to punish that corporation. The "smoking gun" internal memo or e-mail hinting at a cover-up will always be more memorable and salient to jurors than a dozen witnesses trying to explain that evidence away. For this reason, taking responsibility where one can is a step that begins long before trial and continues through trial.

#### **Step 6. Distribute Mutual Responsibility to All Parties**

Another potential "silver lining" to this more skeptical attitude toward corporations is that it is likely to spill over into increased responsibility for those who deal with corporations, be they individuals or other businesses. If expectations are lowered, then it is more "expected" that a corporation may place its own interests paramount. And when that is the case, the onus falls on individuals who deal with corporations to look out for themselves.

The fact that jurors expect individuals or other corporations to look out for themselves translates to something we call the "desensitization effect" in litigation. For example, in our 2003 national juror survey, 69% of respondents agreed with the statement "I was surprised to learn of Enron's actions leading to the recent collapse of the company." At the same

time, however, in response to a follow-up question, only 38% agreed with the statement “I would be surprised if another company acted like Enron did in the future.” We have observed that jurors become desensitized to corporate bad acts with each new Enron or Tyco headline. The bottom line here? If you’re a plaintiff, jurors will look at how likely it is that you could have anticipated the allegedly negligent behavior of the defendant company. If you could have anticipated it and failed to avoid harm, you just lost some degree of juror sympathy.

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*Jurors refuse to accept that any party in the case is completely above reproach. A corporation shows it is only human by admitting a safe level of fault.*

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As long as your message includes an answer to the critical question, “what did you do *well*?” then the stage is set for jurors to take a more realistic look at the responsibilities of the plaintiff and other parties as well. Distributing responsibilities ought not amount to a “blame them, not us” strategy, although ideally, that can be the effect of the strategy applied well.

Potential jurors exhibit a relatively high level of faith in the courtroom to promote corporate responsibility with 70% in our 2004 sample agreeing or strongly agreeing that “courtroom trials have played an important role in promoting corporate responsibility.” In addition, 78% agreed or strongly agreed that “a jury trial is an effective way to address wrongdoing by corporate executives.” The risk of being called to account by this jury pool is a daily reality to today’s corporations. Imagine, however, the large company that is discussed by the actual juror in our opening example. Knowing the extent of anti-corporate bias, and even knowing that this bias created a known predisposition for this juror, the corporation could have either tried to remove the jury for cause (very unlikely), peremptorily (never enough strikes), or it could have despaired their chances of receiving a fair hearing. *Or* they could have done what they actually did: tell a forceful and positive story about their own company which embraced a positive, persuasive burden, targeted

their own worst jurors, and took and distributed responsibility, all while building a clear and positive impression of what they did well. That is the strategy for corporate defense in this skeptical age.

*Persuasion Strategies, based in Denver, CO, is a service of Holland & Hart LLP. Information about Persuasion Strategies’ litigation consulting services is available at [www.persuasionstrategies.com](http://www.persuasionstrategies.com). The authors may be reached at (303) 295-8182 or by e-mail at [kbrodabahn@persuasionstrategies.com](mailto:kbrodabahn@persuasionstrategies.com).*

## Quick Courtroom Tips

By Bob Gerchen

### *Use Active Tense*

Here’s my favorite example of a lawyer strangling the English language through use of passive tense:

*“Sir, what was your understanding of what the nature of the instructions were that were given to her by you?”*

That’s a seven-word sentence in the hands of someone who uses active tense:

*“Sir, what instructions did you give her?”*

*Bob Gerchen is the Director of the St. Louis office of Litigation Insights. He may be reached at (314) 863-0909 or by e-mail at [rgerchen@litigationinsights.com](mailto:rgerchen@litigationinsights.com).*

*For more information about Bob Gerchen’s new book, 101 Quick Courtroom Tips, visit [www.courtroompresentationtips.com](http://www.courtroompresentationtips.com).*

## Counter Claim

By Pete Rowland, Ph.D.

I read with interest and admiration David Ball's piece "Damages: The Basics" in the June 2005 issue of *The Jury Expert*. I was especially impressed with his recommended emphasis on the importance of presenting jurors with vivid information about the plaintiff's harms and losses, and the organization of the recommendations by reference to basic principles applicable to the presentation of any plaintiff case. However, as one who typically works for defendants in personal injury cases, I could not help but notice that, as with so many litigation strategies, several of the recommendations become two-edged swords in the hands of a skilled adversary.

Particularly vulnerable from the perspective of our work over the last five or so years were two pivotal pieces of advice for plaintiffs: 1) the admonition (borrowed from Don Keenan<sup>1</sup>) to "dress" jurors as helpers/caretakers rather than deciders, and 2) the parallel advice to spend more time talking about harm and damages, and by implication, less time talking about causation. Both pieces of advice strike me as creating as many opportunities for the defense as for the plaintiffs in today's litigation climate, where jurors — including jurors in traditionally pro-plaintiff jurisdictions such as Madison County, Illinois — arrive with a healthy skepticism regarding *both* corporate defendants and the legitimacy of personal-injury plaintiffs' claims.

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*[T]he winning plaintiff is usually the one who gains the jurors' trust and convinces them that the plaintiff's injuries were not just severe, but legitimate and caused by the defendant.*

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Our post-trial interviews and mock jury debriefings indicate that, to a much greater degree than was true five years ago, the winning plaintiff is usually the one who gains the jurors' trust and convinces them that the plaintiff's injuries were not just severe, but legitimate, and caused by the defendant. Real and mock jurors tell us that nothing triggers credibility concerns faster than an attorney's attempt to "play on their sympathy" by convincing them that they are caretakers on the behalf of the plaintiff rather than as fact finders. These credibility concerns are exacerbated when the plaintiff spends too much time on injury and damages and not enough time on evidence of causation.

None of this is to suggest that David Ball's basic premise or advice is misplaced; rather, it is a reminder that even the most insightful litigation strategies also create opportunities for the other side.

*Pete Rowland, Ph.D. is a Partner at Litigation Insights in Overland Park, KS. He may be reached at (913) 339-9885 or by e-mail at [prowland@litigationinsights.com](mailto:prowland@litigationinsights.com).*

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<sup>1</sup> Don C. Keenan, Esq. specializes in child injury and wrongful death cases arising from medical negligence, products liability, and premises liability. The Keenan Law Firm is in Atlanta, Georgia.

## Position Statement of the American Society of Trial Consultants Regarding Efforts to Reduce or Eliminate Peremptory Challenges

The American Society of Trial Consultants opposes efforts to reduce or eliminate peremptory challenges. We believe that the arguments for making such a change are unsubstantiated or better addressed by alternative solutions, and we propose alternative solutions.

### Background

In the 18 years since the United States Supreme Court first prohibited discriminatory use of peremptory challenges, commentators have predicted that the peremptory challenge would eventually be abolished.<sup>1</sup> Calls to significantly reduce or eliminate peremptory challenges are currently gaining momentum for a variety of reasons.<sup>2</sup> As professionals who are active participants and observers in jury selections in state and federal courts throughout the nation, members of the American Society of Trial Consultants are obliged to enter into the public discussion of these issues.

Our members have been working to improve jury selection procedures for 30 years. We advocate for procedures designed to help attorneys learn more about jurors' attitudes and to increase the candor of juror responses. As social scientists, we reject stereotypes based on race, gender, or ethnicity as invalid and improper bases for the exercise of peremptory challenges. Instead, we encourage attorneys to focus on case specific factors that could cause jurors to be predisposed or to prejudge a case. The goal of trial consultants' professional efforts in connection with jury selection is to promote the

<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.E.2d 69 (1986).

<sup>2</sup> See, e.g., *People v. Brown*, 743 N.Y.S.2d 374 (N.Y., 2002) where New York's Chief Judge Judith Kaye calls for elimination or reduction of peremptories in a concurring opinion.

gathering of reliable information by attorneys in order that they may make informed jury selection choices.<sup>3</sup>

As professionals engaged in assisting trial attorneys during voir dire and jury selection, we agree with members of the bar who note that jury selection is a misnomer. Instead, the voir dire process actually leads to deselecting jurors who each party feels cannot be fair in a given case.

We have a unique vantage point from which to evaluate current practices in the exercise of peremptory challenges. Our members are constantly involved in researching bias, creating voir dire questions that will effectively elicit useful information from prospective jurors, and assisting counsel in the jury selection process. We promote approaches to voir dire that are designed to increase the quality and reliability of information jurors provide in order to improve our clients' abilities to make intelligent decisions. We help our clients develop criteria for exercising peremptory challenges. And, we often have the opportunity to learn from jurors' opinions about the jury selection process after it is over.

Intelligent exercise of challenges, both cause and peremptory, requires that counsel and the court have a meaningful opportunity to hear jurors describe their views about basic legal principles, case specific issues, and life experiences related to the issues in dispute. The absence of meaningful information about jurors often forces counsel to exercise challenges based on stereotypes.<sup>4</sup> Peremptory challenge decisions based on jurors' attitudes and life experiences, rather than on unreliable and inappropriate demographic stereotypes, such as race or gender, are only possible when jurors are encouraged to provide complete information during voir dire.

<sup>3</sup> "Trial consultants shall not recommend the use of peremptory challenges on the basis of race or gender." Codes of Professional Ethics, Jury Selection Standard IV, American Society of Trial Consultants. (Proposed for adoption at ASTC Annual Conference, June 2004.)

<sup>4</sup> Practitioners note that the restricted nature of voir dire forces defenders to use stereotypes in exercising peremptory challenges. E.g., Smith, "Nice Work if You Can Get it": "Ethical" Jury Selection in Criminal Defense." 1998 Fordham Law Review 523 (1998).



Many rationales have been advanced for significantly reducing or eliminating peremptory challenges. We question whether reducing or eliminating peremptory challenges will address these concerns. Instead we believe there are alternative, and more effective, approaches to addressing them.

### **Alternatives to Reducing or Eliminating Peremptory Challenges**

#### **A. Would eliminating peremptory challenges save time and money?**

An impartial jury is fundamental to the American system of justice. We question whether the goal of saving time and money should be achieved at the expense of a procedure intended to reduce bias.

If peremptory challenges are eliminated, trial consultants will not be “out of work” as some commentators have suggested. Rather, trial consultants will become more focused on eliciting, identifying, and documenting bias in jurors’ responses.

Peremptory challenges allow each side to eliminate jurors it believes will prejudice a case based on inappropriate criteria and to bring the final jury closer to the ideal of impartiality.

It has been suggested that more liberal cause challenges can better accomplish the goal of selecting impartial jurors. However, the suggestion that cause challenges can replace peremptory challenges is unrealistic because it assumes that the judge and counsel share definitions and assessments of bias. However, judges and lawyers diverge in their assessment of bias. The judge may be looking at global criteria without reference to case specific issues, while counsel is concerned with the specific issues that arise in the case to be tried.

In current practice, at least three participants – the judge and counsel for each party – participate in deciding who will be excused and who will sit as a juror. Reducing the number of decision makers to one judge, who is often unacquainted with case specific factors that could trigger predispositions or prejudgment, may save time, but offers no advantage in achieving the goal of an impartial panel.

Moreover, it is unlikely that time will be saved by eliminating peremptory challenges. In absence of peremptory challenges, attorneys will increase their efforts to expand voir dire in order to increase the odds of correctly identifying jurors who should be removed for cause. They will be required to make a detailed record on each challenged juror who is not excused.<sup>5</sup>

Many other improvements to jury selection procedures increase efficiency without sacrificing the safeguard of peremptory challenges.

- 1. Use of case specific written questionnaires to quickly identify jurors who should be either excused for cause or questioned in more detail.** Efficient use of written questionnaires reduces juror waiting. Those whose answers show that they are not qualified to serve on a case can immediately be sent to another courtroom, and thus avoid waiting to be questioned for a case on which they could never serve. Using juror questionnaires to inquire about relevant attitudes and experiences focuses attention on the most reliable indicators of potential bias, eliminating inappropriate or redundant questions.
- 2. Use of mini-openings to alert jurors to issues in dispute, thus enabling them to answer questions more completely.**<sup>6</sup> When jurors know something about case facts and issues before they must answer questions, they are better able to evaluate whether they can be fair and impartial.<sup>7</sup>

<sup>5</sup> If peremptory challenges are eliminated, trial consultants will not be “out of work” as some commentators have suggested. Rather, trial consultants will become more focused on eliciting, identifying, and documenting bias in jurors’ responses.

<sup>6</sup> A mini-opening is an opportunity for counsel for each side to briefly describe the contentions and issues from their side’s point of view before the voir dire. Each side is usually allowed about five minutes for the mini-opening. Munsterman, et al., *Jury Trial Innovations*, National Center for State Court, ABA, (1997) at 154. See also, Connor, *Los Angeles County Trial Courts Test Jury Innovations and Find They are Effective*, 67 *Defense Counsel Journal* 1229 (1993).

<sup>7</sup> Mini-openings can also eliminate complex and argumentative questions describing the nature of the dispute and the evidence.

3. **Use of the “struck system” in combination with written questionnaires to permit the most efficient and intelligent use of peremptory challenges.** Some challenges may not be used if the parties can make a meaningful comparison between the attitudes of jurors “in the box” and those who have yet to be questioned.<sup>8</sup>
4. **Eliminate requirements that peremptory challenges must be exhausted to preserve the right to appeal on jury selection issues.** Because of this requirement, counsel is sometimes forced to exercise challenges in order to preserve a client’s appellate rights. Eliminating this requirement would save time for jurors and the courts.
5. **Improve juror candor by using juror orientation materials and voir dire introductions emphasizing that bias is a normal result of life experience.** Encourage jurors to view jury selection as a process for examining how biases may influence decisions on specific issues in specific cases. Jurors should understand the goal of voir dire as making sure that they serve on cases where their biases won’t make it difficult for them to be impartial.<sup>9</sup>

<sup>8</sup>In the struck system, peremptory challenges are not exercised until after the number of jurors needed for the jury plus the total number of challenges for both sides has been questioned and qualified. Thus, in a federal criminal case, where there are 12 jurors, 10 challenges for the defense and 6 for the prosecution, 28 jurors would be qualified before exercising any peremptory challenges. Frequently, the struck system is a more efficient and time-saving method of exercising challenges than other methods of empaneling.

<sup>9</sup>A sample introduction from Los Angeles County Superior Court Judge Judith Chirlin follows: The goal here is to select a jury that is fair and unbiased and can decide this case based on the law and the facts, and not on any other basis. Now, did you notice that I said we are trying to select a “fair and unbiased jury?” I didn’t say we are trying to select “unbiased jurors.” The reason is that we know that by the time anyone reaches 18 years old, they have biases. After all, what are biases? They are just the attitudes and opinions that we pick up as a product of our life experiences. Those attitudes and opinions just get a bad rap when we call them biases or prejudices.

- a) **“Model” the impact of bias by giving examples that show how experience creates predispositions and prejudgments.** Stop encouraging jurors to deny or ignore their biases with questions like, “You can set that (bias) aside, can’t you?” Jury selection takes longer when the message is given to suggest that relevant experience or knowledge are “problems.”
- b) **Acknowledge that we all have difficulty evaluating the impact of our biases.** Don’t try to talk a juror out of saying he/she can’t be fair. “Rehabilitating” jurors who express bias sends a signal to other jurors that they should avoid being candid in responses to questions.
- c) **Tell jurors that being excused from one panel means that they may be better qualified to sit on another type of case.**

#### **B. Does the exercise of peremptory challenges negatively impact jurors’ perceptions of the justice system?**

Many commentators assume that jurors are insulted, offended, or disappointed when removed by peremptory challenge. Recent research by Dr. Mary Rose<sup>10</sup> and by Dr. Kenneth Broda-Bahm<sup>11</sup> does not support those assumptions. Jurors appear

Your immediate response might be, “Of course, I can be a fair-minded juror because I am a fair-minded person,” but all of us have our loyalties, our sympathies and we should be proud of them. [We have loyalty to our family. We could not sit in judgment on a member of our family. We have loyalty to a church often. We have loyalty, of course, to employers. We have loyalty to labor unions.] There are any number of loyalties that we have, and should have, but in a particular case that loyalty might interfere with our ability to be fair-minded.

<sup>10</sup> Rose, “A Voir Dire of Voir Dire: Listening to Jurors’ Views Regarding the Peremptory Challenge,” 78 Chicago Kent Law Review 106 (2003).

<sup>11</sup> Broda-Bahm and Schwartz, “Those Who Might Have Served: The Attitudes of Excused Venire Members of the Baltimore County Circuit Court.” A paper presented at the annual conference of the American Society of Trial Consultants, June 2003.

to understand why they, or others, were peremptorily challenged and accept the reasons as legitimate.

These research findings echo the anecdotal reports of the American Society of Trial Consultants' members who routinely observe jurors heaving a sign of relief when they learn they are being excused. By contrast, those who remain in the jury box often have mixed feelings about being selected to serve. Jurors routinely report in post-trial interviews that they are willing, but not anxious, to take on the serious responsibility and inconvenience of sitting through a trial.

The research does show, however, that jurors resent being asked questions about private or embarrassing issues in open court.<sup>12</sup> While jurors generally understand why such questions are being asked, they wish greater efforts were being made to respect or protect their privacy. Being allowed to respond to sensitive questions in writing addresses the jurors' concerns and provides attorneys with the information they need.

Where attorneys announce each peremptory challenge as it is exercised, an individual juror may feel some discomfort or embarrassment due to being singled out. That problem is easily avoided by minor procedural changes. For example, the list of prospective jurors can be passed among counsel who cross out names as challenges are exercised. The names of all jurors being excused are announced at one time.<sup>13</sup>

### **C. Do jurors have a “right” to serve on a particular trial?**

The constitutional right of criminal defendants and civil litigants to fair jury trials incorporates the right to select a jury chosen from a fair cross section of the community.<sup>14</sup> The law protects eligible citizens' equal opportunity to be included in the group from which jurors are summoned. American Society of

<sup>12</sup> Rose, Mary, “No Right to Remain Silent: Privacy and Jurors’ Views of the Voir Dire Process,” American Bar Foundation Newsletter, Dec. 2000.

<sup>13</sup> This procedure is consistent with the “struck system” referred to above (A.3). There are variations on this procedure that can be used with other methods of exercising challenges.

<sup>14</sup> *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

Trial Consultants' members have supported and helped to enforce that right by providing technical assistance to counsel challenging jury pools that do not fairly represent the communities from which they are drawn.

There is an important distinction between the right to be included in the pool from which jurors are drawn, and the right to serve on a particular case. No law supports the latter proposition, despite recent arguments to the contrary. There is also no evidence to suggest that jurors feel they are entitled to serve on the particular case for which their names are drawn.

### **D. Is *Batson* working?**

Our experience shows that *Batson* and its progeny prevent parties from exercising peremptory challenges in a discriminatory manner. This is so, both when a *Batson* challenge is successfully litigated at the trial level and when the threat of such a challenge prevents parties from behaving in a discriminatory manner.

While *Batson* has not solved completely the problem of discrimination in the use of peremptory challenges, there is no reason to conclude that those challenges should be eliminated. Some who argue that *Batson* is unenforceable cite appellate decisions accepting frivolous explanations for the discriminatory exercise of a peremptory challenge.<sup>15</sup> However, appellate decisions give insight only into cases where *Batson* challenges were denied at the trial level; they provide no information about cases where *Batson* challenges are successful at the trial level. The real solution to the improper exercise of peremptory challenges lies in expanding voir dire so counsel can obtain enough information to avoid making challenges based on improper stereotypes.

The American Society of Trial Consultants supports efforts to eliminate the discriminatory use of peremptory challenges. Our members are encouraged to educate their clients on developments in this area of law, and discourage clients from exercising challenges based on impermissible criteria. As active

<sup>15</sup> E.g., *Purkett v. Elem*, 115 Sup Ct. 1769 (1995) holding that even “silly or superstitious” race neutral reasons may be acceptable basis for rebutting a prima facie case.

participants and observers during jury selection, trial consultants document discriminatory practices when they occur in order to assist clients in making successful *Batson* challenges.

**Conclusion**

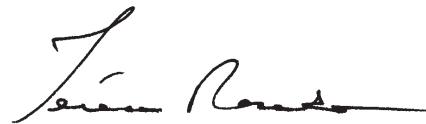
As an organization, the American Society of Trial Consultants recognizes that education and training in the effective use of voir dire is an important element in improving the effectiveness and efficiency of the jury selection process. For this reason, our members have volunteered their services to bar associations, federal and state governments, public defenders, and to organizations of state and federal judges. Believing that the American jury system will be strengthened through education, the American Society of Trial Consultants is committed to continuing to provide that education.

*This ASTC position statement was drafted by members of the Jury Reform Task Force: Susan Macpherson of National Jury Project, Andrew Sheldon, J.D., Ph.D. of Sheldon Associates, and Beth Bonora of Bonora D’Andrea, LLC. Any questions or comments should be directed to Susan Macpherson at [smacpherson@njp.com](mailto:smacpherson@njp.com).*

**Summary of This Issue**

- Corporate Defense in a Skeptical Age: A Model for Crafting your Message — by Persuasion Strategies
- Quick Courtroom Tips: “Use Active Tense”— by Bob Gerchen,
- Counter Claim — by Pete Rowland, Ph.D.
- Position Statement of the American Society of Trial Consultants Regarding Efforts to Reduce or Eliminate Peremptory Challenges — by Susan Macpherson, Andrew Sheldon, J.D., Ph.D. and Beth Bonora.

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[trosado@juriscomm.com](mailto:trosado@juriscomm.com)

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