SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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BILLY LEVINE, ESQ.
TRIAL TECHNIQUE SERIES #1
Jury Selection

FACULTY

Bob Sullivan, Esq.
Marvin Salenger, Esq.
Debbi Aviles, Esq.
Hon. R. Bruce Cozzens
Hon. Randy Sue Marber
Hon. Denise L. Sher

Program Coordinator: Paul Devlin, Esq.

September 12, 2018
Suffolk County Bar Center, New York

Agenda

5:45 – 6:00	Opening remarks by Marvin Salenger and Hon. R. Bruce Cozzens
6:00 – 6:15	Lecture by Hon. Denise L. Sher
6:15 – 6:30	Lecture by Hon. Randy Sue Marber
6:30 – 6:45	Lecture by Hon. R. Bruce Cozzens
6:45 – 6:55	BREAK
6:55 – 7:35	Lecture by Robert Sullivan, Esq.
7:35 – 7:45	BREAK
7:45 – 8:25	Lecture by Deborah Aviles, Esq.
8:25 – 8:30	Questions & Answers

Biography of Marvin Salenger, Esq.

Simply put, Marvin Salenger is one of the most highly regarded personal injury litigators in New York. Most recently he was named "2018 Lawyer of the Year for Personal Injury Litigation – Plaintiffs" in the New York Metropolitan Area" by Best Lawyers(r). In 2012, his was the cover photo of the New York Metro Super Lawyers magazine insert in the New York Times Sunday Magazine, and Marvin has been ranked among the top 100 on the Super Lawyer list for the New York Metro region in what is likely the country's most highly competitive arena.

As one admiring competitor wrote in support of Marvin for the New York Super Lawyer list, "He has extremely polished courtroom skills and has any jury eating out of the palm of his hand. Marvin is a very dangerous adversary."

Fierce in his convictions, imposing in stature, Marvin is compassionate, generous, patient and accessible to his clients. A big personality who prefers to share the credit of his many accomplishments with his team at Salenger, Sack, Kimmel & Bavaro, Marvin Salenger is passionate about fighting for the underdog, in part because he's been there.

Money was always scarce in the Salenger household during Marvin's childhood in Brownsville, Brooklyn. His chronically ill mother struggled to raise her three children single handedly, and their tenuous situation worsened when 9-year old Marvin was struck by rheumatic fever. Severely ill and unable to walk, Marvin was confined to his family's apartment and schooled at home for two and a half years.

The challenges of his early years left Marvin determined to help others like his family—good people living on the edge. Working by day and attending school at night, Marvin earned a teaching degree. He accepted a Social Studies position in Brownsville at one of the most troubled junior high schools in New York City, even though he had also been offered a more prestigious position in Bayside. "I wanted to change the world," explains Marvin.

Realizing that he could effect change in the courtroom, Marvin earned his JD by night at Brooklyn Law. A true "lawyer for the poor," Marvin found his first clients by frequenting the courthouses, picking up work no one else wanted. Then, as now, Marvin worked on contingency, only getting paid when his clients were awarded through a favorable settlement or verdict.

"What's fascinating about the type of work we do is, just think of someone who's poor, or disabled, or worse—and how are they going to be compensated for their injuries? Doctors and hospitals have access to the best lawyers money can buy. How is this poor person with limited resources going to get compensated?"

Marvin recently secured a $10 million verdict for the family of a mother of two whose physician failed to diagnose her breast cancer. The woman ultimately died from the disease. "Tragedies like this change peoples' lives, and the goal of a settlement or verdict is to help keep a family intact after a tremendous loss and give them a chance for a new life."

In another recent case a union carpenter from the Bronx plunged 40 feet down an uncovered stairwell when a plank supporting his scaffold snapped. As a result of the accident, the worker is now paraplegic. The case resulted in a $13 million settlement.

"Working with a client who has suffered a life changing and catastrophic injury, we look to bring some joy, continuity and even a sense of normalcy back into their lives. A favorable settlement or verdict can certainly do that, but our actions, and the small ways in which we can help, are just as valuable."

Biograpghy of Justice R. Bruce Cozzens

Justice Cozzens was elected to the Supreme Court, 10th Judicial District (Nassau and Suffolk Counties) in 1997. He currently is the Presiding Justice in the Trial Assignment Part of the Supreme Court, Nassau County. Justice Cozzens also maintains a full Differentiated Case Management calendar as well as trying both jury and non-jury civil cases. Each morning, Justice Cozzens addresses the new prospective jurors. He explains the jury selection process and thanks them for their service to the community. Prior to taking the bench, he was an attorney in private practice and a founding partner of a Long Island civil litigation firm. Justice Cozzens also is an Adjunct Professor at the Hofstra University School of Law where he teaches a practical skills course. He holds a B.A. Degree from the University of Virginia and a J.D. from Pace University School of Law. He is a member of the Nassau County Bar Association, the Nassau County Women's Bar Association, and the Lawyer-Pilot's Bar Association. He is married to the former Mary Ann Meyer of Roslyn, New York.

Biography of Justice Denise L. Sher

Hon. Denise L. Sher was appointed June 21, 2006 to the New York State Court of Claims. She was Acting Supreme Court Justice in the Matrimonial Center of the Nassau County Supreme Court, Presiding Justice of the Integrated Domestic Violence Court, and is currently Acting Supreme Court Justice in the Nassau County Supreme Court .

Serving since 1995 as a Nassau County District Court Judge, Denise Sher presided over misdemeanor cases, arraignments, small claims actions, civil suits and landlord/tenant disputes. She was the Trial Assignment Judge, insuring the efficient handling of cases and was the first female Judge elected as President of the Board of Judges, Nassau County District Court in November, 2001. Known for her legal expertise and excellent courtroom management, she was appointed Supervising Judge of that court on January 1, 2006.

A practicing attorney since 1979, she served for over ten years as Hempstead Deputy Town Attorney specializing in litigation, was a member of the Supreme Court Appellate Division Law Agency, in private practice, and was a former Adjunct Professor at Marymount Manhattan College. Judge Sher is a graduate of Hofstra Law School and a Summa Cum Laude graduate of Queens College. She is listed in Who's Who in American College and Universities and is a Phi Beta Kappa.

A tireless worker for community and professional organizations, Judge Sher's actions have earned her numerous honors including "The Honorable Edward J. Hart, Jr. Memorial Award" from the New York State Fraternal Order of Court Officers, "Women of the Year" from the Court Officers Benevolent Association of Nassau County, the Public Justice Foundation Award, the "Achievers Award" from the L.I. Center for Business and Professional Women, the Martin Luther King Jr. "Living the Dream Award", the Nassau Bar Association "Volunteer Lawyer Award" and the Hempstead Town "Pathfinder" Award. Judge Sher was the recipient of the "Distinguished Alumni Award" of Hofstra University School of Law, "Woman of Distinction Award" Soroptimist of Nassau County, "L.I. Top 50 Women", Long Island Business News, Neil T. Shayne Distinguished Service Award of Jewish Lawyers, Woman of the Year Italian American Court Officers of Nassau County, the "Lifetime of Community Service Award" from UJA Federation of New York, the Stephen Gassman We Care Award of the Nassau County Bar Association, Yashar Hadassah Judges and Lawyers Distinguished Honoree Award, Judge of the Year Long Beach Lawyers' Association and Outstanding Women in the Law, Hofstra Law School.

Judge Sher served as director of the Nassau/Suffolk Women's Bar Association, chairing the Judicial Screening Committee, a director and lecturer for the Nassau County Bar Association Academy of Law, the chairperson of the Bar Association District Court Committee, and is former secretary to both the Nassau and NYS District Court Judges' Associations. As a result of her ability and professional activities, she was chosen chairperson of the Nassau County Judicial Committee on Women in the Courts, New York State Local Courts Advisory Committee, New York State Family Violence Task Force, and New York State Judicial Committee on Women in

the Courts. She is vice-president of the Jewish Lawyers Association of Nassau County, and past-president of the Theodore Roosevelt Inn of Court.

For over twenty-five years, Judge Sher has been an officer and member of numerous civic and charitable organizations focused on helping the residents of Nassau County. She has served as a director of the Family and Children's Association, Nassau Child Care Council, Center for Family Resources, the Central Council PTA Hewlett-Woodmere School District, Sisterhood of the Hewlett-East Rockaway Jewish Center, Friedberg JCC, and the Nassau Council Chambers of Commerce.

A life member of Hadassah, she is also a member of the Peninsula Counseling Center, Five Towns Community Chest, Kiwanis, American Cancer Society, Women Economic Developers of LI, Hewlett-East Rockaway ORT, and the National Council of Jewish Women.

6/13/17

BIOGRAPHY OF JUSTICE RANDY SUE MARBER

Justice Randy Sue Marber was elected in November 2006 to the Supreme Court of the State of New York in the Tenth Judicial District which includes all of Nassau and Suffolk Counties. She currently presides in a civil part in the Supreme Court in Mineola. Prior to her election, she served from 2002 through 2006 as a Judge of the Nassau County District Court. In District Court she presided over a variety of matters including civil bench and jury trials, criminal cases and landlord-tenant disputes. She is a past President of the Nassau County District Court Judges Association.

Prior to taking the bench, from January 2000 until December 2001, Justice Marber was the Principal Law Clerk/Law Secretary to New York State Supreme Court Justice and Associate Appellate Term Justice Allan L. Winick in Mineola. Before joining the Unified Court System, Justice Marber was a Senior Associate and Trial Attorney at Curtis Zaklukiewicz Vasile Devine and McElhenny in Merrick where she served as outside counsel to various insurance carriers and self-insured corporations, primarily in the defense of personal injury litigation. She also worked as Staff Counsel to the Hanover Insurance Company at Huenke & Rodriguez in Melville in a similar capacity.

Justice Marber is a graduate of the Boston University School of Law and the University of Rochester. She is admitted to practice in the State and Federal Courts of NY and NJ as well as the United States Supreme Court.

Justice Marber has been involved in a number of community organizations, including her local civic association, the Syosset-Woodbury Chamber of Commerce and school PTA. She has participated in various autism awareness events. Justice Marber serves on the Board of Trustees of Temple Beth Torah in Westbury.

Justice Marber lectures for the New York State and the Nassau County Bar Associations, the NYS Office of Court Administration, the NYS Academy of Trial Lawyers and other organizations. She has served as a high school mock trial tournament judge and judges law school moot court competitions. She is a member of the Speakers Bureau of the Nassau County Court System. Justice Marber regularly participates in Career Day events for schools throughout Long Island and lectures as part of "The Law Squad," which teaches high school students how the law impacts their lives. She appeared on an episode of "The Law Squad" which aired on cable television.

Justice Marber is a member of the New York State Bar Association, Bar Association of Nassau County, Suffolk County Bar Association,, New York State Trial Lawyers Association (NYSTLA), Association of Trial Lawyers of America (ATLA), Women's Bar Association, and the Huntington Lawyers Club. She is on the Board of Directors of Nassau-Suffolk Trial Lawyers Association and the Theodore Roosevelt American Inn of Court.

Justice Marber is currently on the Civil Law Advisory Committee and the Operations Committee of the New York State Office of Court Administration. She is also a member of the Judicial Hearing Officer Selection Advisory Committee for the Second Judicial Department, Tenth Judicial District and the Nassau County Judicial Committee on Women in the Courts.

Justice Marber is also a member of the National Association of Women Judges and has served on the District Court Committee, Women in the Courts Committee, Criminal Courts Committee and the Supreme Court Committee of the Nassau County Bar Association. She previously served as liaison between the Supreme Court Committee and the Law Secretaries Association in Nassau County. She is also a member of Yashar and the Jewish Lawyers Association.

Justice Marber is a past member of CSEA.

Justice Marber grew up on Long Island and now resides in Oyster Bay. She has two adult children.

10/17

Biography of Robert G. Sullivan, Esq.
Partner – Sullivan Papain Block McGrath & Cannovo, P.C.

Robert Sullivan, the firm's senior member, is one of America's top trial lawyers and an advocate with an unparalleled reputation for defending the public interest and championing equal justice under the law.

For more than 40 years, he has been trying cases that have had a substantial impact not only for clients but also on the law itself. He has been an instrumental figure in developing and expanding the law of negligence. His skill was evident from the beginning.

Mr. Sullivan joined the firm in 1972 as a clerk to Harry Lipsig, a legendary New York trial lawyer. After graduating law school in 1973 and being admitted to the bar in 1974, he quickly distinguished himself as one of the state's top trial attorneys, and he rose to become a member of the firm just two years later. In 1977 he was admitted to practice before the United States Supreme Court. Over the ensuing years, his successes in the courtroom and at the settlement table have provided tens of millions of dollars of relief for his clients. And as the firm's senior member, Mr. Sullivan continues to direct the firm's growth and to be available to clients for the most sophisticated matters. Mr. Sullivan is based in the firm's Garden City, N.Y., office.

Admissions/Courts

- New York
- Florida
- U.S. Supreme Court
- U.S. District Court Northern District of New York
- U.S. District Court Southern District of New York
- U.S. District Court Western District of New York

Verdicts and Settlements

- Won a groundbreaking, multimillion-dollar settlement on behalf of the firefighters injured and the families of those killed in 1978's devastating Waldbaum's Supermarket fire in Brooklyn. A roof collapse during the fire left six New York firefighters dead and was one of the worst disasters to befall the city's fire department prior to Sept. 11, 2001.
- Has received numerous multi-million dollar verdicts on behalf of injured New Yorkers, including a $22 million verdict against the City of New York and a $4 million verdict in Suffolk County for a deliveryman whose fall over a concrete footing exacerbated his multiple sclerosis.

Education

- St. John's University School of Law, JD 1973
- Marquette University BA 1968

Professional Associations

- New York State Trial Lawyer's Association
- Nassau County Bar Association
- Nassau-Suffolk Trial Lawyer's Association

Biograph of Deborah Aviles

Partner - Lewis Johs Avallone & Aviles, LLP

Deborah Aviles's practice includes the supervision and trial of cases in all areas of defense litigation. In addition to handling claims against corporate defendants, her practice also involves the defense of physician and hospital malpractice, municipal and premises liability, construction and environmental litigation.

Deborah is active in a variety of professional associations. She was a founding member, former officer, and Executive Board Member for the Alexander Hamilton Inns of Court for Suffolk County. She is a member of the Suffolk County Bar Association, where she formerly chaired the Insurance Committee and was a member of the Judicial Screening Committee. Currently, she is a member of the Supreme Court Committee as well as the Bench/Bar Committee. She also serves as the Chair of the Independent Judicial Qualifications Commission for the 10th Judicial District. Deborah formerly served on the Board of Directors of the Nassau-Suffolk Trial Lawyers Association, the American Lung Association of Nassau/Suffolk Counties, and Long Island University, School of Paralegal Studies. She is rated "AV" by Martindale Hubbell and Long Island Pulse Magazine rated Deborah a Top Legal Eagle in Suffolk and Nassau Counties for civil litigation. In 2009 she was recognized by Cambridge Who's Who for demonstrating dedication, leadership and excellence in legal services.

Deborah has given numerous lectures in both the public and private sectors on topics including: "New York Pattern Jury Instructions: Missing Witness/Missing Documents Charges," Suffolk Academy of Law, Suffolk County Bar Association; "Trial Advocacy," Suffolk Academy of Law; "Medical Malpractice Update." Women's Bar Association of Suffolk County; "Discovery 2000 – for Experienced Litigation," New York State Bar Association; "Motor Vehicle Accidents," New York State Bar Association; "Power Advocacy – Achieving Maximum Jury Impact During Trial," New York State Bar Association; "Alternative Dispute Resolutions – Negotiation

Techniques," and "Civil Trial Skill Series," Suffolk Academy of Law; and "Trial of Medical Malpractice Cases," Suffolk County Women's Bar Association.

Deborah Aviles was admitted to the bar of New York State and to the United States District Court for the Eastern and Southern Districts of New York in 1982. In 1981, she received her Juris Doctor Degree from Howard University School of Law, where she was a member of the National Moot Court. Deborah attended the University of Dayton and the State University of New York at Stony Brook, receiving a Bachelor of Arts Degree in Political Science in 1977.

ASSOCIATIONS

- Alexander Hamilton Inns of Court for Suffolk County – Founding Member, Former Officer, and Executive Board Member
- Suffolk County Bar Association – Supreme Court Committee, Bench/Bar Committee, Former chair of the Insurance Committee, Former Judicial Screening Committee
- Independent Judicial Qualifications Commission for the 10th Judicial District – Chair
- Nassau-Suffolk Trial Lawyers Association – Former Board of Directors
- American Lung Association of Nassau/Suffolk Counties – Former Board of Directors
- Long Island University, School of Paralegal Studies – Former Board of Directors

ADMITTED

- New York State 1982
- United States District Court for the Eastern and Southern Districts of New York 1982

PLAINTIFF'S VIEW: VOIR DIRE
BY DAVID DEAN

I. MATTERS TO BE CONSIDERED BEFORE JURY SELECTION

1. Know the local rules. Empanelling rules sometimes change from month to month, from county to county, and often from JHO to JHO. There's nothing wrong with asking.

2. Is there going to be a CPLR 4107 application? The application, if made, must be granted. It is not discretionary. *Baginski* v. *New York Telephone Co.*, 130 A.D.2d 362, 515 N.Y.S.2d 23 (1st Dep't 1987).

3. Consider whether any pre Voir Dire motions in limine should now be made, limiting matters to be discussed before the jury.

4. Be mindful of the January '09 guide "Implementing New York Civil Voir Dire Law and Rules". See III.B. "JHO may question a challenged juror but may not rehabilitate that juror by eliciting a promise to follow the judge's instructions or to be unbiased. Generally, JHOs should err on the side of caution and excuse jurors when there is a possibility of bias."

5. If the local rules do not prevent it, try to get an agreement with your adversary concerning consent excusals. You may save a lot of time and trouble if you reach an agreement as to how to excuse jurors who are clearly unwilling or unable to serve.

6. Before you start, examine the jurors' completed questionnaires with a particular eye toward organizations, hobbies, family status, occupations, any prior claims made and prior jury service.

   Prior jury service? If called for jury duty in either State or Federal court within the past six years (don't even have to serve), you can challenge for cause (Judiciary Law §524, People v. Wynter, 95 N.Y.2d 504,719N.Y.S.2d 637.

7. What does the concept of "nondesignated alternate jurors" mean? If you consent, know the implications.

II. GENERAL PRINCIPLES- CONNECTING WITH JURORS

1. Enjoy the process. Don't advert your eyes, act and look confident and interested. Get yourself in the right frame of mind to have a pleasant and compelling discussion.

2. Before you speak, be aware of body language (yours and theirs).

3. Continue to be alert to the basic purpose of the process: Weed out the malcontents and attempt to establish your basis for peremptory challenges.

4. Throughout the entire process, you must remember to listen. You will never learn anything about or from a juror if it is only you who does the talking.

5. Listen to what the juror says and try to search for common interests. Often you can initiate a dialogue based upon the juror's responses in the questionnaire. Ask about the job or the family. Be interested. When they become comfortable, most jurors like to speak about themselves. Your interest in their life experience will serve you. Attorneys are often afraid-although they shouldn't be- to ask jurors questions to which they don't know the answers.

6. Remember, if you don't like a juror, that often means they don't like you either.

7. Your style should never be overbearing, exaggerating, condescending or bombastic. You should always be courteous and should always thank jurors for their information, whether good or bad.

8 It does not serve attorneys to be belligerent or discourteous with each other. Jurors become embarrassed and uncomfortable.

9. Analyze the type of case, the parties, and prospective witnesses as to whether or not the juror would be sympathetic or hostile to the plaintiff.

10. Be alert to non-verbal communication. Is there deception in a prospective juror's answers. Are there tightened facial expressions, adverted eye contact, shifting or fidgeting?

11. Acknowledge the admittedly stereotypical background evaluation with regard to ethnicity and socio-economic status. There are, of course, multiple exceptions, but general rules are good to know. Basic juror prejudice does exist. For example, be alert when the plaintiff has an ethnic background against whom other ethnic groups have bias.

12. Juror occupations can often be significant. Sometimes they can point to whether a juror will be a leader or follower.

13. Be alert to the potential problem with prior jury experience. If the trial went to verdict, the juror may well use that verdict as a guide to an evaluation of your plaintiffs damages.

III. QUESTIONING THE JURY

1. Assuming the court gives preliminary comments and the parties are mentioned and their attorneys introduced, if called upon be ready to give a cogent description of your case. Don't fumble. It's the first time the jury has heard you and it is essential that you make a good first impression. For example, "I represent a little boy named John and this is a case brought by John's parents because they believe their son was a victim of careless medical treatment. We claim the defendant doctors did not diagnose his condition when they should have - and not until it was too late."

2. Explain the process to the jury. For example: "This is the opportunity that we have to meet you for the first time, to talk to you, and above all, to listen to you- all for the purpose of selecting a jury that's open and honest (better language than "fair and impartial"). In order to do this, we may have to ask you some questions of a personal nature. We certainly don't mean in any way to pry into your personal lives or to embarrass you. Please understand hat we're asking these questions only to insure that in this particular type of case you can do justice for all parties."

3. When questioning, use the phrase "open to the concept" rather than harsher language.

4. Damages. Deal with a juror's fear and reluctance to award damages. Remind the jury that as much as they would want to, they don't have the power to heal your client and all they can do is to award damages. Workshop the damage claim. For example, if applicable, discuss the economic loss of the services of a housewife. Or, in a death case, the loss of mom or dad's care and guidance. Explain (although not citing PJI: 2:280.1) the duty to consider loss of enjoyment of life, pain and suffering your client has and will in the future endure, ("endure" is another good jury word).

5. Ask the "substantial damages" question.

6. Juxtapose "substantial damages" and the insurance question. (Know by heart the language of CPLR 4110 ("Are any of you officers, directors, stockholders, shareholders...")).

7. Develop the "Some people feel...Other people feel...Which one are you closer to...? Tell me about it." format for many of your issues. Asking questions in this manner can be far more productive and revealing.

8. Must, must deal with the burden of burden of proof. The result can be deadly if you don't. Your alternative should be the "Is the plaintiff more likely right than wrong" approach. Remember to use your hands!

9. Sympathy. Don't loose your best juror on the sympathy issue. You must pre-condition a juror before the defendant has a chance to talk the juror off.

10. Juror perception of trial lawyers. "A lot of people have a negative opinion about trial lawyers..."

11. Don't forget the general areas that should always be discussed. (1) right to sue; (2) feelings about trial lawyers; (3) damages; (4) substantial; (5) insurance; (6) sympathy; and (7) weaknesses.

12. Anticipating weakness. This is essential. It cannot be emphasized too strongly that now is the time to discuss the weaknesses of your case. The jury is going to find out about it anyway and here you have a change to eliminate jurors with pre-conceived notions against your client. If your client has a criminal record or has a documented drug or drinking problem or has other blemishes that you know are going to come out, you must workshop them out now.

13. If an unusual delay or lengthy trial is anticipated, you must advise prospective juror.

14. Can you go beyond the language of 4110? Yes. Graham v. Waite, 23 A.D.2d 628, 257 N.Y.S.2d 629 (4th Dept. 1965) reversed the trial court who directed the attorney to use only the 4110 insurance language and not ask any other insurance question. The Appellate Division, without passing on any specific questions, stated that liability insurance rates may be a proper subject for exploration upon voir dire.

IV. CHALLENGES FOR CAUSE

When you have a juror you find unsuitable, it obviously is desirable to attempt to save a peremptory challenge and have the juror excuse herself or himself. But it must be done gently; otherwise the juror will become intractable. Might the juror's prior life experience or professional connections cause the juror to lean ever so slightly in one direction. Might the juror be uncomfortable with this type of case? Would the juror rather not serve? All these questions must be asked tactfully and carefully.

A. Making the argument to the Court that a Challenge for Cause Exists

If the juror and/or your adversary remain intractable, what is the legal standard for an appropriate challenge for cause?

1. What's the Harm?

To support your argument that on a close call a juror should be excused for cause, consider People v. Branch, 415 N.Y.S.2d 985 46 N.Y.2d 645, In this 1984 Court of Appeals case, the Court stated that it was almost always wise to err on the side of disqualification of a juror since the worse the court will have done in most cases is to replace on impartial juror with another impartial juror. The trial court should lean towards disqualifying a

prospective juror of dubious impartiality rather than testing the bonds of discretion by permitting such juror to serve.

2. "Unequivocal Indication of Impartiality" Standard

In April of 2000, the Court of Appeals in People v. Johnson; People v. Sharper, and People v. Reyes, 94 N.Y.2d 600, 709 N.Y.S.2d 134 (2000), again spoke to this issue. In those three cases the Court mandated that a challenge for cause should be granted if there is "no unequivocal indication of that person's ability to set aside any predisposition and fairly appraise the evidence. The juror's expression of impartiality, to fairly appraise the evidence and to set aside any predisposition, must be unequivocal." The Court required an unequivocal declaration of impartiality.

B. Preserving the record

What must you do in order to protect the Appellate record when the Court fails to grant a challenge for cause to which you are entitled?

You must exercise a peremptory challenge and have thereafter exhausted all of your peremptory challenges in order to preserve the appellate issue.

People v. Torpey, 63 N.Y.2d 361, 482 N.Y.S.2d 448, the trial court, faced with an admittedly equivocal answer with regard to a prospective juror concerning her fairness, nevertheless denied the defendant's challenge for cause. The defendant then used a peremptory challenge to exclude the juror. The Court of Appeals acknowledged that "because Torpey exhausted his peremptory challenges before the completion of jury selection, he may and does assert on this appeal that the denial of the challenge for cause was reversible error".

People v. Brown, 111 A.D.2d 248, 489 N.Y.S.2d 92, a prospective juror was asked "do you think that basically the fact that someone is arrested is an indication that they are guilty of something." The juror answered "yes". The court's denial of defendant's challenge for cause forced defendant to use a peremptory challenge. Thereafter, his peremptory challenges were exhausted and he stated that if he "had a peremptory challenge left I would have used it as this time." The matter was preserved as an issue for review.

People v. Foster. 64 N.Y.2D 1144, 490 N.Y.S.2d 726, Aff d as modified 490 N.Y.S.2d 726- a failure to exercise a peremptory challenge following

denial of a challenge for cause, evidences an intent to waive whatever objection there may have been to the challenged juror. (Unless, as in Foster, the defendant couldn't exercise a peremptory challenge because the co-defendants refused to join with him).

French v. Schiavo, 300 A.D.2d 119, 752 N.Y.S.2d 294 (1st Dept. 2002) – juror's statement that he did not believe in awards based "on potential" revealed a prejudice against plaintiff's claim for future damages. The juror though he knew the plaintiff and recalled her speaking to him in a belittling way. Additionally, the juror stated that he did not think he could render a fair and impartial verdict. The First Department reversed the trial court and granted the motion to set aside the jury verdict because the juror's remarks revealed a prejudice against the plaintiff's case.

1. What must you do?

Make a record. It is beneficial and indeed almost essential that the actual dialogue with a prospective juror be preserved for the record rather than relying on the attorney's perception of it, which understandably may well be less than objective. It's not a coincidence that most of the reported cases, especially in the area of the efficacy of "expurgatory oaths," are in the area of criminal law since it is in those cases the voir dire is on the record and therefore preserved.

V. PEREMPTORY CHALLENGES

A. When is a peremptory not a peremptory?

With the advent of Batson and its progeny, peremptory no longer means peremptory. Batson v. Kentucky, 476 U.S.79, 106 S. Ct. 1712 (1986), strictly prohibits race discrimination by a prosecutor. Subsequent cases have proscribed race, gender and ethnic discrimination. See for example: Batson v. Kentucky, 476 U.S.79, 106 S. Ct. 1712 (1986) (race discrimination by prosecution); People v. Kern, 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990) (race discrimination by an accused); J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 1429 (1994)(gender discrimination); Hernandez v. New York, 500 U.S.352, 111 S.Ct. 1859 (1991), aff g, People v. Hernandez, 75 N.Y.2d 350, 553 N.Y.S.2d 85 (1990) (ethnic discrimination); People v. Rambersed, 170 Misc. 2d 923, 649 N.Y.S.2d 640 (Sup. Ct. Bronx Co. 1996 (Italian Americans); People v. Garcia, 217 A.D.2d 119, 636 N.Y.S.2d 370 (2nd Dep't. 1995) (black women); People v. Stiff, 206 A.D.2d 235, 620 N.Y.S.2d 87 (2nd Dep't 1994) (non-blacks).

Ancrum v. Eisenberg, 206 A.D.2d 324, 615 N.Y.S.2d 14 (1st Dept. 1994) was a Batson issue in which defendant's verdict was overruled. In a malpractice case, plaintiff was African American and the panel had three African American jurors. The attorney exercised challenges only against the African American jurors that were in the paneling room. The Court stated that the plaintiff had made out a prima facie case of discrimination and the excuses given by the defendant were pre-textual. The Defendant's verdict was reversed and a new trial ordered.

Siriano et al. v. Beth Israel Hospital Center et al., 161 Misc.2d 512, 614 N.Y.S.2d 700, (Supreme Court, NY County 1994) the 6 co-defendants used their 9 peremptory challenges to strike only minority jurors (6 African American and 3 Latino). The plaintiff was white. Trial court determined that this was a prima facie case of racial discrimination. This '94 decision is a good review of Batson related cases. Judge Lehner found that there had been a purposeful discrimination and put 3 of the excused jurors back on the panel. The Court noted that a minority can't be excluded based on the stereotype that minorities are more sympathetic. The race of the plaintiff did not impact the Batson violation.

B. Must you show a pattern?

No. This question often arises. Gray supports the proposition that a pattern of discrimination need not be a prerequisite. **People v. Gray, 68 A.D.3d 1131, 892 N.Y.S.2d 455 (2nd Dept. 2009)** The Second Department held that the initial burden to make a Batson challenge was met after only one challenge based on race. The Court held that a pattern did not need to be established through multiple challenges because of race. This case cites among others People v. Smocum, 99 N.Y.2d 418, 421-422, 757 N.Y.S.2d 239.

C. What must be done in order to make a Batson challenge.

There is a 3-part procedure:

1. The opponent of the preemptory challenge must make out a prima facie case that the other side's peremptory challenge was based on, for example, racial discrimination. One must show (a) the party is a member of a cognizable racial group; (b) the opposing party has used a peremptory challenge to remove members of that group and (c) there are facts that raise inferences that the removal of such jurors was on account of their race.

2. The proponent of the peremptory challenge must come forward with a race-neutral explanation.

3. If a race neutral explanation is given, after argument the Court must resolve any disputes of fact and determine if the opposing party has met the burden of proving the peremptory challenge was racially motivated. That is, the Court must determine if the racially neutral reason given is only pre-textual or is legitimate. The burden of proving this is on the party opposing the challenge.

D. Right Continues Until Juror Is Sworn

Sorenson v. Hunter, 268 A.D. 1078, 52 N.Y.S.2d 872 (4th Dept. 1945) Mr. Ford was accepted as a juror. However, the plaintiff's attorney later changed his mind and challenged him before the jury was sworn. The Appellate Division reversed the defendant's verdict indicating that the right of peremptory challenges continued until a jury was sworn. Although this case is 67 years old, recent secondary sources support that this argument is still good law today. *See* 8 Carmody-Wait 2d § 55:41 (2012); 50A C.J.S. Juries § 443 (2012).

VI. MISCELLANEOUS MATTERS

A. Time Restrictions of Voir Dire

How long do you have? The time we have to select varies widely, but see the annexed 2009 "Implementing New York's Civil Voir Dire Rules § III C "In a routine case a reasonable time period to report on the process of voir dire is approximately two to three hours of actual voir dire, and, if requested by the judge or the JHO, periodically thereafter until jury selection is completed." So if a Judge or JHO wants to severely restrict your time (and it often happens), point to the new rules indicating two or three hours to report progress is reasonable. You should also cite Zgrodek v. Mclnerney, 61 A.D.3d 1106 (3rd Dep't 2009) in which the above Rules were cited favorably in reversing a verdict which assessed no damages for past or future pain and suffering when the trial court limited voir dire to 15 minutes for each round.

B. Preserving the Jury

Recognize and fight for your client's constitutional right to the jury of his choice. If, through the use of challenges and charm you will have finally

attained jurors that are good for your case, fight for your right to keep them.

Numerous cases support the position that reversible error has been committed when a trial court discharges a juror during the trial for reasons such as a juror's lateness or illness, if, in fact, the Court doesn't make appropriate inquiry as to why the juror has not appeared. The Court, for example, must make a good faith inquiry as to the nature of an illness and ascertain when the juror will be able to return. Although the Court doesn't have to use extraordinary measures, it must make appropriate inquiry before discharging a tardy juror. If a juror is discharged inappropriately, be sure to make a record.

People v. Garcia, 153 A.D.2d 951, 545 N.Y.S.2d 758, a juror during a recess in the trial told the defendant "have a good day" and the juror was excused. The Second Department said it was an error to excuse the juror where he indicated that the statement was not the result of any premature deliberation or that he prematurely formed an opinion as to the guilt or innocence of the defendant.

But, in People v. Clarke, 168 A.D.2d 686, 564 N.Y.S.2d 184 (2nd Dept. 1990) – where, prior to the completion of jury selection, a sworn juror disregarded the court's admonitions by speaking to the prosecutor, the court permissibly exercised its discretion in determining that the juror's conduct constituted grounds justifying a discharge.

C. A Judge Shall Be Present

Guarnier v. American Dredging Co., 145 A.D.2d 341, 535 N.Y.S.2d 705 (1st Dept. 1988) said the language of 4107 is mandatory. "A judge shall be present" means a judge shall be present upon a party's application. Incidentally, the judge (Gammerman) also told the jury that the plaintiff had already obtained a favorable verdict from another jury with respect to liability and damages and that was also prejudicial.

Baginski v. New York Telephone Company, 130 A.D.2d 362, 515 N.Y.S. 2d 23 (1st Dept. 1987) reversed a defendant's verdict, and held that the language of 4107 is mandatory and that a judge shall be present at the examination of jurors upon application. You don't have to show prejudice.

D. Selecting Alternates

Xi Yu v. New York University Medical Center, 4 Misc.3d 602, 781 N.Y.S.2d 416 (Supreme Court, Queens County 2004) and Madhere v. Gottfrey, 127 Misc.2d 99, 485 N.Y.S.2d 195 (Civ. Ct., Kings county 1985) Only two lower court cases deal with this very important concept. Both holdings relate to the question, when an alternate juror is required, what procedural steps must be taken? CPLR 4106 states that if an alternate is required the Court shall "draw the name of an alternate". Both decisions interpreted this to mean that it is not sequential alternate replacement as in a criminal case, but that the Court must place the names of the alternates in a drum and randomly select an alternate.

People v. Gibbs, 267 A.D.2d 179, 701 N.Y.S.2d 27 (1st Dept. 1999) – where 12 jurors had been sworn but no alternates had as yet been selected, the trial court properly resumed "regular" jury selection to replace a sworn juror discharged for a cause which had not been known at the time that the juror was sworn, rather than replacing the discharged juror by selecting an alternate for that purpose.

E. Dismissing Alternate Jurors

What should you do if you hate your alternates?

You can insist on the record that they be discharged after the case is submitted.

Fader v. Planned Parenthood of New York City, Inc., 278 A.D.2d 41, 717 N.Y.S.2d 166 (1st Dept. 2000). CPLR 4106 alternate jurors says that "after final submission of the case the Court shall discharge the alternate jurors." It is not discretionary. However, the parties may stipulate that the alternates be kept after deliberation begins and substituted in the event a regular juror becomes unavailable for continued service during deliberations. In Fader, there was a suggestion, but much too belatedly made, that the alternates and the jurors were not segregated and there was contact between regular and alternate jurors during deliberation.

Gallegos v. Elite Model Management Corp., 28 A.D.3d 50, 807 N.Y.S.2d 44 (1st Dept. 2005) Over the objection of defendant's counsel, alternate jurors were not discharged after deliberations had begun. When one of the principal jurors was unable to continue, the court replaced the juror with an

alternate, again over the objection of defendant's counsel. The First Department reversed the plaintiff's verdict, and held that absent consent of counsel, the court was required to discharge alternate jurors when deliberation began. Subsequent substitution by an alternate was therefore improper.

F. Presence of Parties

Parties have the right to be present at voir dire.

Carlisle v. County of Nassau, 64 A.D.2d 15, 408 N.Y.S. 2d 114 (2nd Dept. 1978) defendant's verdict was reversed because the trial court did not allow the plaintiff to be present during voir dire. The plaintiff has the constitutional right to be at the trial through all phases and that includes voir dire.

Liquori v. Barrow, 160 A.D.2d 843, 554 N.Y.S.2d 278 (2nd Dept. 1990) where defense counsel failed to appear due to a miscommunication, the jury selected ex parte by plaintiff's counsel should have been disbanded. "Absent an express waiver or unusual circumstances, a party to a civil action not in default is entitled to be present in the court, either in person or by counsel, at all stages of the proceedings including the selection of the jury from the panel."

G. Bifurcated Trial

You have the right to ask damage questions during liability voir dire.

Goerlich v. Ippolito, 62 A.D.2d 1030, 403 N.Y.S.2d 922 (2nd Dept. 1978) the plaintiff was successful in overturning an inadequate damage verdict on the grounds that it had been a bifurcated trial in which jury questions during selection had not been allowed on the issue of damages. The Court held that it was a reversible error not to permit questioning the jury concerning damages prior to the commencement of the damage phase.

H. Identifying Witnesses

Draves v. Chua, 168 Misc.2d 314, 642 N.Y.S.2d 1022(1996) is an interesting lower court case which states that at the time of jury selection, upon application, all parties should reveal to the judge supervising jury selection the names of all witnesses the party intends to call. If there were a legitimate reason to protect the identity of the witness at that stage then the lawyer has a

burden of convincing that supervising judge of that need. Otherwise, jury selection parties are required to reveal the names of the medical experts so the judge (or presumably the attorneys- the judge isn't going to do it) may inquire as to the juror's knowledge or acquaintanceship with the medical experts or other witnesses.