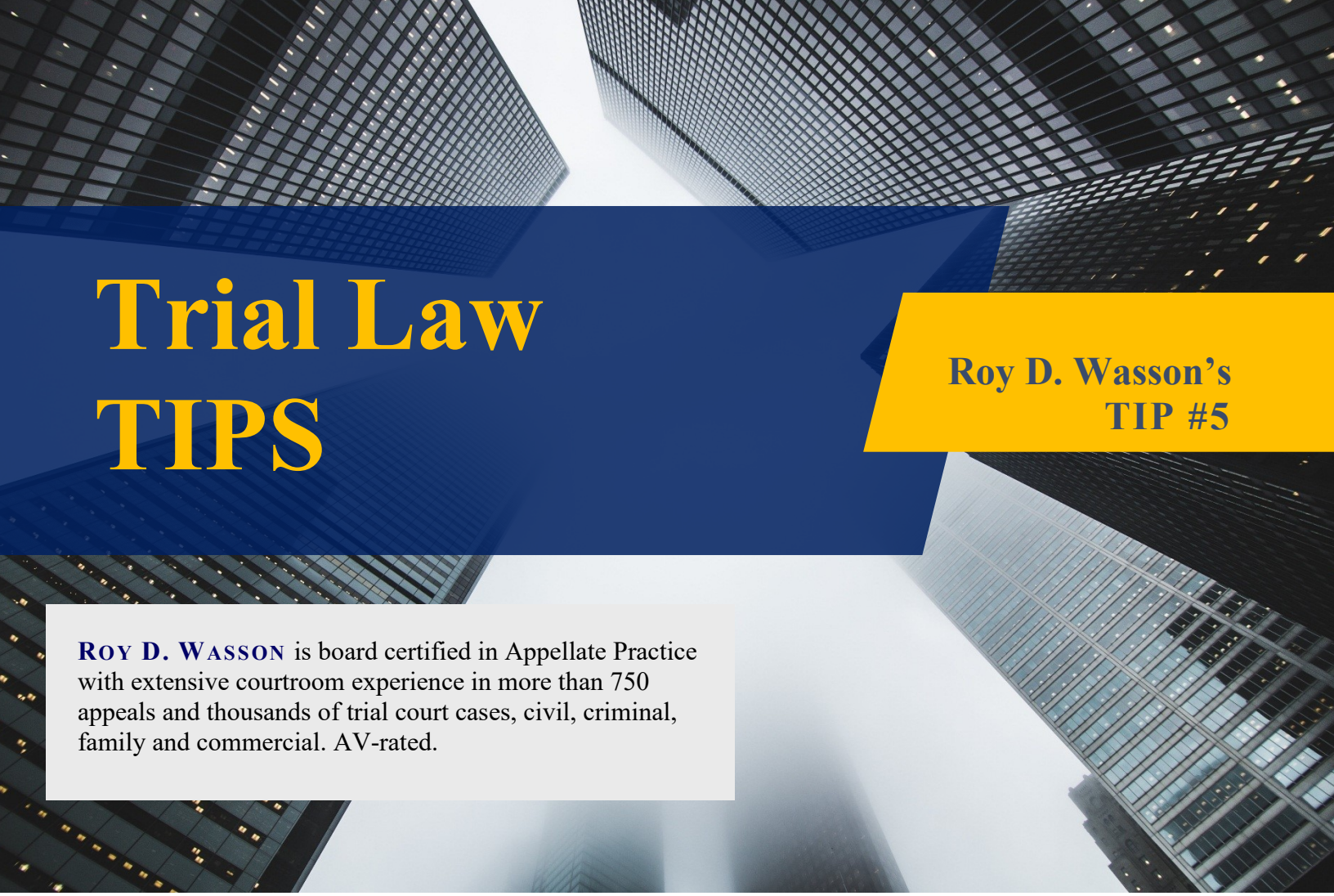

Trial Law TIPS

Roy D. Wasson's TIP #5

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Making and Preserving Jury Challenges for Cause

Introduction

As much as you gunslingers like to think that the case is won by your brilliant opening statement and closing argument, and in the surgeon-like dissection of the defense attorney's witnesses, you know in your heart that 99 out of 100 cases are won or lost before ***any*** of that begins. The ***jury you seat*** wins the case. Or loses it. Jury challenges for cause are vital to that process, because a bad panel can use up all your peremptories in the first row of the venire. Here are a few reminders and some of the key cases to seating a jury which can be fair to you and your client.

Note that this TIP does not include anything on how to use peremptory strikes, including the ever-evolving issue of impermissible, discriminatory strikes. We will save that subject for

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another day. This TIP just deals with identifying and challenging unfair jurors for cause.

Scope and Duration of Voir Dire

Because obtaining a fair jury is among the most basic of litigants' fundamental rights, and because the only process attorneys have to weed out unfair jurors is *voir dire*, the courts of Florida have long recognized the importance of providing attorneys with wide latitude in the questioning of potential jurors. "Voir Dire is the first opportunity the attorneys have to establish personal contact with prospective jurors and the only occasion they have to enter into a dialogue with jurors." *Miller v. State of Florida,* 785 So. 2d 662, 663 (Fla. 3d DCA 2001).[1]

Trial judges need to be made aware of the importance of the voir dire process, and of the need under the case law to afford attorneys adequate time and opportunity to question of the jury panel (and individual members) in relevant areas. "It is widely recognized that the trial court may not impose arbitrary ***time limits*** on *voir dire*." *Miller, supra* at 664(emphasis added).

"Nor may a trial court establish a set number or impose unreasonable . . . limitations on the ***number of questions***" counsel may ask in *voir dire*. *See Zitnick v. State,* 576 So. 2d 1381, 1382 (Fla. 3d DCA 1991)(emphasis added). For example, the judge cannot flatly refuse to let you ask questions in a given area on the ground that the judge covered the area himself or herself. The fact that the trial judge has conducted preliminary questioning of the jurors is not grounds for an arbitrary limitation on the amount of time that counsel may take in voir dire. *E.g., Carver v. Niedermayer*, 920 So. 2d 123 (Fla. 4th DCA 2006)(reversing trial judge for limiting counsel's questioning of 19-member panel to thirty minutes on ground that the trial judge had conducted preliminary questioning of panel members). *Accord*, *Campbell v. State*, 812 so. 2d 540, 541 (Fla. 4th DCA 2002)(it is an abuse of

1 Although Miller and some of the other important cases involving jury selection are criminal cases, the right to a fair jury is no different in civil cases than in criminal trials, so the cited authorities should be equally controlling and persuasive in any sort of lawsuit in a civil case.

discretion to impose unreasonable time or number-of-question limits on voir dire examination).

Further, the trial court may not deny counsel an opportunity to ***question jurors individually*** when the need arises (such as when asking about embarrassing situations such as prior convictions, medical treatment received by the juror, and so on). *See Francis v. State,* 579 So. 2d 286 (Fla. 3d DCA 1991).

Of course, the foregoing authorities do not mean that you are free to question a panel for an hour about the price of tea in China in an intersectional collision case which has no factual or legal complications. The trial court's discretion to hurry you along is more limited in complicated cases involving potentially sensitive evidence and unusual issues, but trial lawyers involved in even small and routine cases have the right to conduct adequate voir dire.

Just as he or she cannot use a stop watch on the amount of time you take, the trial judge cannot impose arbitrary limits into the ***subject areas*** of questioning by counsel in *voir dire*, so long as the areas are relevant to the case and to the task of seating a fair jury. For example, it is error for a court in a personal injury case to preclude questioning of prospective jurors on their views of awarding non-economic damages. *Sisto v. Aetna Cas. & Sur. Co.,* 689 So. 2d 438 (Fla. 4th DCA 1997).

A delicate area concerning *voir dire* inquiry concerns jurors' relationships with, and attitudes for or against, insurance companies. Prior to the enactment of Florida's non-joinder of insurers statute, it was of course proper to inquire in *voir dire* whether jurors believed that returning a verdict in favor of the Plaintiff would increase their insurance premiums. *See Purdy v. Gulf Breeze Enterprises, Inc.,* 403 So. 2d 1325 (Fla. 1981).

Questions concerning relationships with insurance companies and attitudes pertaining to the subject are still common, and the mere mention of insurance will not be reversible error, provided that the Plaintiff's attorney does not use the subject as a ploy to communicate to the jury that the Defendant has insurance coverage. *See Melara v. Cicione,* 712 So. 2d 429 (Fla. 3d DCA 1998).

You can and should ask if anyone on the panel has a relative who works for "X" Insurance Company, without stating that "X" Company provides coverage to the Defendant driver. *See Norman v. Gloria Farms*, 668 So. 2d 1016 (Fla. 4th DCA 1996), where the jury foreman's brother worked for the Defendant's liability insurer, and had actually ***investigated that accident***! No one asked the juror about that and it first was learned after trial, to late to help the Plaintiff.

What suggest you consider doing is say something like: "I am going to be asking all of you questions about your employment experience and that of your close relatives, and the other attorneys may well ask you questions in that area too; but please keep in mind that if I ask if you work for an insurance company, that I am not implying that any party has or does not have insurance, or that there is any issue in this case involving insurance. I may ask whether you served in the military, but that does not mean that there is anything concerning the military involved in this case. I am just getting some background information to help me get to know you a little better."

I have seen some trial lawyers really overdo the hammering of the insurance company under the guise of "asking" the jurors how they feel. I would advise you to stay away from areas designed to build up your client's position as the innocent victim against the big, bad establishment.

In questioning prospective jurors concerning their attitudes toward damages, trial counsel should be careful not to make an impermissible "Golden Rule" argument during *voir dire*. Where questioning of the panel goes beyond their ability to return a verdict for damages (including intangible damages) and enters the area of how much a given panel member would want to receive if placed in the Plaintiff's position, such questioning is improper and could result in reversal of a good verdict for the Plaintiff. *Cf. Goutis v. Express Transport, Inc.,* 699 So. 2d 757 (Fla. 4th DCA 1997)(finding no improper "Golden Rule" *voir dire* in that case, but noting where the line of proper questioning is drawn).

Don't Try To Accomplish Too Much Beyond Locating Bad Jurors

The author of this tip has some words of strategic advice for trial lawyers to consider in formulating your questions for *voir dire*.2 In trial after trial, my co-counsel seem intent on persuading jury panel members that they should drop any bias or prejudice they may have against awarding damages, as if trial lawyers can overcome a lifetime of experiences which have poisoned some panel members and magically transform them into good jurors. It cannot be done! People's basic attitudes are too deeply ingrained to change them during the jury selection process.

Voir dire should, in the opinion of this author, mainly be the opportunity you have to learn who on the panel are the bad jurors, and to get rid of them at all cost. If a prospective juror came into the courtroom with the mental attitude against awarding substantial damages, don't waste your time trying to get that juror to agree that we have the best system in the world and that he or she is going to follow the law. Why in the world would you want to ask a leading question which asks a bad juror to effectively agree that damage awards are right up there with Mom and Apple Pie and the Stars and Stripes, when you know that juror won't believe it, even if he says it?3 Ironically, if you succeed in getting Attila the Hun to mouth the words that sound like he agrees with you about awarding damages, the defense attorney will argue that ***you*** rehabilitated him and cured his prior prejudicial leanings.

Instead, dig until you get that bad juror to agree that he or she will have problems making a substantial award, or has a preconceived "cap," or similar showing of bias and prejudice. The degree to which you will need to make that showing to support a successful challenge for cause is addressed in the next section of this "TIP."

Degree of Impartiality Required of Seated Jurors

The purpose of *voir dire* is to determine "whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the law announced at

trial." *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504, 507 (Fla. 3d DCA 1994). Eliciting the truth about a panel member's partiality and demonstrating it to the judge usually takes a lot of "reading between the lines" when you listen to the juror's answers to your questions and watch his or her body language.[4] However, a prospective juror need not come right out and say, in so many words, that he or she cannot be fair. Simply hemming and hawing about being fair will make the juror subject to a challenge for cause. (The bad news is, only about 25% of trial judges know the law in this area, and it is up to you to educate them.)

Once a juror states that, in light of something about the facts of the case or the parties involved, he or she "***might*** have a problem" with deciding the case solely on the evidence and the law, it is error to deny your challenge for cause and a verdict for the other side should be reversed.[5] *See, e.g., Rodriguez v. State of Florida*, 816 So. 2d 805, 806 (Fla. 3d DCA 2002). Other sorts of circumstances which require a juror to be stricken for cause are illustrated by the facts in a couple of the leading cases on the subject.

Levy v. Hawk's Cay, Inc., 543 So. 2d 1299 (Fla. 3d DCA 1989) is a case in which the Third DCA reversed the trial court's denial of challenges for cause to prospective jurors who "indicated that they had ***negative attitudes toward the legal system***"due to past experiences.

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2 While I am now an appellate lawyer, unlike most appellate lawyers who were born that way, I have picked my share of juries and hope that I have learned from some of the mistakes I made.

3 If you want other, more impressionable panel members to hear something like that, ask it of a juror you already like and want to keep. It will sound more convincing coming from someone who believes what she or he is saying, rather than from a Nazi who was smart enough to get out of jury duty, and whose only reason for being in the courtroom is to personally see to it that your client gets zipped.

4 Remember, they could have got out of jury duty, but they purposefully stayed on to shaft you and your client and to poison the well of jurors during deliberations, so they are ruined for future cases (Me, cynical?).

5 The effect—or lack thereof—of efforts by the defense attorney or judge to rehabilitate a juror who has expressed doubts about his or her impartiality is addressed in the next section of this TIP.

In *Price v. State*, 538 So. 2d 486 at 488-89 (Fla. 3d DCA 1989), a jury panel member was casually acquainted with one of the lawyers for the other side. Despite her "assurances that she did not think her acquaintance with counsel would affect her verdict," the applicable legal standard required her to be excused for cause, because she had agreed that she "may deep down have a little bit of thought about it" and she had said "***just a little*** . . . I think it would be there").6

Another useful case is *Nash v. General Motors Corp.*, 734 So. 2d 437 (Fla. 3d DCA 1999) in which the Court held that a juror should have been stricken for cause, notwithstanding her insistence that she was a "fair person." The court astutely noted that her assurances about being fair were not even responsive to the question being asked, which was whether the Plaintiff was starting off at a disadvantage. "Here, juror Robles' clear reservations about awarding money damages for the death of a loved one, let alone her apparent disapproval of personal injury lawsuits, was sufficient to raise a reasonable doubt as to her impartiality and ability to follow the law."

A prospective juror who indicates that he or she would have some difficulty in following the law concerning awarding damages should be stricken for cause, even without any outright refusal by the juror to agree that he or she could apply the law as instructed by the court. *See Pacot v. Wheeler,* 758 So. 2d 1141 (Fla. 4th DCA 2000) (reversing judgment following verdict for defendants where a trial court denied challenges for cause to jurors who expressed "difficulty" or a "problem" or "trouble" in awarding non-economic damages).

Whenever you receive an equivocal response from a prospective juror concerning an important area of inquiry, make a challenge for cause before wasting a peremptory strike upon such a juror. The Third District in a recent case reversed a judgment based upon the denial of a challenge for cause to a juror who, when asked in *voir dire*, "is there anything about her prior [employment] experience that would make it difficult for you to be fair and impartial in this particular case?" to which she responded, "again,

6 Those examples are even more telling, in light of the "reasonable doubt" standard which applies to this issue, even in civil cases, addressed below.

that's a difficult question. ***I don't think so.***" *Miles v. State,* 826 So. 2d 492, 493 (Fla. 3d DCA 2002)(emphasis added).

Beyond a Reasonable Doubt Standard—Even in *Civil* Cases!

The burden is not on the party challenging a prospective juror to establish that it is more likely than not that the juror would not be impartial. "A prospective juror should be excused for cause if there is a ***reasonable doubt*** as to whether he or she will be able to render an impartial verdict based solely on the evidence and the law." *City of Live Oak v. Townsend*, 567 So. 2d 926, 928 (Fla. 1st DCA 1990)(emphasis added). "When ***any reasonable doubt exists*** as to whether a juror possesses the state of mind necessary to render an impartial verdict . . . [she or] he should be excused." *Tizon, supra,* at 507 (emphasis added).

The burden is on the party opposing the motion to strike a prospective juror to demonstrate that there is no doubt but that the juror could be fair. The Fourth District has held as follows: "Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality." *Rodriguez*, *supra*, at 807, *quoting Sydleman v. Benson*, 463 So. 2d 533, 533 (Fla. 4th DCA 1985) (emphasis added).

"If there is any reasonable doubt as to whether a juror possesses an impartial state of mind, the trial court should excuse the juror for cause." *Miles v. State, supra,* at 493.

Rehabilitation By Court or Defense Attorney is Too Little Too Late

In every case where a juror concedes that there is some small chance that he or she might be unable to overcome every trace of bias or prejudice, the defense attorney or judge will put on a full court press to rehabilitate the juror with leading questions like: "Ms. X, wouldn't you agree that, if the judge instructed you to get those doubts out of your mind and follow the law and the evidence, you would follow the law?" Who in their right mind would say: "No, I am not going to follow the law"?[7] An affirmative (seemingly

[7] Actually, I saw it happen once, where a panel member's religion forbade him to sit in judgment of another human being. The trial court's and

unequivocal) answer that the juror can and will follow the law will not necessarily support denial of your challenge, so don't give up.

There is a presumption that an initial expression of bias or prejudice continues, notwithstanding assurances by the prospective juror to the contrary, as reflected by the following leading decision on the limited value of juror rehabilitation:

> Where a juror ***initially*** demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, ***a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some scepticism***. . . . The test to be applied by the court is whether the prospective juror is capable of removing the opinion, bias, or prejudice from his or her mind and deciding the case based solely on the evidence adduced at trial. . . . ***A juror's assurance that he or she is able to do so is not determinative.***

Club West, Inc. v. Tropigas of Florida, Inc., 514 So. 2d 426, 427 (Fla. 3d DCA 1987)(emphasis added).

In that case, the juror in question initially equivocated about whether she might lean toward one side or the other. "***Although she later indicated that she could be impartial, because of her equivocal answers, serious doubt remained concerning her ability to be impartial***. Consequently, the trial court should have excused her for cause and it clearly abused its discretion by refusing to do so." 514 So. 2d at 427 (emphasis added).

The presumption of continuing prejudice is especially strong when the prospective juror's alleged rehabilitation resulted from leading questions asked by the Court or by opposing counsel. The Third District has held as follows:

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defense attorney's repeated efforts to try to talk this honest man out of his heartfelt religious conviction were an embarrassment to the judicial system.

We have no doubt but that a juror who is being asked leading questions is more likely to "please" the judge and give the rather obvious answers indicated by the leading questions, and as such these responses must never be determinative of a juror's capacity to impartially decide the cause to be presented.

Price v. State, 538 So. 2d 486, 489 (Fla. 3d DCA 1989). *Accord, Williams v. State*, 638 So. 2d at 978 (holding that juror's response to the judge that "I'll be impartial because that's my character" was not sufficient to erase the doubt created by his other comments and, thus, the trial court abused its discretion in refusing to strike the juror for cause); *Brown v. State*, 728 So. 2d 758, 759 (Fla. 3d DCA 1999)(holding that juror's response to judge's question regarding whether juror could set aside personal feelings of crime: "Yeah, I think so," was equivocal).

You may want to consider objecting to efforts to rehabilitate a really bad juror. *See Jaffe v. Applebaum*, 830 So. 2d 136 (Fla. 4th DCA 2002)("any attempt to rehabilitate juror Minker would have been futile in light of his responses to appellant's questions"). Some judges who know the law in this area are receptive to the argument that rehabilitation will not be legally sufficient, even if facially performed, and that rehabilitation should not even be attempted in light of the risk of poisoning the other jurors from the debate with the bad one.[8]

Preservation and Waiver of Error for Appeal

There is no requirement under the law that a potentially prejudiced juror actually sit on the panel, in order for the error in failing to excuse him or her to provide a basis for reversal on appeal. However, in order to get what the law says you ***are*** entitled to—a fair jury—you must ask what you are ***not*** entitled to first: additional peremptory strikes. When a challenge for cause is denied, you must use a peremptory on the bad juror, then ***use up all the rest of your strikes***, and ask for an extra one to replace the one you should not have been forced to use. *Longshore v. Fronrath Chevrolet, Inc.*,

[8] If you really fear such a poisoning effect from a particular panel member, and the judge indicates that attempts at rehabilitation will be permitted over your objection, ask for it to be done individually in chambers or with the rest of the panel in the jury room.

527 So. 2d 922, 923 (Fla. 4th DCA 1988).[9] Although it seems like a hopeless exercise in futility, especially if the trial judge denies your request for an additional peremptory strike, be sure to state on the record the name of a particular juror you would use that strike on if it were granted.

The Florida Supreme Court in *Kearse v. State,* 770 So. 2d 1119, 1128 (Fla. 2000) has held that, in order to preserve for appeal the erroneous denial of a challenge for cause, "Florida law requires a [challenging party] to object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and ***identify a specific juror that he or she would have excused if possible***." (emphasis added). *See also Adkins v. State,* 736 So. 2d 719 (Fla 2d DCA 1999).

Do not fall for a ploy some trial judges have used to make their error appeal-proof. After they deny a challenge for cause and you have used up all your peremptory strikes, the judge might say: "Before I rule on your request for an additional peremptory, let me suggest that you rethink the ones you already exercised, and see if there is a juror you said you were striking who you like better now." In some cases, a cancelled strike has provided counsel with what seems to be the additional strike he requested from the trial judge, which he uses on another juror farther down in the box. But you will still be left with the juror you initially struck and the cases hold that by agreeing to that procedure, you have waived the error for appellate purposes.

It is important to remember that after all the strikes have been exercised and things settle down, you will need to renew ***both*** your challenge for cause (even though the juror has already gone home) and your request for additional peremptories. Where lawyers fail to renew the specific challenge and request as one of the last things before the jury is impaneled, the appellate courts

[9] The cases on this point note that, unless you have used up all your peremptories, it would be premature to ask for more. Unless you use all the peremptories you started out with, there is no harm from the denial of the challenge for cause, because you had the power to use your last peremptory on the bad juror. Likewise, if you do not ask for an additional strike, it looks like you are satisfied with the jury as seated, so the error is not preserved for appeal (then I get testy).

have held that they presume that the lawyer started liking the jury composition more as time went on, and dropped the challenge.

The last hurdle in protecting the record is when the judge asks if you accept the panel. The best answer is to say "No, Your Honor, I do not accept the panel." I have seen a judge sulk and play a waiting game, refusing to swear the jury and start the trial until ***somebody*** says "I accept." If you are worried about giving the judge an excuse to retaliate against you, then you can use the fallback line: "I accept the panel, subject to my prior challenge for cause of Juror "X" which Your Honor denied and subject to my request for an additional peremptory to use on Juror "Y" which you also denied.

One last time: do both. Renew your prior challenge and request for more peremptories ***and*** refuse or condition your acceptance of the panel on those prior objections. You are not off the hook by a judge's ploy of refraining from asking if you accept the panel. If the judge says to swear the jury before you have renewed your objections, stand up and make a record. *See Milstein v. Mutual Sec. Life Ins., Co.,* 705 So. 2d 639 (Fla 3d DCA 1998)(requiring "litigant to renew the previous objection even where, as here, the litigant has made no statement affirmatively accepting the jury").

Conclusion

Get a fair jury. Get a big verdict. Give me part to keep it for you when the defense attorney appeals (your eyes are getting heavier; the only sound you hear is the sound of my fingers on the keyboard; when you awake, the only thing you will remember is that your appellate lawyer is named . . . .)

There is a lot to remember in handling the legal issues of selecting a jury. Even the best trial attorney may not remember everything suggested herein during the heat of battle. All you can do is . . .

Keep Tryin!

Roy

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