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Seating a fair and representative jury

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An unfortunate truth is that our judicial system is skewed against creating a jury consisting of a true cross-section of our community, which often deprives our clients of having a verdict issued by his or her peers. There are two groups that are regularly not represented on our juries: the working poor and minorities.

As Justice Thurgood Marshall once wrote, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." [1]

Regarding people living paycheck to paycheck, consider the following exchange from a recent voir dire experience in one of my medical malpractice cases, and one common to all plaintiff attorneys:

Judge: "You raised your hand to the hardship question. What is it?

Prospective juror: "Well, I'm paid hourly and every day I don't work I lose money. So serving on a trial would be really tough for me."

Judge: "Your employer is required to pay you for the first three days you are serving as a juror. After that, the state will pay you $50 per day for each day. Will that be enough to allow you to serve?"

Prospective Juror: "I'm sorry, I really do want to do this but it would be very hard for me financially."

Judge: "I'm going to let you go."

This person expressed a desire to contribute to the judicial system, but the financial burden associated with service was too much to take on. This is also a problem for independent contractors and those with unpredictable schedules, because they do not even get the three days of employer-required compensation.

As a result, our juries rarely include poor and low-income individuals, who constitute a large population of our state and a significant percentage of our clients.

Often, these individuals, many of whom are manual laborers, are exposed to unnecessarily dangerous or unfair, unsafe or discriminatory situations. They encounter or witness disparities in treatment and understand that the system is not always fair for everyone. Not having this group of people as jurors skews the pool toward groups who may not understand those realities.

Adding to this problem is that juries often lack minorities, many of whom deal with unfair or disparate treatment. With alarming frequency, plaintiffs' attorneys witness minority jurors being stricken by defense counsel using their peremptory challenges. (I can count on one hand the number of minority jurors I have had in over 20 years of trying personal injury cases.)

It's important to consider that some of these folks would enjoy the opportunity to serve but are being denied their right under G.L.c. 234A, §3, which states that, "No person shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation."

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The purpose of peremptory challenges is to remove those with a bias or prejudice against a party in the case, not to eliminate those who bring different perspectives. However, in attempting to arrive at a fair and impartial jury with diverse experiences, we often end up with a rather homogenous one with views partial to the world in which they live, which often is not our clients' world.

The impaneled jurors are those who are thinking, *"Show me overwhelming evidence that the [institution, employer, or doctor] was not as good, fair, and safe as it is for me all the time."* This is, in other words, a defense-oriented jury.

So what is the solution to arrive at a fairer and truly representative jury?

It would certainly help if the $50 per day juror pay (which is taxable) were raised to at least $90. Jurors who make the minimum wage of $12 per hour lose half a day's pay for each day they serve. Jurors who are single parents go into the red if they have to pay a babysitter.

Massachusetts has the third-highest cost of living in the United States. An increase in pay likely would result in a more ideal cross-section of the community.

A more realistic and immediate solution is for plaintiffs' attorneys to object more frequently to the opposing party's improper use of its peremptory challenges.

Peremptory challenges may not be used to exclude prospective jurors solely by virtue of their membership, or affiliation with, defined groupings in the community.[2] The "discrete groups" are those defined by Article 1 of the Declaration of Rights of the Massachusetts Constitution, as amended by Article 106, adopted in 1976, and include "sex, race, color, creed or national origin."[3] Notably, age is not considered a "discrete group" that would render a peremptory challenge improper.[4]

Massachusetts judges are leaning toward being more open and receptive to objections to peremptory challenges. (In fact, I was recently *invited* by a Superior Court judge to make the challenge in a construction accident case involving my Spanish-speaking client because defense counsel kept striking Hispanic jurors.)

So what are the steps for objecting?

First, the *Batson/Soares* challenge[5] places the burden on the objecting party to establish a prima facie case that the peremptory challenge was based on the juror's membership in a protected class. This burden is less than "more likely than not."[6] A prima facie showing of impropriety is present when "(1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded solely on the basis of their membership within this group."[7]

The trial judge evaluates "all of the relevant facts and circumstances" to determine if the objecting party has met that "relatively low bar."[8] It is important to remember that the objecting party need not show much to satisfy this low burden.[9]

In fact, "a single peremptory challenge may be sufficient to raise a legitimate objection.[10] This is especially true if the venire consists of very few people of color. Moreover, the fact that the attorney did not challenge some group members who are already seated is not dispositive since an attorney may discriminate against some even if not all such individuals.[11]

Second, if the judge finds that the objecting party has established a *prima facie* case, the party attempting to exercise a peremptory challenge bears the burden of providing a "group-neutral" reason for the challenge.[12]

The explanation must be "clear and reasonably specific" and "personal to the juror."[13] Mere affirmations of good faith, such as vague references to a juror's appearance, education, or status as a widow, are not sufficient[14]

Third, the judge then evaluates whether the proffered reason meets both prongs of being "adequate" (not based on a protected group) and "genuine" (credible).[15] In doing so, the trial judge may evaluate the demeanor of the lawyer exercising the challenge in determining whether the reason is credible or a pretext.[16]

This includes whether the lawyer's demeanor included "furtiveness of a glance, the hesitation in giving a response, or frantic reading of the juror questionnaire before proffering an explanation."[17] As with determining whether a *prima facie* case of discrimination exists, the judge must make "explicit findings" as to whether the party's proffered reason for the peremptory challenge was both adequate and genuine.[18]

Given the more receptive trend within the judiciary to a *Batson/Soares* challenge, and the more aggressive use of peremptory challenges by defense counsel, these actions are warranted now more than ever.

Along with our clients, those jurors who wish to serve, but cannot, demand of us a more aggressive effort to obtain juries that truly represent a cross-section of our increasingly diverse communities and client base.

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[1] *Peters v. Kidd*, 407 U.S. 493, 503 (1972)

[2] *Commonwealth v. Soares*, 377 Mass. 461, 486, *cert. denied*, 444 U.S. 881 (1979); Article 12 of the Massachusetts Declaration of Rights of the Massachusetts Constitution.

[3] Mass. Const., Declaration of Rights, Art. 1, as amended by Article 106 of the Articles of Amendment. Age is not considered a "discrete group" that would render a peremptory challenge improper. *Commonwealth v. Curtis*, 424 Mass. 78, 80 (1997).

[4] *Commonwealth v. Oberle*, 476 Mass. 539, 545 (2017).

[5] This is usually referred to as just the "*Batson challenge"* after *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the U.S. Supreme Court ruled that a prosecutor's use of a peremptory challenge in a criminal case may not be used to exclude jurors based solely on race. The analytical framework prescribed in *Batson* is essentially the same as the framework in *Soares*.

[6] *Sanchez v. Roden*, 753 F.3d 279, 300 n.15 (1st Cir. 2014) (citing *Caldwell v. Maloney*, 159 F.3d 639, 643 (1st Cir. 1998).

[7] *Commonwealth v. Curtiss*, 424 Mass. 78, 80 (1997) (citing *Soares*, 377 Mass. at 490).

[8] *Commonwealth v. Jones*, 477 Mass. 307, 322 (2017).

[9] *Commonwealth v. Maldonado*, 439 Mass. 460, 463, n.4 (2003).

[10] *Curtiss*, 424 Mass. at 78-79; *Commonwealth v. Harris*, 409 Mass. 461, 465 (1991).

[11] *Commonwealth v. Jones*, 477 Mass. at 325.

[12] *Commonwealth v. Scott*, 463 Mass. 561, 570 (2012).

[13] *Maldonado*, 439 Mass. at 464.

[14] *Id.* at 465; *Commonwealth v. Carleton*, 36 Mass. App. Ct. 137, 143-45 (1994).

[15] *Maldonado*, 439 Mass. at 464.

[16] *Id*. at 466.

[17] *Id*. at 466.

[18] *Commonwealth v. Rodriguez*, 457 Mass. 461, 470-71 (2010).

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