Jury Selection and Anti-LGBT Bias

Best Practices in LGBT-Related Voir Dire and Jury Matters

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Bias against people who are lesbian, gay, bisexual or transgender (LGBT) can influence jurors' decisions.[1] Such prejudice can play out in any matter involving LGBT people, including sexual assault, hate crime, intimate partner violence or other criminal cases, as well as discrimination, tort or even contract disputes. But lawyers can conduct effective voir dire to uncover possible bias among prospective jurors. This guide is designed to help practitioners address both express and implicit bias during jury selection, conduct LGBT-inclusive voir dire, and challenge the discriminatory use of peremptory strikes.

CHALLENGES FOR CAUSE

The right to challenge a potential juror for cause as a means of excluding bias is an important component of ensuring due process and a fair trial.[2] Even as attitudes are changing in many parts of the country, some jurors still openly admit anti-LGBT bias in voir dire.[3] Even more troubling, courts will not always excuse for cause a juror who has expressed anti-LGBT views,[4] and may permit those jurors to remain in the pool if they simply state that they can be fair. Advocates should challenge for cause jurors who express anti-LGBT bias, and should remind the court that its factual determination of whether a juror can be fair should be based not only on the juror's verbal claim of impartiality, but also on the juror's "demeanor and credibility," including body language and evidence of discomfort with LGBT issues.[5]

PROXY QUESTIONS TO UNCOVER IMPLICIT BIAS

Even if a juror does not voice prejudices overtly, research suggests that proxy questions can help to uncover anti-LGBT bias.[6] These questions may be more effective than asking jurors directly whether they are biased, or whether they can be fair. In addition, providing jurors with an opportunity to respond privately (via questionnaire or outside of the presence of the other venire persons) may produce more forthcoming responses. Some possible areas of voir dire include:

Association with LGBT People

Studies show that people who have close friends who are LGBT tend to demonstrate less anti-LGBT bias.[7] By contrast, having an LGBT relative is not necessarily a good indicator of a juror's attitudes.[8] Some sample questions to illicit anti-LGBT bias may include:

Examples:

- "Do you have any close friends who are lesbian, gay, bisexual or transgender?"[9]
- "How would you feel if a same-sex couple moved in next door to you?"[10]
- "How would you feel if you had to work closely with someone who was lesbian, gay, bisexual or transgender?"[11]

Political Ideology

Research also demonstrates that jurors who describe themselves as "politically conservative" tend to have more anti-LGBT attitudes.[12]

Example:

- "Politically, are you liberal, middle-of-the-road, or conservative?" [13]

Attitudes on LGBT Rights Issues

Some jury consultants recommend questioning jurors about relatively uncontroversial LGBT rights issues. They reason that these questions will expose the most anti-LGBT jurors, without "outing" strong allies.[14] At a time when attitudes on LGBT issues are in flux, however, the substance of what constitutes a non-controversial question might be highly contingent on the jurisdiction.

Example:

- "Do you think employers should be able to refuse to hire someone because of the person's sexual orientation or gender identity?"[15]
- "How comfortable are you with same-sex couples raising children together?"

Religiosity

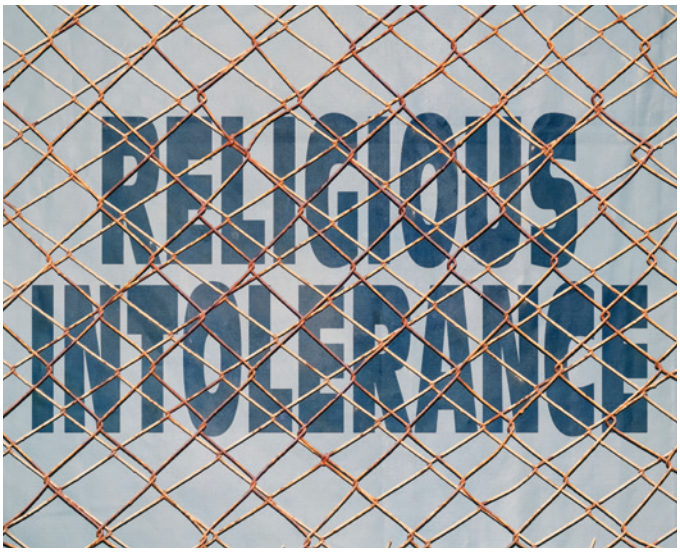
Happily, religiosity may become a less useful indicator of anti-LGBT attitudes. Recent surveys demonstrate that support for LGBT rights is growing among some religiously observant groups.[16]

Nonetheless, surveys indicate that jurors who attend religious services every week, or who report that their religious beliefs are "often important" or "always important" in guiding their daily decisions, tend to hold more negative attitudes about LGBT people.[17]

Examples:

- "Do you try to attend religious services at your place of worship every week?"[18]
- "How important are your religious beliefs in guiding your daily decisions?"

Jurors may be challenged for cause or removed with a peremptory strike if they exhibit anti-LGBT bias, even if it is rooted in religious or moral beliefs. However, whether striking a juror based solely on religious affiliation violates the U.S. Constitution is an open question, and a number of states bar the practice.[19]



ETHICAL CONSIDERATIONS FOR ATTORNEYS

Rules of professional conduct and judicial canons prohibit bias and discrimination in court and can be used to pursue fairness in jury selection. Under the ABA Model Rules of Professional Conduct, adopted in most states, a lawyer may not "engage in conduct that is prejudicial to the administration of justice."[20]

Comment 3 to MRPC 8.4 states that "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates [this rule] when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate [this rule]."

Judicial canons in many states prohibit bias and discrimination on the basis of sexual orientation and/or gender identity and expression. While not all state canons and codes explicitly include sexual orientation and/or gender identity and expression, they all require that judges not show bias or prejudice and demand the same of court staff. Additionally, a growing body of law interprets prohibitions against discrimination on the basis of sex to include bars against discrimination based on gender identity or sexual orientation.

Relevant Code of Judicial Conduct

Rule 2.3 of Canon 2 of the Code of Judicial Conduct states:

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

DEALING WITH STANDARD VOIR DIRE QUESTIONS

Marital Status Questions

As a result of the Supreme Court ruling in *Obergefell v. Hodges*, same-sex couples may marry nationwide. Nevertheless, research shows that standard voir dire questions regarding marital status (**"Are you single, married, or divorced?"**) often make LGBT people uncomfortable, cause them to feel excluded, and taint their perceptions of the legal system and the case in front of them.[21]

Unless specifically relevant to a case, the marital status inquiry may undermine the credibility of the judicial process in several ways:

- By failing to reach information on household members, it may deprive the court and lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process.
- If there are follow-up questions that would disclose the

sex of the spouse, marital status questions may force LGBT jurors to disclose their sexual orientation.

- The marital status question may foster a perception among LGBT court users that their subsequent experiences in courts may not be fully informed or fair.

Where voir dire is broad enough to encompass all close relationships, LGBT potential jurors may feel validated and believe that the judicial system is accessible.[22]

Though people may now access marriage without discrimination based on sexual orientation, some jurisdictions also have alternative relationship recognition statuses such as civil unions and domestic partnerships, so the standard question should *at a minimum* include those statuses.

Examples:

- "Are you single, married, in a civil union, divorced…"
- "Do you have a spouse, domestic partner, significant other…"

The best approach may be to focus on the point or goal behind the question and directly ask about it. Typically, the marital status inquiry seeks to capture who else is living within the home or is otherwise in a position to influence the potential juror's opinions, experiences and conceptions of the persons and events at trial.

Example:

"In the following questions I will be using the terms 'family,' 'close friend' and 'anyone with whom you have a significant personal relationship.' The terms 'family' and 'anyone with whom you have a significant personal relationship' include a domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important."[23]

INVOLUNTARY OUTING AND VISIBILITY AS LGBT

The landscape of legal, political and social acceptance has changed significantly since privacy concerns led one commentator to counsel against asking about sexual orientation and by extension relationship status.[24] Yet, despite the general improvement in legal protections and courtroom dynamics, increased visibility of LGBT people in society and the decrease in jurors' privacy concerns, those changes are likely to be regional.

Choosing whether to reveal one's sexual orientation is very different from being forced to disclose it, and losing control of that decision can produce significant anxiety.[25] One empirical study showed that most lesbian and gay jurors who were out in all other aspects of their lives still did not want to have their sexual orientation disclosed in court.[26] Moreover, a significant number felt compelled to disclose their sexual orientation against their will due to questioning in court.[27] Accordingly, during voir dire, lawyers are well advised to avoid pressing potential jurors to disclose their sexual orientation involuntarily.

EXPERIENCES OF LGBT PEOPLE IN COURT

In 2012, Lambda Legal, with the help of more than 50 supporting organizations, completed a national survey to assess how well courts and other government institutions are protecting and serving LGBT people and people living with HIV.[28] The results show some of the ways the promise of fair and impartial proceedings is tainted by bias against LGBT people and individuals living with HIV.

As is often the case, respondents with multiple marginalized identities—that is, LGBT people who are also low-income, people of color or disabled—reported significantly higher instances of discrimination.

Nineteen percent (19%) of people who responded reported hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression.

Sixteen percent (16%) of respondents indicated that their own sexual orientation or gender identity was raised when it was not relevant.

Fifteen percent (15%) of respondents reported having their HIV status raised when it was not relevant.

USING PEREMPTORY CHALLENGES TO ADDRESS ANTI-LGBT BIAS

In addition to challenges for cause, attorneys have a limited number of peremptory strikes (usually 3 to 6), which can be used to remove jurors whom they perceive to be biased, even if that perception may not sustain a challenge for cause.

Eliminating a juror for cause can be difficult for a variety of reasons:

- Jurors may be reluctant to reveal the extent of their biases;
- Judges may place limitations on the scope of voir dire;
- Judges may be disinclined to dismiss many jurors for cause; and
- If given the right to object and question, opposing counsel may attempt to rehabilitate the juror.

As mentioned previously, even when an attorney establishes a clear record during voir dire that a prospective juror holds anti-LGBT attitudes, some judges may nevertheless attempt to rehabilitate the juror by asking if the individual can set those prejudices aside and neutrally consider the facts. Given some of the limitations placed on the use of for-cause challenges, peremptory strikes are not only valuable, but may serve as a last opportunity for counsel to remove jurors who harbor anti-LGBT bias.

Of course, while peremptory challenges generally can be made without giving any reason, they are "subject to the commands of the Equal Protection Clause."[29] In the 1986 case of *Batson v Kentucky*, the Supreme Court held that peremptory challenges cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race.[30] Since then, the Court has prohibited the use of peremptory challenges on account of a jurors' sex in *J.E.B v Alabama*,[31] or any other classification subject to heightened judicial scrutiny.[32] *Batson* has been extended to apply to criminal defense attorneys as well as prosecutors[33] and private civil litigants.[34]

CHALLENGING LGBT-BASED PEREMPTORY STRIKES

LGBT people have suffered a long history of discrimination in both the public and private spheres. As with other groups targeted with invidious discrimination, far too often discrimination against LGBT people has found its way into the courtroom, denying them equal access to justice and an equal opportunity to participate in civic life.

The Supreme Court has not expressly ruled on whether the Equal Protection Clause of the U.S. Constitution precludes using peremptory challenges to strike prospective jurors on the basis of sexual orientation or gender identity. However, in the 2014 case *SmithKline Beecham Corp. v. Abbott Labs,* the Ninth Circuit Court of Appeals became the first federal court to rule that jurors cannot be disqualified based on their sexual orientation.[35]

The unanimous three-judge panel—relying on the Supreme Court's ruling in *U.S. v Windsor*—held that discrimination based on sexual orientation is subject to heightened scrutiny, and that equal protection prohibits exercising peremptory strikes based on sexual orientation.[36] The court remanded for a new trial based on its finding that, where attorneys struck a man from the jury venire after he made several references to his male partner during voir dire, the record established a prima facie case of intentional discrimination. This broad and significant ruling applies to all federal courts in the Ninth Circuit and thousands of state courtrooms, and should provide persuasive precedent in other federal and state courts.

At the federal level, existing statutory law explicitly bars discrimination in jury selection on the basis of race, color, religion, sex, national origin and economic status.[37]

Even in a jurisdiction without clear statutory authority or binding precedent, counsel should be prepared to object early and often to the opposing party's use of peremptory challenges to strike jurors based on their sexual orientation or gender identity. Counsel should also elicit the factual record necessary to preserve the issue for appeal and provide the court with briefing to support a determination that these discriminatory challenges violate federal and state constitutional guarantees.

SUPPORTING A *BATSON* CHALLENGE BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY

Counsel should draw upon the Ninth Circuit decision in *SmithKline Beecham Corp. v. Abbott Labs* and the Supreme Court's logic and reasoning in *Batson* and its progeny to challenge the use of peremptory strikes based on sexual orientation and gender identity.[38]

Sexual Orientation

With its ruling, the Ninth Circuit noted, "Gays and lesbians may not have been excluded from juries in the same open manner as women and African Americans, but our translation of the principles that lie behind *Batson* and *J.E.B.* requires that we apply the same principles to the unique experience of gays and lesbians."[39] The court went on to examine the history of discrimination faced by gays and lesbians and, looking to the issue of juror exclusion, notes:

> "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve."

The court recognizes the need to ensure that "individuals are not excluded from our most fundamental institutions because of their sexual orientation" and that to allow such discrimination in jury selection demeans the dignity of the individual and undermines the integrity of the courts.[40]

In addition to the decision in *SmithKline*, counsel may draw upon recent rulings that recognize that bans on sex discrimination include discrimination based on sexual orientation.[41]

Gender Identity

It is clearly established that the rule of *Batson* is violated when a peremptory challenge is used to strike a juror based on sex.[42] Many jurisdictions and agencies have confirmed that bans against sex discrimination prohibit differential treatment for failing to conform to gender stereotypes, for gender transition, and for discrimination based upon gender identity or being transgender,

since gender identity and sex are inherently related.[43] As several courts have held with respect to gender identity, "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody 'the very stereotype the law condemns.'"[44] Thus, failing to apply *Batson* to prohibit discriminatory peremptory challenges based on gender identity violates core equal protection principles.

State Protections

Counsel may also consider state constitutional guarantees of equal protection and guarantees related to trial by jury when making out a *Batson* challenge. For example, in *People v. Wheeler,* the Supreme Court of California held that the right to an impartial jury under the California Constitution prohibits the use of peremptory strikes to exclude jurors simply based on their membership in a "cognizable group." The court concluded that the statutory right to peremptory challenges must give way to the constitutional right.[45] In *People v. Garcia*, the California Court of Appeal applied *Wheeler* to peremptory strikes on the basis of sexual orientation.[46] This ruling was later codified and extended to explicitly ban gender-identity challenges.[47]

MAKING A *BATSON* CHALLENGE

When faced with the opposing party's use of a peremptory challenge to eliminate a juror on the basis of sexual orientation or gender identity, counsel should object and follow the three-step approach outlined in *Batson*.

Batson Step 1

First, the party challenging the peremptory strike must assert that the strike was improperly exercised by demonstrating that the totality of the relevant facts "raise an inference" of purposeful discrimination. It is best to request to be heard at the bench and out of the earshot of jurors to avoid affecting the impartiality of potential jurors. Counsel's burden is one of production, not persuasion.[48] Purposeful discrimination does not need to be the most likely explanation, or even more likely than not; rather it must be supported by sufficient evidence to allow a judge to draw an inference that discrimination has occurred.[49] There are no bright-line tests for determining what evidence will suffice.[50] States have been afforded some discretion in determining how to make this showing, and counsel should become familiar with jurisdiction-specific requirements.[51]

Counsel should carefully make out a record based on all relevant circumstances, which may include:

- Numerical data that demonstrate a discriminatory pattern of elimination;
- The line of questioning used by the strike's proponent;
- Deviation from a previous line of questioning;
- A lack of questioning; and/or
- Evidence of similar characteristics shared by the stricken juror and a party.[52]

Batson Step 2

Once the court determines that the party challenging the peremptory strike has made out its prima facie case, the burden shifts to the striking party to present a neutral explanation for the challenge. Some possible neutral reasons might include the prospective juror's occupation, education, family connections to a party, attitudes, personal beliefs, and prior litigation experience. However, even if the striking party produces only a "frivolous or utterly nonsensical" justification for its strike, the case does not end—it merely proceeds to step three.[53]

Batson Step 3

Finally, the party challenging the strike must convince the court that the explanation given by the striking party is a pretext for "purposeful discrimination."[54] If a violation is found, the trial judge will decide whether the juror will be returned to the pool or if a new jury pool or panel may be needed.[55] Counsel should make sure to elicit the factual record necessary to preserve the issue for appeal in the event that a violation is not found. That said, the broad discretion provided means that few cases are reversed based on a claim that the trial judge erred during jury selection.[56]

In developing a complete record of the challenge, be sure to[57]

- Maintain full and accurate notes on each juror;
- Make the challenge right away;
- Request a judge to hear and rule on the challenge if one is not present during voir dire, in order to ensure the decision is subject to appellate review;
- Request a court reporter and state for the record all facts supporting the challenge;
- If the challenge is denied, be sure to object again on the record before the jury is sworn in (doing so outside the presence of the jury).

CONCLUSION

Bias and discrimination in the context of jury selection are particularly harmful, as they reinforce historical invidious discrimination in the court system, interfere with the litigants' right to a fair trial, and undermine the integrity of the judicial system. Developing effective voir dire techniques will help protect the rights and dignity of LGBT prospective jurors while identifying harmful anti-LGBT prejudice that could taint a verdict. While this resource is intended to help attorneys and courts navigate voir dire and other jury matters, it is important to remember that best practices will require a contextualized and localized approach.

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