The Law of Jury Selec in Missouri State Cou

BY MICHAEL L. MATULA[1]
AND
G. NICOLE HININGER[2]

Michael L. Matula
Ogletree, Deakins,
Nash, Smoak
& Stewart, PC

G. Nicole Hininger
Ogletree, Deakins,
Nash, Smoak
& Stewart, PC

Introduction: A Different Type of Jury Selection Article

The Missouri Constitution provides that the right to trial by jury is "inviolate."[3] "[I]n all civil cases in courts of record, three-fourths of [jury] members … concurring may render a verdict[.]"[4] Articles abound about how to select juries – giving insight into how to pick the most favorable jurors, how to discover jurors' hidden biases, how to delve into personal topics without offending the panel, etc. This is not one of those articles. Instead, this article focuses on a different aspect of jury selection: the law. More specifically, it reviews the law pertaining to: (a) the allowable scope and manner of jury selection; (b) the standards for striking potential jurors for cause; (c) use and misuse of peremptory challenges; and (d) juror non-disclosure. The goal of this article is to provide a legal resource to help guide counsel as to the permissible scope of voir dire, the use of for-cause and peremptory challenges, and how appellate courts are likely to treat trial court rulings on these issues.

The Scope and Manner of Jury Selection

The Purpose of Jury Selection

The appropriate scope of jury selection is a function of its purpose, that being "to discover bias or prejudice in order to select a fair and impartial jury."[5] Determining whether a particular juror can be impartial and facilitate a fair trial is impossible without some exploration of the juror's thoughts and beliefs. "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."[6]

All parties have an opportunity to question jurors in an attempt to learn more about their beliefs and draw their own conclusions as to the desirability of a given juror. Typically, counsel focuses at least as much effort on exclusion of jurors as they focus on inclusion of jurors. At the end of jury selection, counsel must have sufficient information to determine which jurors might be susceptible to a for-cause strike and which jurors are sufficiently undesirable to warrant the exercise of a peremptory challenge. "It is well settled that one of the fundamental purposes of *voir dire* is to 'expose juror bias or prejudice which could form the basis of a challenge for cause or be useful in utilizing peremptory challenges.'"[7]

What Limits Do Courts Impose on the Scope and Manner of Selecting a Jury?

General

Missouri law permits extensive inquiry into whether a juror is predisposed or biased toward one party. Bringing to the surface juror bias, which can be subtle or even subconscious, is no easy task.

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Because "bias often lies deep within the minds of prospective jurors, counsel should be allowed a wide latitude to expose that bias."[8]

In evaluating whether a question is within the proper scope of jury selection, the court looks to information the question is likely to elicit. Questions likely to elicit information revealing a bias, incompetence, or inability to follow the court's instructions are generally fair game:

> An examination of a prospective juror on his voir dire is proper so long as it is conducted strictly within the right *to discover the state of mind of the juror* with respect to the matter in hand or any collateral matter reasonably liable to unduly influence him, and questions which go primarily to the ascertainment of any *probable bias* or ground of incompetency, as a basis for a challenge for cause, or possibly of a peremptory challenge, are permissible.[9]

Counsel may inquire into several potential forms of bias. "[I]n civil cases it is proper to probe the minds of prospective jurors to discover prejudice because of sympathy for a child, racial bias, the large amount sued for, social or business relations, or holding a policy of insurance."[10] Of course, the relevance of particular forms of bias may vary, depending on the claims at trial. Accordingly, counsel must consider potential types of bias that could affect the outcome of his or her particular trial.

While counsel has wide latitude to inquire about potential bias, there are limits. Not all topics are appropriate. Although perhaps an often-violated principle, jury selection is not "an appropriate occasion for argument."[11] In addition, even bias-related questions cannot "be used to disguise arguments or pleas for sympathy."[12] Even when counsel is inquiring about proper topics, the form of the question must also be proper. A line of inquiry cannot take the form of hypothetical questions asking how certain facts may influence the juror's ultimate verdict. "Counsel may not, in advance, ask [a juror] to speculate upon what he might do, and how his verdict might be influenced by certain contingencies that may arise later."[13]

Courts will also not tolerate counsel's attempts to "plant the seed" in a juror's mind about how to react to particular evidence at trial. "The phrasing of voir dire questions in a manner which preconditions the juror's minds to react even subconsciously in a particular way to anticipated evidence is an abuse of counsel's privilege to examine prospective jurors."[14]

To What Extent Can Trial Counsel Discuss Jury Instructions During Voir Dire?

The scope of discussion of specific jury instructions is murky. Missouri courts allow limited questioning about jury instructions, particularly when the questioning is general in nature and does not suggest what instructions will necessarily be given. For example, counsel can properly ask jurors about whether they can follow the instructions. "A trial court may permit parties to inquire as to whether potential jurors have preconceived notions on the law that will impede their ability to follow instructions on issues that will arise in the case."[15]

It is improper for counsel to tell potential jurors what the instruction will be. Courts draw the line when counsel uses jury selection to give prospective jurors a preview of what the instructions will be, as opposed to what they might ultimately be.

> It is well settled that, on *voir dire*, one may not declare to the venire what the law will be as given in the court's instructions to the jury. However, we find no authority for the respondent's claim that there exists a blanket prohibition on discussing jury instructions, or using language from them, during *voir dire*. On the contrary, it is permissible to inquire of the venire as to whether they would follow an instruction if given by the court.[16]

Thus, it appears that inquiring as to jurors' thoughts about statements of what might be the court's instructions might well be non-objectionable, but stating to the jury what the instructions will be is improper. Of course, "[t]rial courts may exclude questions that misstate the law … or confuse or mislead the venire members."[17] If counsel embarks into questions about potential instructions, "[t]he correct procedure is for counsel to ask the members of the panel whether, if the court later instructs them in a specified manner, they have any opinion or conscientious scruples such as would prevent them from returning a verdict accordingly . . .."[18]

Although the court in *Ashcroft v. TAD Res. Int'l* suggests that counsel may discuss potential jury instructions with prospective jurors, the issue is more complicated. Jury selection obviously occurs before the jury instruction conference and, thus, before the jury instructions are finalized. What happens if counsel discusses a proposed instruction

that is ultimately rejected by the court? Should counsel limit their discussion to stipulated instructions? Would the court allow discussion of instructions not contained in MAI?

The safest practice is to limit discussion to MAI instructions that are given in every case, such as: (1) MAI 2.01, outlining trial procedure; (2) MAI 2.03, explaining the jury's use of the instructions; (3) MAI 2.02, cautioning the jury not to assume facts in the instructions; (4) MAI 2.04, advising of the power of the jurors to return a verdict; and (5) MAI 3.01, regarding the burden of proof. Instructing the jury as to the proper measure of damages is also required, although the types of damages permitted in a particular case might vary. In addition, some cases will have additional mandatory instructions or instructions that are at least reasonably certain to be given. While verdict directors and verdict forms are mandatory, the precise wording will not likely be determined until near the end of trial.

Courts have also approved using language from MAI 10.01 [1990 Revision] to inquire about potential bias toward punitive damages:

> [U]sing the language of an approved MAI instruction to ask the venire whether they would be able to follow the law as instructed by the trial court was not only permissible, but was preferable, in order to accurately advise them as to the law so that they might give informed responses.[19]

MAI 10.01 states, in part, that "… [i]t may very well be that during the course of the trial the judge instructs you that if you believe the conduct of [defendant] was outrageous and showed conscious disregard for the rights . . . ."[20] Thus, approved MAI damages instructions appear to be fair game. Asking the venire whether they would follow an instruction on punitive damages, if given, is proper.[21] Questions that "attempt to ascertain bias or prejudice as to the award of punitive damages, if an issue in the case, are relevant and permissible inquires."[22]

Discussing substantive MAI instructions, such as verdict directors, and proposed modifications to MAI instructions, may come closer to the line between appropriate and inappropriate voir dire. And, at the far end of the spectrum lie proposed instructions not found in MAI, which are less likely to be approved by the court. "[O]n voir dire counsel may not tell the panel what the court's instructions will be."[23] At a minimum, counsel should couch all questions relating to jury instructions in terms of what jurors would believe *if* instructed in a particular way. In addition to asking about potential jury instructions, the court may permit questioning on the same general topics as covered by certain jury instructions. For example – "Is there anybody here who will demand an eyewitness, so to speak?"[24] – "was a legitimate attempt to discover whether any venireman harbored any preconceived doubts as to the efficacy of circumstantial evidence."[25]

Missouri law clearly allows counsel to explore whether a prospective juror could follow the court's instructions.

To What Extent Can Trial Counsel Discuss Detailed Facts of the Case With the Jury?

The Supreme Court of Missouri has made clear that counsel is not permitted "to try the case on voir dire by a presentation of the facts in explicit detail."[26] Yet, courts also recognize that "[b]ias or prejudice cannot often be uncovered by asking only 'general fairness and follow-the-law questions.'"[27] Indeed, "[b]ecause generic questions are often so ineffective, counsel must be allowed some latitude to ferret out dogmatic views or prejudices that even the self-aware and honest juror may not recognize with the can-you-be-fair-question. Some inquiry into relevant and critical facts of the case is essential to the search for bias."[28]

Counsel will likely get more leeway from the court to present factual details of the case when those details are presented in a straightforward and seemingly non-argumentative manner. If counsel's explanation of the facts of the case draws an objection, he or she should be prepared to explain how those particular facts may elicit juror bias. "An insufficient description of the facts jeopardizes [a party's] right to an impartial jury."[29] As a result, a judge who unreasonably restricts counsel from mentioning any potential evidence at trial could violate a party's right to an impartial jury.[30]

Seeking Commitments From Jurors About How They Should or Will React to Particular Pieces of Evidence is Not Proper

The purpose of allowing counsel to preview certain facts with some particularity is to identify existing juror bias; it is not to influence or obtain a commitment as to how the juror will respond to certain evidence at trial. Accordingly, "counsel may not attempt to elicit a commitment from jurors how they would react to hypothetical facts."[31]

> [W]hen the inquiry includes questions phrased or framed in such a manner that they require the one answering to speculate on his own reaction to such an extent that he tends to feel obligated to react in that manner, prejudice can be created. The limitation is not as to the information sought but in the manner of asking.[32]

For example, in *State v. Newman*,[33] asking the panel whether they agreed that a person who was frightened or

nervous was more likely to make a mistake (as to identification) at the time was an improper request for commitment.[34] In addition, a request for an agreement that a witness's recollection on the day of the incident was more accurate than two weeks later sought an improper commitment.[35] A somewhat more obvious example is that "counsel is not allowed to receive a commitment from the jury as to a certain verdict or amount of damages before hearing the evidence."[36] Asking the jury to consider prospective ranges of damages, however, may be permitted.[37]

Courts prohibit asking jurors for commitments because they are essentially an attempt to create bias and influence the verdict, which is the exact opposite of the goal of jury selection – to ensure a fair and impartial trial. Not all hypothetical questioning, however, seeks an improper juror commitment:

> There is a tendency by counsel and sometimes courts, to jump to the conclusion that every question containing the words "would you believe/disbelieve automatically," connected to some fact of the case, improperly seeks a commitment as to the credibility of some party or witness in the case. Although such questions should be carefully considered by the trial court, they are not *per se* improper. The test is their relationship to a critical fact of the case and whether they are phrased in such a way to uncover rather than inject bias or prejudice.[38]

As with other forms of inquiry, counsel must take a balanced approach to questioning about hypothetical reactions of jurors.

Striking Jurors for Cause

One Bad Apple Sitting on the Jury Might Spoil Your Verdict

Allowing one unqualified, biased, or otherwise improper juror puts the entire verdict at risk. "Parties to a civil case are always entitled to a decision based on the honest deliberations of twelve qualified jurors."[39] Missouri courts recognize that "[t]he presence of even one unqualified juror entitles the complaining party to a new trial."[40] Before opposing a for-cause challenge with too much advocacy, counsel must consider the risks of appeal based upon jury selection.

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Are There Any Statutory Bases for Disqualifying Jurors Based on Bias?

By statute,[41] people in the following categories are *per se* disqualified for-cause:

- anyone "who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person";[42]
- family members of a party to a civil case (including a prosecutor in a criminal case); and
- people "whose opinions or beliefs preclude them from following the law as declared by the court[.]"[43]

These statutory grounds are not exhaustive.

> If, for any reason, a prospective juror is not in a position to enter upon the duties of a juror with an open mind, free from bias or prejudice in favor of or against either party, and to decide the case on the evidence and the law, he is not a competent juror.[44]

When Is a Juror Sufficiently Biased as to Justify a For-Cause Strike?

The general rule is that a juror must be fair and impartial, as opposed to having a bias. In ruling on a for-cause strike, the court must ask "whether a venireperson's beliefs preclude following the court's instructions so as to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[45] The "critical question" in a bias challenge, then, is whether the potential juror "indicated unequivocally his or her ability to fairly and impartially evaluate the evidence."[46] If a venireperson comes across as being uncertain "about his or her ability to be fair and impartial, the trial court has a duty to make independent inquiry."[47] If a juror gives answers that "reveal uncertainty [about an] ability to be impartial, the absence of independent examination by a trial judge justifies a more searching review by an appellate court of the challenged juror's qualifications."[48]

When does a juror demonstrate an inability to be fair and impartial? Indication of a potential bias is not enough.[49] Significantly, if an answer to a question suggests the possibility of bias but, upon further questioning, the potential juror "reassures the court that he can be impartial," then "the bare possibility of prejudice will not" disqualify the potential juror.[50] The Supreme Court of Missouri has ruled that expressions such

as "I think I could" or "I would hope I could" and "I think I would be fair" are not unequivocal responses, but rather constitute affirmative responses.[51] Thus, responses couched in terms of "I think" are not equivocal in context, and will not, without more, support a for-cause strike; even when a juror says it may be "somewhat" of a "struggle" to put aside sympathy toward one side might not warrant a for-cause strike.[52]

For example, in *Joy v. Morrison*,[53] a medical malpractice lawsuit, the Supreme Court of Missouri refused to reverse a jury verdict where a venireperson made several comments expressing disapproval of excessive lawsuits and damages. However, upon questioning, he stated that he could award damages if he found negligence and said he thought he could be "fair and reasonable" and avoid giving either side an unfair advantage.[54]

In assessing whether a juror should be stricken for cause, courts distinguish between "deep-seated and enduring bias" that is a product of "a personal, specific and directly adverse experience" as compared to "a general opinion or belief that may be prejudicial in nature but moderate in degree" such that it "would not necessarily" undermine a potential "juror's ability to be impartial."[55] "Opinions formed, but not of a fixed character, and which readily yield to evidence, do not disqualify the juror."[56]

Whether a juror is qualified cannot be determined "by a single response, but [instead] are made on the basis of the entire examination."[57] Instead, in a more general sense: "A juror's answers on voir dire to questions touching his state of mind are primary evidence of his competency. His testimony or opinion derived from his own consciousness is relevant, competent, and primary evidence on the issue of his indifference and impartiality."[58]

In some cases, a juror's initial response may be so strong as to require more than his or her assertion that the prejudice can be set aside.[59] "On the other hand, the self-assessment of prospective jurors that they can set aside their bias is, in most cases, sufficient evidence, in and of itself, to support the trial court's determination that the juror is not disqualified."[60] Courts frequently overrule for-cause challenges when the sole evidence that jurors could overcome previous bias is their own conclusory statements to that effect.[61]

It is proper to consider "demeanor and credibility" when assessing whether a juror is impartial.[62] Also, "general questions and nonverbal responses may be considered in determining a venireperson's qualifications."[63]

Will Friends and Employees of the Parties Automatically Be Stricken for Cause?

Even if a juror denies any bias, the relationship between the jurors and a party or witness, alone, can also lead to disqualification.

Employee and Business Relationships

Employees of one of the parties must be excluded for cause and may not sit as jurors regardless of whether voir dire examination reveals any indication of bias or partiality; in such a case, overruling a cause-strike constitutes reversible error.[64] On the other hand, a mere business relationship with a party, absent more, does not necessarily disqualify a juror. In *Collins v. West Plains Memorial Hospital,*[65] the court held that, standing alone, the fact that a venireperson was employed by a manufacturer that did business with a party does not necessarily justify a for-cause strike.[66]

Ultimately, it is the court that must decide whether the relationship might affect the fairness of the trial. "Even though a juror has some business or personal relationship with a party, the trial court has broad discretion in determining the qualifications of such venirepersons to sit as jurors[.]"[67]

Friendship and Other Social Relationships

Being friends with one of the parties will not automatically disqualify a potential juror.[68]

Can I Get an Entirely New Panel If One Potential Juror Has Seemingly "Poisoned the Well" By His Responses in Front of the Entire Panel?

"Generally, the disqualification of an individual juror for the expression of an opinion, or for making remarks indicating bias, is not a sufficient ground for the challenge of the entire panel."[69] In *Glasgow v. State*, a venireperson's comment that he knew someone who used drugs and spent time in jail, and who knew the plaintiff, did not justify a new trial. Instead, a new trial requires responses "so inflammatory and prejudicial that the right to a fair trial has been infringed."[70] While the court in *Glasgow* did not explain what comments might "poison the well" so as to justify a new trial, it describes other situations in which more egregious venire comments did not result in a new trial.[71] Similarly, the Missouri Court of Appeals recently found no error where the trial court refused to grant a mistrial based upon a juror's comments during the presentation of evidence and, instead, excused the juror and replaced her with an alternate.[72]

The Use and Misuse of Peremptory Challenges

Only Race and Gender Are Prohibited Reasons for Peremptory Challenges

Counsel has wide latitude to exercise peremptory challenges. Counsel may even rely upon "'hunches' in exercising [their] peremptory challenges as long as" those hunches are not based upon race or any other prohibited basis.[73]

"Under the Equal Protection Clause, a party may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race."[74] *Batson* challenges – asserting that a party struck a venireperson based upon impermissible grounds – are generally resolved through a three-stage process: (1) opponent of the exercise of a peremptory challenge raises a *Batson* challenge; (2) "[p]roponent provides an explanation"; and (3) opponent must show pretext.[75] Thus, counsel should be ready to provide a "race-neutral, reasonably specific" reason for using a peremptory challenge.[76] In addition, counsel should be able to explain why it failed to strike any similarly-situated jurors outside the protected class.[77]

Interestingly, although a party cannot rely on gender as a basis for exercising a peremptory challenge, female jurors in Missouri have a constitutional right to excuse themselves from jury duty.[78] However, the U.S. Supreme Court has held that, to the extent this exception fails to provide a "fair cross section of the community" on jury venires, it is unconstitutional.[79]

Use of a Peremptory Challenge Could Take Away a Basis for Appeal

"[A] litigant does not have a right to a new trial on the ground that the trial court erroneously required him to use a peremptory challenge to remove a juror who should have been removed for cause."[80] Rather, the aggrieved party must be able to show that an unqualified juror sat.[81] Thus, a party who uses – or, perhaps as a practical matter is forced to use – a peremptory challenge to remove a juror will not be afforded relief on appeal.

Juror Non-Disclosure

Each "juror … has a duty to 'fully, fairly and truthfully answer each question asked' so that" counsel may make informed decisions about the juror's qualifications and whether to challenge the juror's qualification.[82] If a juror "withhold[s] material information" that "results in bias and prejudice[,]" a new trial is warranted.[83]

There are two steps in assessing whether a new trial is appropriate based on juror non-disclosure. First, the court must determine whether there has, in fact, been a non-disclosure; and second, whether such a "nondisclosure was intentional or unintentional."[84]

What Constitutes Improper Juror Non-Disclosure?

This initial step in assessing whether a party's right to a fair trial has been infringed by information withheld by a juror is determining whether the juror had been asked a question "reasonably calculated to elicit the allegedly withheld information."[85] If the juror's answer is reasonably responsive to the question posed and reveals "all known and relevant information, [then] non-disclosure has not occurred."[86] Jurors are not expected to answer questions that have not been asked, nor are they required to guess at an attorney's meaning.[87]

The preliminary determination of whether there has been a non-disclosure boils down to this: "Was the question clear?"[88] "[A] finding that a voir dire question clearly and unambiguously called for information which a juror withheld is a *sine quo non* of a successful jury nondisclosure claim."[89] A question is sufficiently clear only if "a lay person would reasonably conclude that the undisclosed information was solicited by the question."[90] The meaning of a question depends "not only on the words used, but also on the context."[91]

The standard is objective; it is not how the actual juror interpreted the question that matters, but, instead, how a reasonable lay person would interpret the question. Questioning must be "precise."[92] Thus, the manner in which other potential jurors interpreted the same question – as demonstrated by their response – is relevant.[93] "[C]onfusion can arise when counsel 'narrow[s] the focus of the questions.'"[94] "When a lawyer … narrows the focus of his inquiry, 'it is not surprising that the answers responded to and reflected this [narrowed] focus.'"[95]

Some specific examples of questioning ruled to have been sufficient or insufficient to require disclosure of certain information includes:

- "Has anyone on the panel or any member of your immediate family brought an action against anybody else, for personal injury or wrongful death?" – sufficient to require disclosure of lawsuits against businesses, not just other individuals.[96]
- "Has anyone claimed you did something wrong that you are responsible for, an injury or something else, and filed a claim or suit against you?" – not sufficiently clear to require disclosure of past collection suits, context was personal injury claims and no other jurors identified collection suits.[97]
- The term "'claim' even in the barest of layman's language," was sufficiently clear to include "not only a lawsuit but also a claim settled out of court."[98]
- "It is at least conceivable that an unsophisticated person served with a summons in a collection matter, traffic case, or the like, to which such person has no defense, would not understand himself to have been a 'defendant in a lawsuit.'"[99]

Alleged non-disclosure of previous litigation experience has been a frequently litigated area, possibly because "questions and answers related to a venireperson's prior litigation experience are always deemed to be material."[100]

What If the Juror's Non-Disclosure Was Not Intentional?

If a juror has failed to adequately respond to a question, the court will proceed to determine whether the non-disclosure was intentional or unintentional. This distinction is critical, and often outcome determinative. As the Supreme Court of Missouri has explained: "If a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment. For this reason, a finding of intentional concealment has 'become tantamount to a per se rule mandating a new trial.'"[101] "Only where a juror's intentional non-disclosure does not involve a material issue, or where the non-disclosure is *unintentional*, should the trial court inquire into prejudice."[102] The Missouri system is, thus, different than the federal system, in which a party seeking to overturn a jury verdict due to intentional juror non-disclosure must still show prejudice.[103]

On the other hand, an unintentional non-disclosure may or may not warrant a new trial, depending on whether the aggrieved party can establish prejudice. Whether unintentional non-disclosure has resulted in prejudice is a factual determination for the trial court, which will be overturned on appeal only for abuse of discretion.[104]

"Intentional non-disclosure [exists] (1) where there [is] no reasonable inability to comprehend" the question asked and (2) where the "juror actually remembers the experience"/information of significance or that "purported forgetfulness is unreasonable."[105] A finding that a juror acted with "reckless disregard" with regard to the duty to disclose is equivalent to intentional non-disclosure.[106]

In evaluating a juror's explanation for non-disclosure, trial courts can assess credibility.[107] Indeed, because the trial court is in the best position to assess whether a juror is being candid in explaining why information was not disclosed, trial courts are given great deference on the matter.[108]

How Does Trial Counsel Establish Prejudice From an Unintentional Non-Disclosure?

Showing prejudice stemming from an unintentional non-disclosure is difficult. For starters, if the juror in question did not vote against the party complaining of the non-disclosure, there is no prejudice.[109] If the non-disclosed information "does not bear on the case," then there is no prejudice.[110] Thus, a failure to disclose information about litigation experience of a different kind than is at issue is not necessarily prejudicial.[111] If a juror discloses information that would reveal a potential bias toward a party that would be sufficient to alert counsel to the bias, then non-disclosure of other information will not likely be prejudicial.[112] On the other hand, "[u]nintentional nondisclosure exists where … the experience forgotten was insignificant or remote in time . . . or where the [prospective juror] reasonably misunderstands the question[.]"[113]

How Does the Court Address Evidence of Prejudice or Bias That Arises in the Course of the Jury's Deliberations?

The Supreme Court of Missouri issued a recent opinion in *Fleshner v. Pepose Vision Institute, P.C.* holding that a juror's derogatory ethnic or religious statements during the deliberations deprive litigants of their Constitutional rights:

> This Court finds that if a juror makes statements evincing ethnic or religious bias or prejudice during jury deliberations, the parties are deprived of their right to a fair and impartial jury and equal protection under the law. Accordingly, the trial court should have held a hearing to determine whether the alleged anti-Semitic comments were made.[114]

Accordingly, the Supreme Court of Missouri reversed the trial court's decision to overrule the defendant's motion for new trial without first holding an evidentiary hearing.[115]

Recognizing the general rule prohibiting an after-the-trial examination of "jurors' mental processes[,]" "thoughts or beliefs[,]" the Court viewed statements evincing bias and prejudice in a different light.[116] When a juror expresses such views during deliberations, the statement alone violates the litigant's right to a fair and impartial trial, without regard to whether the statements influenced other jurors.[117] The Court's holding in *Fleshner* clarifies that, if a party learns of prejudicial or biased statements made during deliberations, the proper procedure is for counsel to raise the misconduct in post-trial motions and request an evidentiary hearing.

Conclusion

The law of jury selection – what is and is not fair game – is not subject to many bright lines. Statements from appellate decisions are often unclear at best and sometimes seemingly conflicting. Still, counsel familiar with these decisions should be better positioned to convince a trial judge that their jury selection inquiries are appropriate and permissible while their opponent's should be curtailed.

Endnotes

1 Michael Matula exclusively represents employers and management in employment-related litigation as a shareholder at Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Kansas City.

2 Nicole Hininger exclusively represents employers and management in employment-related litigation as an associate at Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Kansas City.

3 Mo. Const. art. I §22(a).

4 *Id.*

5 *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998).

6 *Id.* at 146.

7 *Ashcroft v. TAD Res. Int'l*, 972 S.W.2d 502, 505 (Mo. App. W.D. 1998).

8 *Littell v. Bi-State Transit Dev. Agency*, 423 S.W.2d 34, 36 (Mo. App. E.D. 1967).

9 *Id.* at 37.

10 *Id.*

11 *Jones v. State*, 197 S.W.3d 227, 232 (Mo. App. W.D. 2006).

12 *Littell*, 423 S.W.2d at 38.

13 *State v. Reed*, 629 S.W.2d 424, 426 (Mo. App. W.D. 1981).

14 *State v. Taylor*, 742 S.W.2d 625, 627 (Mo. App. E.D. 1988); *State v. Ezell*, 233 S.W.3d 251, 252 (Mo. App. W.D. 2007).

15 *State v. Gill*, 167 S.W.3d 184, 192 (Mo. banc 2005) (noting that prosecutor had stated his example of accomplice liability was "just an example" and that judge would give "the exact law as to this case in the instructions.").

16 *Ashcroft*, 972 S.W.2d at 506.

17 *Jones* at 232.

18 *Ashcroft*, 972 S.W.2d at 506, citing *State v. Mosier*, 102 S.W.2d 620, 624 (Mo. banc. 1937).

19 *Ashcroft*, 972 S.W.2d at 506.

20 *Id.* at 504; *citing* MAI 10.01 (1990 Revision).

21 *Id.* at 507.

22 *Id.* at 506 (ruling that such inquiry is appropriate even if trial bifurcated under § 510.263).

23 *Littell*, 423 S.W.2d at 38 (citation omitted).

24 *Reed*, 629 S.W.2d at 427.

25 *Id.*

26 *State v. Antwine*, 743 S.W.2d 51, 58 (Mo. banc 1987); *Jones*, 197 S.W.3d at 232.

27 *State v. Ezell*, 233 S.W.3d 251, 253 (Mo. App. W.D. 2007) (citing *State v. Nicklasson*, 967 S.W.2d 596, 611 (Mo. banc. 1988)).

28 *Id.*

29 *State v. Clark*, 981 S.W.2d 143, 147 (Mo. banc 1998).

30 *See, e.g.*, *Ezell*, 233 S.W.3d at 253, citing *Clark*, 981 S.W.2d at 147.

31 *Clark*, 981 S.W.2d at 146.

32 *Id. at* 146-47.

33 651 S.W.2d 186 (Mo. App. W.D. 1983).

34 *Id.*

35 *Id.*

36 *Crawford v. Shop'N Save Warehouse Foods, Inc.*, 91 S.W.3d 646, 652 (Mo. App. E.D. 2002).

37 *See id.* (holding that trial counsel's question to "venire if they could return a … verdict if a sum of $150,000 to $200,000 was requested and supported by the evidence … did not attempt to commit the jury to awarding a specific" sum).

38 *Ezell*, 233 S.W.3d at 253.

39 *See Brines ex rel. Harlan v. Cibis*, 784 S.W.2d 201, 204 (Mo. App. W.D. 1989).

40 *Id.*

41 Section 494.470 RSMo 2000.

42 Section 494.470.1 RSMo 2000.

43 Section 494.470.2 RSMo 2000.

44 *See Brines*, 784 S.W.2d at 203.

45 *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. banc 2008) (quoting *State v. Johnson*, 22 S.W.3d 183, 187 (Mo. banc 2000)). *See* § 494.470 RSMo 2000.

46 *Joy*, 254 S.W.3d at 891; *State v. Clark-Ramsey*, 88 S.W.3d 484, 488 (Mo. App. W.D. 2002).

47 *Clark-Ramsey*, 88 S.W.3d at 488-89.

48 *Clark-Ramsey*, 88 S.W.3d at 491; *Joy*, 254 S.W.3d at 891.

49 *Joy*, 254 S.W.3d at 890 (mere equivocation is not enough).

50 *Id.* at 890-91; *Lopez v. Three Rivers Elec. Coop.*, 92 S.W.3d 165, 169 (Mo. App. E.D. 2002); *Clark-Ramsey*, 88 S.W.3d at 489. "Where a venireperson's answer suggests a possibility of bias, but upon further questioning that person gives unequivocal assurances of impartially, the bare possibility of prejudice will not disqualify such rehabilitated juror nor deprive the trial court of discretion to seat such venireperson." *Id., Lopez*, 92 S.W.3d at 169 (quoting *State v. Thomas*, 70 S.W.3d 496, 508 (Mo. App. E.D. 2002)).

51 *Ray v. Gream*, 860 S.W.2d 325, 332 (Mo. banc 1993).

52 *See Lopez*, 92 S.W.3d at 169 (ruling that trial court did not abuse discretion in overruling for-cause challenge based on juror's agreement that it would be "somewhat" of a "struggle" to put aside sympathy for plaintiff when juror later said, "I think I could be fair.").

53 254 S.W.3d 885 (Mo. banc 2008).

54 *Id. at* 890.

55 *Ray*, 860 S.W.2d at 332.

56 *Id.* at 332-33 (citation omitted). For example, in *Joy*, 254 S.W.3d at 888, the Supreme Court of Missouri held that generalized dissatisfaction with excessive lawsuits did not clearly translate into bias against the plaintiff.

57 *State v. Landers*, 969 S.W.2d 808, 811 (Mo. App. W.D. 1998). *See, e.g., Joy*, 254 S.W.3d at 888; *Dooley v. St. Louis County*, No. ED92424 (Mo. App. E.D., Dec. 8, 2009).

58 *Ray*, 860 S.W.2d at 334.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Morris v. Spencer*, 826 S.W.2d 10, 13 (Mo. App. W.D. 1992) (ruling that trial court did not error in refusing to strike jurors who had previously been treated by defendant doctor).

63 *Id.*

64 *See Brines*, 784 S.W.2d at 202.

65 735 S.W.2d 404 (Mo. App. S.D. 1987).

66 *Brines* at 203 (finding no error in refusing

to strike jurors who had been patients at defendant hospital); *Golden v. Chipman*, 536 S.W.2d 761, 764-65 (Mo. App. E.D. 1976) (no error in refusing to strike juror whose son was employed by defendant's attorney's law firm absent showing of actual bias).

67 *Morris*, 826 S.W.2d at 11.

68 *See State v. Johnson*, 721 S.W.2d 23, 31 (Mo. App. E.D. 1986) (no abuse of discretion in refusing to strike juror who was good friend of doctor who would appear as expert at trial); *State v. McGrew*, 534 S.W.2d 549, 551 (Mo. App. E.D. 1976) ("[F]riendship alone is not sufficient to disqualify" a potential juror.); *Grimm v. Gargis*, 303 S.W.2d 43, 49-50 (Mo. 1957) (no error in refusing to strike venireperson who had been a friend of the plaintiff for 30 years and had seen the plaintiff in hospital while plaintiff was recovering from injuries that were at issue in suit).

69 *Glasgow v. State*, 218 S.W.3d 484, 488 (Mo. App. W.D. 2007).

70 *Id. at* 484.

71 *Id. at* 489 (citing *State v. Weekley*, 92 S.W.3d 327, 330-31 (Mo. App. S.D. 2002) in which venireperson said he had seen the defendant's name in the newspaper and police records, and *State v. Weidlich*, 269 S.W.2d 69, 71 (Mo. 1954), in which venireperson called the defendant a "thief.").

72 *Dooley v. St. Louis County*, No. ED82424 (Mo. App. E.D., Dec. 8, 2009).

73 *State v. Parker*, 836 S.W.2d 930, 940 n.8 (Mo. banc 1992).

74 *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000)). *See, e.g., Parker*, 836 S.W.2d at 934.

75 *Marlowe*, 89 S.W.3d at 468-69.

76 *Parker*, 836 S.W.2d at 934.

77 *Marlowe*, 89 S.W.3d at 469-70 (remanding case for a new trial based upon *Batson* challenge and finding lack of explanation for failing to strike similarly-situated Caucasian juror "crucial" to pretext determination).

78 Mo. Const. art. I, § 22(b).

79 *Duren v. Missouri*, 439 U.S. 357, 368-69 (1979).

80 *State ex rel. Mo. Highway & Transp Comm'n v. Sisk*, 954 S.W.2d 503, 508 (Mo. App. W.D. 1997).

81 *Id.*

82 *Nadolski v. Ahmed*, 142 S.W.3d 755, 764 (Mo. App. W.D. 2004).

83 *Id.*

84 *Id.*

85 *Id.* at 765.

86 *Id.*

87 *Id.* at 765; *State v. Walton*, 796 S.W.2d 374, 379 (Mo. banc. 1990) ("Failing to ask a question on *voir dire* waives the right to challenge the juror on any grounds not asked."); *Keltner v. K-Mart Corp.,* 42 S.W.3d 716, 723 (Mo. App. E.D. 2001) (not required to guess at meaning).

88 *Keltner,* 42 S.W.3d at 722. *See, e.g., Sapp v. Morrison Bros. Co.*, 295 S.W.3d 470, 474 (Mo. App. W.D. 2009).

89 *Sapp,* 295 S.W.3d at 477 (quoting *McBurney v. Cameron*, 248 S.W.3d 36 (Mo. App. W.D. 2008)).

90 *Keltner,* 42 S.W.3d at 728.

91 *Id.* at 726.

92 *Id. See, e.g., Sapp v. Morrison Brothers Co.*, 295 S.W.3d 470, 479 (Mo. App. W.D. 2009).

93 *Nadolski v. Ahmed*, 142 S.W.3d 755, 766 (Mo. App. W.D. 2004) (noting that other jurors interpreted the question at issue to include lawsuits against companies).

94 *Heinen v. Healthline Mgmt., Inc*., 982 S.W.2d 244, 249 (Mo. banc 1998).

95 *Id.*at 250.

96 *Nadolski*, 142 S.W.3d at 766.

97 *Keltner*, 42 S.W.3d at 724.

98 *Williams v. Barnes Hosp.*, 736 S.W.2d 33, 38 (Mo. banc 1987) (reversing and remanding for a new trial).

99 *Brines ex rel. Harlan v. Cibis*, 882 S.W.2d 138, 142 (Mo. banc. 1994).

100 *Bell v. Sabates*, 90 S.W.3d 116, 123 (Mo. App. W.D. 2002).

101 *Williams*, 736 S.W.2d at 37 (citation omitted); *see, e.g., Sapp v. Morrison Brothers Co.*, 295 S.W.3d 470, 477 (Mo. App. W.D. 2009).

102 *Brines*, 882 S.W.2d at 140.

103 *Keltner*, 42 S.W.3d at 722 n.3.

104 *Id.*

105 *Nadolski v. Ahmed*, 142 S.W.3d 755, 767 (Mo. App. W.D. 2004).

106 *Heinen v. Healthline Mgmt., Inc*., 982 S.W.2d 244, 248 (Mo. banc 1998).

107 *Id.*

108 *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. banc 2008).

109 *Heinen,* 982 S.W.2d at 250.

110 *Id.*

111 *Id.*

112 *Williams*, 736 S.W.2d at 38 (rejecting corporate defendant's argument that juror's nondisclosure of the fact that he was being garnished by a major corporation might create bias against defendant because juror had disclosed making a slip and fall claim against corporate entity).

113 *Id.* at 36.

114 *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 85 (Mo. banc 2010).

115 *Id.* at 85.

116 *Id.* at 87.

117 *Id.* at 89.