ILLINOIS STATE BAR ASSOCIATION

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Bench & Bar

The newsletter of the Illinois State Bar Association's Bench & Bar Section

Chair's column

BY JUSTICE MICHAEL B. HYMAN

Three Suggestions for Rebuffing Weasels

Lawyers have earned a reputation for being nasty, confrontational, and mean-spirited. The public, and a number of lawyers as well, think this reputation to be entirely justified.

I suspect there is hardly a lawyer who has not experienced, let's call it, an "intense" conversation, in which an opponent descends into disruptive and disrespectful behavior. Actually, can any

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Our evolving notion of what is an 'impartial jury'

BY LINDA J. WATSON

Recently a Central Illinois Judge dismissed an entire jury pool in a criminal case because there was not one single African American in the pool. The trial of the African American Defendant was postponed. The question raised was: "what percentage of the jury pool must be African American" to have a 'peer' jury pool selection? To put it another way: how many people of a Defendant's own ethnicity must be represented in a jury pool, in order to satisfy a Defendant's constitutional right to be judged by their "peers"? The answer: None. For now. However, this constitutional right which is nearly 800 years old has been undergoing some pretty interesting changes in the last century.

First off, there is no such percentage requirement. The state is only required to seek its jurors from a "fair cross section of the venire." There is no law which guarantees that a representative cross section of the community actually show up for possible jury duty selection. There is a requirement, however, that the cross section of the venire is selected ethically. But first, let's back up a minute and I'll explain:

The right to a trial by "jury" goes back, way back, to the Magna Carta in England in 1217, reissued in 1225, and again in 1297 and thus becoming British common law.

Article XXIX of the Magna Carta

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Chair's column

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lawyer, without qualification, say he or she has never once crossed the fine line between acceptable and unacceptable advocacy. A momentary, rare lapse, however, differs markedly from habitual offenders.

Usually, lawyers with sharp tongues, short-tempers, or hostile demeanors earn well-deserved negative reputations in their local legal community. Not that they care one bit. And, you won't get an apology for their temper tantrums, at least not a sincere one.

Let's call lawyers who act this way "weasels," after the Least Weasel, a dangerous predator which is cunning as well as fierce in its efforts to get prey. Weasels enjoy creating tension and don't care if others get upset, especially their opponent or their opponent's client. They take pride in bullying, considering it an acceptable form of zealous advocacy. They prefer discourtesy to decency, conflict to cooperation, antagonism to accord.

There are many ways to respond to weasels. Space permits presenting just three.

Remain professional

Of primary concern is not how we cooperate with each other, but how we treat each other when we do not cooperate. If you happen to cross paths with a weasel, the one thing you must do is remain calm. That is what professionalism calls for and a professional does. React emotionally and the weasel wins.

I know it is easy to say the abuse should be endured with restraint and altogether another matter to maintain a composed demeanor, especially when you are burning mad inside. Sure it is difficult to resist barking back, but muzzle yourself. By facing the situation with maturity (something weasels lack), by preserving your integrity (again something weasels lack), you deny weasels the satisfaction of upsetting you. In addition, you think clearer when you are calm.

Just because weasels abandon professionalism is no excuse for your joining their herd. Weasels want nothing more than for you to crawl under slimy rocks with them. Judges are less inclined to assess blame when both sides behave unruly.

Respond with kindness, not in kind

Take the high ground; kill weasels with kindness. In following this advice, you stay a step removed from their game and undermine the ugly dynamic weasels try to create. Give weasels wide berth, and be as nice to them as possible. Also, a little humor can ease a tense situation.

Showing kindness is not a form of weakness, but an assertion of self-respect which is something sorely lacking in weasels. Only the most insensitive weasels keep their guard up in the face of overt kindness. I am not saying kindness necessarily will ease the conflict, but it might defuse things enough to allow civil conversation.

Seek help and support

While your ego may want to go it alone, the better approach is to find an ally to work things through with you. Get different perspectives on how-to or how-not-to proceed, especially when you are upset. This can be an eye-opener, a mouth-closer, or both. It also can restore your confidence and peace of mind. Even those experienced in parrying with weasels do better talking things over with a trusted colleague.

Maybe the best advice on the subject comes from the grandmother of sportswriter Grantland Rice who warned him to "never get into an argument about cesspools with an expert."

Rehearing: "When all you own is a hammer, every problem starts looking like a nail."

—Abraham Maslow, psychologist. ■

Justice Hyman's article first appeared in the October 2016 issue of the CBA Record and is reprinted by permission.

Bench & Bar

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Our evolving notion of what is an 'impartial jury'

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states: "No Freeman shall be taken or imprisoned or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land."

The Magna Carta, of course, was part and parcel of our foundation for the Constitution where in we detailed our 4th and 6th Amendment rights. There the notion of a "jury" was expanded to include the word "impartial." However note "peers" was left out of the draft in the Constitution. Hmmm. Why? What was James Madison thinking? (No, not Thomas Jefferson – he wrote the Declaration of Independence, not the Constitution).

Pursuant to our Constitution any adult individual charged with a crime punishable by more than 6 months in imprisonment is entitled to a jury trial. Article 6 of the constitution (1789) reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law…"

The 4th Amendment of the Constitution, essentially, guarantees our right to due process, i.e. our right to be free from unreasonable searches and seizures. A conviction for a crime and restrictions on our liberty is certainly a "seizure."

Thus, our right to a trial by an impartial jury is part of our constitutional due process rights required before a court may restrict our liberty. Meaning, every person charged with a crime has a right to be judged innocent or guilty by an "impartial jury of the State and district" where the crime was alleged to have been committed.

NOTE: "jury of his Peers" does NOT actually appear in the Constitution. The Constitution reads "impartial jury."

So, what does "impartial jury of the State and district" really mean? How do we define an "impartial jury"? How do we know we got an "impartial jury"? And isn't our current notion of what makes up an "impartial jury" actually changing or evolving? In short, yes. A look at the court's historical rulings of what an "impartial jury" is, is actually very interesting, because it would seem that the courts have taken the notion of an "impartial jury" back to the original magna carta term of "jury of peers." Let's take a look.

The First time the United States Supreme Court looked at the notion of "impartial jury" as applied to a defendant's race was in Strauder v. West Virginia, 100 US 303 (1880). At the time, the laws of West Virginia excluded all African Americans from juries. Meaning, an African American could not even serve on a jury. In Strauder, an African American man who at trial was convicted of murder by an all white jury appealed his conviction arguing that the all white jury violated his constitutional rights because the law strictly excluded African American jurors. The United States Supreme Court found that it did violate his constitutional rights.

Okay, so an African American person could now serve on a jury, but what about an African American person's criminal jury pool not having any potential African American jurors, as we had here in Central Illinois? The Strauder Court did NOT hold that a jury must have a particular racial balance to satisfy this constitutional right. It just held that the jury pool could not exclude African Americans from potentially serving as jurors. This distinction was affirmed in *Washington v. Davis*, (246 US 229, 1976) who stated: Strauder established that the exclusion of African Americans from juries violates equal protection, but "if a particular jury or series of juries does not statistically reflect the racial composition of the community that itself does not make an invidious discrimination forbidden by the [Equal Protection] Clause." To put it another way: the aim of the *Strauder* Court's ruling was against discrimination not against unbalanced jury pools.

The notion that an unbalanced jury pool is a form of discrimination in and of itself is still a new notion, legally, in our young country. Very new in fact. Jumping off this notion was *Batson v. Kentucky*, 476 US 79 (1986). The Supreme Court ruled that an attorney can not strike a potential juror due to race. However, it noted that in order for a defendant to a make a claim of a violation of equal protection the defendant must show "purposeful discrimination" or purposeful exclusion.

But again, these are notions of who can be on the jury. Not who has to in the pool from which the jurors are selected. In that regard courts across the country are facing a real problem: how to get a diverse jury pool to the court house? This was a poignant problem recently highlighted in an American Bar Association Article: Lack of Jury Diversity: A National Problem with Individual Consequences". (http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html)

Here in Central Illinois, our own United States District Court for the Central District of Illinois, Justice Joe Billy McDade ruled in an unpublished opinion that the right to an impartial jury does not carry with it a "constitutional right to a jury of particular racial composition". *Sargent v. Idle, 212 Fed. Appx. 569 (7*th Cir., 2006). Earlier, the 7th Circuit Court of Appeals had ruled the same in *US v. Guy, 924 F.2d 702 (7*th Cir. 1991) reasoning "the defendant's mere observation that there were no African Americans on the panel that was drawn from population containing

African Americans was not sufficient to demonstrate any systematic exclusion."

But wait: "fair cross section of the community" now = "impartial jury"?

Very recently courts have begun to expand this notion of "impartial" to look more closely at the minority and diversity of the pool of jurors and how we get those pools of jurors. In *Taylor v. Louisiana* the US Supreme Court looked at a jury pool and its make up of women versus men. There the state of Louisiana had a law which excluded women from juror service unless they filed a written declaration. The US Supreme Court ruled that such a systematic exclusion of citizens eligible for jury service does not lead to a representative cross section of the community. 95 S. Ct. 692 (1975).

Springing off *Taylor*, the US Supreme Court expanded that notion to look at the jury selection as it applies African Americans in *Holland v. Illinois*. The United States Supreme Court explained "the Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but a an impartial one (which it does). *Holland v. Illinois* (1990) 493 US 474, 480. There the court noted that this "fair cross section of the community" while not explicit in the Constitution, it is "derived from the traditional understanding of how an "impartial jury" is assembled." Id. Thus, that traditional understanding includes a representative venire, so that the jury will be, as we have said, "drawn from a fair cross section of the community." However, the courts have only taken such to mean that the state must draw up jury lists in such a manner as to produce a pool of prospective jurors such that it does not disproportionately ill dispose towards one or all classes of defendants.

The *Holland* court cautioned, emphasizing "that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition."

In another case, *US v. Ashley, the 7*th Circuit ruled that evidence that African Americans constituted three percent of the voting age population in 27 counties that provided jurors for district court and that no jurors on defendant's venire were African American was insufficient to establish prima facie case that the defendant's 6th Amendment rights to venire drawn from cross-section of community had been violated. 54 F.3d 311 (1995).

The Illinois Supreme Court in *People v. Peeples noted that to establish a violation of the fair cross section requirement (a violation of the 6*th Amendment and Equal protection clause), a defendant must show that : 1.) the group allegedly excluded is a distinctive group in the community; 2.) the underrepresentation of that group in venires, from which juries are selected is not fair and reasonable in relation to the number of such person in the community; and 3.) the underrepresentation is due to the systematic exclusion of that distinctive group in the jury selection process. 155 Ill. 2d 422. Once the Defendant has made a prima facie showing of the violation, the burden shifts to the State to demonstrate that a significant State interest justifies the selection process which results in the underrepresentation. Mere rational grounds or administrative convenience will not suffice. In *Peeples,* the court noted that the defendant resided, committed his crimes, and was tried in the northern half of Cook County. The jury pool (aka Venire) for the defendant's trial was drawn from the northern half of Cook County. Thus, the court ruled that the defendant failed to establish that African Americans were underrepresented in the venires. The Supreme Court went on to uphold the method of juror pool selection using voter registration stating that such was "facially neutral as it allows no opportunity for subjective or racially motivated judgments."

It is important to note, that in *Peeples, t*he venire panel was drawn from a specific section of Cook County. Under Section 9.2 of the Jury Commission Act in a single county judicial circuit which contains more than one million inhabitants, jurors may be drawn from a part of the county which, as determined by the court, to be most favorable to an impartial trial. Cook County Circuit Rule .4 implements this section of the Act by dividing the county into a northern half and a southern half via zip codes. Per the 2010 census, Cook County has more than 5 million inhabitants 26% of which are African American. However, by way of example, Peoria has a mere 186,000 inhabitants 17.7% are African American.

The question then becomes whether a criminal defendant in a city such as Peoria could ever raise jury pool argument since the county is not divided into sections for jury pool selection. While there is not precedent for such an argument, the case law would suggest that yes, a defendant could raise such an argument if the manner in which the jury pools are selected were discriminatory.

Thus, the ultimate question here is: is the manner in which the smaller Central Illinois counties' jury commission selects its jury pool discriminatory? Such, quite frankly, is unlikely. What is more likely is that the African American community has greater logistical and socio- economic challenges which result in their vast under representation i.e. response to a jury duty summons. As noted in the ABA article, such demographic is more likely to not receive the jury summons or to if they do, such service is a financial hardship to miss work, thus resulting in the jury summons being ignored.

The ultimate developing question then becomes: Is the court system's lack of attention to these demographics of the jury pool, a violation of a defendant's constitutional right to be judged by an "impartial jury?"

This, is the quagmire which will confound the legal community for the next decade, as we try to bridge the gap between our developing notion and definition of a constitutional right to an impartial jury and the logistics of actually getting that impartial jury to the jury pool.

The lack of legally required diversity, its practical logistical hurdles aside, is

surprising considering the vast amount of research which supports it. Studies show juries who are more diverse consider the evidence longer and more thoroughly. (see ABA article). Not to mention the fact that in a world where the populace is becoming increasingly skeptical of governance, more diverse juries are perceived as being more fair and impartial, i.e. being "correct" than those that are not.

This takes us back to our original question: to what extent does our constitutional right guarantee a defendant to be judged by an "impartial jury"? If the last 40 years of legal history has shown us anything, it's that the next 40 years of this developing notion should be very interesting. ■

This article was originally published in the September 2016 issue of the ISBA's Criminal Justice newsletter.

Book review of *The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation* by Jeena Cho and Karen Gifford

REVIEW BY HON. EDWARD J. SCHOENBAUM

This is an excellent book by two attorneys who have firsthand knowledge of the problems facing us and the fantastic possible rewards of mindfulness practice.

Each of the eight chapters is to be read and practiced for one week. Each chapter ends with a way to cultivate or implement what was read, instructions on how to practice and a Meditation Log. 1. Beginning to Meditate 2. Mindfulness 3. Clarity 4. Compassion Toward Others 5. Self-Compassion 6. Mantra Repetition 7. Heartfulness 8. Gratitude

Authors Jeena Cho and Karen Gifford write: "Meditation and its related practices can be part of an approach to a life and career that includes achievement, constructive engagement, expanding self-knowledge, and personal fulfillment."

Common reasons for meditation are: stress or anxiety management, increasing focus and productivity, letting go of unwanted habits, dealing with difficult events and seeking meaning and self-knowledge. The focus is on three basic meditative practices: Mindfulness, the practice of bringing our attention to what is happening in the moment; Metta practice, offering good wishes or "loving-kindness" to ourselves and others; Mantra, technique used to focus the attention by repeating a word or phrase.

The authors provide a general overview of the concepts behind meditation and related practices, the science behind them, and the nuts and bolts of cultivating a meditation practice through an eight-week self-guided program. It is a workbook so you must do the work as you read. The key is "spending quality time with your own mind." Start with "a simple breathing technique." "The breath is: always in the present. . . a physical reminder and practical example of how all are connected . . . reminds us we don't have to do everything."

"Virtually every religion includes a practice that involves sitting quietly with the eyes closed or softly focused . . . may be called prayer, meditation, or some other type of contemplation, but all are designed to quiet the mind."

A meditation log at the end of each chapter helps you record each time you meditate, date, time of day and for how long, and record a few reflections on your meditation. "Meditation is a way of getting to know yourself better and any transformation that meditation brings comes from that self-knowledge." Meditation puts you in better touch with what you want for your life. "Anything you decide to do as a result of that knowledge will be the result of your judgment and will reflect your values temperament and preferences."

A common introductory mindfulness practice is a simple body scan where you direct your attention to the physical sensations of various parts of your body moving your tension slowly over your whole body-it is very relaxing. Mindfulness describes the fundamental skill of meditation which is paying attention to what is happening in the moment.

During mindfulness you get a chance to see more clearly because you're not distracted by other things. The last moment is when your mind returns to awareness and is known as "the moment of choice" when you're simply aware of yourself and asks us to focus right here and now known as "a moment of clarity."

Mindfulness has also been discussed as "spirituality, commonness, or being nice, being a thoughtful person." "Mindfulness is the practice of being fully engaged in being

in our life instead of escaping to the past or the future or the future mindfulness." In this book, it means something very specific: "mindfulness is a particular state of mind, a way of being, a way to engage with the world. Present moment without judgment or preference."

"Establishing a meditation practice brings with it a wide range of physical benefits including ability to lower blood pressure and improve heart health." Its effect is well known by the American Heart Association. "Meditation has been used effectively to treat a variety of other disorders, including insomnia, social anxiety disorder, depression, chronic pain, eating disorders, and addiction."

Choosing a mantra or deciding what mantra to use can be as simple or as complex as you like. The purpose of helping your mind settle by giving us something to do doesn't matter what word or phrase you use. Just pick a word or phrase that is pleasant for you to work with.

Heartfulness is short for many attributes: "courage, strength, compassion, kindness, gratitude, and generosity." "In many Asian languages the word for mind and the word for heart are the same, so mindfulness could easily be called heartfulness."

Many people finish an introductory course in meditation like in this book feeling absolutely great. They have mastered basic techniques by practicing every day for two months. The first taste of clarity from using this practice can be intoxicating.

I could have pulled many other great quotes from this book, but my review would have run 25 pages. This book focuses on lawyers engaging in meditation. It also helps us as human beings outside of any particular role we may play.

The book concludes with 5 pages of notes which refer to articles in journals that contain a link to go to the entire article. Other important websites to check out are:

- https://www.mindandlife.org Founded with encouragement of Dalai Lama. Focused on intersection between scientific investigation of the mind and Buddhist meditation practice.
- http://www.gratefulness.org An online sanctuary where you experience, deepen, and share the power of living gratefully.
- http://contemplativeoutreach.org Resources on centering prayer.
- http://dharmata.org the Mahamudra style of meditation practice.

After reading this excellent book and practicing the exercises suggested I received an email from Jeena Cho inviting me and suggesting that I form or join a book club to work with other people through this unbelievably great book. As I was trying to find a book club, I received another email from her inviting me to sign up for a webcast CLE program. September 7, 2016 was my first webcast and it was fantastic.

I highly recommend this book and its program. ■

Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Hon. Thomas Clinton Hull, III, 16th Circuit, 4th Subcircuit, September 1, 2016
   - Hon. Roger B. Webber, 6th Circuit, September 19, 2016
   - Stephanie D. Saltouros, Cook County Circuit, 10th Subcircuit, September 29, 2016
   - Michael A. Forti, Cook County Circuit, 8th Subcircuit, September 30, 2016

2. The Circuit Judges have appointed the following to be Associate Judge:
   - Keith A. Johnson, 16th Circuit, September 1, 2016
   - Michael C. Sabol, 21st Circuit, September 2, 2016
   - Gary Webber, 6th Circuit, September 19, 2016

3. The following judges have retired:
   - Hon. William C. Davis, 9th Circuit, September 5, 2016
   - Hon. Mary E. O'Connor, Associate Judge, 18th Circuit, September 9, 2016
   - Hon. Helaine L. Berger, Associate Judge, Cook County Circuit, September 13, 2016
   - Hon. Harry E. Clem, 6th Circuit, September 15, 2016
   - Hon. Arnold F. Blockman, 6th Circuit, September 15, 2016
   - Hon. Gloria Chevere, Cook County Circuit, 6th Subcircuit, September 30, 2016
   - Hon. Kathleen O. Kaufmann, Associate Judge, 15th Circuit, September 30, 2016
   - Hon. Sarah P. Lessman, Associate Judge, 19th Circuit, September 30, 2016 ■

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Back by popular demand! Lawsuits are often lost or won based on motion practice…so don't miss this seminar that reviews motion practice from the initial filing of the lawsuit through post-trial motions. Attorneys involved in litigation and trial practice with intermediate to advanced levels of experience who attend this seminar will better understand:

- How to file a motion for change of venue and forum non conveniens;
- Motions to dismiss and summary judgment motions;
- Motions to obtain and preserve evidence, including electronic data;
- The strategic use of motions in limine before the trial;
- The requirements for requesting/defending temporary restraining orders and injunctive relief;
- The post-trial motions appellate issues that counsel wishes you knew; and
- The recent ethical issues that have confronted the legal profession.

Agenda

8:50 – 9:00 a.m. Introduction

9:00 – 9:45 a.m. Motions for Change of Venue and Forum non Conveniens
Robert R. Duncan, Duncan Law Group, LLC, Chicago

9:45 – 10:30 a.m. Dispositive Motions
Hon. Daniel T. Gillespie, Circuit Court of Cook County, Chicago
P. Shawn Wood, Seyfarth & Shaw, Chicago

10:30 – 10:45 a.m. Break (beverages provided)

10:45 – 11:30 a.m. Motions to Obtain and Preserve Evidence
Kimberly A. Davis, SpyratosDavis, LLC, Lisle
E. Angelo Spyratos, SpyratosDavis LLC, Lisle

11:30 a.m. – 12:15 p.m. Motions in Limine
Hon. Russell W. Hartigan, Circuit Court of Cook County, Western Springs

12:15 – 1:15 p.m. Lunch (on your own)

1:15 – 2:00 p.m. Temporary Restraining Orders and Injunctive Relief
Cathy A. Pilkington, Pilkington Law Offices, Chicago

2:00 – 2:45 p.m. Post-Trial Motion Appellate Issues
Robert R. McNamara, Swanson Martin & Bell, LLP, Chicago

2:45 – 3:00 p.m. Break (refreshments provided) - Sponsored by the Illinois Bar Foundation

3:00 – 4:00 p.m. Overview of Recent Ethical Issues Confronting the Profession
TBD, Illinois Attorney Registration and Disciplinary Commission, Chicago

4:00 – 4:15 p.m. Closing Questions and Comments

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