

Boston Bar Journal

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Boston Bar Journal

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President's Page

Justice Under Fire

By Donald R. Frederico

Do we know how good we have it? Massachusetts is among the minority of states whose judges all serve by appointment, not election. Successful candidates are rigorously vetted by the Judicial Nominating Commission, carefully reviewed by the Joint Bar Committee, and mercilessly grilled by the Governor's Council along the way to being nominated and confirmed. Once seated, they are insulated from the ebbs and flows of politics, and untainted by the scourge of campaign financing that overshadows judicial elections in other states.

Our citizenry also benefit from a sound judicial structure. It includes a trial court boasting four specialty departments (housing, juvenile, land, and probate and family) as well as three departments of general jurisdiction (BMC, district and superior); an intermediate appellate court to handle a high volume of appeals; and a Supreme Judicial Court with discretionary jurisdiction to review cases of the greatest importance. Staffed by hundreds of highly qualified judges and thousands of dedicated court personnel, our courts, though not immune from criticism, stand as beacons of justice in today's politically charged world.

Yet our third branch of government is under fire, on several fronts. One such front is budgetary. The Governor and the legislature have cut millions of dollars from the trial court's budget over the last few years. Additional cuts this year would add significantly to the existing, severe strain on the court's ability to administer justice. Other salvos have been launched as well. The Governor's budget last year proposed and this year again proposes to consolidate the Probation Department with the Parole Department, moving Probation from the judiciary to the executive



branch. The Governor separately has proposed transferring the public defender function, historically located in the judicial branch, to the executive branch, and placing the management of the Trial Court in the hands of a non-judge manager.

Some may argue that the courts brought the movement for change on themselves. After all, although the legislature for years tied the Trial Court's hands in managing the now disgraced Probation Department, the department's scandal occurred on the judiciary's watch. And while there are perfectly valid reasons why the costs of public counsel services have risen in recent years, the cost increases nevertheless fuel the Governor's argument for stripping the public defense function from the courts.

But there are important, enduring principles at stake in these debates that must not be sacrificed to budgetary exigency or political expediency. The merits of these or any other proposals affecting vital functions of our state court system must be viewed in this light: that the judiciary is not a state agency existing at the whim of the executive or legislative powers, but is a separate and equal branch of our constitutional form of government, charged with the essential responsibilities of administering the peaceful resolution of disputes, protecting public safety, and preserving civil liberties by keeping the other two branches in check. Although the Governor holds the power to appoint judges, and the legislature controls the purse strings, any initiative to deprive the courts of any significant portion of their power must be based on sound policy reasons, not on convenient reactions to a current need or emotionally fraught crisis.

As the only natural constituency for the judiciary, the organized bar has a special responsibility to defend the judiciary's proper role as a co-equal branch of government. We must be ever vigilant against unwarranted assaults on the courts' constitutional powers and unwise intrusions on their traditional authority. This does not mean that the bar should automatically side with the courts in every debate about how they go about their business, or what lines of business they should be in. There likely will be times when the Boston Bar Association supports the contrary views of the other branches, or when we choose to abstain from the debate altogether. But we can and should play the role of watchdog, identifying potential threats to the constitutional separation of powers, subjecting proposals for significant change to careful scrutiny, and letting our voices be heard when proposed legislation would diminish the ability of the courts to fulfill their vital roles. ■

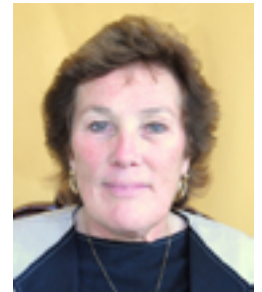
Voice of the Judiciary

Does Justice Go Off Track When Jurors Go Online?

By Judge Linda F. Giles

It has become commonplace for trial judges to issue a pre-charge to newly impaneled jurors, exhorting them, *inter alia*, not to communicate about or research any aspect of the trial before them and not to read, watch, or listen to any account of the case in any news media or any other source. Nevertheless, despite these warnings, a plague of inappropriate information flowing both into and out of the jury box is wreaking havoc around the nation's legal system. Judges across the land are discovering to their dismay that, even in the face of their express cautions, jurors increasingly are using smart phones and other electronic devices to access the Internet in order to talk or learn about their trials. Jurors' seemingly insatiable appetite for nonstop Internet access has begun to trigger so-called "Google" mistrials and other infuriating disruptions.

For example, in March 2009, the Federal judge in a big Florida drug trial had to declare a mistrial when he discovered that nine jurors had conducted their own research about the case on Google, Wikipedia, and other Internet sites, in violation of his explicit instructions. In Arkansas, a building materials company, Stoam Holdings, is appealing a \$12.6 million judgment against it on the ground that a juror had tweeted a message, "oh, and nobody buy Stoam. Its [*sic*] bad mojo and they'll probably cease to Exist, now that their wallet is \$12m lighter." Right here in Massachusetts, in the case of *Commonwealth v. Guisti*, 434 Mass. 245 (2001), the Supreme Judicial Court had to wrestle with the issue of a juror who, during a rape



Judge Linda Giles has served as an Associate Justice of the Superior Court since 1998. She is an adjunct professor of law at Suffolk University Law School and a member of the Board of Editors of the Boston Bar Journal. Judge Giles is a graduate of McGill University and New England School of Law.

trial, had posted a message on an Internet mail service, “Just say he’s guilty and lets [sic] get on with our lives!” In a recent Berkshire County Superior Court rape trial, the judge, who had instructed the jurors not to discuss the trial, had to remove a juror for referring to his jury duty on Twitter; he even tweeted, “I’m in contempt of court, de facto if not de jure.”

Given the strict prohibition against outside research and communication by jurors, it may come as a surprise that the contemporary model of jurors as neutral, passive listeners who choose between the parties’ evidence has not always been the case. The origins of the American jury system can be traced to the medieval period in England, especially during the twelfth-century reign of King Henry II, probably the first jury innovator. Unlike a modern jury, however, jurors in Henry’s day were “self-informing,” that is, they were expected to investigate facts and “declare the truth” on the basis of preexisting, personal knowledge of the facts. Blackstone’s Commentaries on the Law 673-77 (Bernard C. Gavit ed. 1941); Daniel Klerman, “*Was the Jury Ever Self-Informing?*,” Southern California Law Review, vol. 77:123 (2003).

By the fifteenth century, however, the idea of a self-informing jury was yielding to a jury that heard evidence presented at trial. Klerman, at 145. By the middle of the sixteenth century and the advent of the adversarial system, the rules of evidence emerged to control how information, and how much, juries received. Lawrence M. Friedman, *A History of American Law* 101 (3rd ed. 2005). By the dawn of the twentieth century, it was established that juries must base their verdicts solely on the evidence presented in open court, and not on private information or knowledge. 3 Wigmore, Evidence § 1364 (2nd ed. 1923).

Our present-day adversarial system is a two-sided structure that is predicated on the attorneys’ ability to scrutinize and challenge all the facts that go before the jury. “That’s the beauty of the adversary system—you lose all that when the jurors go out on their own,” says Professor Olin Guy Wellborn III, a law professor at the University of Texas and co-author of a handbook on evidence law.

What is the answer to this increasing problem of Internet juror misconduct? Confiscating electronic gadgets from non-sequestered jurors will accomplish nothing. At the risk of sounding like a Luddite, it seems to me that

succumbing to the temptation of technology and allowing jurors to go rogue is not the solution either. The cornerstone of our legal system is a complex set of rules of evidence aimed at assuring that the information provided jurors is authentic, reliable, relevant, and not unduly prejudicial. As untrained laypersons, jurors may not appreciate that surfing the Web could lead to impermissible and even unconstitutional distractions, *e.g.*, learning that the defendant in the trial before them has a prior criminal record. A juror's possible frustration at being denied outside research cannot justify the potential violation of a criminal defendant's right to a fair and impartial trial.

The best way to handle this phenomenon, in my opinion, is to educate jurors that information is not evidence and that there is a vast difference between *accepting* data (i.e., information) and *judging* data (i.e., evidence). I recommend that trial judges take the time to issue expanded and modernized jury instructions that not only caution against the use of the Internet and social networking but that also explain *why*. Some of the language suggested last September by the Board of Regents of the American College of Trial Lawyers includes the following:

“[T]he law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom ... You must not engage in any activity, or be exposed to any information, that might unfairly affect the outcome of this case. Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over ...”

The Internet can be a powerful tool for self-education, -improvement, and -empowerment. If jurors are going to be asked to sacrifice some of their personal freedom and forego their case-specific e-mailing, texting, blogging, instant messaging, and social networking for the duration of their service, they are entitled to a clear and thoughtful explanation of the reason. ■

Vantage Point

A Likely Story: How to Use a Trial Consultant Successfully

By Douglas Green and Jamie Laird

The jury selection process in Massachusetts is among the most restrictive in the country. Typically, there is no attorney-directed *voir dire* and questioning of prospective jurors by the court is usually narrowly focused. Attorneys receive only basic information (such as name, occupation, employer, education level, marital status and litigation experience) about potential jurors and have limited time in which to analyze it before making preemptory challenges. These jury selection practices are long-standing, and do not seem likely to change in the near future. In such a landscape, how can a jury consultant possibly help? The answer is to broaden the jury consultant's involvement in your case beyond the process of jury selection.

Whether or not lawyers overtly use them, all trials involve stories. Just like any other story, a trial's narrative involves characters, conveys events, rouses emotions, engages the imagination and provides a framework for understanding and remembering information. Over the course of a trial, jurors will attempt to fit the case into a narrative framework with which they can identify. The narrative a juror adopts is influenced by the juror's own life experiences and what he or she experiences during the trial. The key to successful trial preparation is to become an active participant in crafting the narrative. This is what modern trial consulting is all about.

From this point of view, jury selection is a single component in a much broader process of pre-trial preparation. Development and testing of the overall strategy for the case, something jury consultants call the



Douglas Green and Jamie Laird are trial consultants with Douglas Green Associates, Inc.

Organizational Narrative, is the main focus. The Organizational Narrative is the central theme around which all of the facts, witnesses and arguments revolve. Effectively controlling the narrative requires that each component of the trial be crafted to support the same story. Every story has three essential parts: the story itself, the audience, and the person telling the story. Ultimately, the Organizational Narrative drives jury selection by laying out either a general idea or a very specific profile of those people most and least likely to respond favorably to the case. Trial consultants can help attorneys conduct mock trials or other forms of jury research to guide development and refinement of the Organizational Narrative and also test its efficacy. The scope of the research typically depends on the scale of the case.

Let's consider the following case as an example of how this works. The owner of a quiet, country inn has taken it upon himself to clear trees on the adjacent undeveloped land belonging to an out-of-towner. In a typical trial, the parties would testify about the fact that the trees had been cut and how the plaintiff discovered that the clearing had been done without his permission, and then expert witnesses would give wildly diverging opinions on the value of the damage to the property. But these elements of the case are not sufficient to engage the jurors on a narrative level. Jurors do not want cold facts and arguments without context. They want to know the how and the why. Why did the defendant cut the trees? How did he go about the clearing? Was a professional arborist involved? Did the defendant attempt to contact the plaintiff? How does the defendant feel about what he did? How did the defendant benefit from his behavior? What did the property mean to the plaintiff? How has the plaintiff been affected by the damage to the property? All of these questions — as well as their answers — must be tied to the Organizational Narrative of the case.

In this example, let's assume that the defendant cleared a corner of the adjacent property to improve the visibility of his inn to approaching traffic and to provide a buffer of open land. These actions were designed to increase the value of his business. Therefore, the Organizational Narrative a jury consultant might recommend to the plaintiff would focus on *Respect*. The property was damaged because the defendant did not respect the plaintiff or his property. That lack of respect was reflected in the conduct that led to the damage in the first place and later in the low valuation the defendant's expert placed on the damage.

Now that the Organizational Narrative has been identified, an experience trial consultant can determine the audience most predisposed to accept it, and those who are least predisposed. Even with the restrictions on voir dire

in Massachusetts, an experienced trial consultant can use the limited biographical information available to make certain assumptions about how a person will view the client's case. Pre-trial jury research, as well as the experience of the consultant in less restrictive venues, can help in this task.

One dimension jury consultants often use to classify jurors based on their work history is a dichotomy called "traditional bureaucrat" versus "free agent." The traditional bureaucrat is a person who tends to identify with the goals and values of the organization, who supports and defends the company, and who believes his or her interests are best served by protecting the organization. The traditional bureaucrat respects values like honesty, integrity, loyalty, and honor. Free agents, on the other hand, rely on their own abilities to survive in the job market and expect to change jobs frequently. They are not team players and tend to have jobs where they work independently. They feel little loyalty to any single organization, although they may identify with a profession or a trade. Returning to the example above, a traditional bureaucrat would likely be more favorable to the plaintiff while a free agent is likely to be more accepting of the defendant's actions. An experienced trial consultant should be able to teach you to identify the key markers in the jury, primarily based on the jurors' occupations, so that you can make educated decisions when picking your jury.

As noted above, every story has three parts: the story, the audience, and the storyteller. Jury selection addresses the audience part of the equation. The Organization Narrative provides the context for those decisions. It also provides the context for the story itself. The last component to consider is the storyteller. In a trial, the storyteller is a combination of the lawyer and the witnesses. Trial consultants work extensively with trial lawyers on a range of skills from interacting effectively with the jury to the proper use of visual evidence. Trial consultants also work extensively with witnesses to help them convey their testimony in a clear, concise way with maximum credibility.

In the final analysis, it is the story of the case that holds the greatest potential for affecting the outcome in a jury trial. Modern trial consultants help lawyers craft an Organizational Narrative that impacts every aspect of the trial from jury selection to closing argument. ■

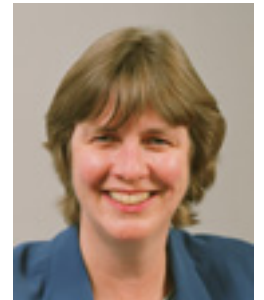
Vantage Point

Massachusetts' Leadership Role in the American Jury System

By Pamela J. Wood

When the Pilgrims landed in Plymouth in 1620, they brought with them their cherished right of trial by jury. One hundred and fifty years later, local attorney John Adams persuaded a jury in Boston to acquit most of the British redcoats who were accused in the deaths of five civilians in the Boston Massacre. In 1860, a Worcester court impaneled the first African-Americans to be seated on a jury in the United States (although Massachusetts did not allow women to serve until 1950). And in 1988, Massachusetts became the first state in the country to adopt the One Day, One Trial system statewide.

Massachusetts thus has long played an important role in protecting, promoting, and improving one of our most important constitutional freedoms: the right to a jury trial by a diverse and representative group of members of the community. Today, Massachusetts continues to lead the country with arguably the most comprehensive jury list of any jurisdiction, the highest compensation rate for serving jurors, and one of the longest periods of disqualification for those who have served. In addition, the Commonwealth's use of jury management technology (notably the Massachusetts Juror Service Website), and its enforcement program (the Delinquent Juror Prosecution Program), have both been cited as models by national court organizations.



Pamela J. Wood is the Jury Commissioner for the Commonwealth of Massachusetts, working to educate the public on the critical role of juries in a democracy.

The goal of the Massachusetts jury system is to provide jury pools that accurately reflect the community from which they are drawn. The Office of Jury Commissioner (OJC)'s process to achieve this goal is based on three components: a broad-based source list, a minimal term of service to reduce hardship, and the elimination of all exemptions. This approach has been demonstrated over time to produce jury pools that are diverse and representative, the cornerstone of "a jury of one's peers."

Broad-based Source List: In order to ensure fair, representative, and diverse juries, it is imperative to start with a list of potential jurors that is as complete and up-to-date as possible. Massachusetts has a unique and enviable resource for this purpose, as it is the only state in the country with a statutorily-mandated annual municipal census. This census data forms the basis of the Master Juror Lists that are created annually by the OJC for each of the fourteen judicial districts (essentially, each county) in the Commonwealth.

Using this annually-updated data source, together with a detailed procedure for cleaning and verifying the list, Massachusetts generates one of the highest juror yields in the country. "Juror yield" is the percentage of people summoned for jury service that actually appear at the courthouse. The higher the juror yield, the lower the costs incurred in printing, postage, and processing undeliverable mail and address changes – costs that run into the millions of dollars in Massachusetts each year. Put another way, juror yield dictates the number of summonses that must be sent to guarantee that a sufficient number of jurors will appear on a given day: if the yield in a particular county is 25%, then the OJC must send 200 summonses to produce 50 jurors at the courthouse.

Most other jurisdictions, including the federal court system, must rely on more outdated or limited data sources, such as voter registration lists (which are composed of a self-selected group of people who vote) or driver registrations lists (which are notoriously outdated and can result in an unacceptably high percentage of undeliverable summonses). The Massachusetts list is regarded in some quarters as the "gold standard" among jury lists, so much so that the United States District Court for the District of Massachusetts sought and received permission to use the Massachusetts list as the basis of its own jury summoning, rather than the more limited voter lists used in other federal courts.

Minimal Hardship: Massachusetts was the first in the country to implement the One Day or One Trial system statewide, in the 1980s. Jurors serve for one day or, if impaneled on a case, for the duration of one trial, after which they are disqualified from service for three years. This is a significant improvement over the prior system, under which jurors served for 30 days and might be impaneled on several trials during that time.

Under the One Day or One Trial system, about 90% of those who appear for jury duty in Massachusetts complete their service in one day, and over 95% are done in three days or fewer. Further, jurors are entitled by law to postpone their service for up to a full year from the date for which they are originally summoned. Massachusetts law requires employers to pay a juror's wages for the first three days of service, and the Commonwealth pays \$50 per day thereafter – the highest juror compensation rate in the country.

In the event of hardship such as lack of transportation, citizens can even be transferred to a courthouse closer to their home, although in general jurors from a particular county are randomly assigned to courthouses throughout that county to assure a diverse mix of citizens in each jury pool. By minimizing the inconvenience of service in these ways – one to three days of compensated service for the great majority, ability to select the service date of the juror's choice, relocation to a nearby courthouse if necessary – Massachusetts has seen a dramatic increase in participation of the full range of its citizens in the administration of justice.

Elimination of Exemptions: With the advent of the One Day or One Trial system came the elimination of a long list of occupational exemptions that had severely undermined the diversity of jury pools prior to 1980. Doctors, lawyers, teachers, parents of schoolchildren, elected and appointed officials, ministers, police and firefighters – all these and more were exempt from jury service under the old system.

Today, there are no exemptions from jury service in Massachusetts. All are eligible to serve, unless one of ten statutory disqualifications under Mass. Gen. Laws c.234A, § 4 applies. (There are eight specified disqualifications, and the introduction further specifies that jurors must be citizens and reside in the county to which they are summoned.) These disqualifications are based on status, not discretionary (except for the option of those over 70 to decline service if they choose): citizenship, age, inability to speak English, service within the last three years,

relocation from the district, and the like. With corroboration from a physician, a potential juror can also be disqualified for medical reasons, or on the basis of caring for a disabled person.

A judge still has the authority to *excuse* a prospective juror upon a showing of hardship, but no one is *exempt* and only a limited number of persons are eligible to be *disqualified*. By creating a system under which virtually everyone is presumed to be eligible to serve, and reserving the right to excuse to judges who consider the jurors' hardships on an individual basis (after they have reported to the courthouse to serve), Massachusetts jury pools are among the most diverse and representative in the country.

By law, the Office of Jury Commissioner tracks the demographic makeup of the jury pools in each county. Comparisons with federal census data show that statewide, Massachusetts jury pools are made up of a demographic mix that closely parallels the racial and ethnic percentages found by the federal government (except in the case of disqualifications due to lack of citizenship or English language skills, such as Asians or Hispanics).

The courts and the Office of Jury Commissioner make every effort to communicate information about the advantages of the Massachusetts system to prospective jurors, with good results. Jurors often comment appreciatively on the flexibility of choosing their own service date, and frustrated jurors who wonder why they have been called again when their spouse or neighbor has not yet served are generally satisfied when the principle of random selection is explained to them. Although much of this information is available in the materials sent with the summons, it is often the judge at the courthouse who is most effective in explaining these principles during the judge's welcome to the waiting jurors, when their attention is most focused on the task at hand.

The Massachusetts system of summoning and qualifying jurors is perhaps the best in the country, based as it is on the unique annual census, and supported by some of the best jury management technology available today. For these reasons, the citizens of the Commonwealth can feel confident that their justice system continues to protect them and their constitutional right to a trial by jury, almost 400 years after their Pilgrim forebears first brought that important right to the New World. ■

Legal Analysis

Inflicting *Soares*: The Continuing Viability of Peremptory Challenges

By Charles E. Walker, Jr.

I. INTRODUCTION

This year marks the 25th anniversary of *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the Supreme Court overruled its earlier decision in *Swain v. Alabama*, 380 U.S. 202 (1965), and declared as unconstitutional the 100 plus year practice of the use of peremptory challenges¹ by prosecutors to exclude blacks from the jury venire. Whereas previously a defendant had to prove that the removal of black jurors was not only “purposeful” but “systemic,” in *Batson* the court invoked the 6th Amendment and shifted the burden to the prosecution to provide a “race-neutral” nondiscriminatory explanation.² In overruling *Swain*, the Supreme Court relied in part on a seminal Massachusetts Supreme Judicial Court (“SJC”) decision, *Commonwealth v. Soares*, 377 Mass. 461 (1979), which, in turn, relied on the Massachusetts Declaration of Rights. Over a quarter of a century has passed since the *Batson* and *Soares* decisions, and yet there remains an ongoing and critically important debate about whether the goals of the Massachusetts Declaration of Rights and the 6th Amendment are effectuated or eviscerated by the continued use of peremptory challenges.³ This article will focus on the legacy of the *Soares* decision and how Massachusetts courts and legislators still struggle with problems inherent in the use of peremptory challenges in the trial courts.



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II. BACKGROUND

In *Soares*, three blacks were tried and convicted in 1976 for the tragic murder of Andrew Poupolo, a Harvard College football player who was stabbed to death in the middle of a fight at the corner of Tremont and Boylston Streets in Boston's then adult entertainment district, notoriously known as the "combat zone." During the jury empanelment, the prosecutor struck "ninety-two percent of the available black jurors, and only thirty-four percent of the available white jurors" from the venire. *Id.* at 473.

The defendants claimed that the elimination of the black jurors deprived them of their right to a fair trial and impartial jury in violation of Articles 12 and 15 of the Massachusetts Constitution. Defense counsel adeptly opted not to appeal on either the federal 6th Amendment (denial of right to a fair and impartial jury), or 14th Amendment (denial of right to equal protection) grounds in order to avoid the draconian standard enunciated by the U.S. Supreme Court thirteen years earlier in *Swain*.

The SJC boldly side-stepped *Swain* and, based on the Massachusetts Constitution, reversed the convictions and ordered a new trial. Chief Justice Paul Liacos, writing for the majority, found that the prosecutor's "exercise of peremptory challenges to exclude members of discrete groups" based on their race violated Article 12 of the Massachusetts Declaration of Rights. *Id.* at 486.⁴

As such, Massachusetts joined California as one of only two states whose state supreme courts: 1) abandoned the *Swain* presumption that the prosecutor's exclusion of blacks from a jury was validly exercised; and 2) established a three step process that requires a) an objection shouldered by a prima facie showing of discrimination, b) the burden shifting to the prosecutor to provide "race-neutral" justifications for the exclusion; and c) the court's determination as to whether that explanation is pretextual. *Id.* at 486; *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); see also *Batson*, 476 U.S. at 105, 108.⁵ Chief Justice Paul Liacos added "...we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories [sic] from sham excuses belatedly contrived to avoid admitting facts of group discrimination." *Id.* at 477 n. 12 (citing *Wheeler*, 22 Cal. 3d 258 (1978)).

III. EXPANSION OF SOARES

Since *Soares* and *Batson*, bars to the discriminatory use of peremptory challenges have been applied to: civil trials, *Edmonson v. Leesville Concrete Company*, 500 U.S. 614 (1991); objections by criminal defense counsel, *Georgia v. McCollum*, 505 U.S. 42 (1992); dismissals of jurors who are not of the same race as the defendant, *Powers v. Ohio*, [499 U.S. 400, 404](#)-16 (1991); race (white males) and gender (black females), *Commonwealth v. Jordan*, 439 Mass. 47, 59-63 (2003); matters involving the exclusion of single member of a protected class or discrete community group, *Commonwealth v. Fryar*, 414 Mass. 732 (1993); national origin, *Commonwealth v. Suarez*, 59 Mass. App. Ct. 111 (2003); religious affiliations and Jewish surnames, *Commonwealth v. Burns*, 43 Mass. App. Ct. 263 (1997) (Appeals Court upheld the exclusion); and employment (peremptory challenges used for employment-based reasons), *Commonwealth v. Fruchtman*, 418 Mass. 8, 16 (1999).

IV. INFLICTING SOARES

a) A Challenge for the Challenges

Without question, the implementation of the *Soares/ Batson* burden shifting to the peremptory challenger to articulate reasons for the dismissal of the potential juror has presented the greatest challenge for both civil and criminal litigants. The sufficiency of the reasons is at the core of the challenge to reconcile the need for a fair and impartial jury with the trial court's and the attorneys' needs to strike jurors perceived to be biased. Once a defendant makes a sufficient showing of impropriety, the burden shifts to the prosecutor to provide a group-neutral reason for challenging the venire person in question. *Soares*, 377 Mass at 486. Mere denials are not enough to satisfy the justification for an alleged discriminatory exclusion. Courts have found that neutral justifications that are "implausible," "silly" or "fantastic" are adequate so long as they are facially and racially neutral and substantiated. See *Purkett v. Elem*, 514 U.S. 765 (1995) (2 black jurors had "long curly unkempt hair", "mustache and goatee type beard...[and] looked suspicious"). "The prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n.20 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)). The reasons must be "personal to the juror and not based on the juror's group affiliation." *Commonwealth v. Young*, 401 Mass. 390, 401 (1987) (citing *Soares*, 377 Mass. at 488); *Commonwealth v. Boticelli*, 51 Mass. App. Ct. 802, 810 (2001). "[A] legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett*, 514 U.S. at 766.

The trial judge must undertake a “meaningful evaluation of the reasons given” by the Commonwealth for making the challenges. *Commonwealth v. Mathews*, 31 Mass. App. Ct. 564, 571 (1991), and determine “the sufficiency of any justification advanced for the exercise of the challenge.” *Id.* at 569. Once the judge decides that an adequate reason exists for exercising the challenge, an appellate court will accord substantial deference to the decision if it is supported by the record. *Fryar*, 414 Mass. at 740; *see also Batson*, 476 U.S. at 98, n.21; *Soares*, 377 Mass. at 486.

As a result of *Soares*, the judgment of the trial courts in ruling on peremptories has come under rigid scrutiny. In *Commonwealth v. Maldonado*, 439 Mass 460 (2003), the prosecutor used his peremptory challenges to dismiss the only two black jurors for the panel and offered as justification that “...He’s single all his life... [and] ...It’s just a feeling....” The Appeals Court reversed the conviction because the trial judge failed to make a finding as to whether the reason “was bona fide.” The Appeals Court gratuitously added that “the proffered reason for the challenge... he was fifty-five years old and childless... [was] no apparent reason ... to keep a juror off the panel....” *Id.* at 457-58.

In another example, after the trial court dismissed three out of the five black jurors “for cause” in *Commonwealth v. Burnett*, 418 Mass. 769 (1994), the prosecutor challenged the two remaining black jurors because one worked with youth. The race-neutral reason proffered was that “people who work with young people have certain feelings about youth and crime.” The trial judge made no findings as to whether the “work[s] with young people” was a bona fide reason, and the conviction was reversed.

In *Commonwealth v. Calderon*, 431 Mass. 21 (2000), the trial judge failed to make a finding on the veracity of the prosecutor’s justification for dismissing the only black juror on the panel. The SJC reversed the conviction, independently concluding that that the prosecutor’s reason, “the juror’s husband was a cop” “sounded superficial.”

b) Reforming the Reforms

Attorneys opposing the abolition of peremptory challenges argue that such challenges are the only means to remove potentially biased jurors who survive the statutory removals by the trial judge “for cause.”⁶ The juror’s automatic inclusion threatens the fairness of the process and the entire jury venire.⁷

The proponents favoring abolition, however, maintain that peremptory challenges are neither constitutionally protected nor sanctioned. Peremptory challenges advance discriminatory practices by enabling parties to perceive a bias based on

stereotypes associated with an “identifiable group,” race, gender, national origin or sexual orientation. The requirement of proffering neutral justifications is an ineffective means to augment discriminatory practices as most lawyers are adept at stating sufficient reasons to mask the underlying discriminatory intent for the exclusion.⁸

States have sought to reduce the risk of the continued constitutional abuses of peremptory challenges through legislative reforms. While the proposal to abolish peremptory challenges has been entertained,⁹ no states to date have passed laws to summarily outlaw their use. Most states have adopted a variety of reforms that range from reducing the number of challenges, or the number of challenges per trial, or the number of challenges for prosecutors only.

Massachusetts, like the majority of states, allocates the same number of challenges to prosecution and defense.¹⁰

Generally, nearly every state allocates more challenges for serious felonies¹¹ and grants each side between two and six challenges for misdemeanors. In capital cases, the majority of states allocate an average of ten challenges for each side, while others grant as few as four or six, or as many as twenty-five.¹²

There have also been non-legislative proposals that would require the prosecutor to show that he/she would have struck the juror had “[the juror] been white.” The trial judge would concomitantly be required to compare and contrast the proffered reasons as against the characteristics of the white jurors in the jury venire.¹³ Similarly, there are venues that have experimented with the creation of jury venires of dismissed jurors to compare and contrast their deliberations and findings against the jury chosen.¹⁴

V. A RESOLUTION

It is a classic oxymoron to require a litigant to explain the reasons for exercising a peremptory challenge. The whole notion of having to draw reasons from a lawyer and to subject that lawyer, an officer of the court (often the prosecutor), to a credibility determination is arguably as repugnant to the whole notion of justice as the sordid history of the discriminatory abuses of the challenges. Few can quarrel with the history of abuses that paved the way for this unfortunate conundrum. The balm to be applied after over 25 years of *Batson* and *Soares* is for the Bar to explore new mechanisms to restore the trial lawyers’ confidence in the potential jurors selected, and to abolish the creative justifications that mask discriminatory dismissals as opposed to abolishing the peremptory challenges themselves. ■

(Endnotes)

1 Under the early English judicial system from which the Anglo-American Judicial process is derived, the Crown and its allies had unlimited peremptory challenges to remove “an unacceptable person that appeared on a jury list.” In 1305, Parliament passed a law that limited their use to “challenges for cause certain.” Frederick L. Brown, Frank T. McGuire, Mary S. Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 New Eng. L. Rev. 193, 193-94 (1978-79).

2 Generally under sections 28 and 29 of M.G.L. c. 234, attorneys may seek to remove unwanted jurors: 1) “for cause” where following a statutory inquiry the trial judge determines that the juror is incapable of being “indifferent,” and 2) via peremptory challenges which unless subject to a *Batson/ Soares* objection, the attorney may remove the juror without an explanation.

3 In 2010, retiring Chief Justice Margaret Marshall exclaimed in a concurring opinion that, “it is time to abolish them entirely or to restrict their use substantially.” *Commonwealth v. Rodriguez*, 457 Mass. 461, 488 (2010).

4 Of note, after *Soares* nineteen states continued to follow *Swain v. Alabama*, 380 U.S. 202 (1965).

5 In 1978, Hon. Frederick L. Brown, Associate Justice of the Massachusetts Appeals Court, co- authored a law review article urging the abolishment of peremptory challenges by prosecutors alone. See Brown, McGuire and Winters, *supra* at 234 n. 239. Seven years later, in his concurring opinion in *Batson*, Justice Thurgood Marshall agreed in large part with the wisdom of eliminating peremptory challenges but disagreed with Judge Brown’s admonition to limit this restriction to prosecutors. In balancing limited versus absolute abolishment of peremptory challenges Justice Marshall was uncompromising in his conclusion:

“If the Prosecutor’s Peremptory Challenge could be eliminated only at the cost of eliminating the defendant’s challenge as well, I do not think that would be too great a price to pay.” *Batson*, 476 U.S. at 108.

6 See footnote 3.

7 As better stated by Justice Antonin Scalia, peremptory challenges when used to “eliminate extremes of partiality on both sides, ... assures the selection of a qualified and unbiased jury.” *Holland v. Illinois*, 492 U.S. 474 (1990).

8 Justice Thurgood Marshall, in his concurring opinion in *Batson* wrote that “any prosecutor can easily assert facially neutral reasons for striking a juror and trial courts are ill-equipped to second guess those reasons...; consequently, “merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the legitimate use of the peremptory challenge.” *Batson*, 476 U.S. at 105.

9 In 1974, “at the urging of the Chief Judge of Suffolk County Superior Court,” State Representative David Mofenson filed a bill that would have eliminated all peremptory challenges in both criminal and civil matters. See Brown, McGuire and Winters, *supra* at 239. The bill did not pass and has never, to date, been reintroduced.

10 Connecticut gives twenty-five challenges to each side in capital cases. California, Indiana, New York, Pennsylvania, and South Dakota give each side twenty. Whereas Delaware, Georgia, Maryland, New Hampshire, New Jersey, South Carolina and West Virginia give the defendant more peremptory challenges than the prosecution.

11 See Roger Allan Ford, *Modeling The Effects of Peremptory Challenges on Jury Selection*, 17 Geo. Mason L. Rev. 377 (2010).

12 *Id.* at 381.

13 Derrick Bell, *Race, Racism, and American Law*, § 9.16.3, 454-455 (5th ed. 2004).

14 See Ford, *supra* at 381.

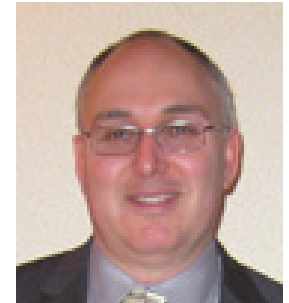
Case Focus

US Bank v. Ibanez: The Mortgage Industry's Documentation Practices in Focus

By Christopher J. DeCosta

In *US Bank National Association v. Ibanez*, 458 Mass. 637 (2011), the Supreme Judicial Court (SJC) upheld the Massachusetts Land Court's invalidation of two foreclosures. While hailed by some as an indictment of securitized lending-- from a purely legal standpoint, *Ibanez* did not depart in any substantial way from the prior Massachusetts case law of foreclosure. However, *Ibanez* did flatly reject that common practice of relying on post-foreclosure assignments of mortgages as sufficient to validate their authority to foreclose pursuant to Real Estate Bar Association Title Standard No. 58(3). Because that practice was widespread prior to *Ibanez*, many titles derived from such foreclosures may be adversely affected, and many homes may be rendered unmarketable. For foreclosing parties faced with litigation regarding the validity of a foreclosure, *Ibanez* provides some specifics regarding how they might prove legal authority to foreclose where the assignment recorded at the Registry of Deeds was executed after the foreclosure.

The lenders involved in *Ibanez* were trustees of mortgage-backed securitization trusts. They brought non-judicial foreclosure actions as assignees of the original mortgage holders, on the grounds that the borrowers were in default of their mortgages. Each lender relied on a mortgage assignment executed and recorded months *after* its foreclosure sale. After concluding the foreclosures, the lenders were unable to obtain title insurance, and therefore unable to market and sell the properties they had foreclosed on. Consequently, the lenders brought actions to quiet title and for declaratory judgment in the Land



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Court. The lenders sought a declaration that their foreclosures were valid based upon post-foreclosure mortgage assignments.

Initially, neither borrower contested the action. Nonetheless, on the lenders' motion for default judgment, the Land Court entered judgment in favor of the borrowers and against the lenders. The Land Court held that the foreclosures were invalid because the lenders had not been assigned the mortgages until after the foreclosure, and therefore lacked legal authority to conduct the foreclosures under Massachusetts law. The Land Court subsequently denied the lenders motion to vacate the judgment, in which they had argued that they had been assigned the mortgages prior to the foreclosures.

On appeal to the SJC, the lenders argued that although their assignments were executed after the foreclosure, their foreclosures were valid because: 1) According to Title Standard 58(3), "title is not defective by reason of ... the recording of an assignment executed and recorded ... subsequent to foreclosure;" 2) under the rule of *Carpenter v. Longan*, 83 U.S 271 (1872), the promissory note had been assigned before the foreclosure and therefore the mortgages "followed the note;" and 3) the mortgages had previously been assigned by virtue of the execution of mortgage assignments "in blank" (without naming the assignee) and by the express language of the securitization documents that purportedly assigned the mortgages into the trust.

The SJC rejected each of these arguments. First, it disapproved of Title Standard 58(3) insofar as it would allow for a foreclosing party to remedy a defective foreclosure retroactively. A written pre-foreclosure assignment of the mortgage to the foreclosing party must be in place in order to establish the authority of the foreclosing party to institute non-judicial foreclosure proceedings. Accordingly, the lenders could not rely on assignments of mortgages executed after their foreclosures. Second, Massachusetts has not adopted the "mortgage follows the note" view expressed in *Carpenter*. In Massachusetts, assignment of a promissory note secured by a mortgage creates in the endorsee an equitable right to an assignment of the mortgage, but it does not, in and of itself, constitute an assignment.

Third, the lenders had the burden of establishing that the mortgages had been assigned to them *by the time they sent pre-foreclosure notices*. The documents submitted by the lenders simply failed to carry that evidentiary

burden. Unsigned securitization and sale agreements, missing the loan schedules which could have shown that the specific mortgages involved in the foreclosure were assigned to the lenders before the foreclosure were insufficient for this purpose. Likewise, an assignment of a mortgage “in blank” without identifying the assignee does not constitute a valid assignment. For these reasons, the SJC held that the lenders failed to prove that their foreclosures were valid.

For consumers facing foreclosure, *Ibanez* gives another avenue by which to delay a foreclosure, albeit temporarily. There is nothing in *Ibanez* that precludes the lender from simply re-noticing the sale after executing a recordable assignment of mortgage. The reality is that after the original Land Court decision was issued in 2009, lenders reversed many of their foreclosures and conducted them again in compliance with *Ibanez*. Therefore, going forward, these types of defects in foreclosure proceedings should become scarce.

For foreclosing parties, *Ibanez* issues a warning against “utter carelessness” in documenting authority to foreclose. The court took no issue with mortgage securitization arrangements. However, to meet its burden under Massachusetts foreclosure law, the foreclosing party must provide written documentation of a pre-foreclosure assignment to the foreclosing party. The documentation need not be in recordable form and may be confirmed by a post-foreclosure assignment recorded at the Registry of Deeds.

For those many individuals and entities in Massachusetts who purchased real estate the title of which depends on a mortgage foreclosure within the chain of title, *Ibanez* casts a specter that their title may be defective and unmarketable. The path to clear those titles is far from certain and likely dependent, among other things, on the daunting task of reconstructing the off-record documentation of securitized mortgage foreclosures that took place years ago. Whether a good faith purchaser has standing to pursue a quiet title action in such cases may be dependent on how the SJC rules in *Bevilacqua v. Rodriguez*, Massachusetts Land Court, No. 10 MISC 427157 (August 26, 2010), in which the Land Court held that such good faith purchasers do *not* have standing. ■

Heads Up

Website Interactivity as a Basis for Personal Jurisdiction

By Mitchell J. Matorin

When does a website provide a basis for the exercise of specific personal jurisdiction over an out-of-state defendant? Three recent decisions from District of Massachusetts highlight the ongoing uncertainty.

The general analytical approach to specific personal jurisdiction is well-established. A plaintiff must show that the state long-arm statute authorizes the exercise of jurisdiction and that asserting personal jurisdiction would comport with the Due Process Clause of the 14th Amendment. This requires that the defendant have sufficient “minimum contacts” with the forum, meaning that: (i) the contacts must reflect the defendant’s “purposeful availment” of the privilege of conducting business in the forum; (ii) the claim must arise out of or relate to those contacts; and (iii) the exercise of jurisdiction must not offend “traditional notions of fair play and substantial justice.” The “purposeful availment” element is typically the most controversial part of the analysis for websites.

Courts have long puzzled over the question whether a website operator “purposefully availed” itself of the privilege of doing business in a forum. In the early 1990’s, websites were relatively passive billboards on the clichéd Information Superhighway, and the mere fact that a forum resident could access the website was generally



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understood not to constitute purposeful availment. As websites became more complex, courts struggled with the new technology. In 1997, a Pennsylvania federal district court proposed what has become a widely accepted analytical structure. According to *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), the jurisdictional effect of a website turns on its place on an interactivity spectrum. At one end of the spectrum are websites that clearly conduct business over the Internet. At the other end are websites that passively display information and have no interactive features. In the middle lie semi-interactive websites that are judged by reference to the level of interactivity and the commercial nature of the information exchanged.

The *Zippo* interactivity spectrum sounds good in theory, but as websites have widely adopted greater interactive features, the spectrum has become increasingly blurry and unpredictable. For example, in *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34 (D. Mass. 1997), the court held that a website that encouraged users, including Massachusetts residents, to email the defendant was sufficient to create personal jurisdiction. In other cases, however, courts have held that higher interactivity levels did not constitute “purposeful availment.”

Judge Gertner of the District of Massachusetts recently took a step toward restoring some clarity. In *SportsChannel New England Limited Partnership d/b/a Comcast SportsNet New England v. Fancaster, Inc.*, 2010 WL 3895177 (D. Mass. Oct. 1, 2010), defendant Fancaster moved to dismiss for lack of personal jurisdiction. Plaintiff SportsChannel argued that Fancaster’s website was sufficiently interactive to create personal jurisdiction in Massachusetts because, *inter alia*, it targeted Massachusetts residents by “tagging” certain sports-related videos on the site with labels referring to Boston sports teams, it permitted visitors to register and communicate with Fancaster through the website, and it allowed visitors to vote in contests for the “best” amateur play-by-play video.

Judge Gertner disagreed. After pointing out that neither the First Circuit nor the Supreme Court has addressed the issue, she noted that *Zippo* had in some respects been outflanked by fast-changing website technology:

In the era of Facebook, where most websites now allow users to “share” an article, choose to “like” a particular page, add comments, and email the site owners, [and where] virtually every website is now interactive in some measure, it cannot be that every website subjects itself to litigation in any forum— unless Congress dictates otherwise. Interactivity alone cannot be the linchpin for personal jurisdiction.

Consequently, despite earlier cases like *Hasbro*, Judge Gertner refused to find that every website with features such as “contact us” page and user registration “subjects itself to universal jurisdiction.” Judge Gertner also considered the non-commercial nature of the site and the fact that video tags on the site referred to cities other than Boston.

In *Broadvoice, Inc. v. TP Innovations LLC*, 733 F. Supp. 2d 219 (D. Mass. 2010), Judge Stearns addressed a similar question. In that case, the non-resident defendant operated a “gripe” website criticizing the telephone services of Massachusetts-based Broadvoice. The website urged Broadvoice subscribers to share experiences in an online forum and to file complaints about Broadvoice with various agencies, and it linked to other on-line complaint sites and information about lawsuits against Broadvoice. Judge Stearns held that the website, although semi-interactive, was insufficient to create personal jurisdiction because it was non-commercial, because it was aimed at the entire world and not specifically Massachusetts residents, and because there was no evidence that any Massachusetts resident actually accessed the site.

But while the *SportsChannel* and *Broadvoice* decisions seem to signal a developing narrower approach, other recent decisions still adhere to the *Hasbro* view. For example, in *Edvisors Network, Inc. v. Educational Advisors, Inc.*, 2010 WL 5115752 (D. Mass. Nov. 30, 2010), Judge Saris held that a website that invites contact with web users, including with a “contact us” page and registration features, was sufficient to show purposeful availment, even though there was no specific targeting of Massachusetts residents, and the only mention of Massachusetts

on the site consisted of an “Important Links” page which contained a single Massachusetts organization among a list of 36 entities.

Notwithstanding this continued adherence to the earlier view, *SportsChannel* and *Broadvoice* suggest an eventual rejection of the *Zippo* interactivity test. Judge Gertner recognized that interactive aspects that had once been distinctive had become so common that they would now create universal jurisdiction if the same test applied in *Hasbro* were used today. Taken to its logical conclusion, this argument suggests that the *Zippo* methodology is fundamentally flawed, because a useful interactivity line cannot be drawn at today’s technology with any more clarity than it could be drawn at the technology that existed in 1997. Indeed, the Seventh Circuit has consistently rejected the *Zippo* spectrum, concluding that websites are not really all that different from any other type of contact and need not be specially analyzed. This approach provides greater clarity and is independent of fast-changing website technology. ■