Issues of Race, Ethnicity, and Class in the Civil Litigation Context

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I. Introduction.

Article I of the North Carolina State Constitution ("Declaration of Rights") guarantees the "great, general, and essential principles of liberty and free government" in this State. Section One ("The equality and rights of persons) of the Declaration of Rights states,

> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor; and the pursuit of happiness.

N.C. Const. Art. I, Section 1 (*emphasis added*). Similarly, the goal of the North Carolina Bar Association is to promote the fair and impartial administration of justice in the State of North Carolina in order to ensure the equality and rights of all persons in this State.

This manuscript will examine issues of race, ethnicity, and class which may arise during the course of civil litigation. The first section, *infra* at pp. 1-9, will present recent judicial decisions which bear upon the rights of an undocumented immigrant to file suit. Three North Carolina appellate cases will be discussed, followed by an examination of the United States Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd., 535 U.S. 137, 122 S.Ct. 1275 (2002), and subsequent cases applying the legal principles articulated in Hoffman. The second section of this manuscript, *infra* at pp. 9-13, will examine the law as it relates to the rights of minorities to serve on a jury, and permissible questions to discover possible racial or ethnic bias and prejudice during *voir dire* at trial.

II. The rights of undocumented workers to prosecute a civil suit.

The Fourteenth Amendment to the United States Constitution holds that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. Similarly, Article I, Section 19 of the North Carolina Constitution mandates that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. Art. I, Section 19. These constitutional rights are complicated by the immigration laws of our

country. In this section, we will review recent challenges in North Carolina and across the United States to the rights of undocumented immigrants to institute and prosecute civil lawsuits.

A. The rights of undocumented workers to seek redress in the Courts of North Carolina.

Within the past decade, the State of North Carolina experienced a tremendous increase in the number of Latinos (primarily Mexican and Central American) living, residing, and working in this State. North Carolina companies recruited most of these workers, and brought them into the State under temporary visas. While many Latinos have proper immigration documents, there are some workers who are not properly in our Country, and hence shall be referred to hereinafter as "undocumented workers."

Undocumented migrant workers have contributed to the economic vitality of our State. They have started to remain in North Carolina where they often work and live alongside the resident immigrant community. Like citizens and residents, undocumented workers suffer personal injuries and property damage, injuries on the job, discrimination in employment, and civil rights violations. However, their immigration status leaves them particularly susceptible to abuse and reluctant to have their injuries addressed in our courts of law due to fears of incarceration and deportation.[1] In recent years, North Carolina employers have challenged the rights of undocumented workers to receive workers' compensation benefits for on the job injuries.

The first challenge occurred in the matter of Rivera v. Trapp, 135 N.C. App. 296, 519 S.E.2d 777 (1999). In Rivera, the plaintiff was an eighteen year old male roofer from Honduras who spoke little English, and did not possess an INS "green card" or Social Security number. In January of 1997, a forklift carrying the plaintiff collapsed, and he fell from the third story of a home which was being repaired. Mr. Rivera sustained a fracture of his left radius, and contusions to his abdomen and chest. He was given a 10% permanent partial impairment rating of his left arm, and directed to refrain from heavy lifting. The Industrial Commission subsequently determined that the plaintiff was entitled to temporary total disability benefits. The employer appealed the award and argued on appeal that the plaintiff was not entitled to temporary total disability benefits because he lacked earning capacity as an undocumented worker. The North Carolina Court of Appeals rejected the argument, and held "that the General Assembly sought to include individuals like the plaintiff under the protections of the Workers' Compensation Act." Rivera, 135 N.C. App. at 303, 519 S.E.2d at 781.

A couple years later, a broader challenge was made in the case of Ruiz v. Belk Masonry Co. Inc., 148 N.C. App. 675, 559 S.E.2d 249, *petition for disc. rev. denied*, 356 N.C. 166, 568

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[1] See, General Accounting Office, Garment Industry: *Efforts to Address the Prevalence and Conditions of Sweatshops* 8 (GAO/HEHS-95-29, Nov. 1994) (noting a higher incidence of labor violations in areas with large populations of undocumented aliens).

S.E.2d 610 (2002). In Ruiz, the plaintiff was an undocumented worker who presented a false social security card and I-9 form (Employment Eligibility Verification) to his construction employer. In the Fall of 1997, the plaintiff fell seventy (70) feet from a forklift onto a concrete floor while working, and sustained a traumatic brain injury, kidney contusion, and several fractures. The Industrial Commission awarded the plaintiff permanent and total disability benefits, and the employer appealed. On appeal, the employer argued that the plaintiff was not entitled to any benefits because he was an illegal alien. The employer further argued that the Federal Immigration Reform Control Act of 1986 prohibited the employment of illegal aliens, and pre-empted the State workers' compensation laws. (See Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd., 535 U.S. 137, 122 S.Ct. 1275 (2002), *discussed infra* at pp. 4-6). The Court of Appeals rejected both arguments, and held that "federal law prohibiting the hiring of illegal aliens does not prevent illegal aliens from being included in the North Carolina Workers' Compensation definition of 'employee,' nor does federal law prevent illegal aliens, based solely on immigration status, from receiving workers' compensation benefits." Ruiz, 148 N.C. App. at 679, 559 S.E.2d at 252.

One month after the Ruiz decision, the North Carolina Court of Appeals examined in Gayton v. Gage Carolina Metals, Inc., 149 N.C. App. 346, 560 S.E.2d 870 (2002), the appropriate workers' compensation standard for terminating temporary total disability benefits for an undocumented worker. In Gayton, the plaintiff was an undocumented worker who presented a false social security card and a false resident alien card to his employer. In May 1997, the plaintiff suffered two herniated central discs while moving a pallet on the job. The defendant-employer accepted the plaintiff's workers' compensation claim and began paying him temporary total disability benefits. In April 1998, the defendant-employer discovered the plaintiff's illegal status while attempting to find the plaintiff suitable outside employment through a vocational rehabilitation specialist. The defendant-employer was unable to locate a suitable job for the plaintiff, and thereafter filed an application to terminate his workers' compensation benefits. The Industrial Commission denied the application, and the defendant appealed arguing that the plaintiff's illegal work status constituted a constructive refusal to perform vocational rehabilitation. The Court of Appeals held as follows:

> [I]t is the employer's burden to produce sufficient evidence that there are suitable jobs plaintiff is capable of getting, "but for" his illegal alien status. Until the employee reaches this "but for" situation, the employer may perform any vocational rehabilitation to place employee in a position where if the employee were a legal alien he could be employed. This vocational rehabilitation may even include helping the employee take steps to obtain proper authorization forms. However, we reiterate that the employee's illegal alien status is the last step for consideration. An employer still has the burden of returning the employee to a state where "but for" the illegal status, the employee could obtain employment.

Gayton, 149 N.C. App. at 351, 560 S.E.2d at 874. The Court affirmed the decision of the Industrial Commission finding that the "[d]efendants never conclusively identified a specific job

that "but for" plaintiff's illegal alien status he could return to suitable work that met plaintiff's work restrictions. Id., 149 N.C. App. at 353, 560 S.E.2d at 875.

The Rivera and Trapp decisions were victories for immigration advocates and plaintiff's attorneys. The decisions clearly allow undocumented workers to receive workers' compensation benefits on equal footing with other workers in this State. The Court's opinions also forestalled challenges in other aspects of North Carolina civil law to the rights of undocumented immigrants to seek redress in the courts.

However, the Gayton decision was a victory for employers and defense attorneys since it establishes that the immigration status of an employee/plaintiff may be relevant in the vocational rehabilitation context. The relevancy is limited to the issue of suitable employment for an injured party, and is not pertinent to an examination of the party's general right to workers' compensation benefits. The relevancy of immigration status should also be limited in a personal injury action to cases in which the defendant has a legitimate defense to a plaintiff's claim of permanent disability causing a future loss of earnings. It is reasonable to anticipate further challenges to the legal rights of undocumented immigrants in North Carolina.

B. The impact of the United States Supreme Court's decision in Hoffman upon the rights of undocumented workers to seek redress through the judicial system.

Efforts have also been undertaken nationally to limit the rights of undocumented workers to obtain redress through the judicial system. The most significant U.S. Supreme Court decision within the last couple of years occurred in Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd., 535 U.S. 137, 122 S.Ct. 1275 (2002). The Hoffman decision and recent jurisprudence applying Hoffman will be discussed in this section.

1. Hoffman Plastic Compounds, Inc. v. National Labor Relations Board

In May 1988, Jose Castro was hired by Hoffman Plastic Compounds after he presented documents verifying that he was allowed to work in the United States. In December 1988, a union organizing campaign began at the Hoffman Plastics plant. Castro and several other employees supported the organizing campaign and distributed authorization cards to co-workers. One month later, Hoffman Plastics laid off Castro and other employees who were engaged in union organizing activities.

In January 1992, the National Labor Relations Board found that Hoffman unlawfully laid-off Castro and three other employees in violation of the National Labor Relations Act. The Board ordered Hoffman to cease and desist from further violations of the NLRA, post a detailed notice regarding the remedial order, and offer reinstatement and back pay to the four workers. In June 1993, a hearing occurred before an administrative law judge to determine the amount of back pay owed to each employee. At the hearing, Castro testified that he was born in Mexico, and that he had never been legally admitted to or authorized to work in the United States. Based

on this testimony, the Board declined to award back pay or reinstatement to Castro on the grounds that such relief would be contrary to Sure-Tan, Inc. v. NLRB, 467 U.S. 833, 104 S.Ct. 2803 (1984), and in conflict with the IRCA (Immigration Reform Control Act of 1986).

In September 1998, the National Labor Relations Board reversed the order of the administrative law judge with respect to the award of back-pay. The Board calculated the back-pay award from the date of the illegal termination until the date of the administrative hearing, when Hoffman learned of Castro's undocumented status. The Federal Court of Appeals for the District of Columbia enforced the Board's order after hearing the matter before a panel, and *en banc*. The United States Supreme Court was then asked by Hoffman Plastic Compounds to review the order of the Board awarding back-pay to Mr. Castro, the undocumented worker.

On March 27, 2002, the Supreme Court reversed, in a 5-4 decision, the judgment of the Court of Appeals enforcing the order of the NLRB. The majority opinion was written by Chief Justice Rehnquist, and the dissenting opinion was written by Justice Breyer. The majority was primarily concerned with the interplay between the award of back-pay to an undocumented worker, and the dictates of the IRCA. The Court stated that "awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer." Hoffman Plastic, 535 U.S. at 149, 122 S.Ct. at 1283. The Court further stated that "[t]here is no reason to think that Congress nonetheless intended to permit back pay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from 'accommodating' IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it." Id., 535 U.S. at 149-50, 122 S.Ct. at 1283-84. In sum, the majority held as follows,

> We therefore conclude that allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd., 535 U.S. 137, 151-52, 122 S.Ct. 1275, 1284-85 (2002).

The dissenting opinion examined the interplay between the order of the NLRB and IRCA in an opposite manner. The dissent concluded that the Board's limited back-pay order "reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent." Id., 535 U.S. at 153, 122 S.Ct. at 1285. Justice Breyer expressed concerns over the ramification of the majority's decision rhetorically asking the following questions,

> What is to happen, for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once - - secure in the knowledge that the Board cannot assess a monetary policy?

Id. 535 U.S. at 155, 122 S.Ct. at 1286. The dissent then concluded that the majority's decision undermined, rather than enforced, immigration policy stating,

> To *deny* the Board the power to award back pay, however, might very well increase the strength of this magnetic force [pulling immigrants towards the United States]. That denial lowers the cost to the employer of an initial labor law violation (provided of course that the only victims are illegal aliens). It thereby increases the employer's incentive to find and hire illegal-alien employees.... [T]he Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations.

Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd., 535 U.S. 137, 155-56, 122 S.Ct. 1275, 1287 (2002)(*J. Breyer dissent*).

2. Post-Hoffman judicial decisions.

Following the Court's decision in Hoffman Plastic, there were immense concerns among immigrant advocates and labor attorneys about the rights of undocumented workers to recover compensatory damages as a result of discrimination by their employer. Furthermore, there has been additional concern among attorneys that the Court's rationale in Hoffman might be applied to other areas of the law, *i.e.*, tort law, civil rights law, etc. We will next examine recent decisions across the United States applying Hoffman in non-NLRA cases.

- Flores v. Albertson's, Inc., 2002 WL 1163623 (C.D. Cal., April 9, 2002).

Federal class action lawsuit in which employee janitors asserted claims for unpaid wages (minimum wages and overtime premiums) under the Fair Labor Standards Act (FLSA) and various common law torts. Defendants sought to compel the discovery of documents reflecting the immigration status of the plaintiffs.

Held: The plaintiffs' immigration status was not relevant in a FLSA action, and that the production of the documents would have an *in terrorem* effect upon undocumented class members.

- Zeng Liu v. Donna Karan Int'l, 207 F.Supp.2d 191 (S.D. N.Y., June 11, 2002).

Class of Chinese immigrant workers brought action against employer under FLSA to recover unpaid wages. Employer requested the right to conduct discovery concerning the immigration status of the plaintiffs.

Held: Evidence of workers' immigration status was not relevant in a FLSA action, and any probative value was outweighed by the risk of injury to the plaintiffs, namely the danger of intimidation and the danger of destroying the cause of action which would inhibit plaintiffs in pursuing their rights.

- Singh v. Jutla & C.D. & R's Oil, Inc., 214 F.Supp.2d 1056 (N.D. Cal., August 5, 2002).

The plaintiff, an undocumented worker, was recruited by the defendant employer to come work in the United States. The plaintiff worked for the employer for three years and received no pay. The undocumented employee filed a wage claim, and was awarded a judgment. The parties subsequently settled the wage claim on May 3, 2001. The following day, the INS arrested and detained the plaintiff. On March 7, 2002, plaintiff filed an action against the defendant for retaliation under the FLSA. Defendant moved to dismiss the action under Hoffman.

Held: Plaintiff's claims under the FLSA were not barred by the Supreme Court's decision in Hoffman. The Court found that "[p]rohibiting plaintiff from bringing this claim under the FLSA would provide a perverse economic incentive to employers to seek out and knowingly hire illegal workers, as defendant did here, in direct contravention of immigration laws." Singh, 214 F.Supp.2d at 1062.

- Flores v. Amigon, 233 F.Supp.2d 462 (E.D. N.Y., September 20, 2002).

Plaintiff filed action under FLSA against employer to recover unpaid overtime premiums. Defendant employer sought discovery under Hoffman of plaintiff's immigration documents, social security number, and passports. Plaintiff moved for a protective order.

Held: The principles of law articulated in Hoffman do not apply to an action under the FLSA to recover unpaid wages. Hence, the requested documents are not relevant to the action. Furthermore, any relevancy is outweighed by the potential for prejudice, namely "[i]f forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance. This would effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation." Flores, 233 F.Supp.2d at 465, fn. 2.

- Martinez v. Mecca Farms, Inc., 213 F.R.D. 601 (S.D. Fl., November 25, 2002).

Agricultural workers moved for class certification in an action against defendants-employers to recover unpaid wages under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Defendants opposed class certification arguing that under Hoffman, the plaintiffs, as undocumented aliens, lacked standing to bring action.

Held: The plaintiffs had standing to bring suit under AWPA to recover compensation for work already performed. The Court allowed the motion for class certification, and reiterated that "[u]ndocumented individuals have bee allowed to represent classes of deportable aliens." Martinez, 213 F.R.D. at 606.

- Cano v. Mallory Mgmt., 195 Misc.2d 666, 760 N.Y.S.2d 816 (Richmond County, NY, April 10, 2003).

Plaintiff suffered personal injuries when an electric meter exploded, and filed a negligence action against the owner of the meter, Con Edison. The plaintiff was a citizen of Costa Rica who had been present in the United States for twenty years, but could not produce proof of citizenship or residency. The owner moved to dismiss the action under Hoffman arguing that the plaintiff is an illegal immigrant, and not entitled to seek redress from the courts.

Held: The Court denied Con Edison's motion to dismiss the plaintiff's complaint based upon his undocumented alien status. "The plaintiff's undocumented alien status may be presented to the jury on the issue of lost wages, but not on the issue of pain and suffering." Cano, 195 Misc2d at 699-70, 760 N.Y.S.2d at 818.

- Escobar v. Spartan Security Service, 281 F.Supp.2d 895 (S.D. Tex., July 30, 2003).

Plaintiff-employee filed sexual harassment and sex discrimination claims under Title VII, along with various common law torts. At the time of alleged events, plaintiff was an undocumented worker, but subsequently gained lawful status following his termination from defendant-employer. Defendant moved for summary judgment on plaintiff's Title VII claims arguing that Hoffman precluded all relief because the plaintiff was an undocumented worker.

Held: The Supreme Court's opinion in "Hoffman only compels the conclusion that Escobar [plaintiff] is not entitled to back pay on his claims under Title VII, such a remedy being foreclosed by the fact that he was an undocumented worker at the time he was employed by Spartan. Thus Escobar's claims for back pay under Title VII will be dismissed." The Court denied the defendant's motion for summary judgment with respect to the Title VII claim and other recoverable remedies.

- Tyson Foods, Inc. v. Guzman, 116 S.W.3d 333 (Tex App. Tyler, July 31, 2003).

Plaintiff, an undocumented worker employed by a sub-contractor, suffered personal injuries when a Tyson employee ran into him with a fork-lift. Plaintiff sued defendant for negligence, and recovered a judgment upon a jury verdict. Defendants appealed the judgment of the trial court. On appeal, the defendants cited Hoffman for the proposition that national public policy, as expressed by IRCA, militates against any award of wages as damages to undocumented alien laborers.

Held: The plaintiff was entitled to an award of lost earning capacity because Texas law "does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity." Tyson Foods, 116 S.W.2d at 247. Furthermore, "[t]he issue of whether Guzman [plaintiff] is a United States citizen is immaterial to the determination of his damages for lost earning capacity." Id.

In summary, defendants across the country have sought to expand the Supreme Court's holding in Hoffman so as to curb the right of undocumented aliens to initiate and prosecute lawsuits. However, the courts have generally limited the Hoffman decision and been unwilling to expand its application to other areas of law. It is reasonable to expect that these issues will be addressed in North Carolina during the next couple of years. Attorneys in this State, both plaintiff and defense, must continue to ensure that all persons, including undocumented workers, continue to have access to the courts of North Carolina.

III. Issues of race, ethnicity, and class at trial.

In the previous section, we examined the rights of undocumented workers to file suit. Presently, the major litigation in this area concerns Latinos since they are the largest group of recent immigrants. This section will address issues of race, ethnicity, and class which impact all minority parties during a civil trial. The first part will examine the law as it relates to guaranteeing the right to select a diverse jury at trial, and the second part will address permissible *voir dire* questions to discover possible racial or ethnic biases held by prospective jurors.

The right to a trial by jury in a civil case is guaranteed by Amendment VII of the United States Constitution which states,

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court o f the United States, than according to the rules of the common law.

U.S. Const. Amend. VII. In North Carolina, either party may demand a jury trial under Rule 38 of the North Carolina Rules of Civil Procedure. An attorney must be cognizant of the type of jury that will best sympathize with, and respond to the client, and his or her claims or defenses.

Jury selection will be critical and complicated when representing a minority client with any claims of improper or discriminatory treatment based upon race, ethnicity, or class, *i.e.*, employment discrimination, civil rights violations, malicious prosecution/abuse of process, slander and libel, consumer rights. Quite simply, many jurors believe that discrimination in society is an element of the past, and that minorities are often too sensitive and accusatory. These sentiments will be exacerbated if the client is from a low socioeconomic class. Therefore, the attorney must find jurors who have common experiences with one's client, and find ways to discover potential bias during jury selection.

A. Selecting a diverse jury.

Article I, Section 26 of the North Carolina Constitution states:

> No person shall be excluded from jury service on account of sex, race, color, religion, or national origin.

N.C. Const. Art. I, Sec. 26. The North Carolina Supreme Court has interpreted Article I, Section 26 in the following manner:

> By its plain terms, this section of our constitution prohibits the exclusion of persons from jury service for reasons of race. It makes no distinction between civil and criminal trials. We conclude that this section applies to the use of peremptory challenges in *all* cases, civil and criminal. Furthermore, this provision of the constitution would be eviscerated if the use of peremptory challenges did not come within its ambit. It is true that a litigant in a civil case may exercise peremptory challenges during the voir dire process, N.C.G.S. §9-19 (1986); Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951), but such challenges must be exercised in a constitutional manner.

Jackson v. Housing Auth. of High Point, 321 N.C. 584, 585, 364 S.E.2d 416, 416-17 (1988).

The Federal Courts also prohibit a civil litigant from excluding a potential juror on account of their race. In the matter of Edmondson v. Leesville Concrete Co. Inc., 500 U.S. 614, 111 S.Ct., a Black construction worker sued a concrete company in Federal district court, alleging that the company's negligence caused him personal injury. During jury selection, the defendant-company used two of its three peremptory challenges to remove Black jurors from the prospective jury. The plaintiff requested that the defendant articulate a race-neutral explanation for the peremptory strikes under the dictates of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The court denied the request on the grounds that Batson did not apply to civil proceedings. In a 6-3 decision, the United States Supreme Court reversed the decision of the Court of Appeals for the Fifth Circuit affirming the judgment of the trial court. The Supreme Court held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race, since race-based exclusion violates the equal protection rights of the challenged jurors. The majority's opinion forcefully stated that,

> Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. See Thiel v. Southern Pacific Co., 328 U.S. at 220, 66 S.Ct. at 985-86. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U.S.C. §243l 28 U.S.C. §§1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial.

Edmondson v. Leesville Concrete Co., 500 U.S. 614, 630, 111 S.Ct. 2077, 2088 (1991).

The law is clear that in a civil case, jurors may not be excluded on account of their race. Under Batson, there is a three step-process for evaluating claims that a prosecutor (or private attorney) has used peremptory challenges in a manner which violates the Equal Protection Clause. First, the movant must make a *prima facie* showing that the attorney has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the attorney to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the movant has carried his burden of proving purposeful discrimination. Batson v. Kentucky, 476 U.S. 79, 96-98,106 S.Ct. 1712, 1722-24 (1986); see also, Hernandez v. New York, 500 U.S., 352, 358-59, 111 S.Ct. 1859, 1866 (1991) (Exclusion of bilingual Latino jurors reviewed under Batson).

B. Proper questions during *voir dire* regarding possible racial and ethnic biases.

In addition to selecting a diverse jury representative of one's client and the community, the attorney must select a jury which will be fair and impartial. There will be few potential jurors who will admit in court to possessing serious racial or ethnic prejudices. It is the attorney's obligation to uncover any bias or prejudice that may compromise the client's right to a fair and impartial trial. Typically, the attorney will attempt to solicit from the jury panel discussions about life experiences, opinions, and associations which might indicate potential bias or prejudice. This next section will examine North Carolina cases on proper *voir dire* questions concerning possible racial or ethnic bias.

In 1870, the North Carolina Supreme Court examined whether counsel for a Black defendant could ask the following question during *voir dire*: "[Whether] he believed he could, as a juror, do equal and impartial justice between the State and a colored man?" State v. McAfee, 64 N.C. 339, 1870 WL 1747 (1870). The North Carolina Supreme Court found the question to be proper and stated as follows,

> It is essential to the purity of trial by jury, that every juror shall be free from bias. If his mind has been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here, his Honor refused to allow a proper question to be put to the juror, in order to test his qualifications. Suppose the question had been allowed, and the juror had answered, that the state of his feelings towards the colored race was such that he could not show equal and

> impartial justice between the State and the prisoner, especially in charges of this character: it is at once seen that he would have been grossly unfit to sit in the jury box

McAfee, 64 N.C. 339, 1870 WL at 1. It bears noting that in McAfee, the Supreme Court cited with approval an opinion of the California Supreme Court, People v. Rogers and Valencia, 5 Cal. 347, finding that it was appropriate for Mexican nationals to question a jury panel about their associations and opinions with respect to "Catholic foreigners" and "a prisoner of foreign birth."

In State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), the Court of Appeals examined the propriety of *voir dire* questions propounded by counsel for the Black defendants ("Wilmington Nine") concerning possible juror bias. The Court found that it was improper to examine prospective jurors concerning their beliefs in racial equality stating, "[w]e think this type of inquiry does not address itself to possible prejudice against persons of defendants' race and was properly excluded." State v. Chavis, 24 N.C. App. 148, 170, 210 S.E.2d 555, 570.

The Court sanctioned *voir dire* questions addressing clubs and organizations which a juror belonged. However, the Court disapproved of the follow-up question, "Have you ever belonged to any club or organization that excluded Black people among its membership?" The Court found that "[i]n any event it began to border upon harassment and bore no direct relation to the juror's prejudice, or lack thereof, against persons of the Negro race." Chavis, 24 N.C. App. at 168-69, 210 S.E.2d at 570. Finally, the Court of Appeals reiterated that it is proper to ask a juror, "Would any of you more readily convict a person charged with a crime because he is Black than you would if he was some other color?" Id., 24 N.C. App. at 169-70, 210 S.E.2d at 570.

In State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990), the criminal defendant was Indian (Native American) and prosecuted at a time of racial tensions in Robeson County (Eddie Hatcher events). The defendant was found guilty of murder, and on appeal argued that the prosecutor directed to Indian jurors impermissible questions concerning racial beliefs. The Supreme Court held that it was permissible for the prosecutor to direct questions to Indian prospective jurors regarding their perceptions of racism in the criminal justice system. The Court stated that "[t]he challenged line of questioning was a permissible effort to determine whether prospective jurors' perceptions of the trial process would affect their ability to render a fair verdict." State v. Porter, 326 N.C. 489, 497, 391 S.E.2d 144, 150.

In State v. Robinson, 330 N.C. 1, 409 S.E.2d 288, the criminal defendant was Black and convicted of the murder of a White man during the course of an armed robbery. On appeal, the defendant contended that the trial court improperly restricted his counsel's questioning of potential jurors during *voir dire* concerning their feelings about racial prejudice. The trial court allowed the following questions to be asked to prospective White jurors:

- Whether racial prejudice would affect their ability to fairly and impartially determine defendant's guilt?

- Whether Blacks had visited their homes?

- Whether Black people worked where they were employed?

- Whether Blacks had attended school with them?

The trial court sustained prosecutor objections to such questions as:

- Do you feel the presence of Blacks in your neighborhood has lowered the value of your property or had any effect on it adversely at all?

- Have you ever seen examples of discrimination in your place of work?

- Do you have any particular feeling about Black people [from] your association [with] them?

- Do you think that racial discrimination exists in Guilford County?

- Do you belong to any social club or political organization in which there are no Black members?

The defendant argued that former questions would only uncover an openly biased person, while the latter questions would "elicit responses indicative of the more subtle forms of racial bias still present in our society." State v. Robinson, 330 N.C. 1, 12-13, 409 S.E.2d 288, 294-95 (1991). The Supreme Court held that the trial court had permitted the defendant sufficient inquiry into racial bias, and not abused its discretion by disallowing the latter questions during *voir dire*. Id., 330 N.C. at 13-13, 409 S.E.2d at 294-95.

While the cases in this section were criminal matters, the legal principles are applicable to the civil context. The trial court has broad discretion in controlling the manner and extent of questioning on *voir dire*. In certain civil cases, the trial court may allow an attorney greater leeway to inquire into possible racial/ethnic biases and prejudices held by the jury panel. In other cases, the court may be more restrictive, especially if the case clearly does not have any aspects of alleged discrimination. However, in every civil case involving a minority client, the attorney should be alert during jury selection to any possible racial or ethic animus towards your client, no matter how small.

IV. Conclusion.

All persons, both plaintiffs and defendants, are entitled to competent and zealous legal advocates. In certain cases, minority clients need a legal representative who fully understands the potential issues of race, ethnicity, and class which may arise during the course of civil litigation. This is especially true since the events of 9/11.