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# Strategic Jury Selection

By Ben Rubinowitz, Michelle Levine and Evan Torgan

To many trial lawyers, jury selection holds the key to a successful verdict. For this reason, it is crucial to carefully explore juror attitudes, biases, and beliefs during voir dire. In contrast to a "one size fits all" approach to jury selection, lawyers would be far better served by carefully crafting their questions to provide insight into a juror's mindset. If conducted properly, not only will the information gleaned during voir dire inform a lawyer's decision of whether or not to challenge that juror, but additionally, it will offer valuable information that can be used effectively to emphasize points during the course of trial.

In particular, during jury selection, trial lawyers should avoid asking repetitive, checklist-type questions that provide little to no substantive value. In addition, other questions with minimal value are those which merely seek confirmation—such as yes-or-no questions—rather than eliciting more detailed, illustrative responses. For example, consider the following questions asked in a rote manner, without strategic placement:

Q: Can you be fair?

Q: Will you decide this case fairly and impartially based on the evidence?

Q: Can you listen to the evidence based on the facts?

Q: Do you consider yourself a fair-minded person?

In these examples, not only will the attorney almost always receive a "yes" answer, but the attorney learns very little about a juror's thought process—and has learned even less about the juror's attitudes that will assist in final argument. Rather than seeking a one-word confirmation (yes or no), the attorney

is far better off designing questions that encourage jurors to speak and share their insights, including the reasons for their answers. Consider the following questions:

Q: How do you feel about (a particular topic)?

Q: What is your opinion on (that topic)?

Q: What do you think about (that issue)?

Q: Why do you feel this way?

For each of these questions it is difficult, if not impossible, to simply give a one-word answer. Each question prompts the juror to elaborate in a manner that offers insight rarely provided by a one-word answer.

To further illustrate that rote questioning is not nearly as helpful as carefully-crafted questions that assess the strengths and weaknesses of a claim, consider a wrongful death case. While, at first blush, some may think that all wrongful death cases are similar, a closer analysis makes clear that nothing could be further from the truth. For instance, some wrongful death cases have components of severe economic loss, while others have none, and some tug at the heart strings while others fall flat. Indeed, a case involving a five-year-old child who loses a 35-year-old mother may evoke different emotions than a case in which a 55-year-old man loses his 85-year-old mother. In both scenarios, it is a relatively easy task to determine the extent of economic loss, if any, suffered by the surviving son. But it is the intangibles, such as the loss of parental care and guidance and a potential award for pain and suffering, that pose the greatest hurdles in presenting the case. Such hurdles must be overcome so that the evidence translates into an appropriate monetary award. A major step in overcoming these challenges is the voir dire itself.

Accordingly, strategic planning for voir dire includes creating a list of the strengths and weaknesses of the case. Counsel should always create a list of her greatest fears and concerns before ever setting foot in the jury selection room. Clearly, the most significant fear of the plaintiff's lawyer is often the greatest strength of the defense lawyer, and vice versa. That list should aim to cover all potential attitudes and beliefs that may be held by the prospective jurors.

Some of the thoughts that might be going through the mind of a plaintiff-oriented juror might be:

• The greatest fear I have is losing my Mother.

• No one is more important to me than my Mom.

• I will never get over the death of my Mom.

• I would give anything to see my mother again.

• Not a day has gone by when I didn't think about my Mom.

• Nothing is more important to a child than his Mom.

While these thoughts and attitudes are certainly strengths for the plaintiff's lawyer, that list must include the weaknesses for the plaintiff—which, put another way, are the attitudes held by the defense-minded juror (which are also strengths for the defense lawyer):

• His mother is dead. What difference does the money make now?

• It was her pain and suffering, not his.

• Get over it. Everyone dies.

• I didn't get compensated when my mother died.

• Death is inevitable.

Although both the plaintiff's lawyer and defense lawyer would like to excuse those jurors with adverse attitudes to their respective positions in the case, the reality is that each only has a limited number of peremptory challenges. The true art of jury selection is to preserve these peremptory challenges, including by effectively arguing that challenges are instead made for cause. Unlike peremptory challenges, there are an unlimited number of challenges for cause; however, because the granting of a

challenge for cause is wholly dependent on the discretion of the court, it is always wise to fully explore juror attitudes. Even if a challenge for cause is denied and the peremptory challenges have been used up, that exploration may provide crucial insight for summation.

To begin the exploration of juror attitudes, counsel should consider offering a short statement of the case followed by open-ended questions, rather than leading questions:

"A woman died. It is our position that she should never have died. It is our claim that she died because of the carelessness and negligence of the defendant (company, driver, doctor, etc.). Her son came to us and asked us to bring a lawsuit to vindicate the death of his mother."

Here, counsel now has a choice. She can proceed by leading questions or open-ended questions. Consider first the leading question:

Q: Knowing that little bit about the case, can you be fair?

This question merely seeks confirmation. It provides little value and no insight about the juror's thoughts, attitudes or feelings. Compare that to an open-ended question:

Q: How do you feel about a son who came to court to vindicate the death of his mother?

This question calls for explanation. It encourages the juror to share thoughts and insight that would otherwise remain unknown.

Other open-ended inquiries can be separated into "soft" questions and "hard" questions, both of which will serve to shed more light on juror attitudes. First, consider the soft open-ended questions:

Q: Tell us about your relationship with your mother?

Q: What did you like most about your mother?

Q: What did you like least about her?

Q: What life lessons did your Mom teach you?

Q: Have you ever shared those life lessons with anyone?

Critically, the answers obtained should be stored for later use during final argument.

Second, the "hard" open ended questions are those which explore the fears and weaknesses of the case:

Q: Some people think there is never a reason to bring a wrongful death case. They think to themselves "She's dead. What's the difference?" How do you feel about that?

Q: Some people think, "Everyone dies. Why should her son be compensated? Why should he receive money?" It is our position that she died before her time, and she died through the negligence of another. If you believe that it makes no difference when a mother dies, we want to know that. How do you feel about this?

Q: Some people feel that compensation should only be for children who lose parents. Others feel that compensation has no age limits—that you never stop needing a mother. How do you feel?

In continuing this line of questioning, counsel should review the pattern jury instructions to make certain that the prospective jurors are not just willing to follow the law but also understand what they will be asked to consider in the case. Often, the best way to do this is to ask a leading question followed up, immediately, by an open-ended question:

Q: Do you agree with the part of our civil justice system which holds that if someone dies through the negligence of another, the estate of the person who died is entitled to be compensated for the pain and suffering experienced before her death?

Q: Why do you agree?

As another example:

Q: How do you feel about the part of our civil justice system which holds that when a child loses a parent through the negligence of another, the child is entitled to be compensated for loss of parental guidance?

A: I think it is right.

Q: Why?

The more challenging part of jury selection is to work with the negative answers by arguing, to the extent possible, that the answer results in a challenge for cause. Imagine for example, the above question is asked but, instead of receiving a supportive answer (such as "I think it is right"), the answer received is: "No, everyone is going to die eventually. I got over the death of my mother. In time, so will he."

Here, rather than conceding the peremptory challenge, an attorney would be prudent to deal with the answer head-on, including by exploring the answer and following up with pointed questioning that may, consequently, pave the way for a challenge for cause. Here is an example of how one can use this answer to build support for a challenge for cause:

Q: You just told us that everyone dies and that you got over the death of your mother, correct?

A: Yes.

Q: Did your mother die as a result of the fault of another?

A: No.

Q: In this case, we are not just suggesting that because everyone will eventually die that we are seeking compensation, but that she died as the result of carelessness—through the fault of another—and that she died before her time. Do you feel that it makes no difference whether there is fault or not—because everyone dies you would never award compensation?

A: Yes.

Q: So even if the judge instructed that is someone dies through the fault of another, the estate is entitled to be reasonably compensated for that death, you would not be willing to make an award, true?

A: Well, I just think that because everyone will die sometime, what is the difference?

Q: Many of us have strong beliefs and we are not asking you to change your beliefs. It is just that we have limited time to speak to you—and now is the time for truthful, honest answers. So, my question is: Based on your beliefs, which you have clearly explained, the truth is that you would not follow the judge's instructions in this instance, true?

A: Yes.

This is the type of questioning that would result in a challenge for cause, for the simple reason that every juror is duty bound to follow the court's instructions. The answer, in effect stating, "I will not follow the law," should suffice for a challenge for cause, thereby preserving a peremptory challenge.

Overall, rather than approaching jury selection as a formulaic exercise, or with the simple goal of having patently unfit or adverse individuals discharged from the jury, with careful and strategic preparation, this is a valuable opportunity to uncover more subtle information about those with the potential to decide your case. By questioning in a manner that allows for both the preservation of peremptory challenges and insight into the mindset of the jurors, the odds of a successful verdict will be dramatically increased.

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