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Confronting Difficult Issues in Jury Selection Head On

By ben Rubinowitz and Evan Torgan

It goes without saying that jury selection is critical to the success of your case. These days, jurors often arrive at the courthouse already holding strong opinions and beliefs about jury service, lawyers and lawsuits before you have even said a word. Not only do they bring opinions about our civil justice system but they also may bring beliefs and prejudices about certain groups of people. While a trial lawyer has no control over who will be called as a panelist, the trial lawyer does have control over who will be sitting and hearing their case. During jury selection, it is the responsibility of a trial lawyer to identify and, hopefully, remove those jurors who cannot be impartial or who start off leaning ever so slightly against your case. Traditionally, the common teaching is that a case should be decided by a jury of one's peers. But the failure to deal with tough issues head on will result in a jury that one fears.

Jury selection must begin before you walk into the jury room. With discovery and depositions as broad as they currently are, problematic issues in a case should be laid bare before you even walk into the courtroom. It is not the fact that there is a problem but often the trial lawyer's ability to confront and address the problem during jury selection that can make the difference in the outcome of a case. A good place to start in preparing for jury selection is to ask yourself the following question: What are my greatest fears about the case? Or, put another way: What issues in my case scare me to death? While not all of the issues can be dealt with during jury selection, those that are appropriate for inquiry must be dealt with head on.

Many trial lawyers will argue that the goal of jury selection is to get a jury who votes for them. In reality, unfortunately, this approach is shortsighted. The true goal of jury selection, from a procedural point of view, should be to preserve peremptory challenges. In New York each side is allowed only three peremptory challenges but an unlimited number of "cause" challenges. A "cause" challenge should always be allowed when the juror admits that he or she cannot be fair.¹ By artfully allowing the juror to admit that he or she cannot be fair, the trial lawyer dramatically increases the odds of success by turning a limited peremptory challenge into an unlimited challenge for cause. The questioning technique used by the attorney, if executed properly, can go a long way toward the goal of preserving those precious peremptory challenges.

General and Specific Fears

In preparing for jury selection, the trial lawyer should always consider two categories of fears: "general fears" and "specific fears." General fears are those that apply to every case regardless of the specific facts or circumstances of the case. For the plaintiff's attorney, these fears may include a juror's belief or opinion that:

- * there is too much litigation and it is his job to put an end to it;
- * there are too many frivolous lawsuits;
- * if she awards compensation her taxes or insurance premiums will go up; and
- * all plaintiffs are just trying to make a quick buck.

For the defense, such general fears held by a juror might include opinions or beliefs that:

- * if someone is injured he or she is deserving of compensation, regardless of fault;
- * sympathy will rule the day rather than facts;
- * there must be fault if there is an injury; and
- * this is just another case in which a greedy insurance company refuses to pay.

No matter how strong the trial attorney thinks her case is, she must always be concerned about those general fears and be ready to address them during jury selection. Unlike general fears that are applicable to all cases, specific fears are those that are unique to the specific facts

of the case you are trying. Whether one is a plaintiff's or defendant's attorney, examples of specific fears include the fact that the client is:

- * A convicted felon
- * A drug or alcohol abuser
- * A minority
- * Gay or lesbian
- * An individual who does not speak English
- * An individual who is old or infirm
- * A motorcycle driver or cab driver

These potentially problematic issues must be addressed head-on in jury selection. The trial lawyer who chooses not to address a specific issue in the hope that it will not be an issue at trial is not only making a significant mistake, but missing an opportunity to get potential jurors accustomed to what might be a problematic issue in the case.

Encouraging Jurors to Speak

To successfully deal with troublesome issues the trial lawyer must properly phrase questions in such a way that the juror is encouraged to speak. Leading questions alone are insufficient to achieve this goal. While leading questions might focus a juror's attention on a worrisome issue, they do not allow for meaningful discussion sufficient to adequately reveal the juror's true opinions and beliefs. Consider the following example. The trial lawyer is exploring the jurors' beliefs about our civil justice system and a juror states: "you know what -- I think there are too many lawsuits." The worst question the plaintiff's lawyer could ask in such a situation is a leading question that locks in the potentially unfair juror:

Q: Can you put that aside and be fair?

A: Of course.

Because of the leading question, the juror has now given the trial attorney her assurance that she can be fair when, in truth, she is coming in with a belief that could be detrimental to the case. The

better approach is to carefully meet the issue head on by using a combination of leading and open ended questions. To do this properly, the inquiring attorney must not be afraid to explore the juror's feelings while at the same time emphasizing the importance of her client's claim:

Q: You just told us that you think there are too many lawsuits?

A: Yes.

Q: And we haven't even presented any evidence yet?

A: True.

Q: Here is the concern I have. Everyone who brings a claim or defends a claim is entitled to start off with a fair jury. In other words no one should be starting off with an advantage or a disadvantage -- the case should be decided on the facts. You have been honest and we appreciate that. You have shared your thoughts about the civil justice system -- and we appreciate that too. But how do we get a fair shake if you have already decided there are too many lawsuits?

A: I just think there are too many lawsuits.

Q: Knowing you feel there are too many lawsuits, would you agree that you are leaning - - even if it's ever so slightly -- in favor of the defense?

A: Maybe a little. It's just the way I feel.

Here, that answer must be used by the attorney to secure a challenge for cause and avoid having to use a peremptory challenge. Once the juror admits that she cannot be completely fair, a challenge for cause is in order.ⁱⁱ Continue the line of inquiry by thanking the juror and letting him, and the other jurors, know how important that answer was.

Q: Thank you for that answer and for your honesty. Our biggest fear is that a potential juror has feelings or beliefs about something that might favor one side but does not tell us. Knowing that you feel there are too many lawsuits and knowing that we are seeking jurors who have no leanings one way or another, wouldn't you agree that you are favoring the defense even if it's to the slightest degree?

A: Yes, just a little.

Q: And knowing that you are leaning in favor of the defense, even if it is ever so slightly, you would agree we are really not getting a fair shake are we?

A: I agree with that.

Clearly, that answer shows that this juror cannot give an unequivocal assurance of fairness to each side and should be discharged for cause.

Confronting Hot Button Issues

In addition, although unpleasant to acknowledge, the fact that a plaintiff or defendant is of a particular race, religion or sexual orientation may create a problem for some jurors. It is highly unlikely that any juror is going to volunteer that they hold a prejudice or have a bias against a group of people so the slightest degree of bias must be fully explored. If the questioning is done right each issue that causes concern can be dealt with in a similar manner. For example, assume your client is gay and you are concerned that he will not get a fair shake by the jury. The use of a leading question without proper follow-up offers little, if any, insight into the juror's opinions:

Q: Can you be fair to my client, John Smith, if you learned he was gay?

This type of question has, at least, two major flaws. First, as discussed, no juror wants to be seen as prejudiced or unfair so the majority of the time the answer to such a question will likely be "yes, I can be fair." Second, nothing was learned about the juror's true beliefs or feelings.

A more effective approach is to use a mixture of statements, leading and open-ended questions to properly explore the area. Unlike leading questions which often provide only one word answers, the open ended questions allow for thoughtful insight and discussion. Words that are often used to develop a good narrative on direct examination such as Who, What, When, Where and Why should be used. Questions to effectively explore a juror's deep feelings include questions such as:

Q: Tell us how you feel about...?

Q: Why do you feel that way...?

Q: What are your thoughts about...?

Q: What is your opinion about...?

An effective approach to preserving peremptory challenges and meeting worrisome issues head on is to use the "confessional approach" to jury selection. The "confessional approach" is a technique for dealing with troublesome issues such as prejudices against a group of people. To succeed with this approach the trial lawyer first makes a statement "confessing" a concern. After that, through a series of open ended and leading questions the issue is explored in detail. For example:

Q: I'll tell you right now John Smith, my client, is a gay man. The concern I have is that some people might have strong feelings about that fact. Some might agree with his lifestyle and some might disagree with it. I don't want to just ask the question "Can you be fair?" because that question provides no real insight. What I really want to know is what are your thoughts and opinions on this issue?

Here, a leading question can be used but only if followed up with an appropriate open ended question:

Q: How do you feel about gay people?

Q: Why do you say that?

Often, the answer given by one juror can be used to explore other juror's feelings:

Q: You heard Ms. Glass (juror) say the fact that my client is gay will not negatively impact the verdict and that all people deserve to be treated equally. Do you agree with her?

Q: Tell us why?

Often times when dealing with hot button issues such as race or religion people are very reluctant to admit any bias or prejudice. Perhaps they will disagree with something but will nonetheless give their assurance that they will listen to the facts. Take the example of John Smith above.

Q: How do you feel about people who are gay?

A: I don't really agree with it. The choice.

Q: Tell us why.

A: I think it's wrong.

Q: I thank you for your honesty but I am concerned. Does my client, John Smith have to worry that his being gay will negatively impact the verdict?

A: No. I will be fair.

Q: I appreciate that but let's look at it another way. You are wearing a blue shirt. Suppose you brought a claim and a juror said "I hate people who wear blue shirts. They just can't be trusted. But I can be fair." Would you want someone like that sitting on your case?

A: I see your point.

Q: Would you agree that given your feelings about gay people my client is not starting off on equal footing with the defendant?

A: Yeah, probably not.

Conclusion

Challenging issues in jury selection should not be avoided and must be met head-on by the trial attorney. Whether it is a general issue such as the belief there are too many lawsuits or a specific issue such as a bias against a particular group of people, a trial lawyer must acknowledge and address the issues. By artfully encouraging people to speak, the trial lawyer can identify those jurors who hold opinions and beliefs that will negatively impact his or her case and exercise challenges for cause while preserving the limited yet precious peremptory challenges.

ⁱ People v Daniels, 218 AD2d 589 (1st Dept. 1995) (holding a juror should be discharged "when it becomes evident that a juror either by reason of implied or insufficiently purged actual bias is unable to render a fair and impartial verdict")

ⁱⁱ People v Johnson, 94 NY2d 600 (2000) (holding that parties are entitled to "unequivocal assurance that [jurors] can set aside any bias and render an impartial verdict based on the evidence.")

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