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HEADLINE: **Trial Advocacy, Voir Dire in Medical Negligence Cases: A Plaintiff's Perspective**

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BODY:

An attorney selecting a jury on behalf of a plaintiff in a medical negligence case faces several obstacles to finding jurors who can hear the evidence and decide the case in a fair and unbiased manner. Most potential jurors do not want to believe that doctors or other medical professionals make mistakes, because that belief forces them to acknowledge that they, themselves, are susceptible to being injured as a result of medical negligence. Jurors also may be intimidated by the prospect of judging the conduct of a doctor, preferring instead, as a layperson, to demur to the superior knowledge of a medical professional.

In addition, medical negligence cases today have become a hot-button political issue. An important point in this presidential campaign has been the impact that medical negligence cases have on health care at large. Indeed, with the threat of physician strikes on account of inflated insurance premiums, coupled with a presidential call for a federal cap on pain and suffering damages in medical negligence cases, it is no surprise to learn that a prospective juror may fear that a large plaintiff's verdict will interfere with his own ability to receive appropriate health care, regardless of the dubious logic that supports that linkage.

The key to a successful voir dire is to factor these biases and beliefs into the process and deselect those who cannot be fair in this type of case.

Anticipating Your Adversary's Points

There are several strategies available for a plaintiff's attorney to conduct a voir dire in a medical negligence case that will weed out jurors who are predisposed against the case and lay the groundwork for a plaintiff's verdict with the jurors who do remain on the panel. Initially, it is crucial that your plan for voir dire be structured in terms of anticipating what your adversary will say when it is her turn to speak. Further, this process requires you to expect both what defense lawyers say generally and what your particular adversary likes to say specifically.

For example, one can rest assured that a defense attorney will speak to the jury about avoiding sympathy for the plaintiff. Since you know this is coming, an effective voir dire requires that the plaintiff's attorney is the one using the word and talking about it with the jury first.

Rather than permit a defense attorney to convince a jury to view your arguments in terms of a plea for sympathy, the plaintiff's attorney can defuse this point by stating flatly, "We are not here for sympathy," and asking jurors to affirm your statement: "Do you believe that if this case is decided on the basis of sympathy, that that would be wrong?'

This accomplishes two important things. First, it lessons the impact of defense counsel's questions -- the jury has already heard you dismiss sympathy as a grounds for a plaintiff's verdict -- and instills in the jury the feeling that you believe in the merits of your case.

Secondly, having the jurors agree that sympathy has no place in the courtroom can be used as a place to begin questioning them about biases that they have against your case. Now you can follow: "You've told me that using sympathy as a factor in your decision of this case would be wrong? Do you feel as strongly that the case should be decided on its merits and not opinions about medical negligence cases generally? Would you think it's right if, during deliberations, a fellow juror told you that these lawsuits are out of control, and we need to stop it right here? Is that type of reasoning on behalf of the doctor any different than deciding for the plaintiff on the basis of sympathy?" It is now time to ask an open-ended question: "How do feel about this?'

This approach invites prospective jurors to talk about their biases, while also giving you the opportunity to make the point that their political viewpoint is irrelevant to the final decision in your case.

There are other areas about which you can safely expect your adversaries to question jurors. Typically, defense attorneys will remind jurors that the mere fact that the plaintiff was injured, or that the results of the surgery were less than expected, does not mean that medical negligence occurred. They will usually remind jurors that the case must be viewed without hindsight, that the doctor's conduct can only be judged based on what he knew or should have known at the time of the occurrence. In most cases, defense attorneys will stress that a judgment call made by their client, even if it proved ultimately to be the wrong decision, does not constitute malpractice.

You must be ready to speak about these topics first. Indeed, since they are indisputably true, do not be afraid to say, for example, "We are not asking you to judge this case in hindsight. It is our position that the facts will prove that the defendants, based on what they knew or should have known at the time these events were taking place, departed from good and accepted practice in their treatment of my client." These statements will serve to enhance your credibility with the jury, diffuse your opponent's argument and permit you to broach these topics with the jurors in the manner in which you decide.

The other aspect of a successful voir dire is gaining specific information about your adversary's approach and then incorporating his pet phrases into voir dire. Obviously, you must speak to lawyers who have picked juries with your adversary previously and rely upon your own experience with them. Once you have obtained your scouting report, you can attempt to disarm your adversary by actually using some of the words they normally do and presenting them to the jury in your own way.

For instance, imagine that you learn that your adversary regularly stands up and announces to the jury that his client has been accused of being guilty of committing medical malpractice. The intent of the words is clear: to make it seem, as much as possible, that a criminal indictment has been handed up and that the jury will be deciding the innocence or guilt of his client.

Knowing this, you can diminish the impact of this statement by telling the jury something like: "I want you to know right now, this is not a criminal trial; no one is saying that the doctors intended the harm that was caused to my client, in fact, no one is saying that they are bad doctors. Guilty or not guilty is something that you should never hear in the case; the concept of guilt or innocence belongs to a criminal trial, not here in a civil trial. You will be asked to decide simply if these doctors departed from good and accepted practice, which caused injury in the treatment of my client.'

Learning ahead of time the other methods or metaphors that your adversaries like to use in jury selection is invaluable and provides the opportunity to present certain concepts to the jury while your adversary will be forced to appear as if he is spinning his words off your ideas.

Dealing With Political Issues

Today's political climate simply cannot be ignored when it comes to talking to a group of jurors about medical negligence cases. Whereas just a short time ago, only those who have been directly involved in such cases, i.e., parties, doctors, lawyers, insurance people, were likely to have strong opinions regarding these cases in the courts, today they are a topic that comes up in virtually every discussion of domestic policy.

A good plaintiff's attorney cannot hope to avoid mention of the sentiment among some people that these cases, in general, are bad for the economy and the health care industry. Instead, we believe you must talk about it frankly. Make people who believe, for example, that caps on pain and suffering should be imposed feel comfortable to express that view during voir dire. It is your only chance to identify those people who walk into the room philosophically troubled by a large plaintiff's verdict in your case.

Once a prospective juror does express ambivalence regarding medical negligence cases, this is not the time to try to change that person's political viewpoint. Instead, if the person is on the fence, but honest enough to talk about

his discomfort with the case, you must do all you can to draw out the information: "Have you discussed these opinions with others? What have you read on the subject? Do you have any feelings about a trial lawyer running for vice president? Do you have any feelings about a particular political party's statement on this issue?'

In the end, you must accomplish one of three things: help the juror come to the realization that he cannot put aside his political feelings and thus should not sit on the case; or, in the absence of that, elicit enough information that could serve as a basis for a challenge for cause; or else gain a commitment from the juror that he is open-minded about this case and could fairly decide the facts of the case and render a verdict based upon the law with which he is charged.

The importance of this line of inquiry cannot be overstated. We live in a time in which the president of the United States has chosen to vilify plaintiff's medical negligence lawyers and sound the call for reform in just one area of the law: medical negligence. The income or fees generated by corporate or transactional lawyers, although enormous, is simply never discussed. The good done by plaintiff's lawyers in protecting civil rights is never discussed. In other words, this topic has been moved to the forefront of the American consciousness. To do anything other than bring it up and have the jurors engage in a frank discussion regarding their political beliefs on the topic would stand as the antithesis to the actual purpose of voir dire -- to uncover biases and opinions that prevent the parties from getting a fair trial.

Questions for All Jurors

For all jurors, regardless of whether or not they state built-in opinions regarding medical negligence cases, there are a number of areas of inquiry that you must touch upon. First, you must gain a certain amount of general information about the juror's affiliation with the health care industry and, secondly, you must address your fears and concerns about their attitudes towards the case.

Generally, the following questions should be asked:

• Have you, or any close family member, ever studied medicine (or nursing)?

• Have you, or anyone in your family, ever worked for a doctor or medical care practitioner?

• Do you have any relatives who are nurses, doctors or health care providers?

• Do you have any training or experience with (the particular treatment or injury involved with the case)?

• Have you had any particularly good or bad experiences with doctors yourself?

• Have you or any close friends or family ever brought a case alleging medical negligence?

Of course, if any of these questions elicit a positive response, you must probe for more information for the purpose of learning how the experience has affected the mind-set of the juror.

Fears and Concerns

In addition, you must share your fears and concerns about potential juror attitudes and beliefs that could be detrimental to your case. Some of them are as follows:

• Fear: That a juror believes that a doctor or nurse might lose his/her license if found to be at fault.

• Concern: That the jurors will hold the plaintiff to a higher standard of proof than is required under the law.

You must make it clear that nobody's license is at stake at this trial: "I'll tell you right now, this is not a criminal trial, no doctor is going to lose his/her license as a result of what happens in this case; you understand that the issue is whether or not, on one specific day and time, there was a departure from good and accepted practice which

caused injury to my client.'

• Fear: A juror will see any choice made by a doctor as a judgment call made under difficult circumstances.

• Concern: The jury will excuse the negligence of the doctors.

You must introduce the concept that applicable standards and practices govern health care and ensure that jurors will listen to whether or not those standards were breached in your case. Ask jurors if they agree with this statement: Doctors who fail to act in accordance with good and accepted practice should be held liable for those actions, even if they say they used their best judgment?

Conclusion

Jury selection is your only opportunity to address these issues and uncover biases before the trial begins. The trial lawyer who neglects to do this may still try a great case and be left wondering how the jury could have rejected his claims.