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# Scaled Questions During Jury Selection

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One of the most crucial tasks a trial attorney must undertake is selecting a pool of jurors that will view her client's case in the most favorable light possible. By carefully crafting and preparing a series of questions to ask potential jurors, a trial attorney can efficiently eliminate jurors with a potential bias. One effective way of examining a potential juror—but by no means the only way— is by asking what is known as a "scaled question." A scaled question calls for an answer on a spectrum, which allows the attorney to know where on a pre-determined scale a juror falls on a particular topic. This technique, when applied to the jury selection process, helps to gain insight not only into reticent jurors, but also into those jurors who are willing to share their beliefs, concerns, and thoughts with the attorneys without hesitation.

Generally, to set up a scaled question, the trial attorney should ask a question that puts a specific subject, idea, or belief at issue and then pose follow-up questions that explore the juror's beliefs, feelings, and opinions on that same issue. One of the best and most basic ways to use this technique is to ask: "On a scale of 1 to 10, with 10 meaning you strongly agree with the following statement and 1 meaning you strongly disagree with the statement, how do you feel about [a specific subject]. This straightforward technique can then be adapted to work in a broad array of categories in both criminal and civil matters.

For example, in the state courts where lawyer-conducted voir dires are still permitted in criminal cases, a well-known quote can be used as a springboard to gain insight into a potential juror's true beliefs about fundamental concepts of guilt and innocence.

Q: On a scale of 1 to 10, with 10 meaning you strongly agree and one meaning you strongly disagree, how do you feel about the following statement: "It is better to let 10 guilty men go free than to convict one innocent man."

Whatever the answer, the next question should call for explanation.

Q: Why do you feel that way?

Changing the question ever so slightly might also provide fertile ground for discussion with the potential juror.

Q: On a scale of 1 to 10 how do you feel about this statement: "It is better to risk saving a guilty man than to condemn an innocent man."

Q: Tell us why you feel that way.

Or perhaps:

Q: On a scale of 1 to 10, with 10 being complete agreement and one being total disagreement, what number would you give to this statement: "Innocent until proven guilty."

Q: Why is it that you feel that way?

Utilizing this technique also allows for insight into areas that are of real concern to defense lawyers and prosecutors alike. For example, while jurors are instructed that they must follow the law as given to them by the court, jurors might still harbor divergent opinions as to whether the law is right, whether it makes sense, and whether it should even be followed. Asking a boilerplate question such as, "Can you follow the law the judge gives you?" does not seek any meaningful insight into the juror's attitude. Instead, the trial attorney should use scaled questions to probe the potential juror's perspective on these important matters:

Q: On a scale of 1 to 10 with 10 being something you really agree with what number would you give to this statement: "Criminals have too many rights."

Or

"If he is accused of a crime he probably did it."

Or

"If he doesn't take the witness stand he's likely guilty."

These questions allow for a creative hook to engage the prospective jurors in real discussion as opposed to a boilerplate question that merely seeks confirmation or agreement with the person asking the questions. Follow-up questions, seeking an explanation, should be put to the juror.

Ineffective boilerplate questions should not be used at all as they have the effect of influencing the answers before they are even given. For example, at the outset of jury selection the statement, "We are looking for jurors who are fair and impartial" makes the jurors think their answers should reflect their ability to be fair. Jurors may respond to questions after such a statement in a way that hides the juror's true feelings on an issue.

The better statement at the outset is, "We are looking for jurors who are open and honest." Once an attorney tells the jurors that there are no right or wrong answers, they are more likely to answer in an open fashion without fear of giving a "wrong" response, trying to come up with an answer that will please an attorney, or answer in a way they view as appropriate based on that which they were just told by the attorney.

### **Core Beliefs**

As with criminal cases, a potential juror's core values must be explored in civil cases. Indeed, these core values must include topics concerning liability as well as damages. Due, in part, to misinformation put out by the news media and tort reformers, jurors may have subconscious biases. While an attorney could try to educate jurors during jury selection, it is more effective to find out whether a specific juror would bring suit if injured by another. Here, the scaled question proves useful:

Q: On a scale of 1 to 10 with 10 being something you would likely do and one being highly unlikely, where do you put yourself on the scale in the following situation: If someone in your family were injured or killed due to the negligence of another, would you sue?

After the initial question, a series of follow-up questions will be fruitful.

Q: Why is that your answer?

Q: Using the same scale, how would you respond to this question, with 10 being you strongly agree and one being you strongly disagree: If a defendant's acts (or omissions) hurt another person, that defendant should be held responsible.

The answers given to these questions not only provide insight into the juror's core beliefs, but provide fertile information for follow-up questions. The juror who is unlikely to sue might resent the fact that your client brought suit in this case but would never disagree that we should have such constitutional rights.

Other issues, such as comparative fault, can be explored through scaled questions without even having to explain the concept. By asking a scaled question, without providing any factual detail, the juror's partiality might become clear.

Q: Using the same scale where do you put yourself: "If a worker was injured on the job, it was probably the worker's own fault."

Or

"If a driver was injured in a two-car accident both drivers were at fault."

Here, some jurors will ask for more information before answering the question. Once you tell them that you would like an answer without providing more, the scaled answer can provide insight into the prospective juror's core beliefs or their leanings that might otherwise be unattainable.

#### **Challenge for Cause**

A carefully crafted scaled question can also assist a trial attorney in preserving peremptory challenges. The odds of getting a more favorable jury are increased dramatically when a peremptory challenge can be turned into a challenge for cause. Consider, for example, the issue of burden of proof. A plaintiff's attorney could explain to the potential jurors that he or she has to prove the case by a fair preponderance of the credible evidence. A superficial way to ask a question on this issue is to ask:

Q: Would you agree to follow the law that we only have to prove our case by a fair preponderance of the credible evidence?

This ineffective leading question provides for an easy out for the potential juror by allowing the juror to say "yes" without explanation. However, using the scaled question in the same example is particularly effective in setting up a challenge for cause.

Q: On a scale of 1 to 10, 10 being you strongly agree and one being strongly disagree, where do you put yourself: "I would require the plaintiff to prove his case by more than a preponderance of the credible evidence."

If a juror answers that question with "agree" or "strongly disagree" and demonstrates bias in favor of the defense, the plaintiff's attorney must lock that juror into that position and ultimately seek that juror's removal on cause grounds. For example, the following leading questions should be put to the juror to further expose his bias.

Q: You just told us that you strongly agree with that statement. To be clear, you would require more proof for the plaintiff to win?

Next, the lawyer should thank the juror for his honesty and continue the line of inquiry:

Q: So even if the judge told you that we only have to prove the case by a preponderance of the evidence, you would require more, right?

Affirmative answers to those questions will result in a challenge for cause since the juror has implicitly expressed his bias and explicitly stated that he will not follow the law. Of course, once an answer like that has been given by one juror the follow-up question to the entire array should be:

Q: How many others feel that way?

To the extent other jurors share the same bias, they too should be excused for cause.

In some situations, a juror's bias for or against a plaintiff may become clear well before a scaled question is even asked. In such circumstances the trial lawyer should avoid the temptation to start any question with the following words: "Can you put that aside?" For example, imagine

the situation in which a potential juror says, "I will listen to all the evidence fairly but I think most plaintiffs are greedy." The wrong question to ask is:

Q: Can you put your personal opinions regarding plaintiffs aside and give everyone a fair shake?

Such a follow-up question can potentially rehabilitate the juror and prevent the use of a challenge for cause. Instead, if used properly, the scaled question can result in an immediate challenge for cause. Thank the juror for his honesty and his ability to open up about his true beliefs, then ask follow-up questions such as:

Q: On a scale of 1 to 10 how strong is your bias against plaintiffs?

Or

Q: On a scale of 1 to 10 how strong is your bias against personal injury lawsuits?

To the extent the juror solidifies his bias on a scale, that same juror has solidified his excuse from service on cause grounds.

Clearly, scaled questions can work equally well for the defense. To the extent a juror expresses bias in favor of the plaintiff, the scaled question can work to the defendant's advantage. Imagine a scenario in which a juror says, "My sister was in a very bad accident and she wasn't compensated fairly by the jury." The wrong question for the defense lawyer to ask is:

Q: Can you put your thoughts about your sister aside and judge this case fairly?

The defense attorney has done a disservice to his client by asking a question of the juror in this manner because it potentially rehabilitates the juror, thereby eliminating a potential challenge for cause. The more effective tactic is to let the juror know how much you appreciate his honesty and then ask leading questions to further expose the juror's potential bias.

Q: You believe the jurors in your sister's case made a poor decision, true?

Q: Isn't it true that based on that experience you might be leaning ever so slightly in favor of the plaintiff in this case?

Q: Despite your best efforts the defendant might start off with a strike against him?

An affirmative answer to this question should result in a challenge for cause.

To expose bias, in a similar line of questioning, a scaled question, where appropriate, might be:

Q: On a scale of 1 to 10 where do you stand on this statement: "Regardless of fault a plaintiff should always be compensated."

As with the earlier scenario that showed bias in favor of the defense, by appropriately following up with questions demonstrating bias in favor of the plaintiff, counsel can use the same tack for a successful challenge for cause.

The most difficult task in using scaled questions is crafting them sharply. The objective is to formulate probative questions that address important and central issues in the case. To properly prepare for jury selection using this questioning technique, a trial lawyer must carefully evaluate the problem areas in the case and set definite goals well before walking into court. But if done properly, the use of scaled questions allows the trial attorney to effectively expose the bias of potential jurors, allowing for the use of challenges for cause and the preservation of peremptory challenges.

Although scaled questioning is somewhat more time-consuming and cannot always be directed to all potential jurors, the questions and answers are heard by everyone in the jury panel. As a result, everyone sitting in the courtroom is in a position to understand the very real nuanced issues of prejudice and bias that the voir dire process seeks to root out. Therefore, using carefully thought out scaled questions will ultimately assist in saving peremptory challenges and choosing a more favorable jury for the attorney's client.

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