New York Law Journal

JURY SELECTION: The Art of Turning Bias Into Cause

By: Ben Rubinowitz and Evan Torgan

Jury selection is often called the most important part of trial. And in many ways, it is. We all want to secure a favorable jury: one that will see the case our way and deliver a substantial monetary award if we are the plaintiff, or a strong defense verdict if we are the defense. But that is an idealistic goal.

The realistic goal of successful jury selection is more tactical: to preserve your peremptory challenges.

In New York, each side generally gets only three peremptory challenges during voir dire. These are challenges you can use to excuse a juror without stating a reason (excluding explicit discrimination). In contrast, challenges for cause are unlimited, but require a clear showing that the juror cannot be fair and impartial.

If you can convert an unfavorable juror from a peremptory strike into a challenge for cause, you dramatically increase your odds of a favorable outcome. Every cause challenge granted is a peremptory saved—and that strategic preservation can make the difference between winning and losing the case.

THE PRACTICAL

Let's begin with a basic premise: If a juror says, "I can't be fair," that's a challenge for cause. That juror will be excused.

But what if the juror doesn't say it so clearly?

Often, jurors say things like:

- "I think I can be fair."
- "I'll try my best to be fair."
- "I believe I can be fair."

- “It depends on the facts.”

These doubt words present an opening for a skilled trial lawyer. This is where the art of voir dire begins: turning equivocation into a clear admission of bias.

TURNING THE PEREMPTORY INTO A CHALLENGE FOR CAUSE

Simply asking a juror “Can you be fair?” is often the fastest way to lose a cause challenge. It all but guarantees the “right” answer (“Yes”) and cements a record that makes the juror far harder to remove.

The experienced trial lawyer takes a more thoughtful route, leading the jurors to recognize and admit bias themselves. This approach relies not on confrontation, but on analogies, empathy, and logic.

Example: A Tool from 30,000 Feet

Suppose a juror says, “I think I can be fair” or “I’ll try my best to be fair.” Rather than accepting this at face value or pushing back directly, try the following:

> Q: “I noted you said, ‘I’ll try my best to be fair.’ Imagine you and your family are on a plane flying 30,000 feet in the air. The pilot comes on the loudspeaker and says: ‘I think we may be able to land today. I’ll try my best to land.’ You’d be a little uneasy with that, right? Why?”
>
> A: “That’s my family.”
>
> Q: “In the same way, can you understand why my client might be a little uncomfortable with your answer? This is *her life,* on the line.”

That gentle but firm analogy reframes the juror’s uncertainty as an unacceptable risk. The juror now sees the problem and may be ready to admit they can’t be fully impartial, laying the foundation for a cause challenge.

From “Lean” to Cause Challenge

Any lean to one side, no matter how slight, is bias. Almost every juror comes to jury selection with some predisposition; what matters is whether they will admit it. Your goal is to draw out that subtle or unspoken “lean” and turn it into an explicit acknowledgment of bias.

Example: Medical Malpractice Example (Plaintiff Side)

Take for example, a medical malpractice case. While exploring background, a juror says:

A: “My wife is a physician, but I think I can be fair.”

The defense lawyer will be thrilled with that answer. As the plaintiff’s counsel, however, this is a problem. To avoid using (wasting) one of your limited peremptory challenges, you can instead probe, carefully and respectfully, with the goal of transforming a suspected bias into an explicitly stated one.

The wrong approach:

Q: “Can you put aside the fact that your wife is a physician and be fair?”

Or:

Q: “Can you put aside bias and be fair to all parties?”

A: “Yes.”

Here, the plaintiff’s lawyer has unfortunately locked in an unfavorable juror and done the work for the defense: there is no challenge for cause now. By neglecting to explore the juror’s potential bias—including related feelings about malpractice lawsuits, the wife’s struggles and/or challenges in the field, and/or any prior difficulties with the legal system—the lawyer has missed the opportunity to bring existing bias to light.

The better approach:

Q: “I noticed you said your wife is a physician. I imagine she worked very hard to get there?”

A: “She sure did.”

Q: “I hope you understand, but I have to ask some further questions: has she ever spoken to you about friends or colleagues who’ve been sued in malpractice cases?”

A: “Yes, she has.”

Q: “Can you tell us about that?”

A: “One of her colleagues has been involved in a case that’s been dragging on for years. It’s not fair to the doctor.”

Q: “Sounds like your wife’s colleagues have some strong opinions about these cases?”

A: “Yes, they’ve spoken about it many times.”

Q: “Would it be fair to say, you believe your wife has strong opinions about these cases?”

A: “I guess so, a little bit.”

Pause. Acknowledge. Respect. Don’t be afraid to thank the potential juror for what may seem like a bad answer – if it’s an honest one.

Q: “I want to thank you for your honesty. I notice you said ‘a little.’ Would it be fair to say your wife would lean a little bit in favor of the doctor?”

A: “Probably”

Q: “Based on the fact that your wife is a physician and has expressed opinions about these types of cases, in fairness: do you think you also might lean just a little bit—even ever so slightly—in favor of the doctor in this case?”

A: “Yes. I’d probably lean just a little bit.”

Q: “Can we agree that even a little bit is unfair to my client?”

A: Yes.

That juror is now excusable for cause—and you have saved a preemptory challenge.

Example: Medical Malpractice Example (Defense Side)

Now, flip the courtroom. The defense often focuses on “sympathy” or “empathy” in voir dire. The concern is that a potential juror may be sympathetic to the plaintiff and vote in their favor not because of the evidence, but due to external emotional factors.

Suppose, for example, a juror says: “I think I can put sympathy aside and be fair.”

Wrong approach:

Q: “You understand you can’t let emotions influence your decision?”

A: “Yes.”

Here, the defense attorney has failed to probe further, thereby missing the opportunity to test whether that sympathy will in fact color the juror’s ability to remain impartial.

Better approach:

Q: “I noticed you said you’d try to put sympathy aside. Why do you say ‘try’?”

A: “Well, it’s hard. This is a sad case.”

Q: “Of course. These facts are emotional. That’s understandable. But do you think, deep down, that might affect how you view the case?”

A: “Maybe. A little.”

Q: “Would it be fair to say you might lean, even slightly, in favor of the plaintiff because of that sympathy?”

A: “Possibly.”

Q: “Would it be fair to say that’s not quite impartial?”

Q: “In fairness that would be like starting a race with one foot over the starting line, right?

A: Yes.

You’ve now moved from a vague “I’ll try” to an express admission of bias—opening the door to a cause challenge without using a preemptory.

CONCLUSION

This is the art of voir dire. You don’t just identify bias, you lead jurors to recognize and admit it themselves. You use analogies, respectful follow-ups, and logic to bring existing leanings to the surface. By using the voice of reason and appealing to honesty and logic, you preserve your preemptory challenges, protect your client, and put yourself in the strongest position to win your case.

Ben Rubinowitz is the managing partner at Gair, Gair, Conason, Rubinowitz, Bloom,

Hershenhorn, Steigman & Mackauf. He is also the immediate past Chair of the Board of

Trustees of the National Board of Trial Advocacy (NITA). BBR@gairgair.com

Evan Torgan is a member of the firm Torgan Cooper & Aaron, PC. TorganCooper.com;

etorgan@torgancoper.com

James Rubinowitz, the senior partner of Rubinowitz Law assisted in the preparation of this article. James@rubinowitz.com