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Confronting the Immigration Bias in Jury Selection

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It goes without saying that a thoughtful and well-planned jury selection is critical to the success of your case. When jurors walk into the room for jury selection, they bring with them years of attitudes and beliefs shaped by, among other things, family, politics and the media. While a trial lawyer may have great confidence in his powers of persuasion to overcome these long held beliefs, the reality is that most jurors, although well intentioned, will evaluate the facts through their life experience. Indeed, many trial lawyers contend that a case can be won or lost during jury selection. They argue that your success in identifying and weeding out those jurors who have a prejudice against your client or his cause will determine the fate of your case. Although trial lawyers have no control over who will be called as a potential juror, the trial lawyer does have the ability and responsibility to identify and, hopefully, remove those jurors who cannot be impartial or those who start off leaning against your case.

Peremptory Challenges

From a procedural point of view, the real goal of jury selection for the trial attorney is to preserve peremptory challenges. In civil cases in New York each side is allowed only three peremptory challenges; however, each side is allowed an unlimited number of challenges for "cause." The rationale for this is that to the extent a juror admits that he or she cannot be fair, the court is duty bound to exclude that juror. The exclusion of a juror for cause is generally left to the sound discretion of the trial court and not reversible. As the Court of Appeals has made clear, "the 'worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror'." See *People v. Johnson*, 94 N.Y.2d 600 (2000). To the extent the trial lawyer can turn what would otherwise be a peremptory challenge into a challenge for "cause," he has significantly increased the odds of getting a more favorable jury and one that will return a more favorable verdict. The techniques used in questioning the potential juror, exposing bias or prejudice, and turning a peremptory challenge into a challenge for cause is the real "art" of jury selection.

Given the time constraints in which jury selection must be conducted, jury selection must begin with a fundamental question before the attorney ever steps foot in the courthouse: What are my greatest fears? Or, put another way: Who can I not live with on my jury? While not all issues can be addressed during jury selection, those that are appropriate for inquiry should be dealt with head-on.

Questioning Jurors

Once the trial lawyer has created a list of her most troubling concerns and fears, careful consideration must be given to the manner in which those issues are dealt with during jury selection. To the extent the lawyer asks only leading questions, she will never discover the juror's true feelings. Conversely, to the extent a lawyer asks only open-ended questions, she may not be able to secure much needed assurances from the prospective juror(s). Careful use of both leading and open-ended questions can pave the way for insightful answers and, ultimately, confirm the prejudice of a juror for a "cause" challenge thereby preserving a peremptory challenge.

Consider, for example, a case in which the plaintiff, a 35-year-old married man, was injured at a construction site when he fell from a scaffold, injuring his elbow and hip. Although liability has been challenged, the real issue in the case is the nature and extent of the injuries sustained.

While this might seem like a typical Labor Law §240 case, it is not. The plaintiff, Mohammed Hallan, is a Muslim immigrant from India with a heavy accent and his wife, Yolanda, is an immigrant from Mexico. Given today's highly polarized political climate with respect to immigration, the trial lawyer has a choice: He can ignore the "immigrant" issue altogether, or he can address the issue head-on during jury selection and work to determine whether any bias or prejudice exists that might affect the outcome of the case. To the extent the trial lawyer puts his head in the sand and ignores the "immigrant" issue altogether, he has left to chance an issue that cries out for discussion. He has further squandered an opportunity to learn about the jurors' attitudes on a thorny issue and potentially wasted an opportunity to turn what would be a peremptory challenge into a challenge for cause. It is the lawyer who has taken the time to prepare and create a well thought out set of questions designed to gather information, expose and confirm bias that will be in the best position to preserve peremptory challenges by turning them into challenges for "cause."

No Easy Outs

Obviously, in the scenario outlined above, the concern and fear is that a juror may be prejudiced or biased against immigrants, Muslims or Mexicans. One of the worst approaches a trial lawyer could take when dealing with this potential problem area is to inquire about the issue and then offer an easy out for the potential juror:

Q: Who here has any concerns about immigrants?

A: I do.

Q: What concerns do you have?

A: I feel they are taking our jobs.

Q: Having told us that, can you put those feelings aside in this case and be fair?

A: Sure.

The question: "Can you put that (issue) aside and be fair" is one of the worst questions that can be asked when trying to excuse a juror for cause. Conversely, it is one of the best questions when trying to rehabilitate a juror or prevent a juror from being excused based on bias. The problem with this type of questioning is two-fold. First, asking "Can you put those feelings aside in this case and be fair" is a leading question that does little to inform you about the juror's true feelings. Second, the question virtually forces the juror to answer in the affirmative for fear of

being seen as less than fair or biased by the remaining jury pool. The question merely seeks confirmation, which undermines any chance for a challenge for "cause." Since the concern is that the juror will hold a bias against your client, the better approach is to make careful inquiry designed to encourage the juror to express his opinion honestly. After the answer is given, and without passing judgment on the answer, explore the juror's true feelings and see whether or not the juror is biased or leaning against your client.

Approaches

One effective approach to questioning jurors on this thorny issue is to start with leading questions and then immediately follow up with open-ended questions designed to explore the juror's state of mind:

Q: (To the group) Does everyone agree that everybody should be given a fair shake in court, regardless of that person's race, nationality, religion, creed, color or sexual orientation?

A: (All answer) Yes

Q: If you notice, I said "should" they receive a fair shake. Do they always get it?

A: (One juror speaks up). No.

Here is where the real inquiry begins. Following these leading questions, the attorney should pose additional questions that allow for a thoughtful answer so that an open discussion can take place:

Q: Why not? (or) Why don't people always get a fair shake?

A: Because some people are prejudiced. Some people are never given a fair shake just because of the color of their skin or their religious beliefs.

One of the best ways to zero in on the troubling issue is to use the "confessional approach" to jury selection. With this approach, the trial lawyer confesses her fear or concern and then discusses it with each juror. With this approach, the lawyer should reinforce that there are no right or wrong answers to the following questions:

Q: I'll tell you right now, one of the concerns I have in this case is that my client is an immigrant. I am concerned some people may hold that against him. We hear a lot of talk from politicians and pundits about immigration. On the one hand, there are those who feel that immigrants are taking away our jobs and, on the other hand, there are those who feel that our borders should be open to everyone. What are your thoughts about this?

Q: Why do you feel that way?

To the extent the juror says, "They are taking away our jobs and they are not paying taxes," the lawyer should carefully explore bias. First, the inquiring lawyer should thank the juror for being honest and then inquire by leading:

Q: Thank you for your honest answer. Your honesty is really all we ask for. However, given the fact that I represent an immigrant, wouldn't you agree that given your feelings you might be leaning ever so slightly against him?

If the juror says "yes," the inquiry should continue:

Q: And to the extent you are leaning ever so slightly against him, wouldn't you agree he would not be getting the same fair shake as someone who is not an immigrant?

Q: Yes.

Q: And just as you would want a fair shake if you were either a plaintiff or a defendant, wouldn't you agree that you would be better off serving on a case where you were not leaning for or against anyone at the outset?

A: Yes.

With these answers, the juror has expressed a bias that should result in a challenge for cause.

The trial lawyer must always anticipate that his adversary will attempt to rehabilitate that juror and force the attorney to use a peremptory challenge. Before the trial lawyer leaves the topic he should anticipate the attempts at rehabilitation and build up the conviction and courage of the juror:

Q: It is not always easy sharing these beliefs but we appreciate the fact that you did. After I sit down, you may be asked these same or similar questions by my adversary or perhaps by a judge. Will you give them the same answers you have given me?

A: Yes.

Q: Thank you. It takes courage to express an opinion, especially in front of a bunch of strangers, but I appreciate that you have done that. You have helped ensure Mr. Hallan will get a fair shake. Would you agree that, at times, it takes courage to express opinions?

Accentuate the Positive

While the concerns of bias against someone's status as an immigrant are real, the trial attorney can also use jury selection as an opportunity to highlight positive aspects of someone being an immigrant. Although you are not permitted to delve deeply into the facts of the case in jury selection, an attorney can generally discuss the facts and question jurors about their attitudes. Highlighting the fact that your client came to the United States at a young age, knew nobody and had to work hard to make a living is a theme that can turn potential negatives into positives.

Q: One of the things that you will learn is that Mr. Hallan came to the United States alone when he was 19, knew nobody but immediately began working in construction to support himself. Do you have people in your family or any friends who came to the United States from another country?

Q: Do you have an understanding of what that experience was like for them?

Q: Tell us about that?

Q: How do you feel about people who decide to move to the United States to work and live?

Q: Do people who make that decision create any concerns for you? Why not?

Here, the trial lawyer has explored the issue of immigration in a positive light and turned what could be considered a fear into a strength of the case by emphasizing hard work and courage.

Another approach a trial lawyer can take to gain a better understanding of a juror's potential bias is to explore where and how the jurors get their news. Cable news shows and talk radio often present strong opinions and viewpoints that can impact a juror's thoughts on hot button issues like immigration. Learning what shows or networks the juror watches may reveal a great deal about their attitudes and beliefs. After exploring the source(s) of news, the lawyer should explore the juror's feelings about current events as they relate to central issues in the case. Rather than telling the jurors what your concerns are you can explore bias as it relates to immigrants by posing provocative open-ended questions and then asking pointed leading questions to weed out those jurors who might be biased.

Q: One of the things we have heard in the news lately concerning immigrants is the statement "Build a Wall." What does that statement mean to you?

To the extent the potential juror does not offer an insightful answer, a similar question with a slight variation might be put to the juror:

Q: Recently, a statement made by our President has been in the news. The statement is "I'm going to build a wall." On the one hand some people argue that is a good idea because it prevents certain people from coming into this country illegally. On the other hand, some people argue it's a bad idea because we should be building bridges, not walls. Given those two differing points of view which side do you favor?

Q: Why do you feel that way?

To the extent the juror answers "I favor building a wall," the lawyer should find out why the juror feels that way. Questions should be asked of the entire panel to find out which other jurors share those same feelings.

Q: (To the juror) Thank you for your honesty. (To the group) Who else feels that way?

Once the attorney knows who shares that same sentiment, questions should be asked individually with leading questions to try and turn peremptory challenges into challenges for cause:

Q: Given that you feel that way about immigration, wouldn't you agree, in fairness, that you are leaning against my client?

A: No, I can be fair. I will keep an open mind.

Q: I appreciate you saying that but I am still concerned that Mr. Hallan may not get a fair shake. Look at it this way. You are wearing a bright blue shirt. Suppose I said "I can't stand people who wear bright blue shirts. But I can be fair." Would you want that person on your jury if you brought a case?

A: I guess not.

Q: The reason you say "I guess not" is because you would be concerned that person, despite their best efforts, may bring certain prejudices against you to the case?

A: Yes.

Q: Given your feelings about immigration, can we agree that this might not be the right case for you to sit on as a juror?

Q: That you may be leaning—even to a small degree—against Mr. Hallan?

On the other hand, to the extent the potential juror favors open borders, questions should be asked to ensure that the juror will, in fact, render a fair verdict without any leaning one way or another:

Q: You just told us that you favor open borders. While this is not a symposium on political values and views, immigration is an important issue in this case. Can we have your assurance that if you are selected you will ensure that everyone—both sides—will get a fair shake?

Q: Would you agree that the case should be decided on the facts regardless of whether or not someone is an immigrant?

In addition, when you receive answers from a potential juror that you like, it is important to reinforce those answers by looping in other jurors and asking if they agree:

Q: Mr. Jones just told us that he favors an open border and that the case should be decided on the facts, regardless of someone's status as an immigrant. Do you agree with him?

Q: Tell us why.

When a trial attorney is faced with a potentially divisive issue such as immigration, the attorney must confront the issue head-on in jury selection. While some attorneys may wish to steer clear of the issue, the thoughtful trial attorney will leave little to chance. Preparing a thoughtful and methodical voir dire of both open-ended and leading questions will expose and confirm the juror's bias or prejudice. In doing so, the trial attorney is well on her way to excusing the juror for cause and saving the limited, but crucial, peremptory challenge.

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