

## Identifying Susceptible Jurors

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**V**oir dire can be valuable to a defense dealing with dramatic and disturbing pictures, and time spent considering your voir dire options, often proves to be time well spent.

# Utilizing Voir Dire to Address Challenges Presented by Horrific Images of Fire Casualties

Over the years we have been confronted with the question of how to deal with the horrific images of plaintiffs injured in fires or tremendous explosions. When handled with finesse by plaintiff's counsel, these images are powerful,

and our research has shown that they influence jurors on issues of liability, as well as compensatory and punitive damages.

Relying on preclusion of the pictures by the court or mishandling of the images by plaintiff's counsel are risky strategies for the defendant. It is also true that we have yet to see a single magic bullet or one approach that will mitigate the effect of these images in every case. However, we have found several approaches that should be considered in developing voir dire and overall case strategy. Case facts,

venue characteristics, and local court rules will affect whether and how any of these approaches might be applied, but as a general matter, we have found it useful when shaping the defense strategy to consider the following:

- 1) Do the pictures present an opportunity to measure the degree of emotion that certain jurors bring to the case and to focus cause challenges on those jurors when appropriate?
- 2) Can the pictures be used as a vehicle for addressing the emotions that jurors



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and counsel will undoubtedly bring to the case?

- 3) Can the pictures be used to provide a teachable moment to help jurors gain self-awareness about the power of the pictures and the work that it takes to move from impulsive, emotionally driven decision making to evidence-based and law-based decisions?
- 4) Can the pictures be used to inoculate the jurors by dissipating the emotional power of the initial viewing?
- 5) Can the pictures be used to highlight the questions that the pictures do not answer?
- 6) How can the images be used to show the jurors that the causation question that they will be asked to answer is more complicated than the plaintiff would have them believe?
- 7) Will the plaintiff's use of the pictures and jurors' emotional reactions expose plaintiff's counsel to questions about his or her credibility by heightening jurors' suspicions about being manipulated?

Each of these potential voir dire strategies is discussed briefly below.

### **Can You Use the Pictures to Measure Jurors' Emotional Responses to the Case and Focus Cause Challenges on Appropriate Jurors?**

It goes without saying that careful observation of jurors' responses to viewing the images is the first line of defense in understanding how the images will affect their decision making. Some nonverbal responses are obvious and should not be ignored. Other responses are more difficult to interpret, or they will be entirely masked and require expert observation. Even then, nonverbal cues should be taken with a grain of salt. Not all people wear their emotions on their sleeves, and interpreting facial expressions and other body language can lead to false impressions. It is also important to get beyond jurors' initial reactions to the images because these may change as the trial progresses.

Understanding how jurors react emotionally in their daily lives will put your voir dire on more solid ground, although getting to this level of personal understanding of the jurors is difficult in voir dire because it requires indirect methods. One method that we have found useful for

uncovering jurors' emotional tenor is to ask them about how they have dealt with difficult events in their lives.

*This case is about a difficult event in the lives of the people who experienced it. Most of us have had difficult events in our lives and it is important for everyone here to understand what difficult experiences you have had in your life, how you felt at the time and how you worked through the situation. Mr. Peters, would you mind getting us started? What difficult situations have you experienced in your life?*

In a typical voir dire, a wide range of events will be recalled, some more emotional than others. Most of the stories will be outside the range of normal, everyday experience, such as the stories behind the images that they will experience at trial. During voir dire we have heard a wide range of stories about serious plane, boat, and car accidents; sudden or violent deaths; and criminal events, including those involving domestic violence. The content of the stories that jurors share, their emotional intensity in relating their experiences, and how, in the end, they dealt with the situation, all go into assessing how they are likely to react to the images in a case and the case in general. Looking back, how do they feel about the experiences? How much residual emotion has been carried forward? Did the experiences work to make them stronger people, or do they feel victimized by what happened?

In addition, your reactions to the stories that this question and the logical follow-ups will illicit can also be useful for connecting with jurors and for determining the degree and nature of their emotional responses when faced with emotion-provoking situations. People do not change when they enter a courtroom. They are the same people before and after they walk through the front door. Understanding who jurors are as people, and how they deal with and process their emotions in the real-life circumstances that they have encountered, are paramount goals of voir dire in cases that provoke emotions that can harm the defense.

Assessing how emotional a juror tends to be generally and the degree of emotion created by viewing of the trial images specifically can become a springboard to a cause challenge. For example, the pictures can be used as the premise for the question,

"Having seen no evidence other than these pictures, right now do you feel that the plaintiff should be awarded at least enough money to cover her medical expenses?" This question tends to draw out plaintiff-leaning jurors, and their responses may in and of themselves be sufficient to support a cause challenge.

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### **Can You Use the Pictures to Address the Emotions that Jurors and Counsel Will Bring to the Case?**

Even without horrific images, many cases carry a high degree of emotion. Moreover, jurors bring with them a variety of emotions related to the factual content of the case. Both the court's preliminary and final legal instructions remind jurors that they should put their emotions aside and decide the case exclusively on the evidence and the law. Of course, this is easier said than done, especially when the jurors are given little or no instruction on how someone is supposed to separate and exclude the influence of emotion. This challenge is only exacerbated when plaintiff's counsel is permitted to introduce gruesome images of burn or explosion injuries.

Ignoring the potential emotional effect of the plaintiff's evidence is wrought with danger to both the substance and credibility of the defense. It is important to consider what you will say to jurors about the sympathy and compassion that they feel and that you and your client feel for the

pain that the plaintiff and family members have and will experience. It is also important to acknowledge how difficult the work that the jurors will be asked to do will be.

As you develop your short statement for the start of your voir dire, consider whether the pictures (which presumably have already been shown by the plaintiff) might be used to speak sincerely about the emotions that you and your client bring to the case and the work that you are empowering the jurors to perform. We have heard statements that are cold and insincere, sounding more like an inconvenience than an opportunity, and we have heard statements—generally delivered after a good deal of preparation and practice—that are sincere and less prone to juror cynicism. Can you acknowledge the power of the pictures while turning jurors' attention to the value of doing the work that it takes to test continually whether a juror has succeeded in making decisions that have not been unduly or unfairly influenced by the pictures?

### **Can You Use the Pictures in Teachable Moments to Help Jurors Gain Self-Awareness and Make Evidence-Based and Law-Based Decisions?**

Nobel Prize winner Daniel Kahneman in *Thinking Fast and Slow* identified the power of fast, impulsive, biased choices (Brain's System 1) over slower, data-based, objective decision making (Brain's System 2). In short, the emotional tail wags the rational dog, and it takes self-awareness, time, and effort to allow System 2 to exert its influence.

Consider using the pictures during voir dire to help jurors gain a degree of self-awareness about the emotional power of the pictures and the work that it takes to avoid making an impulsive, emotionally driven decision and to be able actually to make an evidence-based and law-based determination. Ask the jurors to think of themselves as standing in front of a mirror that reflects back the strength of their feelings in different colors, from cool blue to red hot. We have found that most jurors find it easier to admit how they feel using colors instead of words. As they look at the images of the injured, and feel those emotions, can they consider what really

happened here? How much of what happened was an accident that could not be prevented? How much, if any, responsibility does the defendant have for what happened? Such questions can be the start of a series of questions leading to a strike for cause.

### **Can You Use the Pictures to Inoculate Jurors Against Their Emotional Power?**

Repeatedly viewing horrendous images can have a numbing effect, reducing the shock that is felt on the initial viewing. In the Rodney King case in Los Angeles, for example, we found that the more the jurors saw the police officers surrounding King and beating him with clubs, the less emotional effect the film had on their decision making. See Louis Genevie, *The Key to the Desired Verdict*, National Law Journal, June 9, 1992, available at litstrat.com. This psychological process plays out in trials and in many real-life situations in which people see death and destruction, such as in hospitals and war zones. It is a powerful dynamic that can be extremely useful for the defense.

Although this emotional acclimation process is real, it is often a difficult strategy to enact at trial with the day-to-day limitations that are dictated by trial process and procedures. Furthermore, people process emotions in different ways and with different timing. Some people may process the emotions that the images in your case elicit quickly, relegating them to the cognitive background in a few minutes. Other people may take longer and may need to see the images more often to experience the dampening effect.

When and how often to show the images, and under which circumstances, is case specific and should be a continuing consideration that begins before voir dire, continues through the plaintiff's voir dire, and is made in real time as your defense voir dire and opening unfold.

### **Can You Use the Pictures to Highlight the Questions that the Pictures Do Not Answer?**

The relevance of pictures to the actual issues in a fire case is usually minimal, at least as far as the defense is concerned. Nonetheless, many jurors find them very

important, and certainly the plaintiff's attorney will highlight them. Arguing against their importance to jurors is often a difficult obstacle to the credibly hurdle and should be avoided. Instead, consider whether it would be useful to refer to the pictures while raising some of the questions that the jurors will be tasked to answer—answers that are not provided by the pictures no matter how long or how often they are shown. Looking at the pictures, for example, you don't know the basics. What happened? When did this happen? Who was involved? Why did it happen? How, if at all, are the pictures connected to your client?

The images can also be a taking off point for pointing out what the plaintiff is required to prove:

There isn't going to be a debate that people were injured in the situation. That is a given. If that was all that the plaintiff had to prove, we could all go home right now, but we can't. That's because there is so much more that the plaintiff must prove, and prove with strong evidence, including why the accident occurred and who, if anyone, is responsible for causing it.

### **Can You Use the Images to Show that the Causation Question Will Be More Complicated than the Plaintiff's Counsel Contends?**


The accused product or alleged wrongful conduct is at the beginning of the causal chain, and the pictures are at the end. Plaintiffs often hope that jurors will jump right over the middle and use the dramatic pictures to induce them to not sweat the details of the causal chain.

Plaintiffs use the powerful images to establish a sense of the inevitable. That is to say, for example, the defendant made the product, or the defendant failed to protect, and the injury was the inevitable consequence of the use of the product or conduct of the defendant. The defense should consider the various gaps and different paths that challenge this simple uninterrupted line and use the images to highlight the various factors that make the narrative much less cohesive and continuous than a plaintiff's attorney suggests.

For example, in a case involving a tragic home fire that alleged failures on the part

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of the city building department to require the requisite licenses, several questions existed: If there was a lack of licensing, was that a reason that adequate alarms were not yet installed at the time of the fire? How did the fire start and spread? Would alarms have made a difference to the victims? Did the conduct of others cause or interfere with the safe evacuation of the premises? Real life is often messy and more complicated than a simple one-step narrative from bad conduct to horrific burn pictures. However, there is not a lot of room between complications and excuses, and the defense needs to stay vigilant about presenting a credible causation narrative for the injuries.

during the voir dire is one tool available for identifying jurors who are particularly susceptible to being swayed by sympathy, anger, anxiety, fear, or another powerful negative emotion, which may be exacerbated by viewing what are often horrible images. Voir dire can also be an opportunity for important teaching about the dangers of failing to heed the court's admonition to set emotions aside and judge the case based on the evidence and the law. While not a panacea, voir dire can be valuable, and time spent considering your voir dire options, crafting your approach, and testing and practicing your delivery often proves to be time well spent. 

### **Can You Take Advantage of a Plaintiff's Counsel's Overuse of Images to Harm His or Her Credibility?**

Plaintiff's overuse of images can invite skepticism on the part of jurors who do not appreciate any attempt to manipulate them through emotional pleas. This is not something that can be addressed directly by defense counsel, nor is it necessary. Rather, an unwavering focus on sympathy for the injured and the links in the causal chain that the plaintiff would like to avoid works best. Observe jurors' reactions to the images carefully and trust the jurors to see through attempts to manipulate through emotions rather than persuade through evidence. During voir dire jurors may give clear nonverbal cues in body language and facial expressions about their assessment of what the plaintiff's counsel is trying to achieve with the images.

### **Conclusion**

There is little doubt that gruesome images of injured plaintiffs in burn and explosion cases have a profound effect when viewed by jurors. Moving to exclude evidence that is only marginally relevant at best and highly prejudicial or limiting its use at trial is an option that should be exercised. But should such motions fail, as they often do, identifying, mitigating, and managing the emotional responses of jurors becomes one of the critical challenges at trial.

Depending on the voir dire practice in a given court, the connection and interaction that the defense has with jurors