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BUILDING CHALLENGES 'FOR CAUSE': PRACTICE POINTERS FOR IMPROVING YOUR JURY POOL

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INTRODUCTION

Partiality on important issues related to both civil and criminal cases exists, in every jury pool, and, within most every juror. Most adults have formed some opinion or perspective that favors some litigants and disfavors others. Indeed, the absence of any partiality, in an individual, often reveals an absence of connection – intellectual and emotional to the world.

Certainly an effective jury system requires engaged individuals connected rationally and emotionally to the issues that surround them. Yet an effective jury system also requires jurors who are impartial towards the parties and the issues that they try. A motion for cause is the only real tool available to judges and attorneys seeking to diminish significantly the partiality, in their pool, of prospective jurors. The successful use of the cause process is the best way of improving the venire and creating a situation where there may be sufficient peremptory challenges to at least remove the opposition leaders from the panel.

Unfortunately, the 'for cause' process that takes time and commitment and is often neglected or avoided by judges who, instead, rely on the attorneys' use of peremptory challenges to remove the most partial jurors from the pool and their own instructions to focus and constrain the remaining jurors. However, the idea that partiality can be corrected or controlled is more myth than reality.

Research has consistently shown how difficult de-biasing is generally, and, specifically, how ineffective legal instructions are when used to limit or constrain a variety of juror predispositions. For example, according to Neil Feigenson, a professor of law at Quinnipac College of Law and a research affiliate in the Yale University Department of Psychology: "...research indicates that jurors have a hard time 'de-biasing' or correcting for the biases to which their intuitive habits of thought lead them, especially when, as is typically the case, they are unaware of the magnitude of the bias and lack a set of procedures for avoiding its improper influence." ***See*** NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 44 (APA 2001). As a result, juror biases including, but not limited to, hindsight bias, have been shown to be somewhat "impervious" to legal instructions aimed at de-biasing. ***Id.*** at 105 (citing Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998)).

In trial, judges and lawyers ask prospective jurors, if they can be fair by putting aside their preconceptions and assessing cases on the

evidence, without sympathy or bias. Jurors are essentially asked to self regulate and control or 'put aside' their rational and emotional partialities. Most prospective jurors, with all good intention, say they can be fair and objective. Most do, in fact, try hard to do so; but the notion that strong feelings and opinions can be suspended, during a trial, is an unrealistic expectation. It is important for the process, and, for the litigants, to try to ferret out those jurors who commence the trial process with strong and long-held feelings or opinions that have created a partiality or even the appearance of partiality. The jury system does not accept such partiality or its appearance, in judges of law, and should not do so with respect to judges of fact either.

BEYOND 'RELATIONSHIP' PARTIALITY

As judges rode the circuits, in the early days of our jury system, they would come into town with little local knowledge. One of the original objectives, of voir dire, was to identify those, in the community, who, through their prior or current contacts with a party, had a 'relationship' bias or the appearance of one. The tradition is continued today with most courts reviewing, with prospective jurors, a list of attorneys, parties, and fact and expert witnesses, in an effort to identify any relationship. Indeed, this inquiry is far too often the sum and substance of the courts, for cause examination. Bias and partiality runs much deeper and is far broader than mere relationship bias.

Few lawyers explore the potential for expanding the 'for cause' process, nor do they practice their approach to building cause challenges, an essential skill for forming the best jury possible from the venire. Time is often a limited resource at trial and building a cause challenge takes time. Efficient cause building requires practice and a clear sense of how to begin and then conclude the cause dialogue with the juror. Handling cause challenges, especially in the context of a voir dire that is designed to be open and conversational, is not an easy task. It is a challenge that requires more than a fair amount of finesse and practice.

As with the voir dire, and, the jury selection process in general, an important initial step with respect to building cause challenges is detailed knowledge of the local practice and the past practices of the presiding judge. Doing homework to become familiar with the precise language o the statute dealing with bias and strikes, for cause in the venue, is an important initial step. In this respect, the insights of local trial tested counsel can be invaluable.

While the wording of the 'for cause' statutes varies by state, the basic idea is the same: a pervasive, long-felt belief that evidences a biased state of mind. Prior to trial assess the trial judge's familiarity, with the relevant statute, and consider putting the statutes and how they should be applied in a pre-trial bench memo to the judge. The court's pre-trial order may invite proposed voir dire questions providing another opportunity to highlight potential areas of case specific bias.

In addition, the judge's standard practice may not be suitable for certain high profile cases. When preparing for such a case, it can often be important early in the process to ask the court to plan to bring in a substantial pool of jurors. This is very important because the judge's flexibility in agreeing to strikes for cause is greatly influenced by the number of jurors in the pool. Judges are very adept at rehabilitating jurors and are reluctant to excuse jurors, especially if there is a shortage of available jurors in the pool. In this regard, impressing upon the court the need to bring a large enough pool to take into account bias and hardship, in the venire, may take some of the pressure off the court to rehabilitate jurors.

Part of this process, of eliminating jurors for cause, is sensitizing the court about the nature and extent of the bias in the venire. Although a motion, for change of venue, will likely be denied it can provide the court with tangible proof of the existing bias and alert the judge to the bias problem.

A questionnaire can be useful in this regard, especially if the questions are open ended and directed at identifying strong feelings and biases. Judges respond more favorably to statements that jurors make on their own, with minimal prompting from counsel. If you have anticipated the questions and legal instructions that the jury will probably be given beforehand, it will be helpful to find ways to create bias-seeking questions that go to the legal questions jurors will be asked to decide. To accomplish this focus on questions that are directly related to the verdict form and turn them into issues to which the juror can relate to his or her personal experiences and, thereby, if it exists, reveal bias. Formulate the questions, in the broadest way possible, to optimize the number of affirmative responses.

A pre-trial juror questionnaire can also be useful in creating an opportunity for winnowing down the pool of prospective more 'impartial' jurors in advance of the oral voir dire. If designed, administered and analyzed effectively, the pre-trial juror questionnaire can assist both counsel and the court in conducting a more efficient and effective voir dire process.

The pre-trial juror questionnaire also creates the possibility for exploring and negotiating hardships or cause challenges, with the other side, in advance. Before engaging in such negotiations, it is important to understand not only the law, but how the judge interprets it; know the details of the procedure the court will use to sit jurors. For example, how many jurors will make up the venire? What order will they be seated, when entering the courtroom? What order will they 'fill the box"? How will replacement jurors, for those excused for cause or hardship, be selected and seated? Understanding every detail of the process, before the voir dire begins, is crucial for a successful negotiation and voir dire.

SECURING CAUSE CHALLENGES

Once the oral voir dire starts, the level of difficulty of securing cause challenges is high; prospective jurors bring strong social norms like fairness and the desire to be accepted to the voir dire process. Attacking the juror, or even appearing to attack him, will usually create resistance, in that juror, and in others in the venire as well. Instructing the jurors, on the legal difference between fairness and impartiality, in a simple and non-threatening manner, is an effective way of allowing jurors to learn the concept of partiality and identify potential feelings and experiences that have created a partiality for them.

Each of us believes we are fair, and, jurors are no different. Having them commit to the concept of being fair has little positive value. Impartiality, on the other hand, is a concept that jurors can relate to more readily, since there are numerous personal examples of situations in which we recognize a predisposition or preference. The following statements and questions can identify biases, without appearing to attack the jurors:

- Can anyone explain the difference between being fair and being impartial?
- Well, let's try the other side of that coin: What does it mean to be partial?
- So, for example, who here prefers chocolate ice cream and who prefers vanilla?
- Now who has little interest in ice cream at all?
- Well, those of you who have no interest in ice cream have no preference for chocolate or vanilla ice cream....that's impartiality.

The same type of questioning can be used with sports teams, or TV shows, or vegetables. Once the concept of impartiality is taught, it becomes important to link back to the jurors' job, as impartial judges in this case, and the need to discuss, in the voir dire, any feelings or experiences they bring to the specific case that may indicate a partiality.

Many jurors will identify a predisposition or feeling but claim they can 'put it aside', during the trial or once they hear the evidence. It is important to recognize that the statutes often speak about how jurors start the process, not what they may or may not be able to do during the trial process. Neither party should have to bring jurors to an impartial position; the trial should start with impartial judges.

Hence, asking jurors how they feel, at that moment, and what brings them to that point in time, rather than what they may or may not be able to do about their feelings and preloads during trial or in response to the judge's instructions, is a key question in building cause challenges. Many jurors try to slide by their partiality by saying they need to hear the evidence. You can respond by refocusing the question: "Of course you do, but that is not the question, at the moment. The question is how do you feel right now, before you've heard any of the evidence?"

We have seen many attorneys use the analogy of a foot race asking jurors, if their client is starting behind. Invariably, this leads to discussions of burden of proof on what has been heard so far during the voir dire; neither is useful to the cause discussion. We suggest staying more directly on point by asking about partiality at the start and probing the basis and strength of that exposed preference. However, if there is "magic language" that the specific court expects to hear, in order to evaluate the cause challenge, then know it and use it in your questioning.

While the process of building cause challenges may start with some general or survey type questions of the panel, it should fairly quickly move into a more conversational and individual mode focusing on individual jurors. In this regard, try to use open-ended information seeking questions rather than closed ended cross examination type questions. Closed ended questions that ask jurors for a yes or no response are less effective in identifying prejudice and are usually viewed less favorably by most trial judges. However, after sufficiently building a cause challenge, close-ended questions should be used to confirm what the juror has already said and limit the opportunity for rehabilitation.

During oral voir dire, except in the unusual situations where the court permits one-by-one individual voir dire, as with all aspects of the voir dire, your sincerity and credibility are being evaluated by all the jurors, in the pool, even as you speak with an individual. Be appreciative

of their willingness to share important information and experiences, about themselves, with you in public. Practice listening to adverse and hostile opinions and to angry or frustrated emotions. The more hostile, adverse, emotionally charged, the more important it is for you to uncover. Being anxious, combative, or resistant to uncovering such thoughts and feelings will interfere with the likelihood of identifying the partialities that you need to find and challenge.

THE ISSUE OF POISONING THE PANEL

Of course, one party's poison is the other side's medicine. Trying to communicate trial themes, during voir dire, is a well recognized voir dire objective. One concern, often heard from trial counsel, is that in an effort to build cause challenges he or she will undercut the effort to communicate trial themes to the panel. While getting biases out in the open may come with some cost, the benefits typically outweigh the risks. It is important to get jurors talking about themselves, their lives and their experiences, especially those related to the case. Keep the conversations, in the courtroom, going by asking if there are other jurors who agree with what one juror has just said, even when it is bad for your case. It is natural to want to move away quickly, when you hear a fact or attitude that does not help your case. Instead, thank the juror for their honesty and really mean it; that is exactly what voir dire is all about. You need to hear the bad; you need to feel the level of hostility.

The good attitudes, feelings and opinions that you would like to hear from everyone only identify your jurors. You want to hear and be able to deal effectively with the negative remarks. If you shy away from negative remarks, they are most likely to occur in the jury room; you won't have to listen to them, but you will see their results.

It is true that panels can be poisoned; however; it is also true that poisoning the panel is much more difficult than most lawyers believe it to be. Consider the assumption of human behavior that panel poisoning is based on: When an adverse statement is made in open court, some jurors either have not thought about or disagree with, these jurors will now form or change their opinion on the basis of what a complete stranger has just said. That assumption, of course, is very weak. Some of the jurors, who already agree with the statement, may experience some level of reinforcement, but the alternative is to remain blinded to biases that can overwhelm your case, which would obviously not be a good choice.

If you are worried, about tainting the venire, consider this: When was the last time the opinion of a stranger changed the way you felt about

anything? Chances are that has not often happened to you and you can bet it will not happen to most people. There may be some mild reinforcement of already held views, but if someone changes his opinion after hearing a perfect stranger speak, he will probably also change it, after the next comment.

An exception to this rule is the situation, in which one of the members of the venire identifies himself as having special knowledge or access about a particular topic, such as a physician who believes that the drug at issue, in your case, has caused problems in his patients. Faced with an 'expert' in the group, it may well be time to ask for a sidebar in order to question such an individual privately and, hopefully, have him removed for cause.

Another exception to the poisoning prospect has to do with the emotional intensity in the voir dire room. A dramatic and emotionally charged answer can energize the room and create greater hostility toward your client than previously apparent; it can also challenge your control of the voir dire process. Such an effect does not occur unless there are simmering emotions that already exist. First, uncovering these emotions is a benefit, not a cost of voir dire. Second, be prepared to embrace the emotions, regain control, and use it as a teaching moment on the challenges and importance of impartiality.

The process of building cause challenges does not come without risk. While it is always sound voir dire practice to try to avoid identifying jurors you feel have an orientation favoring your side of the case, engaging in a cause-type inquiry may well uncover both jurors with adverse biases and with favorable biases.

If you have uncovered one of *your* jurors and it becomes apparent that the juror is going to be challenged or struck, it may present a good opportunity to use that juror as a *partner* in a dialogue that allows you to develop some of your communication points. Draw out as much favorable information, as you can, about this kind of juror. While you may lose a favorable juror to a peremptory challenge, that juror's story, interesting and credibly told, may provide important insights to other prospective jurors with little or no comparable experience or at least serve to reinforce positive attitudes in the venire.

Uncovering favorable jurors also raises questions regarding the inoculation of jurors. Jurors can often be trained to parry an adversary's cause challenge. Such inoculation includes walking *your* juror through the process of agreeing to their ability and willingness to:

- judge this case on the evidence presented here;

- place sympathy and bias aside;
- follow the judge's instructions;
- be confident that they can be fair and impartial in this matter, and
- believe that this is as appropriate, as any case, for them to serve.

Of course, if you work to inoculate your jurors, you are also giving adverse jurors the same playbook, so proceed with caution and wait until you have done all you can to build your cause challenges before anticipating your adversary's.

CONCLUSION

In his book *Theater Tips and Strategies for Jury Trials*, Dr. David Ball observes: "As we use the word today, 'attitude' is a fixed state of mind that shapes opinions and controls behavior. Jurors' attitudes come from their life experiences and inherent personality traits. Nothing during the trial changes a juror's life experiences or inherent personality traits." DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 99 (National Institute for Trial Advocacy 3d ed., 2003).

In many cases, the venire is stacked, with jurors, whose life experiences have created attitudes adverse to fundamental aspects of your case – attitudes that will not, indeed cannot be altered at trial. Failure to identify these jurors and the life experiences and attitudinal lenses they bring to the trial and to find a way to keep them off the jury often results in an insurmountable problem and should be given high priority in pre-trial planning. It is vital, in many cases, that counsel work to create a robust 'for cause' process and confront opposing counsel's and the court's arguments to eliminate, or substantially restrict, the 'for cause' process – arguments which are diametrically opposed to the jury system's fundamental values of fairness and impartiality.