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Asked and Answered

VIEWPOINT: A few simple questions to ask a sympathetic prospective juror can prevent the opposition from utilizing a challenge for cause.

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Most experienced trial lawyers think of voir dire as the opportunity to ask a series of questions at the outset of a trial that, if done just right, will result in a jury of twelve individuals, all of whom are pre-disposed to find in favor of their clients.

Most judges see the process as a technique by which lawyers question potential jurors for far more time than is necessary or reasonable in an effort to gain an improper advantage by prematurely exposing the jury to their opening arguments, and, in some cases, their summations.

Blacks Law Dictionary takes a third approach, defining voir dire as "to speak the truth."

But one thing is certain: A litigator skilled in conducting voir dire gains an edge over one who is not.

All trial lawyers know the "high" of hearing prospective jurors say things that make it clear that they would be sympathetic to the client and then, a few minutes later, experience the "low" of having that prospective juror dismissed when the opposition exercises preemptory challenges.

The best way to prevent opposing counsel from successfully utilizing a challenge for cause is to ask the court for permission to voir dire the prospective juror who is the subject of the challenge for cause. This request will almost always be granted and provides an opportunity to ask leading questions that, if phrased properly, will ensure that even a prospective juror of minimal intelligence will be able to ascertain the "correct" answer and perhaps avoid removal for cause.

For example, in a case involving sexual harassment,

prospective juror number four is Ms. Jones, a woman who says she has been sexually harassed. When asked by defense counsel if she thinks she can be fair to both sides, she responds that in view of the sexual harassment that she herself had to endure, she does not think she can be fair to the defendant.

At that point, defense counsel moves on to the next juror, believing that a major victory has just been achieved, i.e. uncovering a prospective juror who is sympathetic to the plaintiff and laying the foundation for a successful challenge for cause.

When defense counsel finishes voir dire and tells the judge that the defendant is challenging prospective juror number four for cause, plaintiff's counsel should ask for an additional opportunity to voir dire number four.

Counsel should ask the following questions:

"Q: You understand that after the evidence is presented the jurors will be instructed on the law by the judge?"

A: Yes.

Q: And even if you do not like the law or do not agree with the law when the judge tells you the law you will do your duty and follow the law?"

A: Yes.

Q: And if the judge instructs the jury that they must be fair and impartial you will follow that instruction?"

A: Yes.

Q: No doubt about that in your mind, correct?"

A: No doubt."

Most jurors want to be fair, so if the questions are posed in

this manner, jurors will answer in a manner that will avoid a challenge for cause. Of course, the defense will, in all likelihood, challenge number four, but the plaintiff will have achieved a significant victory if the defense side had to use one of its preemptory challenges to get rid of this prospective juror.

What should counsel do if representing the party on the other side of this situation? Assume the same facts, but this time, the information is elicited during the plaintiff's voir dire that Jones has concerns about whether she can be an impartial juror.

Receiving this response, the plaintiff's lawyer asks her in a leading manner whether she can assure both sides that she will follow the law as the judge gives it to her and be fair to both sides. When Jones replies in the affirmative, the plaintiff's lawyer takes a deep breath and sits down, believing number four has now been saved from a challenge for cause.

Defense counsel then stands up, knowing that the most important task will be to figure out a way to challenge Jones for cause without having to waste a preemptory challenge on her.

The voir dire should go something like this:

"Q: Ms. Jones, you understand that the integrity of our legal system depends on having cases decided by jurors who are unbiased?"

A: Yes.

Q: Do you think that even though you will do your best to be a fair and impartial juror to both sides in this case that there is a chance that what happened to you when you were sexually harassed might have some effect on your ability to be fair and impartial?"

A: No.

Q: Please think carefully about my next question and remember that the system only works if each potential juror does their best to answer our questions as honestly as possible.

With that in mind, Ms. Jones, is it possible that when you hear the facts of this case even though you want to be fair, even though you want to be impartial, that you might find yourself tending to lean, ever so slightly, toward a plaintiff who says she was sexually harassed because you yourself were sexually harassed?"

A: I suppose it could happen.

Q: Ms. Jones, my client and I thank you very much for your honesty."

The key to this type of questioning is to personalize it. Counsel should address juror number four by her name, look right at her and talk to her as if no one else is in the room, make her feel that she is doing the right thing by admitting (if that is the case) that she could be a biased juror, and when she gives the desired answer, let her

know counsel appreciates her honesty.

This last gambit makes it more difficult for the defense counsel to question her again and get her to say that despite all of this she can be impartial.

If Jones is like most jurors and wants to do the right thing, this type of questioning could elicit a desirable response that would make her a prime candidate for a challenge for cause.

Some advocates might read this article and wonder which technique is more powerful:

- The "you agree to follow the instructions of the judge" technique used to rescue a juror from an impending challenge for cause, or
- The "won't you lean ever so slightly," line of questioning designed to support a challenge for cause.

The answer generally depends on two things. Does the juror have a strong desire to either sit or not sit on the case? If the juror does have strong feelings one way or the other, then no amount of voir dire, no matter how brilliantly phrased, will overcome that obstacle.

However, if the prospective juror has no strong predisposition, then it all boils down to which counsel is more skilled in conducting voir dire. ■

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