

Select the right jury for your case

Here's how to root out bias among potential jurors during voir dire to strengthen your client's chance of a fair trial.

DAN CHRISTENSEN

In recent decades, the jury pool has changed a great deal, as have most trial lawyers' voir dire techniques. Most lawyers today recognize that identifying unfavorable potential jurors is the most important objective of voir dire. However, what you do to reach this goal should not destroy your rapport or credibility with potential jurors.

Today's jurors are exposed to a constant barrage of media describing a tort system in desperate need of "reform," so concerns that you will contaminate the venire during jury selection are misplaced: Potential jurors have already been influenced by antipointiff messages. Moreover, social scientists have dispelled the idea that a person will abandon firmly held personal beliefs or values simply because a stranger exposes an inconsistent view.

You can use many methods to uncover bias. Select one that reflects your personality and trial demeanor. While there is no right way to address juror prejudices about controversial issues, these tips may be helpful.

Building rapport

To identify potentially unsympathetic jurors, you must have a good rapport with the venire. If the potential jurors do not trust you or do not feel comfortable enough to speak frankly, you will not be able to extract enough information to

identify negative jurors, let alone strike them for cause. Most panel members will be experiencing voir dire for the first time. Being interrogated by an attorney in public about their history, values, and beliefs can make jurors anxious. Try to reduce or eliminate that anxiety early.

Building rapport requires credibility. The key to establishing credibility during voir dire—and maintaining it throughout trial—is to be totally honest. This includes discussing the negative facts of your case during voir dire.

Before sharing worrisome case issues, though, you must relax the jurors enough to make them willing to share their beliefs. Here are some suggestions for doing this.

Show them yours if you want them to show you theirs. Generally, people are more willing to open up to others who have revealed something about themselves. You can share something personal when you introduce yourself and your client. After a few opening words, tell a brief personal story that is tied to the voir dire process.

For example, you could explain that you don't like the taste of a certain food; if the case were about that food, you would not be able to serve on the jury because of your bias against it. Or, you might confess that because this is your client's only chance for justice, you are

nervous and afraid; then share with the jury your biggest fears about the case. No matter how you do it, the object is to humanize yourself and lower the jurors' inhibitions.

Share a few facts. Once you've broken the ice with the panel, explain briefly what the case is about. Psychological studies show that many jurors quickly form opinions of what they think happened, then search for evidence that confirms their beliefs and disregard evidence that is inconsistent with them.¹ Therefore, you should share a few positive case facts with the potential jurors early, while their initial impressions of the case take hold.

When you do this, take care not to sacrifice the credibility you've begun to build. People do not trust those who appear to be selling them something. Your description should be relatively balanced. Do not consciously omit an important fact and give defense counsel the opportunity to reveal it later.

Start with a question that will encourage a response. Get the panel members talking. One way is to begin by asking the entire panel a nonthreatening, simple question to which anyone would have an answer. For example, ask whether anyone knows the attorneys or parties involved. Once you get the group talking, questions posed to individuals may seem less threatening.

Another technique is to ask a potential juror what he or she thinks about "frivolous" lawsuits. If addressing a single juror, the question should be open-ended, not easily answered with "yes" or "no," and not asked in a suggestive manner.

Typical questioning

There are several different ways for you to introduce and discuss a potentially troublesome issue with the venire. Here are a few examples.

Ask a direct question to a potentially unfavorable juror. One way to introduce an issue is to address a question to a juror you've identified as potentially unsympathetic to your client's case. Ask how he or she feels about a certain topic. Because voir dire time is usually limited, focus your efforts on trying to extract bases for causal strikes against the unfavorable jurors.

Target the leaders first. You can try to ascertain whether a potential juror is unfavorable or a leader before trial by looking at juror questionnaires or the juror cards themselves. While demographic data is not foolproof, it can provide some valuable information on which you can make an initial, preliminary judgment.

Ask the entire venire a direct question. If you decide to start by posing a question to the entire panel, ask it in a manner that encourages a response. For example, asking, "How many of us feel . . . ?" or "How many agree that . . . ?" while raising your hand and smiling, will be more effective than simply reading from your notes, "Does anyone think that . . . ?" "Does anyone have a problem with . . . ?" or "Can everyone on the panel promise me . . . ?" If several people raise their hands, note the responses for the record and then ask each juror additional questions individually.

Ask a question posing alternatives. A particularly effective method is to introduce an issue by asking a question that suggests alternative responses. For example, "Mr. X, let's talk for a minute about chiropractors. Some people really like chiropractors and believe they can cure just about anything. Others believe that chiropractors are quacks. Which of

these statements best describes how you feel about them?"

When using this technique, pick a juror you see as being potentially unfavorable and also a leader. When you ask the question, describe the "positive" position that supports your side of the issue using terms that make the alternative less attractive. When you describe the "negative" position, use terms strong enough to set up a causal challenge, but not so extreme that the unfavorable juror would feel uncomfortable adopting such a position. The objective is to

get the unfavorable juror to select the negative stance.

Flush out. Once your target adopts the negative position, firmly tie the juror to it so he or she cannot try to back away later. Then, gently push the juror even closer to the extreme. This not only sets the juror up for a causal challenge, but it also reduces that juror's credibility with others on the panel. Be careful not to push the unfavorable juror so far that he or she recognizes that the extreme stance is ludicrous and tries to backpedal.

After the juror adopts the negative position, thank him or her. The venire members will probably see that this position is against the plaintiff's interest and expect you to be antagonistic. Instead, explain that the jury system is built on honesty and say that you sincerely appreciate this juror's candor. Do this before moving on to any other jurors.

"Loop" to identify other unfavorable jurors. To expand your inquiry, you can "loop" the negative juror's position into a question to the entire venire.² Ask, for example, "How many of us agree with Mr. X that all chiropractors are quacks?" Again, be careful not to go too far: You don't want other potentially negative jurors to back down and adopt a less extreme alternate position.

Occasionally, when you use the "looping" technique, you discover a juror who

takes a more extreme position than the first juror or who has deeper feelings on the topic. When that happens, you may want to loop off at the more extreme position rather than at that of the original juror. The objective is to get as many unfavorable jurors as possible to agree with the most extreme position possible.

"Lock in" negative jurors for causal challenge. While you are flushing out the views of each juror and looping to others, you will want to make sure to lock each unfavorable juror into as extreme a position as possible. You typically will

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not want to establish the causal challenge at this point, but rather simply lock the juror into his or her position. The more solidly you lock the juror, the less chance he or she will escape challenge later and the more comfortable other jurors will be in joining with his or her views.

Turn to positive jurors. Next, you may want to open the discussion to jurors who do not agree with the negative position. Take this opportunity to educate the panel about the case theory on the controversial issue. Allowing the "positive group" to respond to the "negative group" gives you a preview of juror deliberations. Be careful not to spend so much time on this step that you cannot flush out bad jurors on other topics.

Inoculate. If you address the controversial issue with your positive jurors, it is important to inoculate them against defense challenges before moving on. Use leading questions to get the jurors to assure the court that they will evaluate the evidence objectively and follow the court's instructions. For example, if a juror states that he or she suffers from an old back injury and therefore knows it is just a matter of time before surgery

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is necessary, you may want to inoculate the juror against a subsequent defense attack. You could ask, "Even though you know firsthand how painful injuries like these are, can you still follow the court's instructions and require the plaintiff to prove each element of damages, including future medical expenses, by a preponderance of the evidence?"

Causal challenges

Once a juror has admitted a bias, there are many ways to establish a basis for a causal challenge. The method you

use depends in part on the court's procedures. Some courts require challenges to be made when the bias is uncovered. Others will not consider challenges until after both sides have questioned the panel. Typically, challenges are made at the bench with only counsel, the judge, and the individual juror present. Know the judge and his or her preferences before formulating a strategy.

Don't make jurors feel as though they are being cross-examined, manipulated, or persuaded. Ask your questions in a nonthreatening manner.

In certain circumstances, offering a causal challenge in front of the entire venire can be effective. For example, if you believe a juror who has expressed an unfavorable bias wants to be dismissed, you may want to ask, "Given what you have just shared with us, would you mind if I asked the judge to excuse you from having to serve as a juror in this case?" If the juror doesn't mind being excused, other unfavorable jurors who want to go home may follow suit when you "loop" them in with similar questions. This technique is best used when the first negative juror's opinions are strong and you are confident that he or she will agree to being excused in front of the rest of the venire.

Although some potential jurors are eager to provide reasons for the judge to let them go, others will do anything to dodge a challenge. They may reveal attitudes and experiences that indicate bias but refuse to admit that they may favor

one side or be unable to follow the judge's instructions. Pursue these jurors as aggressively as possible without seeming to be "out to get" the person.

One attorney and jury consultant suggests using a story to preface your closing questions. For example:

When my father used to play games with me, he would tell me to go in the corner and not think of a red-faced monkey. I would go in the corner and, no matter how hard I would try, the only thing going through my mind would be a red-faced monkey. Sir, you have told us that you [restate the juror's attitude or experience]. Now, I know you will try

your best to put [the attitude or experience] out of your mind, but because this is such an important issue in this case, would you agree with me that you might be better suited for service on a different case that doesn't have that issue in it? Isn't it fair to say that because of your [attitude or experience], I am starting out behind the defense in your mind?⁵

Another consultant suggests telling the unfavorable juror the following to encourage candor:

Everyone has heard about doing their civic duty by serving on a jury. It can be one of the most honorable things to do as a citizen of this country. Rarely, however, do we hear about the equally important duty *not* to serve. There are all types of cases being tried in this courthouse for which you might be an appropriate juror. But wouldn't you agree that, based on what you have told me today, in this particular case it is probably your duty not to serve?⁶

Keep in mind that it is generally easier to elicit answers that show bias when jurors are seated in the venire than when they are being individually interrogated by the defense or judge at the bench. At some point, however, the unfavorable juror will have to undergo individual questioning. Carefully reiterate your basis for challenge, and guard against efforts by the defense or the judge to rehabilitate the person. For example:

Mr. X, my notes indicate that you said that—regardless of the facts, evidence, or instruc-

tions—while you could award the plaintiff damages for things like lost wages or medical expenses, you just could not give money for something intangible like pain and suffering or mental anguish.

Are my notes accurate?

Did you tell us that because it was the truth? I'm just asking to make sure that I did not intimidate you into saying something that is not the truth.

So if the judge or defense counsel were to ask you the same question, you would answer the same way?

Mr. X, I know you will try to follow the judge's instructions on things like not talking to the lawyers during the case or not deliberating until the case is over. But is it fair to say that you just could not follow an instruction that required you to give money for something intangible like pain and suffering or mental anguish?⁷

Your success in this sensitive part of voir dire depends on your delivery. Do not make the juror feel as though he or she is being cross-examined, manipulated, or persuaded. Ask these questions in a nonthreatening manner.

Occasionally, the judge hampers your attempts to root out juror bias. The court has broad discretion over the scope of voir dire, but that discretion is limited by the litigants' right to a fair trial. Generally a party has the right to question the panel about the alleged liability crisis or tort "reform."⁸ If the court does not allow you to ask potential jurors about these or other important issues, preserve the record by objecting, identifying the matters you need to discuss, and obtaining a ruling.⁹ If the court denies a causal challenge, inform the court before exercising your peremptory challenges that, despite exhausting your peremptory challenges, specific objectionable jurors will remain on the jury. This will properly preserve the error.⁸

Fitting it all in

Many courts limit voir dire to 30 to 45 minutes, sometimes less. Judges are more likely to impose these time limits in cases that involve seemingly routine facts and issues, such as low-speed auto collisions. They often assume that attorneys have little to discuss with potential jurors if injuries and property damage are limited.

In reality, the opposite is true. Cases

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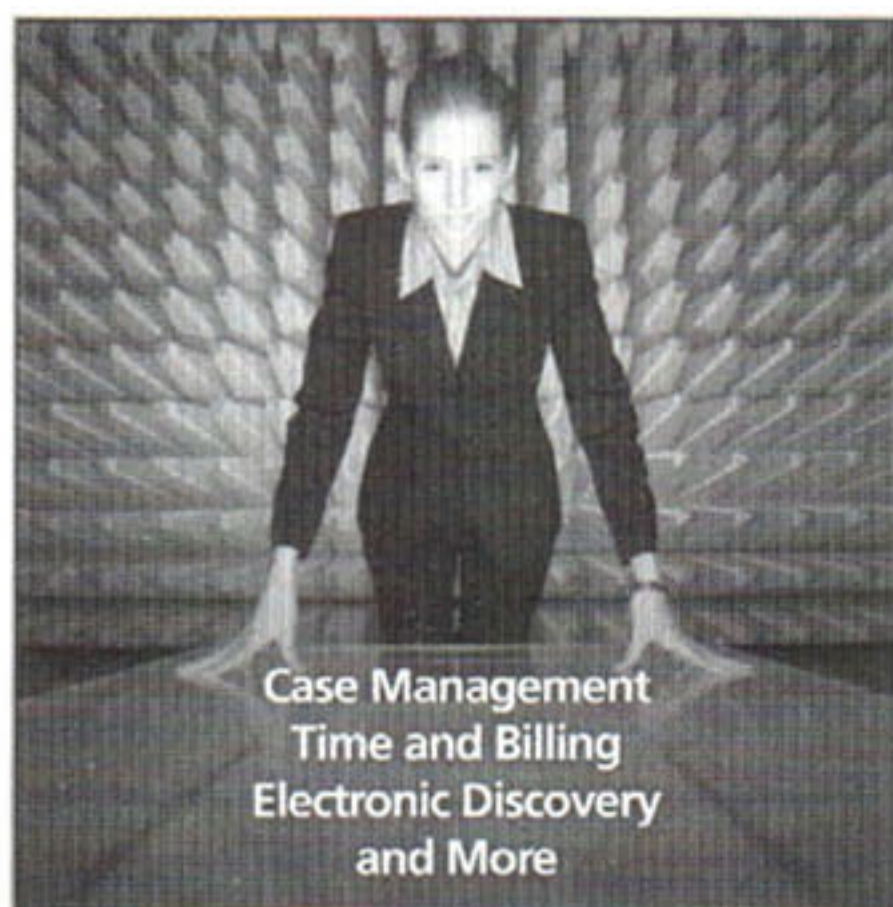
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involving injuries that are difficult to prove and quantify, such as whiplash and pain and suffering, are more vulnerable to juror bias than cases where the injuries are severe and objective, such as quadriplegia and death. If you need more time to conduct an effective voir dire, ask for it,⁹ and provide the judge with a list of the topics you need to discuss, the questions you want to ask, and the controlling case law.

On the other hand, panel members may get bored quickly and become frustrated with inefficient questioning, so always balance your desire to know everything against jurors' limited tolerance for lengthy voir dire. This is especially important in cases involving less severe injuries, which the panel may not see as significant enough to warrant a lot of time.

When time is limited, the following suggestions may be helpful:

- Request permission to use a juror questionnaire.
- Request that the court ask "obligatory" questions, such as whether the jurors know any of the parties, attorneys, or witnesses.
- Ask that causal challenges be made all at once at the end of voir dire.
- Limit introductory comments and case overview to two to four minutes.
- Limit the number of topics you discuss to one topic for every five minutes allowed.
- Ask each juror no more than five questions on each topic.
- Focus on the jurors within the "strike zone" and explain why you are talking more to those seated up front. (If you have a 12-person jury and 6 peremptory strikes per side, your "strike zone" would consist of the first 24 people on the venire. You want, therefore, to concentrate your questioning on jurors 1 to 24, usually seated toward the front of the venire.)
- If you encounter talkative jurors, thank them, tell them you understand how they feel on the issue, and explain that you need to hear from others.
- Introduce new topics by using questions that pose alternatives. This can be an efficient way to frame the issue and elicit useful responses quickly.

The objective of voir dire is not to persuade unfavorable jurors that their beliefs are misguided, but rather to flush out those views and use them as the basis for causal challenges. Once you establish yourself as credible, potential jurors will be more willing to speak openly about their biases. And the more biased jurors you eliminate, the better your client's chance for a fair trial. ■

Notes

1. Studies have shown the presence of a "confirmation bias" within jurors that causes them to search for evidence that confirms their beliefs and either disregard or closely scrutinize unconfirming evidence. Thomas K. Srull et al., *Associative Storage and Retrieval Processes and Person Memory*, 11 J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION 316 (1985).

Other research has also indicated a so-called "belief perseverance bias" referring to jurors' tendency to quickly form a theory as to what happened in a case and then disregard or reject evidence that conflicts with their theory. RICHARD E. NISBETT ET AL., *HUMAN INFERENCE: STRATEGIES & SHORTCOMINGS OF SOCIAL JUDGMENT* 167 (1985).

2. See Michael R. Cowen, *Jury Selection in Connective Tissue Injury Cases*, TRIAL, Feb. 2003, at 46.

3. This example comes from Robert Swafford, an attorney and jury consultant in Austin, Texas.

4. This example has appeared in numerous publications; however, noted trial consultant Cathy Bennett from Dallas was arguably the first person to introduce this technique.

5. This example comes from attorney Robert Swafford.

6. See, e.g., *Babcock v. N.W. Mem'l Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989); *Nat'l County Mut. Fire Ins. Co. v. Howard*, 749 S.W.2d 618, 620-21 (Tex. Ct. App. 1988); see also Richard L. Ruth, Annotation, *Propriety of Inquiry on Voir Dire as to Juror's Attitudes Toward or Acquaintance with Literature Dealing with Amount of Damage Awards*, 63 A.L.R. 5th 285 (1998).

7. See, e.g., *Rohrkaste v. City of Terre Haute*, 470 N.E.2d 738 (Ind. Ct. App. 1984); *Pollard v. Whitener*, 965 S.W.2d 281, 289-92 (Mo. Ct. App. 1998); *McCarter v. State*, 837 S.W.2d 117 (Tex. Crim. App. 1992).

8. See, e.g., *State v. Fletcher*, 341 So. 2d 340, 346 (La. 1976) (requiring that a party must first exhaust peremptory challenges to preserve error for a court's denial of a causal challenge); *Hallett v. Houston N.W. Med. Ctr.*, 689 S.W.2d 888 (Tex. 1985).

9. See, e.g., *Watson v. State*, 693 So. 2d 69 (Fla. Dist. Ct. App. 1997); *State v. Peterson*, 368 N.W.2d 320, 322 (Minn. Ct. App. 1985); *Ratliff v. State*, 690 S.W.2d 597, 600-01 (Tex. Crim. App. 1985).

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