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June 2011 Jury Tip: "Building and defending cause challenges"

In nearly every case, cause challenges during jury selection have the power to make or break your success in trial. An attorney skilled at making jurors comfortable enough to admit their biases and persuading judges to grant cause challenges can dramatically reduce the risk of the jury misconduct that most attorneys inevitably face, while essentially picking up a handful of extra peremptory challenges.

Winning cause challenges can completely neutralize your most dangerous weaknesses. Imagine trying a spilled coffee case and getting every juror who complains about the infamous McDonald's verdict off the jury, without using a single peremptory challenge. At the same time, defense attorneys who are skilled at rehabilitating jurors who have expressed potential biases during the plaintiff's voir dire—or a plaintiff's attorney skilled at insulating pro-plaintiff jurors from admitting to potential biases before the defense voir dire—can essentially reduce the other side's number of peremptory strikes.

Simply put, the best way to cement a challenge for cause is to get a juror to admit that he or she "might have a hard time" or "could not guarantee" being able to "ignore your feelings" or "ignore your concerns" or "abandon your beliefs"—and this last part is essential—"even if you tried your best to be fair."

Let's break that down. First, you must ask questions in a completely non-judgmental way. Your jurors have to feel completely comfortable admitting that they think people who claim to be disabled are exaggerating and could probably work if they wanted to, or that they think corporations are greedy or unethical, or that they distrust insurance companies and assume that they're usually trying to find a way to avoid paying worthy claims, or that it would be wildly unfair to blame or second-guess a doctor who was trying to save a patient's life. These are controversial views, and your jurors know that. They'll only fully admit to feeling this way if they hear other jurors admit it first, or if you make them feel that it's a perfectly valid way to feel and that you understand how they feel, even if you don't necessarily agree with it.

Once you get a juror to admit to a concern or a bias or to a potentially biasing experience, the question then becomes: can they be truly fair and impartial as a juror? Remember that most jurors will never feel comfortable admitting that they can't be fair or impartial, even to themselves. Everyone thinks of themselves as fair and objective. Real villains don't realize they're villains. I'm not saying that jurors are villains, but I am saying that even the most racist or biased or prejudiced jurors don't believe that their views are "biased." They believe their views are reasonable and accurate and objective. That's why you should never ask a juror if they can be "fair and impartial," unless you want them to say that they can be. The only jurors who will say no are those who want to dodge jury duty.

Instead, you must agree with them that they are fair and objective people. Always preface your "cause" question by saying something like "I have no doubt that you would try your best to be fair and to set your feelings aside" at the start. Then ask "but even if you tried your best, do you think you still might have a difficult time ignoring those feelings as you view this case?" From time to time in voir dire, I would even ask jurors with biased feelings or experiences questions like, "based on what you've seen, do you already have the feeling that my client probably did the same thing in this case?"

In my experience, many lawyers have their own successful ways of trying to build and argue cause challenges, but few lawyers have developed advanced ways of insulating their most receptive jurors from being challenged by the other side. And it's not due to lack of trying—most lawyers do try, but not necessarily in effective ways.

Simply put, the best way to insulate a juror from being challenged for cause is to find ways for them to promise to decide the case only on the facts and evidence, no matter how jaded their values, beliefs, and experiences have been. My way is simple. Imagine you're suing an insurance company in a bad faith case, and during your voir dire a juror says that he has seen dozens of examples of insurance bad faith and thinks that most insurance companies are greedy, unethical, and will do anything to get out of paying a valid claim. When it's your turn to voir dire this juror, you need ask only one question: "We're not asking you to forget about your experiences or ignore your feelings. There is nothing wrong with distrusting insurance companies. What we need to know is, can you promise to decide whether or not THIS particular insurance company was distrustful and unethical based on the facts and evidence you see in this case? In other words, it's okay to be suspicious, but can you promise not to ASSUME that this insurance company broke the law if you don't see evidence that supports feeling that way? That's all we're asking."

Unfortunately, I haven't yet mentioned the most difficult part of getting a juror excused for cause—getting the judge to agree. As I'm sure most of you have learned from experience, there are a large number of judges—by my estimation, maybe as many as 40% of the judges whose courtrooms I've selected juries in—who will almost never grant a challenge for cause, even when the juror has unequivocally admitted that one side is "way ahead" or that they "can't promise to be fair," or worse. Just as frustrating, no two judges seem to share the same criteria for what constitutes a valid challenge for cause. I don't want to ignore the reality that some judges may render all my advice about cause challenges moot, but—as I've heard several judges say—"that's why you have peremptory challenges." Good luck.

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