

March 2018 Jury Tip: “What works (and what doesn’t) in getting cause challenges”

Any experienced trial lawyer knows that every jury panel has its share of hopelessly biased jurors that should be excused for cause; in my opinion, probably 10% of any jury pool should be dismissed for cause. But “should” isn’t the same as “will be,” and any experienced trial lawyer also knows that most judges are reluctant to grant cause challenges. Lawyers shouldn’t be forced to use their precious peremptory strikes on jurors who have made it abundantly clear they can’t be fair. But in reality, you’re often forced to use half your strikes on biased jurors... unless you have refined the challenging art of getting jurors to say the judge’s magic words to be excused for cause, whatever those may be.

One of the most frustrating challenges is that every judge’s “magic words” seem to be different. I’ve heard judges say that jurors who admit to being “biased” isn’t enough... unless they definitively say they can’t “set aside” that bias. I’ve heard judges deny cause challenges on jurors who say “I can’t be fair”... because they didn’t say they “won’t follow the law.” Most often, I see judges “rehabilitate” jurors who have definitely made pre-judgments about the case (for example, “I don’t believe in awarding money for pain” or “I don’t trust any big corporations”) by intimidating them into agreeing to “follow my instructions on the law.” But this month’s tip isn’t about figuring out your judge’s magic words and getting your jurors to say those words, because another equally formidable challenge is simply to get jurors to admit they can’t be fair in the first place.

The most common stumbling-block I encounter on the road to getting a biased juror off for cause is a juror’s natural reluctance to admit they cannot be fair. Understand that, as a rule, people want to think of themselves as fair. Most people don’t view their biases and prejudices as “unfair.” Instead, they view their point-of-view as objective and reasonable. So when a juror, for example, says that all people who file lawsuits are greedy liars, they will usually still insist (and truly believe, in their own minds) that they can “absolutely” be fair in deciding a civil case. Over and over again, I see jurors express attitudes that can only be interpreted as biases, but in the same breath insist that they can “set them aside” or “be totally fair” or that their attitude “won’t affect my decision.” Anyone with a basic understanding of psychology knows that’s impossible... but most jurors (and most judges) aren’t willing to accept that reality.

I’ve often written that a good lawyer should never let a juror self-diagnose their biases. So ultimately, it’s your job as an attorney to convince your jurors that they’re incapable of being impartial, even when their instinct is to stubbornly cling to the belief that they’re “fair” people. So let’s talk about some ways to convince jurors to admit they can’t be fair. Some of these ideas are mine, and some are approaches I’ve seen from other lawyers.

Let's first talk about a few approaches that never work. Never, never, never use the word "fair" when you're talking a juror off for cause. Jurors will almost always snap back to saying they can be fair when you challenge them with that word (unless they're trying to get dismissed). Here's a word that always, always, always works better: "neutral." As in, do you think your 20 years working for the city might make it challenging to be NEUTRAL in a lawsuit against the city? There is nothing insulting or embarrassing about being less than "neutral." And notice a few other crucial word choices I made in that question: "might" and "challenging." Don't ask jurors if they would "definitely find it impossible" to be neutral; jurors feel much more comfortable admitting that it's possible they might have a struggle than bluntly saying they can't or won't be neutral.

Here's another phrase that never works: "do you have a PROBLEM with the concept of awarding money for pain and suffering?" It's insulting to suggest to someone that they have a problem. In their minds, they don't have the problem; the law does. Phrase your questions in a way that supports their belief system, like "do you think the concept of awarding money for pain seems unfair or ridiculous?" That's insulting to the concept, not the juror. Way too often, I see voir dire questions that get no responses because they unintentionally shame jurors. Never do that. Jurors are proud of their beliefs... even those beliefs that you or I might find appalling. And before we move on, let me point out that even the word "bias" is derogatory, so don't use it. There are plenty of alternative word choices that make jurors feel comfortable admitting their "biases," like "dislike" or "personal belief against" whatever you're voir dire about.

Now for some approaches that often do work.

Many lawyers use the analogy of a "starting line" to get jurors to admit that their side may be "starting behind" in trial. This works often, but especially when you make the biased juror feel like they're still fair-minded by including in the analogy the idea that "you're not saying that you've already decided, you're saying that my side COULD catch up and win the race, but that we're starting behind and would have to do a lot to catch up first, right?" It's a good compromise that allows the juror to sound fair, when in reality the law demands that both sides start out even. Use this analogy when jurors express pre-judgments that they find the other side's story more believable than yours, but aren't willing to admit they've already decided. I often hear jurors say things like "when I first heard what this case was about, my first thought was 'sounds like the plaintiff is making this up,' but I can definitely be fair and listen to the evidence."

Another analogy that I find effective, when a juror expresses feelings of skepticism about what you're trying to prove, is the concept of an "uphill climb." Whenever a juror says that something you're alleging seems "hard to prove" (maybe you only have circumstantial evidence) or "hard to believe, based on my experiences... but I can listen," they're basically telling you "I'll listen, but it's going to be a struggle for you." Ask these jurors "I think what you're saying is that you'll give me a fair chance to convince you, but it's going to be kind of an uphill climb for me to convince you, that I'm going to need a lot more evidence than the other side? Kind of like going uphill on a football field, instead of a totally even one?"

The best approaches to getting jurors to admit bias all involve allowing the juror to save face and insist they're still fair people. And so another effective approach is to make it crystal clear that you're only talking about one isolated, unique issue. We'll call this the "right case for you" approach. Let's say you're voir diring on the subject of sexual harassment, and you have a juror who has been falsely accused of sexual harassment, is clearly bitter about it... but is insisting he can be fair as a juror in a sexual harassment trial. Help that juror save face by telling him "it sounds like you're a fair person on almost any subject, right?" before you isolate the harassment issue by asking "but when it comes to this one issue, because you've seen an ugly side of it, this might be the one issue out of a million where you would have the biggest struggle being totally neutral; does that sound right?" Most judges will insist that getting a juror to admit that "there are other cases that might be a better fit for me" is not the standard for cause... but it is the first step to getting a juror to admit that "of all the cases out there, this kind of case is probably not the right case for me."

I always find it helpful to tell your jurors "being neutral as a juror is so important, and it shouldn't be a STRUGGLE for anyone here. I'm sure you're all fair people who will try your best to be fair in any case, but sometimes a case might involve an issue that makes it a struggle for you to be neutral, and there is nothing wrong with telling us if you have some concerns. We're not going to run out of jurors, and there are plenty of others here who can be neutral without any struggle at all. That's what we're looking for."

A friend of mine and terrific lawyer, Keith Mitnik from Orlando, uses a terrific analogy that helps many jurors be more honest about their biases: being a judge in a pie-baking contest for someone who hates cherry pie. The detail that makes this analogy so effective, to me, is that when he tells this story to jurors, he includes the judge's inner monologue about trying to be fair. "But if the cherry pie is perfectly made, and the apple pie is a huge mess, I can still be fair and vote for the cherry pie." That's exactly the way biased jurors justify their fairness to themselves in jury selection. "But what if it's a close-call? What if both pies are baked perfectly?" That's the best part of the analogy, because every juror understands not only how unfair that would be to the bakers... but also how powerful the self-delusion of the biased judge can be. And that's the analogy you need to convey to biased, self-conflicted jurors: of course you can be fair if a trial is a slam-dunk... but what if it's a close-call? Could anyone but a truly neutral judge be trusted to make the best decision?

Finally, let's talk about how to close the deal when you're talking a juror off for cause. You have to get them to admit that, even if they're trying their BEST to be fair, they would probably still struggle with it. One of my favorite analogies is to compare controlling your bias with controlling my 3 year-old daughter. Tell jurors "I'm sure you'll try your best to block that belief/experience out of your mind and set it aside. But let me share an example with you. If I brought my 3 year-old daughter here to court and sat her next to me, I sure would PROMISE the judge I'd try my best to keep her from singing and running around the courtroom and interrupting everyone... but no matter how hard I would try, I doubt I could succeed. Do you think your [bias] is a little like my daughter, that saying you can control it might be unrealistic when you hear the facts of this case?"