



Successful Cause Challenges

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Successfully identifying and making challenges for cause is both an art and a science. It is an art because each potential juror brings unique experiences and beliefs to the process, a science on account of the rules and procedures that have been established. Regardless of individuals' idiosyncrasies or procedural roadblocks, what must result is an impartial jury, a daunting task with three strikes allowed to each side.

To further complicate this difficult task, critics of the American jury system are calling for changes ranging from less attorney-conducted voir dire to the omission of peremptory challenges. If either of these suggestions is taken, challenges for cause will become even more critical. Unfortunately, many attorneys tell us it is very difficult to remove truly biased jurors for cause. For instance, jurors won't say the magic words, "I cannot be fair" and even when they do, some judges may not excuse them.

Before we discuss ways to make cause challenges successfully, three points are important to clarify. First, advice on how to use peremptory and cause challenges effectively is not intended to skew the jury. Rather, the advice is based on the fundamental right granted to all citizens of a trial by an impartial jury. Thus, jurors ought to be excluded when they have background experiences or strong opinions making it difficult, if not impossible, to judge the case fairly.



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Second, we acknowledge it is completely up to the judge's discretion to make a cause ruling. Although it is an issue that can be used for appeal, the judge decides what is cause and what is not. Having been in hundreds of state and federal courtrooms across the country, we have seen first hand there is little to no consistency in what constitutes a successful cause challenge from one courtroom to the next.

Third, we recognize and understand that human beings are often unable to gauge their own decision-making processes, otherwise known as a difficulty with "self-report." The court, however, expects jurors to report accurately whether or not they have attitudes and opinions that will make it difficult to be fair to one side or the other. Therefore, the court expects jurors to do something that is contrary to human nature – judge their own judgment in an unbiased way.

These three points aside, it is possible to improve how lawyers go about challenging for cause. All of the strategies flow from one simple principle: the juror is an ally, not an enemy.

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WORKING TOGETHER

Treating jurors as allies rather than enemies decreases the likelihood of stress, discomfort, and intimidation, thereby increasing disclosure in the courtroom. A courtroom is not a setting conducive to open, honest discussion amongst jurors, lawyers, and judges. Why? The jurors are not familiar with the setting or with anyone in it. The situation is not improved when the judge looks down and asks the juror in a commanding voice, "You will follow the law, won't you?" Or, as heard in a real courtroom, "Are you saying you won't do what I tell you to do?"

Often during voir dire an attorney becomes frustrated with a juror who denies bias that clearly exists. Rather than engaging the juror in a cross-examination, simply assume the juror is telling the truth to the best of his/her ability. This avoids placing more stress on the juror, which makes it less likely that he/she will admit bias. Furthermore, hostile cross-examination will likely discourage other jurors with similar beliefs from identifying themselves.

In addition to increasing disclosure, working together also decreases the effects of the social desirability bias. Briefly, jurors do not want to tell a group of strangers that they are biased because this makes them sound like bad people. Therefore, they are more inclined to ignore or misrepresent bias simply because they truly believe themselves to be fair people and want those around them to agree.

So, how can a lawyer present himself/herself as a friend rather than a foe? What follows are five recommendations for improving rapport, which will subsequently help elicit information vital to successful cause challenges.



ELICITING VITAL INFORMATION

First, contextualize voir dire as a conversation. Voir dire is about jurors, not about attorneys. Therefore, create an environment in which jurors are encouraged to speak. Ask open-ended questions and wait for people to respond. Tell jurors verbally and non-verbally that their honest answers are the right answers. Maintain a pleasant facial expression and truly listen to jurors when they speak. So many times we have seen attorneys ask a series of questions, barely looking at the jurors. When no one raises a hand to basic yes/no questions, the attorney moves on and this process is repeated for the duration of voir dire. Not only does this method of questioning feel coercive to the jury, it lets people off the hook. As a result, attorneys aren't left with much more information than they started with before voir dire began!

Second, keep in mind that bad news is good news. If any juror hates the case, the only opportunity the attorney has to remedy the situation is during jury selection. How many times have verdicts come back followed by someone saying, "I had no idea the jury would react that way"? Or, "I thought that accountant would identify with my client, not lead the charge against him"?

Not only should bad news be listened to, it should be welcomed. When someone directly or indirectly tells an attorney, "I hate your case," or strongly disagrees with an element of the case, this person should be asked more questions. Rather than trying to shut them up, counsel should say, "Tell me more about that."

Many attorneys worry that the rest of the jury pool will be tainted by one juror's verbalized bias, but consider the alternative. If that bias is revealed during deliberations for the first time, there is no remedy. The bias can take on a life of its own and the juror who should have been removed from the panel suddenly becomes a prominent player in the decision. Therefore, if a juror disagrees with the idea of monetary damages or distrusts all big companies, listen respectfully. Then, turn to the rest of the group and ask, "Who else agrees with that?" The entire jury panel won't be inclined to agree with the speaker if it believes each opinion is valued and respected.

Third, in order to get the most out of these possibly difficult conversations and communicate an open environment to the jurors, attorneys must make jurors' jobs as easy as possible. They must be comfortable with the questions they ask, including those questions relevant to a case's weaknesses. They must engage in real eye contact, not a rapid, 180-degree sweep of the panel. Attorneys should not rapid-fire questions, allowing no time for answers. Asking long convoluted questions sounds like a trick, not a question. Don't ask jurors to comment on the law or interpret legal jargon. Don't ask jurors to tell you what they will do in a week after they hear all the evidence. And, be careful about asking jurors to commit to something during voir dire. Jurors tell us in post-trial interviews that those "promises" were very difficult to understand and they felt like the lawyer was trying to trick them.

**Voir dire is about jurors,
not about attorneys.**

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Fourth, respect jurors' privacy. There are two types of questions that should never be asked in the open courtroom. First, questions which call upon jurors to tell something painful or embarrassing about themselves or someone close to them. Examples are questions about who has been raped, who has relatives in jail, who has been accused of a serious crime, or who has experience with bankruptcy. These and myriad other examples do need to be asked, but supplemental juror questionnaires or in camera voir dire are far more likely to elicit the truth than a public inquiry.

In addition to questions that elicit embarrassing responses, questions that trigger a strong emotional reaction should not be explored in open courtroom. In this situation, asking jurors to explain themselves does not increase candor. Rather, it is often inhumane. As much as attorneys might try to read non-verbal behavior, emotional reactions can come unexpectedly. For example, a prospective juror in a civil trial was asked if she had ever been in a courtroom. She burst into tears. Privately, she told the judge and attorneys that her brother had been murdered and she had attended the criminal trial. Thus, being in any courtroom was very uncomfortable for her and she was subsequently excused. While this situation could not have been prevented, it was dealt with appropriately and respectfully.

Finally, assure jurors that bias is a part of human nature. Be of the opinion, "What someone else might call bias, I call experience." Lisa Blue, a successful plaintiff attorney from Texas, does an excellent job demonstrating this. She gives jurors a personal example, such as the following: "I had X experience. I now am strongly opinionated about X and should not serve as a juror in that kind of case. There is nothing wrong with that, I just need to be assigned to another case." Then she asks who has had an experience related to the case at hand. As a result of normalizing bias and normalizing opinions, the jurors are more willing to share experiences. They are more likely to open up and discuss how the experience has changed their perspectives and how it will affect their judgment in the case at hand.

Once attorneys know how to ask questions, they need to know what questions to ask.

SEALING THE DEAL

Once rapport has been developed, it has to be maintained. Once attorneys know how to ask questions, they need to know what questions to ask. Rather than cross examining a biased witness, support him or her as they cooperate with you. This is best addressed by an example.

Assume counsel suspects that a prospective juror who is a nurse with 20 years of experience might not be fair in a medical malpractice case. What follows is a hypothetical exchange, the questions followed by the nurse's hypothetical answers.



Ms. Jones, you have been a nurse for how many years?

20 years

Are you an R.N.?

Yes

That requires a degree, doesn't it?

Yes.

How many years did you study nursing?

Four

Then, you have been following standards and procedures in your work for over 20 years?

Yes

So, you know quite a bit on how to treat a patient?

Yes

You have learned the right way and the wrong way to do your work?

Yes

Do you teach others how to treat patients?

Yes

Twenty years is a long time. Based on your years of experience you have firm opinions about your professional issues?

Yes

And you feel strongly about what you have learned?

Yes

In this example, the attorney begins by engaging in a pleasant conversation with the potential juror. Counsel spends the first part of the conversation gauging the depth of case-related information the prospective juror has, also complimenting the juror's level of expertise. The questions are simple and reasonable. It is clear that it is a good thing to be knowledgeable about one's job and reasonable to have opinions about it. Returning to the example, the attorney asks,

If an expert told you something that wasn't what you knew to be true, is it possible you would question that expert's opinion?

Counsel has arrived at a critical point. Based on what the nurse has already said, it would be unusual for him/her to say it would not be possible to doubt an expert's opinion. After all, this prospective juror has 20 years of experience. Counsel has just opened the widest door by using the word possible. Continuing on, here is a list of follow-up questions meant to elicit critical information:

- Is it possible that you would rely on your own judgment instead of the expert's?
- You have a lot of in-depth knowledge on the subject. Would it be difficult to set aside what you already know? Could you listen to the evidence like someone with no medical training or experience?

If an expert told you something that wasn't what you knew to be true, is it possible you would question that expert's opinion?

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- What are your opinions about medical malpractice?
- So, it would be difficult for you to be unbiased about medical evidence?
- Would you prefer to serve as a juror on a trial you weren't professionally knowledgeable?

Depending on what else the nurse says and what opinions he/she has expressed, the judge may be convinced that this juror should be assigned to another case. If the judge requires the magic words, "No, I cannot be fair" it all depends on whether the juror will say those magic words. Either way, the attorney has not made an enemy of the nurse. Moreover, counsel has not sent the message to the rest of the jury that he/she doesn't like knowledgeable people like the nurse.

CONCLUSION

As we've demonstrated, the art and science of challenging for cause can be learned and it can always be improved. Working with jurors rather than against them to empanel an objective group is key to a successful trial and a successful outcome. Of course, the question remains, "How do we get the judge to agree with our cause challenges?"

KEY WORD/PHRASE LIST

Cause challenges

Voir dire

Bias

Jurors

Impartial

Jury selection

Communication

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