

Jury Selection in Employment Litigation: Preparing for Voir Dire, Identifying Bias, Leveraging Strikes

WEDNESDAY, JUNE 22, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Jury Selection in Employment Litigation: Preparing for Voir Dire, Identifying Bias, Leveraging Strikes

A live 90-minute CLE webinar with interactive Q&A
with Jonathan Clark, Tyler M. Paetkau, Steven J. Pearlman

Wednesday, June 22, 2022
1:00pm-2:30pm EST, *10:00am-11:30am PST*

Strafford

- Use of themes in jury selection
- Effective questioning to determine biases and identify who to strike
- Use of juror questionnaires
- Dealing with a tainted jury panel
- Pros and cons of using social media in jury selection



Overview

- More educated; in many jurisdictions, “some college” is average
- Learn by watching and doing, not reading or lectures
- Grab and Go Culture = get to the point, quickly
- Want to do good, but need guidance
- Participate in social justice
- More business acumen
- TV, Netflix, Movies and Media coverage of trial
- Political Polarization



Today's Venire Panel

- Perception of Fake News
- Trust in Leadership/Authority
- Affects of COVID-19 on personal life
- Health concerns in reporting to jury duty

Considerations for “New Normal”

- Central Task: **De-selection**
- Identify life experiences affecting impartiality
 - Experiences/biases most harmful to your case
- Listen and learn- less talking, more listening
- Get jurors to care about your case on a personal level
 - Employment juries will relate the case to personal experiences
- What will your judge allow?
 - Form of questioning
 - Number of challenges based on panel size
 - Shuffle



Purpose of Voir Dire

Start theming after the initial client meeting- BEFORE you get into the weeds

General Questions

- Too many lawsuits?
- Think most lawsuits are frivolous?
- Ever been party to a lawsuit?

Case Specific Questions

- Generally- 4- 6 case specific topics with 30-45 minutes of attorney voir dire
- Generally about 3 case specific topics with 15 minutes of attorney voir dire

Purpose: Expose Dangerous Juror

Prepare: Outline Themes for Voir Dire

- Moral themes places moral BLAME and appeals to COMMON VALUES
- Taxonomy of Moral Themes- develop your theme, inoculate opponent's theme
- Examples of Moral Themes in Employment Litigation Cases:
 - CARE vs. HARM – Are you protecting us?
 - FAIRNESS vs. CHEATING- Are you just?
 - LOYALTY vs. BETRAYAL- Did you honor the Agreement/Policy/ Practice?
 - AUTHORITY vs. SUBVERSION- Did you play by the Rules?
 - SANCTITY vs. DEGRADATION- Do you have clean hands?

What are Moral Themes?

- Jurors want to get it right, but need guidance
- Why your client should win as a matter of fairness and justice
- “Why are we here?” rather than, “This case is about...”
- Use impact words and phrases

Moral Themes

- Topics have to grab interest
- Topics must overcome innate shyness of newcomers in groups
- Don't let discussion be hijacked by a few eager in panel
- Subjects people have definite opinions on, which they don't mind sharing, won't self-censor, and which reveal true thoughts/feelings
- Dr. Ford vs Judge Kavanaugh:
 - Who did you believe, more? Why? What were keys?
 - What else would you have like to know?
 - What part made it hard for you?



Relatable Themes

- Preparation often pushed aside in the frenzy as trial date nears
- Important to use time talking with decision-makers wisely
- We all have biases
- An effective voir dire:
 - feels like a conversation to the panel;
 - allows the questioner to look jurors in the eyes and show genuine interest;
 - produces information about individual jurors; and
 - Seeks to learn the WHAT *and* the WHY.



Prepare Early and Practice

- In employment case, HR has to make tough calls every day, without all facts
- HR is a person
- People make mistakes
- But HR leaders aren't trying to break law
- Have to decide things at the “speed of modern business” without much certainty or unlimited time/budget for investigation
- Jurors will have the benefit of “hindsight bias”



Precondition the panel

- Plan for how to record the data for juror poll/survey questions
 - Develop your team's shorthand in advance
 - Plan team assignments
 - DO use a stock form
 - DO create juror number cards if possible
- Raise your hand, hold up juror card, stand up if you or a family member have

- Listen with your ears and your eyes
- Study survey data quickly and thoroughly
- Plan who you want/need to challenge for cause
- Get as much info from the Court in advance as possible



Develop Form

- Opinions, attitudes, and beliefs are formed and enforced by lifetime experiences
- A stranger one encounters on a jury panel with a different opinion is unlikely to change years of experiences, attitudes, and beliefs
- Ask now, rather than be surprised later
- Techniques to deal with the overbearing panel member



Poisoning the Jury Pool is a Myth

- What is easily visible above the water does not show the whole picture
- Beware of designating desirable vs. dangerous on paper only
- Dive down to look at attitudes, opinions, life experiences below the surface
- Learn why a particular individual holds a particular attitude
- Demographics much less predictive of decision-making than are life experiences



Jurors are like Icebergs

- Be curious while cordial
- Reveal something personal about yourself
- Make it okay to disagree or have a different opinion
- Talk about biases and that everyone has them
- Permission to talk privately
- Thank the folks who share

Jurors who feel like the attorney cares are more willing to share



Execute: Warming up the Panel

- Get them active - raise your hand (or better yet juror card) if you have ever...
- Who on the first row....?
- No one on the first row has ... ?
- Anyone else agree with Mr. Smith?
- Mrs. Jones, what do you think? More like Mr. Smith or do you have another opinion.
- Relate to personal experiences
- Always build rapport
- Remember, a primary goal is **De-Selection** – get a “bad juror” talking, and find out who agrees with her, don’t ‘accidentally rehabilitate



Execute: Avoid the Crickets

- “A Batson” challenge is an objection to the validity of preemptory strikes based on argument it’s being used to exclude jurors because of race or sex (or other “cognizable” groups)
- Timing (don’t wait)
- Establish prima facie case
- Have a neutral explanation theory ready
- Preserve error



Something about Batson

- When the other side is attempting to rehabilitate a juror:
 - Two opponents: opposing counsel and the judge
 - Be careful with your questions; everyone wants to be thought of as “fair.”
 - Alternative: “Because of your experience with ‘X’, would it be fair to say that my client would be starting from behind in this case in your mind?”
- When you are trying to rehabilitate:
 - Remember: everyone wants to be thought of as fair.
 - Everyone has biases. “You are someone who could put your own experiences aside and judge this case based on the evidence, right?”
 - Don’t be afraid to object.
- Recall the challenge for cause standard: Can the juror reasonably be found able to render a fair and impartial verdict?

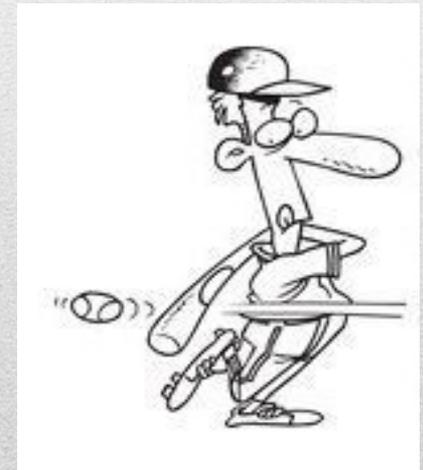
Juror Rehabilitation

- **Challenges for Cause**

- No hard and fast rules; specific, disqualifying situation
- Being fired likely won't cut it
- Reasonably be found able to render a fair verdict even in light of some factor suggesting possible bias?
- Categorical: Financial interest in litigation; relationship to party/attorney/witness; attorney in the field.

- **Preemptory Challenge**

- A party's unspoken desire to strike a particular juror
- Number may vary with panel size/jurisdiction. Ask the judge.
- Subject to challenge by the other side
- How will alternates be determined?
- The judge has nearly un-reviewable discretion during jury selection



Strikes

- Predetermine “strike” themes identified in short phrases or words
- Use color codes (green, yellow, red)
- Make a chart of everything you learned from voir dire from the actual members of the jury- this may be helpful later

Don't waste voir dire

- Supplemental Juror Questionnaire
- Social Media
- Get the litigation team involved – assign each member a task
- Challenge for Cause List with Reasons
- Call backs to talk with judge and attorneys



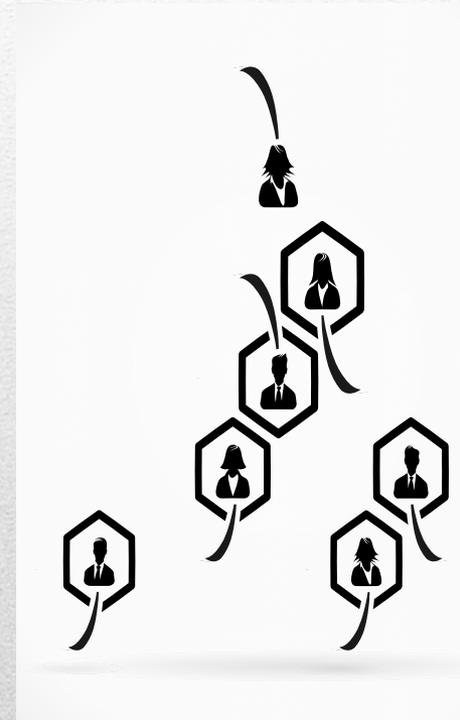
Tools to Gain Insight

- Come to agreement with opposing counsel before you approach the judge
- Agree on the questions to be included in the questionnaire
- Inform the Court that all sides want the questionnaire and that it is completed
- Have a plan for administration that reduces/eliminates extra work for Court personnel
- Use of questionnaire makes voir dire more helpful and laser focused on possible bias issues
 - Short and sweet—not repetitive
 - Juror identifying info: no. and name
 - Different questions styles
 - Use the Likert scale
 - Don't forget to ask WHY



How to get the judge to agree?

- Use questions likely to predict decision-making
- Case specific questions
- Realistic answers, versus socially acceptable answers
- Data point for each panel member
- Makes voir dire more efficient
- Identify folks with whom you need to drill down and learn more



Benefits of the SJQ

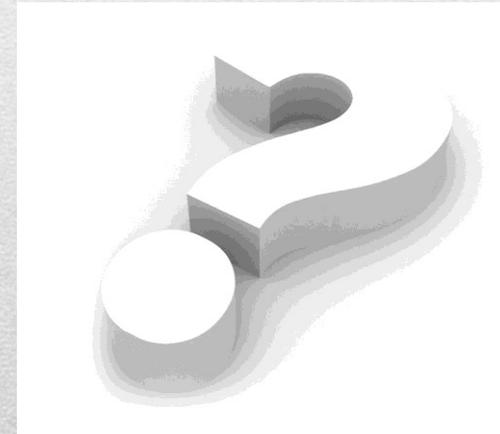
- Don't copy same information on juror information card
- Collect juror number, name, gender and age for reference
- Use combination of multiple choice, short answer, open-ended
- Ask for explanation or further description where necessary
- Measure intensity of opinions using Likert Scale
- Important to know WHAT opinion is, but more important to learn WHY
- Mutually exclusive categories
- Agree to include questions suggested by opposing counsel

Constructing SJQ

- Grade the questionnaires - important not to be married to what a juror looks like on paper, could be F on questionnaire but A+ in person depending on answers
- Follow up questions for certain jurors based on answers
- Compile easy reference data base for use during strike conference

Develop Plan for Interpreting Questionnaire

- What are your duties at work?
- What previous jobs have you held?
- Do you have any formal education or work experience in any of the following:
 - TV, Podcasts, Movies frequently watched
 - What do you do in your spare time?
 - You or family member ever Plaintiff, Defendant, Witness in lawsuit?
 - Under what circumstances would you file a lawsuit?
 - Serious business dispute with partner, customer, client (or boss)?
 - Falsely accused of violating an employment agreement?
 - Do you consider yourself leader, follower, team player
 - Do you think your life is more difficult than the lives of most people?



Sample Questions for SJQ

- Advantages
 - More honest, less self-censorship
 - Far more detailed information: opinionated, legal dramas, religious, media-diet
- **Know** the avenues of inquiry:
 - LinkedIn, Google, Facebook, Twitter, Instagram, PR Databases
- **Know** the footprint you'll leave:
 - Will your search be identified to the juror? Privacy settings.
- **Know** jurisdictional issues and limitations:
 - ABA Opinion 466 (April 2014)
 - New York Bar Association Formal Opinion 2012-2
 - Changing area of law
- Practical Examples
 - “Erin Brockovich is my hero!”
 - “F--\$% McDonald’s!”



Social Media

- Timing? Determines whether and how you can use in jury selection.
- What to look for/learn?
 - Confirmation of juror card job/education/marital status
 - Inconsistencies
 - Photos -any big changes recently
- Plan for how to collect data?
 - Divide among available hands
 - How certain are you that this social media belongs to this particular juror
 - No evidence of social media can be interesting

Considerations for Social Media



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Thank you
