

Jury Selection in Personal Injury Litigation: Connecting With Today's Jury Pool

Using Effective Juror Profiling and Voir Dire to Pick the Best Jury

WEDNESDAY, JUNE 21, 2017

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

Today's faculty features:

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JURY SELECTION IN PERSONAL INJURY LITIGATION

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ROADMAP

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Jeb Butler, BUTLER TOBIN

Matt Wetherington, THE WERNER LAW FIRM

- ▣ Summoning and Qualifying Jurors
- ▣ Scope and Manner of Examination
- ▣ Strikes for Cause
- ▣ Attacking Tough Issues
- ▣ Building a Theme
- ▣ Your Questions

Summoning and Qualifying Jurors

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- O.C.G.A. § 15-12-122(b): The judge **shall** cause the panel to be filled with 24 **competent** and **impartial** jurors **before requiring the parties or their counsel to strike a jury.**

Juror Competency

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- Special and Undue Hardship
 - ▣ Disability
 - ▣ Work
 - ▣ Childcare
 - ▣ Commute
- Clear Conflict
 - ▣ O.C.G.A. § 15-12-135: Relationship with party or other entity with interest in outcome

Juror Impartiality

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- O.C.G.A. § 15-12-134: In all civil cases it shall be good cause of challenge that a juror has expressed an opinion as to which party ought to prevail or that he has a wish or desire as to which shall succeed.

Scope of Examination

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Scope of inquiry is very broad

- O.C.G.A. § 15-12-133: [C]ounsel for either party shall have the right to inquire of the individual jurors examined touching **any matter or thing** which would illustrate **any interest of the juror in the case . . .**

Scope of Examination

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- **Any** opinion as to which party ought to prevail,
- The **relationship or acquaintance** of the juror with the **parties or counsel** therefor,
- **Any fact or circumstance** indicating any inclination, leaning, or bias which the juror might have respecting the **subject matter** of the action or the **counsel or parties** thereto, and
- The religious, social, and fraternal connections of the juror.

Strikes for Cause

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- ▣ Once a potentially biased juror is identified:
 - “[a] trial judge **should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors**”. Judges should use their discretion to remove partial jurors, even when the question of a particular juror’s impartiality is a very close call. *Kim v. Walls*, 275 Ga. 177 (2002)

Strikes for Cause

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- two types of strikes during the voir dire process – peremptory strikes and strikes for cause.
- Law
 - Strikes for principal cause are supplemented by strikes for cause based on partiality. *Mitchell v. State*, 69 Ga. App. 771 (1943); O.C.G.A. § § 15-12-134, 15-13-135.
 - A biased or partial juror cannot be “rehabilitated” through talismanic questions. *Kim v. Walls*, 275 Ga. 177 (2002) (leading case).
 - the standard: “A challenge to favor is based on circumstances raising ***a suspicion*** of the existence of actual bias in the mind of the juror . . .” *Mitchell*, 69 Ga. App. at 668.
 - “[N]o party to any case has a right to have any particular person on their jury.” *Walls v. Kim*, 250 Ga. App. 259, 260 (2001) (aff’d).
 - If a party uses a peremptory strike to remove a juror who should have been removed for cause, reversible error exists. *Jones v. Cloud*, 119 Ga. App. 697, 708 (1969).
- Establishing
 - sometimes it’s specific: *State of Georgia v. Michael Eugene Johnson*, Clayton County
 - (drug-dealing jurors)
 - sometimes it’s general: *Gibson v. Ford Motor Co.*, Clarke County

Strikes for Cause

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product liability: *Gibson v. Ford*

demonstrating cause:

21 THE WITNESS: Well, my father-in-law
22 is a doctor and has lots of lawsuits against them, a
23 lot of which were frivolous, which I don't know what
24 the law exactly is on that. I will say they would
25 have to be very good evidence of neglect to me to
1 want to give much money to somebody.

2 BY MR. BUTLER:

3 Q. My question is whether or not those views
4 about -- your father-in-law?

5 A. Father-in-law.

6 Q. -- father-in-law being a doctor and being
7 sued and your view that a lot of those suits were
8 frivolous, that in addition to what you told us out
9 there about being in favor of caps and opposed to
10 juries imposing punitive damages, would that
11 influence you at all any bit whatsoever?

12 A. It's going to influence me, of course, but
13 I know I'm a fair person, I would want to hear the
14 facts and see the evidence, yes, but my opinions are
15 going to affect anything we --

16 THE COURT: Could you not only listen
17 to the evidence but could you follow the law that
18 you would be duty-bound to apply to the evidence if
19 you were selected to serve on this jury, laying
20 aside your prior experiences and personal opinions?
21 And I think that's what they are trying to get to.

22 THE WITNESS: I want to say yes to
23 that. The only thing that scares me about that is I
24 don't know what the law is; and granted, if I feel a
25 law is wrong, I'm going to have a problem with my
26 own consc[ience] in deciding that. I don't know,
2 that's honestly what I would -- I'm assuming the law
3 would be relatively --

4 MR. BUTLER: It would be difficult for
5 you?

6 THE WITNESS: Difficult for me.

7 MR. BUTLER: Thank you.

Strikes for Cause

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attempted rehabilitation:

22 MR. REID: Just a couple of quick
23 questions, Ms. Haymore. You said that if the law
24 was reasonable, that you wouldn't have a problem in
25 applying it. If the Judge instructed you as to this
1 question of punitive damages that they could not be
2 awarded unless there was a clear and convincing
3 evidence of extreme conduct on the part of a
4 defendant, would you have any problem in applying
5 that and following the Court's instructions and
6 coming to a fair result in this case?

7 THE WITNESS: I think if I heard you
8 correctly, yes.

9 MR. REID: All right. Thank you,
10 ma'am.

11 MR. BUTLER: Anything else?

12 MR. FRYHOFER: Nothing further.

13 THE COURT: Thank you, ma'am. You may
14 go back outside and remain there until we have an
15 announcement.

16 (Ms. Haymore leaves the room).

17 MR. BUTLER: Judge, under Walls versus
18 Kim, she's a goner.

Court's ruling:

17 MR. SNYDER: I think she said if it
18 wasn't reasonable, she was assuming it was
19 reasonable, in response to Mr. Reid's questions,
20 said she would be able to follow that if that was
21 the instruction.

22 THE COURT: But there was more to it
23 than that. I mean, she's also saying it would be
24 difficult at one point in time in her facial
25 expressions and her situation I think tells more
26 than any other person that's been in here. And I
2 think she's trying to say the right things for us
3 all, is what I view. And, but I think that her
4 statements about, you know, if the law is
5 reasonable, it would be difficult and all the other
6 factors that I have personally observed about her,
7 her mannerisms and her responses, *I'm of the opinion*
8 *now after having had her brought in at Ford's*
9 *request to find that there's a suspicion of*
10 *partiality.*

Strikes for Cause

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—on the attack—

- explain blind lady-justice with scales
- it's okay to admit a leaning
 - Broccoli: President George HW Bush
- it's patriotic to admit a leaning
- civil vs. criminal

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—on the attack—

- Tell me about it (take the different or weird and ask).
- Demand an answer, don't let the jury say, "maybe."
- Who else feels that way to any degree?
- Now that I have thought about it "me too".
- How strong on a scale of 1-10?
- About how long have you felt that way (start with highest 10/years).
- So you have these strong feelings, a 9 on a scale of 10 for 10 years on frivolous lawsuits.
- Are we starting out a little bit behind?
- There's nothing a lawyer is going to say to you to change your mind, true?

Strikes for Cause

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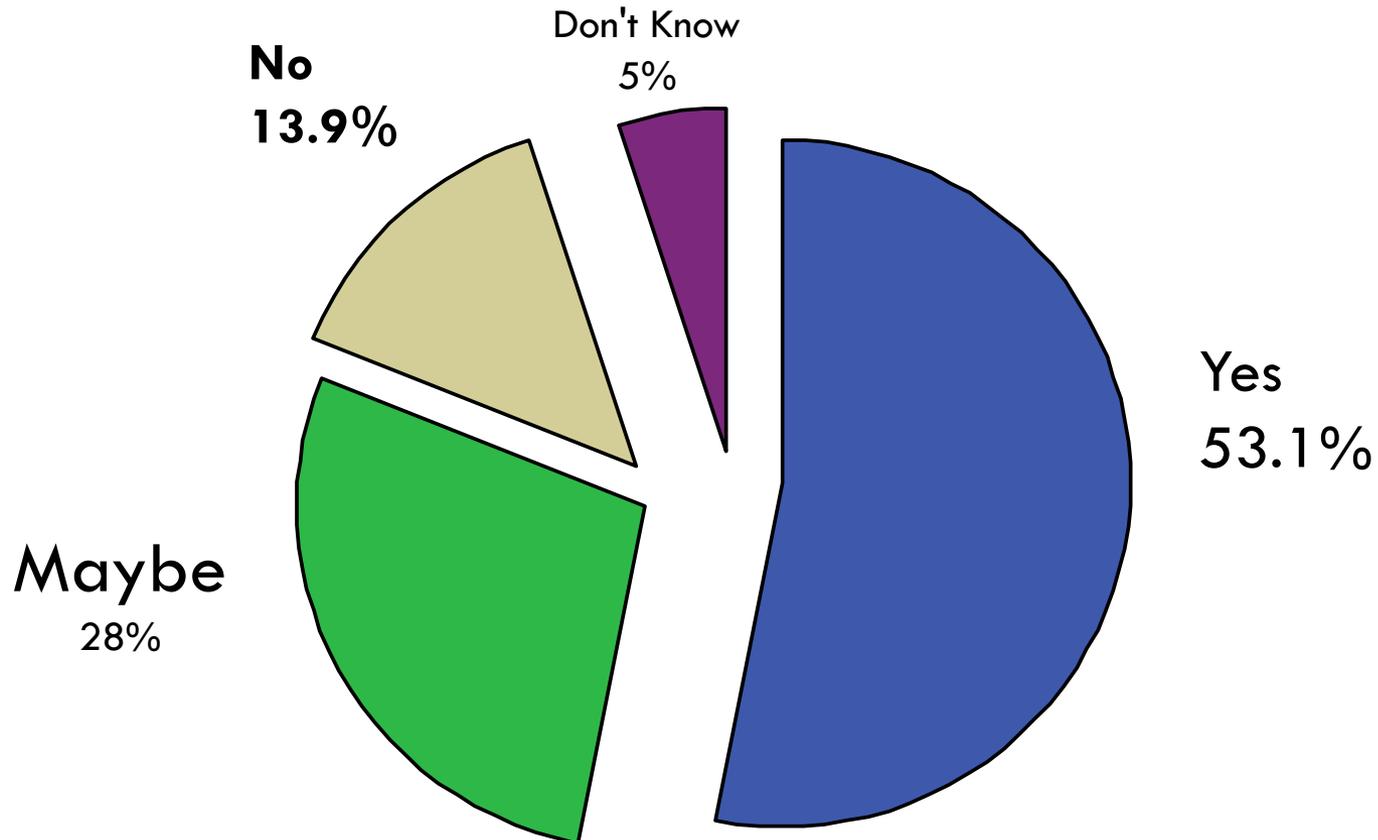
—on defense—

- we don't want sympathy
- here for justice
- see client as a person seeking justice, not someone maimed for life
- could bring back verdict for defense
- even scales
- need firm answer—I'm not the only lawyer who will be asking you questions

Tort Reform

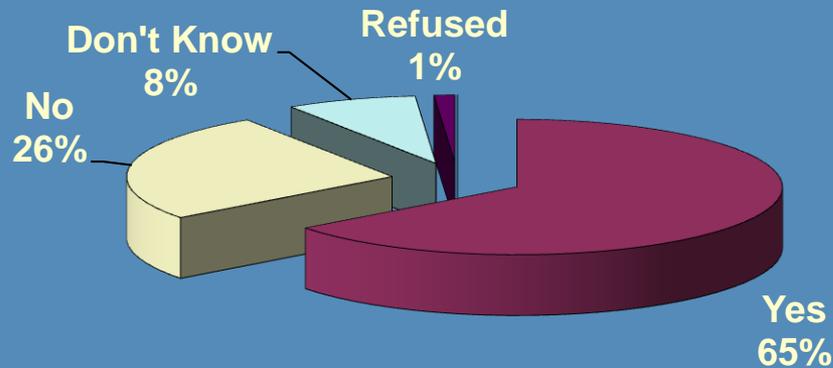
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Are jury awards too high?



A Majority of Jurors Support Caps

Do you support legislative proposals to place caps or limits on the amount of money juries can award?



Tort Reform

“G.O.P. Bill Would Make Medical Malpractice Suits Harder to Win”: NY Times 04/15/17

- Who agrees with the title of this article?
- Who thinks California has it right capping medical malpractice cases for non-economic damages at \$250,000?
- https://www.nytimes.com/2017/04/15/us/politics/republicans-health-care-bill-medical-malpractice-suits.html?_r=1

G.O.P. Bill Would Make Medical Malpractice Suits Harder to Win

By ROBERT PEAR APRIL 15, 2017



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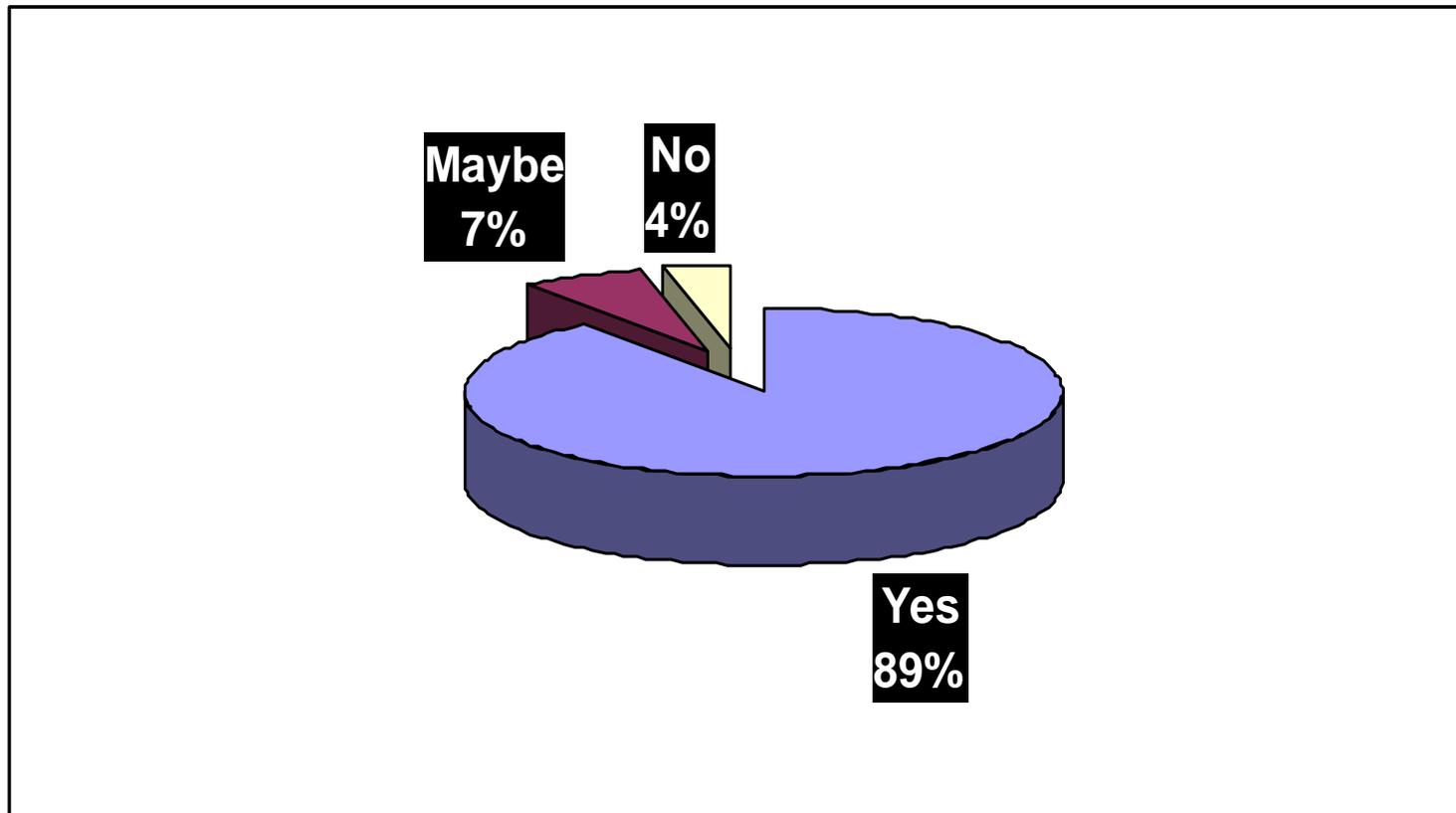


Who Stopped the
MARCH 24, 2017

Tort Reform

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Are people too ready to sue?



Tort Reform: Majority of Jurors Believe There are Too Many Lawsuits

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There are too many lawsuits.

	Percent
Yes	83.0
Maybe	10.6
No	4.5

Tort Reform

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“Never forget, almost every case has been won or lost when the jury is sworn.”

-Clarence Darrow

Recap

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Questions to ask:

- source of news: television, radio programs
- McDonald's coffee
- frivolous lawsuits
- drive up costs of insurance, products, medicine
- caps
- pain & suffering
- punitive damages
- burden of proof
- would not file a lawsuit
- most American companies are honest and ethical

Theme Building

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□ Let the *Jurors Educate You* as to:

- What is most important in life to you?
 - Who/what matters most to you?
 - What makes life valuable to you?
 - Who they provide for? (Spouse? Children?)
 - Why do you work hard everyday?
 - What do they enjoy doing with their time & money?
 - What's more valuable to you: **Working life** vs. **Personal life**?
 - (value of economic vs. non-economic damages)
 - Do you believe that only perfect people should get justice?
- **Do you live to work OR work to live?**

Theme Building

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- **“*They Said It*”**: Begin to build your trial theme by using the jurors’ own words
 - Jurors during Voir Dire may “say it better” than you ever could have if left to your own devices
 - **“Family, Friends, & Faith”**
 - **theme for case:**
 - *Opening Statement*
 - *Direct Examination*
 - *Closing Argument*
 - *Even Cross Examination of Defendant’s Corporate Rep*

Listen

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**We have two ears
and one mouth so that
we can listen twice as
much as we speak.**

Epictetus



Listen: Avoid a Jury of Those Who Didn't Talk in Voire Dire

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Social Media

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Pointers:

Do's and Don'ts

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- ❑ Don't try your case in voir dire
- ❑ Self Disclosure: I Dislike Certain Brands/Companies
- ❑ Give Permission to Express Bias
- ❑ Listen and honor their answers
- ❑ Don't ask questions that do not help you determine which jurors will be bad for your case
- ❑ Provide information about your case and disclose weaknesses
- ❑ Honor the Court, your client and your opposition
- ❑ Always display devotion to fairness for both sides in your questioning
- ❑ Speak in plain English
- ❑ Don't argue with a juror. Honor their life experiences.
- ❑ Be mindful of time – move along so the judge does not move you along
- ❑ Float Money, Generally, Early
- ❑ Use Scale 1-10
- ❑ Know the Judges tendencies, attend prior jury selection