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Getting Rid of Bias Lightning-Quick

If you want a fair contest, don't ask a biased person to judge the outcome. Eliminating biased decision-makers can be easier said than done, until now.

What Makes This System Different?

One of the hottest topics now in seminars and books is voir dire. Voir dire is the most important and one of the most difficult parts of trial. If you end up with jurors whose lips curl in disdain when they hear what kind of case you're bringing, you're in trouble. If you end up with jurors who come to court with views that align with the defense, you're in trouble. If you end up with jurors who think your case is just a money grab, you're in trouble. The problem is too many people have just such feelings and either don't want to admit it or, at least, don't want to admit those feelings will affect their impartiality. As a result, those of us who represent the injured are focused on addressing the challenges of seating a fair

and impartial jury in new and better ways. Collective wisdom is where the answers lie.

I have read many books on voir dire and have come away impressed with the ideas others have developed. You may be asking yourself: why bother reading another book that covers voir dire? What does this book bring to the table that is unique and worthwhile?

First of all, the systems in this book go far beyond voir dire. They present a framework for the entire case and new ways to take strength away from the defense. But the voir dire part itself is unlike other first-rate resources out there because of the speed in which the approaches I explain allow you to cut out bias. Many other approaches are extraordinarily effective if you have time. They often provide you with ways to really get to know your jurors (which is of huge importance), ways to get basic concepts favorable to your case introduced in voir dire, and good ways to tackle bias.

My system was born out of the frustrating fires of situations where bias ran rampant and time ran short. The more I can get to know potential jurors and see them interact, the better. However, if I have the miserable choice between getting to know the jurors better or getting rid of bias, I choose bias elimination. Some judges simply will not give you the luxury of having enough time to do full justice to both.

I have come up with a system that allows you to identify bias and establish grounds for cause very quickly. Despite the speed of this process, you are still assured enough time to gather essential information about the panelists so you are not flying blind. Sometimes you learn through further questioning that someone who gave answers that would allow you to strike them for cause is actually someone you want to keep for other reasons. When that happens, you keep your challenge in your pocket. Just because you created a record of bias against your client doesn't mean you have to exercise your challenge.

Getting rid of bias quickly protects you from seating jurors who are partial to the defense, particularly in those frequent situations where you have a panel smack full of biased jurors and don't have enough peremptory challenges to cover them all. With the ideas

presented here, you will have at least enough time left to learn key things about people on your panel, such as who are the leaders.

If you have a judge who respects the process enough to give you ample time, then this system works wonderfully together with some of the other methods out there. The sooner you get done with the bias part, the sooner you can get on to other smart ideas suggested by other authors.

You will see, at the end of this section, that I have an alternative way to start the process, one that is designed to get to know the jurors better on the front end, if you have a judge who is not pressing you unreasonably for time. I include it at the end because I want to first show you the lightning-quick bias elimination steps before getting into variations.

What Makes This System Tick?

The most offensive bruise of all is jury bias. Most defenses are tailor-made for those people who do not trust or approve of lawsuits. The defense counsel will fight as if his or her life depends on keeping those biased jurors. This intentional struggle to impanel unfair jurors is an affront to our fundamental belief in fair trials, and we must excise it before it ruins the entire case.

It is no secret that the biggest obstacle to a just verdict has become biased jurors. The incessant, insidious drumbeat of "frivolous lawsuits" and "runaway verdicts" has taken a toll. Hard economic times have compounded the problem and added other hurdles. Many jurors now worry about harming an American company that provides jobs. The number of bitter jurors has risen (jurors who are struggling, who are angry, and who view lawsuits as bailouts for other sufferers while no one is bailing them out). The daunting reality is that we rarely have enough peremptory challenges to ensure a fair jury. Mastering the art of securing challenges for cause has become essential to plaintiffs' lawyers.

Prospective jurors, and often judges, do not appreciate the subtle, yet influential, workings of bias. They overestimate people's ability to separate personal beliefs and opinions from the

decision-making process, and they mistakenly believe right will always trump leanings. They think that case specifics will win out over general preconceptions ("I may not like your case, but I will find for your clients if you convince me they are deserving. So what's the problem?").

The reality, as we all know, is that bias can skew the fairest person's judgment. It is a powerful, invisible force that infiltrates and subverts the justice process like a sleeper agent. For example, a Romney supporter who saw the final presidential debate in 2012 would say Romney beat Obama hands down, while an Obama supporter would say, "You're out of your mind. Were you watching the same debate as me?" Both would admit bias existed, but neither would likely admit their conclusion was based on it. They would argue that cold, hard facts led to a correct result.

The same phenomenon happens in lawsuits where the outcome is driven by evaluating the believability of competing witnesses, particularly expert witnesses. A juror who starts out with feelings against your type of suit is likely to find a defense witness more persuasive, since he aligns with that person's internal compass. After returning a defense verdict, that same juror would likely be convinced that bias had nothing to do with it. He could take and pass a lie detector test on that point. Such is the stealth of juror bias. If asked, after the fact, about any potential role bias might have played, the juror would likely scoff at the suggestion; pride would get in the way. No one wants to admit he is not the master of his own mind.

The opportunity to explain the potential impact of bias occurs at the front end, before jurors make up their minds, when there is still time for a conscientious person to opt out. Even then, it is a challenge. The affected ones typically have a hard time seeing themselves as unsuitable and will naturally resist the notion. To make matters worse, the opposing side will have a hard time accepting the elimination of their ringer jurors and will strategically resist. The judge may join the resistance movement when it becomes clear that the court will have to summon another panel.

Some panelists are too rigid to ever admit their preconceived feelings could influence them, no matter how or when you present

the question. Sadly, there are also those who set out to sabotage tort cases. No approach will get either of these types to acknowledge anything sufficient to establish a cause challenge. Thankfully, usually only a few of these biased panelists appear on any given panel. Hopefully, you have enough peremptory challenges to cover them. The remaining panelists who shouldn't be deciding your case typically are decent people who want to do the right thing. For them, it is imperative you have a plan that maximizes the chances of getting challenges for cause granted.

Making a Bias List

Before trial, make a list of potential bias subjects. Go through the process of thinking, "If I were to lose this case, what would be the reasons?" Include general bias areas, such as the type of case you are bringing (personal injury, medical malpractice) or pain and suffering damages. Then add case specific concerns (the plaintiff was not wearing a seat belt, the plaintiff was on a motorcycle, and so on).

The bias list is based on common sense. Ask yourself, what parts of my case are likely to cause a significant number of people to have a bad taste in their mouths? Here are some examples of bias topics together with a brief description of the underlying concerns that could create problems for your case.

- In a car crash case, one of the most threatening areas of bias is general distrust of personal injury cases—expectations that plaintiffs will exaggerate their injuries, mixed in with suspicion that your client sees the crash as an opportunity to cash in, rather than an unwanted intrusion thrust into his or her life.
- In slip and fall cases, many people feel it's your clumsy client's own fault. She should have been looking where she was going, they would say, and now she's trying to pass the blame off onto someone else.
- In motorcycle crash cases, bias often pops up based on bad experiences with bikers aggressively darting in and out of traffic. Motorcycle cases can also trigger strong reactions

about assumption of risk for being crazy enough to drive on the road with cars and trucks, completely exposed. Throw no helmet into the mix and you'll have a bias riot on your hands.

- In whiplash cases, many on the panel will be thinking, "fraud alert!"
- In medical malpractice cases, the primary danger comes from the misconception that lawsuits like yours are the reason people can't get a good doctor for their family.
- In all injury cases, pain and suffering damages are at risk for bias from anti-lawsuit propaganda that has too many people thinking it's about profiting from tragedy.

The following are other examples of bias hotspots:

- Wrongful death damages: all the money in the world won't bring them back.
- Large verdicts: they hurt us all.
- Consortium claims: claiming injury by a spouse is overreaching.
- Comparative negligence: you didn't protect yourself, so don't blame others.
- Vicarious liability: they didn't do anything wrong.
- Lawyer advertising: you can't trust ambulance chasers or their cases.
- Sympathy for defendants: they didn't mean to hurt anyone.
- Resentment over jury duty: bitterness is a poison pill.
- Plaintiffs who do not speak English: you live here; learn the language.
- Clients who have a felony conviction: you're not worthy.
- Clients who were drinking at the time of the crash: you've got to be kidding me!

Case Example: Drunk Driving Plaintiff

This last extreme example of bias illustrates just how well this system works. Following is a real case I tried where our plaintiff was admittedly driving drunk at the time of the crash in which she was hurt. If my approach could tackle that bias, no bias was too big for it. So I am going to jump ahead to give you a taste of just how good this method is at cutting bias bruises out, even the really ugly ones. Then, I will get back on track and go through the steps in logical order.

Our client was well over the legal alcohol limit at the time of the crash; there was no getting around that nuclear-charged fact. On the other hand, she was driving in her own lane and going the speed limit when the defendant, in a clunky, rust-bucket truck, pulled smack out in front of her from a side street. A big clump of overgrown shrubs blocked our client's ability to see the truck until it pulled out just a few feet away from a poorly lit side street. The best the defense could come up with from their accident reconstruction expert was one second to slam on her brakes, before impact, just enough to argue the booze was relevant. We fought to keep it out, but the judge ruled, before trial, that it was coming in. The truth was, drinking had nothing to do with this crash, but getting jurors who would be open to such a conclusion was daunting.

Here are the questions I designed for that monumental task:

Q: How many of you feel that if someone gets behind the wheel of a car while drunk, turns the key, drives down a public road, gets in a crash, and gets hurt, he or she should not be able to recover money in a lawsuit, no matter what the evidence shows as to whether drinking had anything whatsoever to do with the crash?

Q: How many believe that, as a matter of principle, the person should not be able to recover?

As you can imagine, lots and lots of people acknowledged feeling this way. Fortunately, we had a good judge who kept striking

them and bringing up more jurors. It took four panels to seat six jurors. There was nobody left to act as an alternate.

The result was a seven-figure verdict with zero comparative negligence on the plaintiff drunk driver. The verdict was righteous to the bone, but unimaginable minus this process of culling through prospective jurors who would have acted like an angry mob waiting to chase my client and me out of the courtroom with pitchforks.

Back to the Bias List

Now let's get back to where we left off: creating a bias list. Here is an example of the process of bias spotting being applied to a particular case I tried, one that was far less daunting than the drunk driving plaintiff case.

It was a car crash case without a lot of visible property damage, resulting in a herniated disc. We were suing the parents of a teenage driver, as the owners of the car. The defense hired a private detective to get surveillance, which showed nothing contradictory to our client's testimony, no smoking-gun bad evidence. The only problem with the film was that our client just didn't look all that hurt because you couldn't see neck pain on a video.

My pretrial bias list included the following:

- General feeling against personal injury lawsuits
- Feelings against pain and suffering damages
- Feelings against the idea that someone could be seriously hurt if there was not a lot of visible property damage
- Feelings against suing parents for their teenager's driving
- Feelings of suspicion that can arise from the mere existence of surveillance films, even when they don't show any exaggerating or faking

Pretrial bias lists lay the foundation for what is to come once you get to trial and crank the system up in voir dire.

The System Mainframe

1. Educate the jury about the power of bias.

   You will accomplish this goal in a snap by using an everyday analogy that brings home the unintentional, yet significant impact bias can have on the most fair-minded and strong-willed people when they are put in the position of judging a contest and have some leanings against one side going into it. Once the potential jurors on your panel understand that the influence of bias is not a sign of weakness or unfairness, but simply a product of being human, the steps that follow will flow smoothly.

2. Identify potentially biased panelists.

   After you've done your analogy-based education, the next step is to use questions you prepared before trial to identify people who may have bias in areas contained on your pretrial bias list. An example would be, "How many of you have feelings against personal injury lawsuits? How strong are those feelings against personal injury lawsuits on a scale of one to ten?"

3. Establish grounds for cause challenges.

   After identifying panelists who have feelings against the type of case you are bringing or aspects of it, then you have to find out which of those people have feelings that rise to the level of true bias. You must ask carefully worded questions (which you have designed before trial) to establish cause under the law of your venue. In this step the adage "words matter" is of utmost importance. You must pick words that provide a path of least resistance and which are wrapped around the law on challenges for cause.

Step one, the analogy-based bias education, is what you do at the beginning to create the right mindset for steps two and three (identifying and eliminating bias). From then on, you are able to repeatedly apply those next two steps (identify, eliminate) to each of the items on your bias list until you have covered all of

the bases and have put your client in the best position to get an impartial jury.

We will walk through the steps of this process in a way that ends with you *getting it*, not just reading it. My aim is not to share only *what* I do, but *why* I do it, so you can make it fit your personality, your style, yourself. As I explain my goals, my thought processes, and my struggles going from the drawing board to the courtroom with this system, you will be able to own it, run with it, even improve on it. The system works best when it comes from your heart, not my pen.

Once the core concepts are laid out, my hope is that everything will fall smoothly and comfortably into place. In time, my words will fade into echoes of influences and something that is your own will take over. I know this from years of getting feedback from lawyers who have attended seminars where I have shared these same methods.

What You'll Learn in Part I

Every step of the way will be covered in the chapters to come.

In chapter 2, "Educating Jurors about Bias," you'll learn how to come up with lightning-quick ways to educate jurors about the powerful influence subtle bias can have on all of us. For most on the panel, giving an analogy will be like turning on a light switch. When potential jurors understand the effects of bias, they are much more likely to recognize and acknowledge the impact their own predispositions may have on them.

In chapter 3, "Identify Those at Risk for Bias," you will be shown how to seamlessly transition from that meeting of minds on how bias works into identifying those on the panel who are at high risk for being biased.

In chapter 4, "Establishing, Expanding, and Fortifying Cause," I will show you how to establish cause, without having to pull teeth, on those who are biased. It is amazing how much better the honor system called voir dire works once this foundation of understanding is laid. I will also show you ways to use group dynamics

to accelerate this process of gathering and eliminating bias. You don't have to reinvent the wheel with each panelist. Once someone has modeled the integrity of admitting their bias and its potential impact on them, other biased jurors will be more comfortable acknowledging the same.

In chapter 5, "Nuances and Common Complications," I'll cover common bumps you will face along the road. There will be biased jurors who resist the natural flow of this process. I will show you how to deal with them.

In chapter 6, "Identification and Cause Questions for Car Crash Cases," chapter 7, "More Identification Questions and Cause Questions," and chapter 8, "Identification and Cause Questions for Medical Negligence Cases," I'll give you lists of bias topics that show up repeatedly and describe how I deal with them. There is no reason for you to make the same mistakes I've made along the way while developing things that I now know work. I'll give you the end products—the keepers, not the flops nor early prototypes. Then feel free to tinker with them, or build your own with the same aim in mind.

In chapter 9, "Wrapping Up Bias," I'll provide additional key pieces, such as safeguarding your cause challenges and explaining your honorable intentions to the Court if friction arises. I will also lay out for you an alternative way to begin this process, if you have the luxury of a little more time, one that will help in the overall gathering of information to better understand the people on your panel. I'll also cover things like how to use catchall questions to make sure you aren't missing any bias; how to protect your challenges from defense attorneys who cling to bias like a stolen life raft and will try desperately to "rehabilitate" biased panelists; how to reach an accord with judges who may become agitated when the number of valid cause challenges start to mount; and when not to ask questions about bias areas.

In chapter 10, "Completing the System after Bias," we'll round out the process with important topics such as how to fill in information gaps about individual jurors, how to head off defense voir dire tricks, how to identify leaders on your jury, and how to insulate fair jurors from falling prey to defense efforts to run them off.

In chapter 11, "Putting It All Together," I will walk you through a voir dire, from beginning to end, to show you how all these pieces fit together. It is a particularly short voir dire session, and I have redacted parts where the back and forth grows tedious. As we go through this piece by piece, I will give examples of how each segment unfolds in the free-for-all we call jury selection.

Paring It Down

Bias is the worst bruise of all and the biggest spoiler of justice. This system will allow you to cut out bias faster than any I know of.

- Prepare a pretrial bias list of areas that concern you.
- Educate the jury about how bias works, using an analogy.
- Ask questions to identify those who may harbor bias in the areas on your list.
- Ask questions to establish grounds for cause challenges as to those who are biased.
- Repeat this identification and elimination process for items on your bias list.
- Keep reading to really *get* how all of this comes together.