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PUTTING IT ALL TOGETHER

To let you see how this flows in real time, I have included excerpts from a trial transcript of an actual voir dire. I added short explanations in brackets to point out key concepts along the way. Here are the excerpts.

THE COURT: Okay. Mr. Mitnik, you may proceed.

[First comes the lead-in to the analogy: points of friction.]

MR. MITNIK: Thank you, Judge. Good morning. Again, I'm Keith Mitnik, and I'm going to be asking you some questions about life experiences or opinions you may have that could potentially influence you if you were to sit on this case. Sometimes people can have life experiences that create points of friction with the particular kind of case it is. There's nothing wrong with that. That's human nature. We all have issues on which we have feelings or beliefs that would create friction points, if we were asked to decide who's right or wrong. The question is do you have any for this particular kind of case?

[Then comes the analogy to explain how bias works.]

For example, let's imagine a contest to see who made the best barbecued ribs. It is down to two rib recipes—one with mustard barbecue sauce and one with tomato barbecue sauce—and I have been randomly picked out of the audience to be the judge. I'm not crazy about tomato-based barbecue sauce. I like the mustard sauce better. Does everybody understand, in that situation, the contestants would probably want to know, particularly the one with the tomato sauce, that I'm not crazy about tomato barbecue sauce? Does everyone agree the only right thing for me to do would be to reveal that distaste to the contestants and let them decide what to do with it? And lastly, does everyone agree that the right thing for me to do would likewise be to soul-search and consider what impact my personal taste might have on my decision, be honest with myself and not sugarcoat the potential impact? Not to suggest that if we had a succulent, wonderful rib over here, that just happened to have tomato sauce on it, and a dried-up, sorry rib over here with mustard sauce on it, that I'd throw it for the mustard one, but all else equal, when I bite into the one with the tomato sauce, I kind of go... [holding imaginary ribs up to my mouth, with my lip curling up on one side]. It's hard to put the reaction aside. So does everyone agree that I'd be better off down the hall judging pies or something where I don't have to struggle with that?

[Now, I explain the process and the one-to-ten scale with the first topic on my pretrial bias list.]

Well, this case has got nothing to do with ribs. This is a car crash case; it is a personal injury case. So I need to ask about feelings you may have against that kind of case. I've got several subjects that I'm going to ask you about, and I'm going to follow kind of the same model—because I think if you know what's coming, it makes it easier. You've been pulled into here, and this is kind of a foreign procedure to you.

On each of these subjects, I'm going to tell you what it is that I would have a concern about. I'll ask each of you if you have any

feelings against that particular subject. For example, I'm going to start with, generally, some feelings against personal-injury-type lawsuits. If you do have feelings against the lawsuit, then I'm going to ask you to put them on a scale, as best you can, of one to ten. And, to be clear, if you're neutral, you wouldn't have any number. I would be asking you to put a number on it only if you had some feelings against this kind of lawsuit, not for it or neutral, but some feelings *against* people bringing these kinds of lawsuits. The mildest feeling against would be a one; ten would be the strongest; five would be moderate feelings against. I know it's not an exact science. You didn't come in here with a number, and nor do I expect it to be precise. But it'll give us some gauge of the depth of those feelings.

After I've talked to everybody about this, I'm going to come back and ask you specifically—because I'm going to give you a little time to think while I ask others to soul-search it in this honor system and to think on this: is it one of those things that you are confident you can completely put aside where it would have no influence? Or is it something that, in all honesty, you'd try your best to put aside, but it might unintentionally affect you and cause us to have a strike against us because of those feelings? And I'll do that with several subjects.

[Next, I move into the step where potential bias is identified.]

So let me start with that first subject, and I'm going to start with Ms. Gatehouse.

MS. GATEHOUSE: Yes.

MR. MITNIK: Okay. Do you have any feelings against personal-injury-type lawsuits?

MS. GATEHOUSE: No.

MR. MITNIK: Mr. Lattimore?

MR. LATTIMORE: Yes, sir. I would say I have some mild against, maybe like a two.

MR. MITNIK: Okay.

MR. LATTIMORE: —because of my experience.

MR. MITNIK: Understandable. I appreciate you telling me, and I'll come back to you. Mr. Thurston, do you have any feelings against personal injury lawsuits?

MR. THURSTON: Yes, about a nine.

[I explain how I am trying to save time by the way I'm asking questions.]

MR. MITNIK: There are two ways I can do this: the long way and the short way. I'm going to do it the short way. The long way is to ask you to describe in detail what your feelings are and talk to each of you about the potential impact they may have on you here. The short way is to tell you what my concern is and then have you tell me if that is a valid concern. If we need to go further into it, we will. If not, this will save time. Is everyone okay with that approach?

[Then I establish cause for the biased panelists by asking questions based on case law. I ask Mr. Thurston first, because he seemed like someone who would tell it like it is. It is important to get the first person to model it right, if you can.]

MR. MITNIK: Mr. Thurston, would your feelings be such that there's a chance we may be starting out with a strike against us in spite of your best effort to push them aside?

MR. THURSTON: Yes, sir.

[I praise him for his honesty, so others understand it is the right thing to do.]

MR. MITNIK: I appreciate you sharing that, Mr. Thurston. That's what makes the system work. I appreciate it.

[I expand the first admission of bias by asking how many others feel that way.]

MR. MITNIK: How many of the rest of you feel like Mr. Thurston to any degree? Mr. Lattimore, by raising your hand, did you mean to say that we may have a strike against us because of your feelings against personal injury lawsuits, in spite of your best effort to put them aside?

MR. LATTIMORE: Yes, sir.

MR. MITNIK: I very much appreciate your honesty and candor.

[There were more, but let's move on to the next subject on my pretrial bias list.]

MR. MITNIK: Let me move to the next subject. In a personal injury lawsuit, there are two major categories of damages. Damages is the part where the jury sits as a group of appraisers and assesses the value of what was lost; they put a monetary value on the losses. The first value is economic damages, things like lost wages and medical expenses. The second is noneconomic damages, often called pain and suffering damages. These deal with the impact on quality of life. Most people are okay with the economic damages, but when they get to the noneconomic, pain and suffering damages, they have feelings against them, a level of distrust or dislike. Let me ask how many of you have feelings against pain and suffering damages in a lawsuit?

MR. MITNIK: Ms. Ellerbee?

MS. ELLERBEE: No.

MR. MITNIK: Ms. Richards?

MS. RICHARDS: About a two.

MR. MITNIK: All right.

MR. ANDREWS: I guess it would depend on the type of pain we're talking about, but—so I would say possibly a two or three.

[Here I explain that we have to talk in generalities.]

MR. MITNIK: I do realize I'm asking you questions in a vacuum with very little information, and these aren't the easiest questions; but it's the nature of how we have to do it. We're not allowed to lay out our evidence and ask, which way are you leaning? We can't pre-try the case, so we do have to talk in generalities. Given those limitations, it is still important to talk about it.

MR. MITNIK: Mr. Thurston?

MR. THURSTON: I'd say about an eight.

MR. MITNIK: Ms. Sanders?

MS. SANDERS: Two.

[I go back to Mr. Thurston, because he seemed ready to admit his bias.]

MR. MITNIK: Mr. Thurston, with—let me come back to you with the eight. I know we've talked about the first issue, but would that be an additional ground that we may have a strike against us in—on proving that part of the case, given your feelings in spite of your best effort to put it aside?

MR. THURSTON: Yes.

MR. MITNIK: How many of you feel like Mr. Thurston to any degree—that we would be starting out with a strike against us on pain and suffering damages? Raise your hands, please. Mr. Andrews, by raising your hand, did you mean to say that we would be starting out with a strike against us on pain and suffering damages, in spite of your best efforts to put those feeling aside?

MR. ANDREWS: Yes.

MR. MITNIK: And, Mr. Lattimore, is that what you meant?

MR. LATTIMORE: Yes, sir.

[Next I'm looping back to those who had feelings against pain and suffering damages, but did not raise their hands to feeling like Mr. Thurston.]

MR. MITNIK: Who gave me a number for feelings against pain and suffering, but didn't raise their hands as to feeling like Mr. Thurston?

Ms. Sanders, you said you had feelings against pain and suffering damages, but you did not raise your hand to feeling like Mr. Thurston, who said we would be starting out with a strike against us. Did I get that right? Do you mind just sharing with me your thought process?

MS. SANDERS: It's just that we were involved in an accident a long time ago, and it was hardly anything; but then they put a claim in on us, personal injury, for a big amount.

MR. MITNIK: And you thought they were exaggerating it?

MS. SANDERS: Yeah.

MR. MITNIK: I have a question later about people that have been defendants in a lawsuit, but since you brought it up, let me go ahead and cover that with you, if you don't mind.

MS. SANDERS: Sure.

[I'm now covering another topic on the bias list—defendants in lawsuits—a bit out of turn.]

MR. MITNIK: Sometimes when people have been through a personal experience like that, it can leave a mark on them or leave a memory that's a little hard to shake. My concern would be, having been through that personal experience, that while you try to separate it from this situation, there may be some bleed-over so that we end up with a strike against us in spite of your best effort to put that aside. Is there a chance that could come into play?

MS. SANDERS: I don't think so, because, just after hearing the evidence, well, then you're going to see what it is.

[I clarify what she means by "I don't think so."]

MR. MITNIK: All right. And I'm going to ask a question that will sound pretty precise, but I need to make sure I understand what you mean by your answer. When you say, "I don't think so," that could mean, "I'm 100 percent certain; that's just my way of saying it." Or you could mean, "I'm almost sure, 95 percent sure, but not completely." Which did you mean?

MS. SANDERS: Well, the first, 100 percent.

[That answer does not qualify for cause. She will go on my list of possible peremptory challenges, depending on her overall answers.]

MR. MITNIK: Okay. Thank you, ma'am. And that's why I ask, because I really don't know the answer to the question, and it is important that I get a clear understanding. Was there anyone else who gave me a number, but didn't feel that it would cause us to have a strike against our side? Yes, sir, Mr. Gathers. Do you mind sharing with me your thought process on that?

MR. GATHERS: Well, it's subjective. I mean, how much do you award somebody for pain and suffering? How much pain did they go through?

[Here I give a brief lesson on how bias is not about being an unfair person.]

MR. MITNIK: Ultimately, the judge will give you the law on it. But I can give you a basic concept, which is that people sit as a group of appraisers of loss and listen to the testimony about how bad it is and how it is affecting my client. And then the jury decides what would be fair and just. What my concern is—I say “fair and just,” and I think everyone would say, “Well, I can be fair and just.” I'm sure everybody is fair-minded. But kind of like my barbecue example, sometimes, in spite of being a very fair person, those kinds of feelings or experiences can have an unintended influence.

MR. GATHERS: I don't like mustard or tomatoes.

MR. MITNIK: Well, you'd be all right at a rib contest. My real question is this: Given some of the feelings that you have, when it comes down to assessing those kinds of damages, might that have a bit of an adverse impact, some level of distrust that could come into play even though you try not to let it?

MR. GATHERS: I'm 95 percent certain it wouldn't.

MR. MITNIK: All right. Ninety-five percent certain, but you have some doubt in your own mind. Is that fair?

MR. GATHERS: That's fair.

[That answer qualified for cause in the venue. I would have to decide with such a mild-sounding answer whether he was biased and downplaying it or

just being very honest. In this instance, I ended up excusing him, because he was a cranky retired guy. I never want to come off as if I am grilling the panelists—this next part makes my intent clear.]

MR. MITNIK: By the way, I'm saying things back to you in my words because things move quicker that way. It is faster than saying, "Explain what you mean." Look around. If I ask all of you to explain what you mean every time, it will take a long time. So I will say back to you what I think you were saying. If I am wrong, for goodness' sake tell me. I do not want to ever put words in your mouth. Is everyone all right with that shorthand way of communicating clearly?

[Next, I ask about a case-specific concern; a big part of the defense is *subjective*.]

MR. MITNIK: Thank you. Let me move to another question. In an injury lawsuit, there can be various ways of proving an injury. One type of evidence is called *subjective proof*. Subjective proof is when someone goes to the doctor and says, "This hurts." What you tell a doctor is subjective. The subject is saying it. *Objective proof* would be when an X-ray or some test is run. It's not dependent on what you're telling the doctor. That's objective. Subjective is what the patient says. In medicine, doctors rely on subjective all the time in treating patients. They don't just throw it out the window, but they also use objective testing.

In a courtroom, here would be my concern. What people say to their doctor in a lawsuit setting, as opposed to if no lawsuit is involved, often leads people to start out thinking, "They're probably exaggerating some of what they're telling the doctor." Others might feel, "Look, they may be exaggerating, but I sure wouldn't start out thinking that way." They'd start out with a clean slate on that, even though they're in a lawsuit. My question is this: how many feel, honestly, if there is a lawsuit, your starting point would be to think there's probably some exaggerating going on, and we'd have to disprove it? We could come forward with evidence and convince you otherwise, but that would be where you would be starting out? Am I making

myself clear? Okay. The question is this: Would you be starting out thinking there's probably some exaggerating going on in the lawsuit? We'd have to prove to the contrary?

MR. MITNIK: How about you, Ms. Ellerbee?

MS. ELLERBEE: Clean slate.

MR. MITNIK: Mr. Drovers?

MR. DROVERS: Some degree of exaggeration.

MR. MITNIK: Okay. You would try to put that aside, but in all honesty, that's the way you'd start out?

MR. DROVERS: Yes.

[Next I cover the burden of proof the new way—see chapter 25, “The Civil Burden of Proof,” for more on this.]

MR. MITNIK: Let me move to burden of proof. The judge touched on this. I want to touch on it just a little more. This is a civil case, not a criminal case. And I am sure everyone has heard the criminal burden of proof being “beyond a reasonable doubt.” It's almost a black-and-white certainty. Before we put someone in jail in America, we've got to prove it beyond a reasonable doubt. And it's a high burden. It means, if someone were to sit on a jury and decide, “I think he did it; I'm almost certain the guy did it, but I've got a little doubt,” and that doubt was reasonable, if he or she were following the law, he or she would have to say not guilty. On your watch, you'd see that person walk out of the courtroom. It can be a tough thing to do.

We've all seen criminal settings on TV, where experts are creating confusion and picking at the evidence to create doubt. In a criminal case, creating doubt creates an out. Well, this is not a criminal case, and no one is going to jail. This is a civil case. We have a different burden of proof. Creating doubt does not create an out here. In a civil setting, we have a much more manageable burden for the jury to work with. It is a weighing process in which you get to decide what is more likely right

than wrong, what makes more sense. Many jurors prefer that approach. They consider it to be more juror-friendly, more manageable—they like the idea of the outcome being based on reason and sense.

Having said that, some people feel that if a person is suing for money damages, he or she ought to have to prove it beyond a reasonable doubt. How many of you feel that way? Okay, I see no hands. Does that mean all of you are happy with a standard where you get to decide the outcome based on what's more likely right than wrong, where creating doubt does not create an out? I see everyone is nodding yes.

[You will see in chapter 25, “The Civil Burden of Proof,” how important it is to establish this and why I do it this way. Next, I cover another topic on the pretrial bias list—former defendants.]

MR. MITNIK: Let me ask you this: How many of you have been a defendant in a lawsuit? And before you answer that, I want to make it clear what I am asking about and put some limits on it. I would include you or a loved one, so not just you personally. By “loved one” I mean a family member or a friend who is like family, not some acquaintance, but somebody who is close enough to be influential. Have you or a loved one been sued in a lawsuit? Now, I want to leave some things out. I don't want to know about family court—divorces, custody, none of that. Also, I am not asking about anything criminal, only civil. And I'm leaving out any kind of foreclosures or bankruptcies, not including that, but any other kind of a business suit or personal-injury-type lawsuit where you or your loved one would have been the one being sued. And I would include instances in which it didn't get all the way to a lawsuit. Maybe there was a claim and it got resolved before it got that far. But had it gone the whole way, you or your loved one would have been the one getting sued. That's a lot of explaining. Is everybody with me? Okay.

[Notice, as follows, this time I ask by rows rather than individually, since we're later in the process.]

In the front row, how many of you would say, yes, I or a loved one fits into that category of having been the defendant in a civil suit? Okay. Ms. Dylan. Mr. Drovers, and Ms. Dorfli. How about in the middle row? I know you raised your hand earlier. You told us earlier, Mr. Lattimore. Is there anyone else in that row? How about the last row? Okay. Did you tell us already, Mr. Lattimore? Is that correct?

MR. LATTIMORE: Yes, sir.

MR. MITNIK: Thank you. Ms. Dylan. I don't want to get too far into personal things, but do you mind just sharing with me a little about the situation?

MS. DYLAN: Yes, well, I was in—in the vehicle when the accident happened. And the driver of our car was to blame. However, the one that got out from the other car was very well, had no problems; but then we heard through the insurance that he was asking a larger amount, and it was settled with the insurance company. But that was just something that happened to me; that's not this case.

[I use a new analogy to get across how bad experiences can have a lingering effect.]

MR. MITNIK: Let me follow up on that, if I may, and give you a short analogy to help explain what I am interested in. I don't like lemon in my water, and I'll go to any restaurant in the country and say, "No lemon," and about three-fourths of the time they put a lemon in it. They're not ignoring me; it's just a habit. Most people like the lemon. I can take the lemon off and I can wipe the top of the glass and I can take the seeds out and I can hold it up and can't see it; but when I'm at the bottom chomping on the ice, there's still that lingering little bit of sourness from the lemon. I worry sometimes, when people have had an actual bad experience that leaves a sour taste in their mouths, that it can have a lingering effect that can have an unintended impact. In your mind, is there a chance that your experience could linger and have an unintended impact, despite your best efforts?

MS. DYLAN: In all honesty, it might.

MR. MITNIK: Thank you for telling us.

[Here I'm protecting my challenges for cause from unfair attempts to undo them.]

MR. MITNIK: Before I sit down, I want to thank all of you for your patience and thank you for your cooperation. This was not pulling teeth. Everybody took this process seriously. You did the process proud, and I thank you. And for those of you who have said that, "We may have a strike against us, in spite of our best efforts," on a variety of subjects, I want to thank you individually.

[I read their names].

That kind of openness and candor is what makes the system work. This is an honor system, and you did it honorably. The integrity of justice relies on people taking it seriously, and I thank you. Before I sit down, I just want to make sure—since I don't get to get back up and talk to you about it again—do each of you that told me we may have a strike against us in spite of your best efforts to put your feelings aside, that we were clearly communicating with each other, that there was no misunderstanding, were we clear when you told us that? Since this is my last chance to talk to you about those feelings, let me just be sure: was that your final answer? Okay. Everyone is nodding their heads yes.

MR. MITNIK: Thank you very much. Now I'm going to hush.

THE COURT: Okay. Thank you, Mr. Mitnik.

PARING IT DOWN

- ◆ Inform the jury with a bias analogy and everything is in place.
- ◆ Start working your way through your pretrial bias list.
- ◆ Identify potential bias and establish cause for actual bias.
- ◆ Make it clear you are not putting words in their mouths, just moving things along.
- ◆ Protect your valid cause challenges before sitting down.