

## **Practical Tips for Jury Selection in Civil Rights Cases: Bad Attitudes and Other Common Problems<sup>1</sup>**

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Twenty some years ago social scientists got involved in a variety of court cases in order to assist defense attorneys in evaluating racial attitudes of jurors. As "volunteers" who had generally not been involved in the courts, many of us were shocked at the types of questions that were asked. Shocked because of both the ineffective questions and the methods used to ask those questions. As we began to work more and more with attorneys and became involved in workshops and seminars, we were struck by the type of questions we were asked about asking jurors about racial and other controversial attitudes. "Don't you think that jurors will get mad, be resentful?" "Don't you think that jurors will think I'm asking for special treatment for my client if I focus too much on race?" Thankfully, we've come a long way since those dark ages, and most attorneys recognize the importance of getting at the jurors' prejudicial attitudes on any issues that might affect their decision making, in spite of the tension it can create in the courtroom. However, lingering doubts remain among attorneys as to how far to go - often uncomfortable themselves with the line of questioning. This doubt can result in failing to ask questions that will get meaningful answers, and can come through to the jurors, subtly influencing their answers as well.

The key to getting answers that mean something from jurors, on sensitive matters like race, gender, or any other subject for that matter, continues to be the use of open-ended questions. Planning ahead and being prepared are also essential for obtaining the most information possible, given the courtroom conditions. Since most federal courts and many state courts restrict or forbid attorney conducted voir dire, I will cover some strategies for getting more information under those circumstances at the end of this article.

But first, let's take a quick look at what makes voir dire work - regardless of the issues.

### **A "Less Is More" Approach to the Questioning**

A successful voir dire is one where there is an exchange of information - a conversation that takes place between the attorney and jurors. Bluntly speaking, most attorneys talk too much during the questioning. They take six questions to ask what could be asked in one. This is most obvious if one takes typical questioning about occupation:

Are you currently employed?

Where do you work?

What do you do?

Do you supervise anyone?

Are you the person who ... ?

Do you work with other people or are you on your own?

How long have you had this job?

The less is more approach would be to simply say, "Tell me about your job - where you work,

what you do." Chances are that the juror will say more in response to this open-ended invitation than to the previous six questions. The juror will self select what is important to him or her about the subject, and if there are other factual matters that need to be followed up on, the attorney can ask specifically. And equally as important, the attorney can set the tone for a conversation rather than setting him or herself up as the Lord High Inquisitor who gets only staccato answers.

The importance of the atmosphere in the courtroom cannot be underestimated - many jurors tell us they feel nervous and often intimidated, they are worried about being "cross examined". Any attorney who can counter that expectation by engaging in conversation rather than interrogation will win the gratitude - and the cooperation - of most of the panel.

When it comes to questions about sensitive matters, there is even more of a tendency to want to control the jurors' answers by asking very narrow questions - at the very time when the questioning should be the broadest. If the jurors become used to talking about themselves in response to "Tell me..." style questions, it is much easier to get them to talk about their attitudes towards case issues. And if the jurors do clam up, or change postures in the interaction with the attorney in relation to questions about certain issues, that information is very valuable in and of itself.

### **Attitudes about Civil Rights and Discrimination**

What we are seeing in jury interviews, trial simulations and focus groups around the country is that most jurors do believe that "it is wrong to discriminate", but they also believe that a lot of people cry discrimination as an excuse for things which happen to them when it is really the person's own fault. Some jurors also have a hard time defining a situation as discrimination unless more than one person - be it a woman, Asian American, etc - has been discriminated against, or if there are other women or Asian Americans who weren't discriminated against. Of course, some jurors are more committed to a negative analysis of discrimination cases than others, and would hold plaintiffs to a higher burden than others. They are the jurors who need to be identified and with luck, removed from the panels.

The biggest change in recent years is that an ever increasing percentage of the population, regardless of where they live, has had direct experience with situations involving what they perceive to be either founded or unfounded accusations of discrimination. These situations take place primarily on the job, but there has been an increase in charges of discrimination involving other organizations and other aspects of life as well. What this means for jury selection is that more jurors are coming to court with attitudes that are based on personal experiences, not just what they have read about combined with their ideological orientation. This provides us with fertile ground to learn about individual jurors and have a firmer basis to exercise strikes. Unfortunately, opportunity is being lost due to fear and lousy questioning habits.

### **What if a Juror Gets Hostile?**

One of the biggest fears for attorneys in jury selection is that a juror will become angry or resentful about the questioning. It happens. We've all been there. But rather than be afraid of this kind of interaction, we need to reframe our thinking and see it as an opportunity, a gift. It's much

better that the "hostile" juror say whatever it is he or she has to say in open court, rather than save it for deliberations.

"But what about the effect on the other jurors? Won't they turn on me too?" It depends on how the attorney handles the situation. If the attorney jumps down the negative juror's throat in an effort to get the juror off for cause, many of the other jurors will be horrified, critical and/or become inhibited about their comments. No one wants to talk to someone who is disrespectful or nasty. The other big fear attorneys have is that one of the jurors will say something that will "pollute the panel". This is a fear that is extremely overblown. While there are things that a juror could say that would "pollute" the others, most of the time this is not true.

General attitudes being expressed are not going to hurt your case - "I think affirmative action is terrible", "I think the police deserve more support" - unless it's poorly handled. And in some instances, those types of attitudes don't necessarily mean that the juror will be negative towards your case. The types of information that can prejudice other jurors are that which is case specific - "I know the plaintiff, he was fired because he was a lousy worker", "The plaintiff comes from a bad family and she has always been in trouble." The risk of jurors divulging case specific information, while rare in big cities is common in smaller towns. The legal team has to be sensitive to this possibility, so that the juror can be talked to out of the hearing of the other jurors if possible. But it is also important to distinguish this kind of case specific information from general attitudes being expressed.

### **Negative Answers Are an Opportunity, Not a curse**

We all know from our everyday interactions, and research confirms, that general attitudes that are "bad" for civil rights cases are ubiquitous these days. But they don't necessarily mean that we can't win the cases. Most jurors will probably have heard the "bad" attitudes themselves, if they don't already have some similar feelings. For the jurors who don't agree, hearing another juror express his or her opinion isn't going to change a juror's mind. Give the jurors some credit. They are mostly adults, with ideas of their own. They've probably heard it all before anyway. We need to see negative answers as an opportunity.

### **Bring Negative Attitudes Out**

The most effective way to defuse negative attitudes is to get them out into the light of day. In a group voir dire situation, if a juror expresses an attitude that the attorney feels is death to the case, that's the time to step back, take a deep breath, and in a calm voice ask something along the lines of, "It's interesting you should say that. Does anybody else feel that the police should not be sued?" And then go back to the original juror and explore that opinion in depth, with open-ended questions:

"Why is it that you feel that way?"

"Are you thinking about a particular case when you say that?"

"How would you handle a situation where the police were clearly in the wrong and injured

someone?"

"What do you think you would do if something happened where you felt the police were abusing their position?"

Then, ask the other jurors who raised their hands what they think about the issue. Finally, go back to the original juror who brought it up and sum up in a tone that is curious, rather than accusatory:

"In this case, Mr. Smith is suing the police department of our fair city, saying that they abused him. How do you think your feelings about suing the police might affect you in being a juror in this kind of case?"

"Given how you feel, how do you think you will be able to be impartial?"

"It sounds like you feel that the police should not be criticized in this situation. You're supposed to start out neutral as a juror. How are you going to be able to do that?"

Using this approach, there's always a chance that you could get a cause challenge. But even if you don't, if you keep your tone respectful, the other jurors will see your point, and they will respect you for your willingness to take the issue straight on and deal with it without becoming insulting. We hear over and over from jurors in post-trial interviews that they didn't like the way an attorney "went after" another juror - "He wasn't on trial." But it doesn't have to be. There are ways to handle the prejudiced or even hostile jurors which will result in more cause challenges and less offense to other jurors. There will still be tension in the courtroom, but that is not what jurors complain about. The key is getting the jurors to talk.

### **Preparation Makes a Difference**

The only way to feel comfortable with letting jurors express negative opinions in the courtroom is if you are prepared - both with specific questions to ask to see how firmly the juror holds the view, and psychologically so that you can remain calm and focused. Attorneys need to plan for the worst. Don't just agonize over the bad attitudes that might come up, be ready. Think through what your biggest fears are that jurors could say, and think through the ways you could handle it. Role playing with someone else - colleagues, legal assistants, trial consultants, spouses, friends - is probably the best preparation, but writing out jury scenarios and following them through is also helpful.

Many attorneys have the tendency to fall back on old, closed-ended habits when questioning what they perceive as "hostile" jurors. By writing out open-ended follow-up questions for specific problem areas - questions designed to bring the juror out rather than shut the juror up - the attorney will be more likely to fully explore a juror's attitudes. The answers may be surprising at times, but most likely they will provide a firmer basis on which to ask for a cause challenge or to exercise strikes. Once the juror has clearly stated their opinions, closed-ended questions are appropriate to try to establish a cause challenge. The problem we see is that when closed-ended questions are used at the first inkling of negative feelings in a juror, the dialogue is

cut off and the juror doesn't realize the impact of his or her feelings on his or her impartiality in the case. Without that self recognition, cause challenges are generally lost. But jurors who have expressed bias in their own words are less likely to back down during rehabilitation attempts by the defense or judge.

If it's clear that the juror is not going for cause, it's also best to have a final closed-ended question which will appeal to universal values we all hold dear. Something along the lines of, "You have some strong feelings about cases like this. All Ms. \_\_\_ is asking is that you listen to what she has to say and treat her as an individual. If we can prove to you that she was discriminated against, she's asking that you find in her favor. She's asking that you not judge her until you know the whole story. Do you think you can do that?" One never knows how that juror who seemed so bad at the time will look compared to the rest of the panel.

Handling bad attitudes that will be expressed by letting jurors not only say them, but then elaborate on them, is frightening because we want the atmosphere in the courtroom to be one where our client's right to recover if we prove our case is in the forefront. That means that the entire panel must be brought back to a positive point once negative attitudes on a certain subject have been adequately explored. This again requires an appeal to universal values:

Some of you think affirmative action is terrible, others of you think it is important to eliminate discrimination. But do we all agree with the law that says an employer can't discriminate against a person - can't treat that person differently on the job - simply because she is a woman? That's what this case is all about.

### **"I Don't Really Know the Details"**

In many instances, jurors are not personally involved in situations involving charges of discrimination, and so when asked about them, they will often say, "I don't know the details." However, it's important to remember that people don't need to know the details to have an opinion about what happened, whether they are aware they have opinions or not.

We trial consultants are always amazed at the number of times attorneys will let a response of this type go unexplored, or end the conversation by saying "so I take it you don't have any opinions from that that will affect you in this case." But because jurors often feel that they don't have a right to an opinion without knowing all the facts, the classic question, "Did you form an opinion about that situation?" is useless. In fact, even the open-ended version, "What opinion did you form about that?" is not likely to get much more response.

The most effective way to question a juror who has some minimal exposure to real life situations is to have the juror begin by describing what the conflict was about, since the words the juror uses will often reveal an opinion the juror doesn't know s/he has, or might not want to reveal. These jurors should be asked many of the same questions as one would ask jurors who were personally involved in a similar situation. The following open ended questions give the juror permission to talk about something they don't really know "much" about:

What did you hear happened?

How did you learn about this?

What did your co-workers say about this?

How was your company handling the situation?

What effect did this have on the department that was involved?

What did you think when you heard about it?

What ultimately happened?

and finally,

How do you think that might affect you in this case where ... [ Ms. \_\_\_ is saying she was treated differently because she is an African-American]?

This last question is useful for two reasons:

1. it allows the attorney the opportunity to once again state what the case is about and possibly get a reaction to the gross outline of the case, and
2. it allows the attorney to see how the juror thinks - does the juror see why this might be a problem, is the juror willing to acknowledge their attitudes might be a problem. Some jurors will almost automatically say "it won't be a problem." Others will pause to think about the situation and offer either some concern, distinctions s/he sees in the situations, or another experience to demonstrate why s/he can be fair.

Questions which ask jurors to think provide insight into the juror's decision making processes, in addition to providing the opportunity to try for a cause challenge or to proactively protect a juror from a defense challenge.

### **It's the Impact of an Experience that Counts**

It's important to remember that it's not the experience itself that is definitive as to whether a person can be fair, it's the impact of the experience. But once a juror reports that they or someone they know was discriminated against or accused of discriminating against someone else, the instinct is to want to "keep" or "get rid of" the juror based solely on that experience, "She has a co-worker who was discriminated against, she'll probably be more sensitive to our client." Maybe, maybe not. While it is true that jurors with related direct or indirect experiences are more likely to have stronger and more specific opinions, one cannot predict what those opinions will be simply on the basis of their circumstances. There are two broad questions about the juror's experience that must be answered:

1. How does the juror's experience compare to the plaintiff's experience?

2. What lessons did the juror take away from that experience?

Perhaps the juror thinks that even though the co-worker was discriminated against, the co-worker handled the situation poorly and that was much of the problem. Perhaps the co-worker's claim was backed up with strong, direct evidence, but it wasn't upheld. This can lead to juror feelings that "discrimination is almost impossible to prove."

Jumping to the conclusion that a juror with a similar experience will be sympathetic is particularly risky in sexual harassment cases. The types of actions which constitute harassment have been experienced by a large percentage of women, yet many of those women have not defined the actions as harassment. They may be seen as unpleasant, but something a person simply has to put up with in this world. In many instances, women with similar experiences will have handled the situation completely differently than the plaintiff. How the juror's experience compares to the plaintiff's situation may be prime for that juror.

## **Race**

Questions about race are some of the most difficult, yet important to ask. Some white, Native American, Hispanic and Asian American jurors will never be able to find in favor of an African-American plaintiff - or give them a penny. When the tables are turned, there are some black jurors who don't particularly like whites or other races either. In most jurisdictions, the white jurors are the biggest problem by virtue of numbers. We all know that the most prejudiced jurors are the same jurors most likely to hide behind a simple "no, I won't have any problem being fair", if given the opportunity. How can we draw them out? Don't give them a choice - get them talking. Typically, attorneys will start asking questions about race with closed-ended "fact oriented" questions:

Do you have any black friends? Do you have any black members of your church? Did you grow up with any black people? Have you ever had a negative experience with a black person?

Again, the bad habit of trying to control the answers by controlling the questions gets in the way of true information gathering. The less is more principle can be applied here as well:

Tell me about the kinds of experiences you have had over the years with people of other races.

I think many of us have experienced racial tension of some kind over the years, can you tell me about situations involving racial tension that you or people you know have been involved in?

These kinds of questions give the jurors a chance to talk about what they are thinking about, and it gives the trial team the chance to hear what they have chosen to say. This is not to say that you would not ask, "Have you ever had a negative experience with a black person?" That can be a useful question, but only after you've talked about issues in general, and if followed up in a manner that allows the juror to talk about the experience and the impact it had on him or her:

Could you please tell us what happened and how that affected you.

It sounds like that was a very distressing situation. How do you think that affected your feelings about African-Americans as a group?

Why is that?

In this case, Mr. \_\_\_\_\_, who is obviously African-American, is saying that ... How do you think you will be able to be impartial given the situation you were involved in?

If delivered in a non-judgmental tone of voice, questions as probing and personal as this last question can be very revealing.

The kinds of questions which really provide insight into jurors' attitudes need to be worded simply and in ways which force them to think about what they think. While there will always be jurors who will put on their best face in voir dire, it is easier to identify those jurors using open-ended questions:

How do you think your feelings about race relations have changed over the years?

Some people think that there really is very little racial discrimination any more, while others feel that it is simply less overt now. What do you think about this?

### **Jurors Who Don't Know People of Other Races**

a problem many of us face in certain jurisdictions is that we will have large percentages of jurors who have not had much experience with people of other races. "Tell me about your experiences with people of other races." "I really haven't had any; I had this one friend in college..." What can you do to give this person something to talk about in relation to race, besides the platitudes that he or she thinks the attorney wants to hear? Actually, there are some simple questions which can be asked to provide some insight into how much and what the person has thought about racial issues:

When you first met that person, what was it like for you - did you talk about differences in what it meant to grow up black?

How do you think that knowing that person affected how you feel about racial issues?

Were there problems that that person experienced being one of the only African-Americans in that college? Tell us about that.

Were you aware of any of other people who had prejudices and stereotypes about your friend because of race? How did you deal with that?

When do you first remember becoming aware that there were people of other races?

What was it like for you when you first moved to the city where there were so many people of different races, after having grown up in an all white area?



People who have had very little contact with people of other races are not necessarily bad or good for cases involving discrimination. It depends, again, on how they have understood their experiences and how that relates to the facts of the case.

### **Disability Discrimination**

These cases are relatively new. Both pre and post trial jury research indicates that many jurors don't even realize that the law protects employees on the basis of disabilities. Also, it's not uncommon for jurors to feel that a major or chronic illness is not the same as being disabled. The tension in these cases is generally between the right of a person to have a job and the right of a business to maximize profit. Most jurors seem to feel that an employee should be allowed to work so long as they can "do the job". Most seem to feel that it is only fair for an employer to give someone with a medical problem a break, but they don't know that the law requires "reasonable accommodations" be made.

What any given juror sees as a "reasonable" accommodation will depend, as with other issues, on a combination of their experiences and values, particularly their experiences dealing with employers' responses to their own and co-workers illnesses and/or disabilities. Some jurors, while unaware of discrimination against the disabled, will know someone whose talents they feel were not recognized or were undervalued because of a disability.

The jurors who know about disability laws tend to be those who either have some experience with the disabled, or have learned about the laws because of job responsibilities. They will likely have thought more about the issues connected with this area. If the voir dire procedures allow you to talk to individuals in the venire in whatever order you wish, you may want to identify someone who has some direct experience to talk about their feelings first, to give the other jurors a chance to figure out how they feel.

Exploring an area like this where jurors haven't really thought much about the concrete issues involved requires nerves of steel, since many jurors will express attitudes which could be negative for the case. For example, jurors can be expected to sympathize with an employer who has to make a "hard" decision about the impact of someone who is disabled on the productivity of a company. On the other hand, the idea of fairness to someone who has been a good employee resonates strongly as well. But since many jurors will be thinking their feelings through for the first time, it is very important to let them say what they are thinking without rushing in to correct misconceptions. Being prepared to end this segment of questioning with a focus back on the right of the plaintiff to do the job if they can is essential.

In federal court or states where there is no attorney questioning, it is easy to become discouraged about having any kind of decent voir dire; but it is important not to give up. Because voir dire is so truncated, any small gain is worth fighting for. More and more courts are allowing supplemental juror questionnaires to be used. Tailored to the specifics of the case, these questionnaires can be given to the jurors to fill out before voir dire begins, and can provide a basis for follow-up questioning. More judges are allowing attorneys to follow-up on answers on the questionnaires as well, either in court or in chambers, so it is important to be prepared to ask

some questions if given the chance. Written questionnaires can also be very useful in courts where there is attorney conducted voir dire - there are often sensitive issues that jurors will be more likely to discuss in writing than in open court, and jurors are often more forthcoming about attitudes they perceive as controversial in questionnaires.

Motions can be filed to ask for supplemental questionnaires which detail specifics of the case that would be better covered in a written questionnaire and newspaper polls or other attitudinal research can be cited showing the kinds of problematic attitudes that are widespread. Questionnaires can include both open-ended and closed-ended questions. They can cover much of the basis demographic background information as well as attitudinal questions.

Attitudinal questions such as the following have been used in numerous courts:

[1] How do you feel about affirmative action programs which give preference to women and minorities in employment and education?

Do you generally \_\_\_\_ favor or \_\_\_\_\_ oppose these programs?

Please explain your answer:

[2] Some people feel that racial discrimination is a thing of the past, that today people of different races are treated pretty much the same in our society. What do you think about that?

Please see my colleague Elissa Krauss' article in last years Civil Rights Litigation Handbook, and JURYWORK: Systematic Techniques® for an in-depth discussion of supplemental questionnaires, including sample motions and questionnaires on a variety of subjects.

### **Organize Your Written Questions by Headings**

In the situation where the judge asks the attorneys if there are other questions he or she would like the judge to follow-up on, or where there is a bench conference before follow-up questions are asked, attorneys should be prepared to point to specific questions in the voir dire they submitted to encourage the judge to delve into jurors' experiences and attitudes. Voir dire which are organized as a string of numbered questions are often difficult to use, and requesting that the judge ask questions six through twelve sounds like a large request. On the other hand, if the questions are labeled, along the lines of "Follow-up Questions for Jurors who have personal experience with discrimination", and a list of questions follows, it may be easier for the judge to find and use some of the questions. Labeling or putting headings on each series of questions also can be helpful to the judge who actually reads the submitted questions ahead of time. A well organized voir dire may result in the judge using the plaintiff's voir dire as the boilerplate, which can mean that more questions get asked. In judge conducted voir dire, every question counts.

### **Stereotyping Jurors**

It's ironic that the biggest mistakes in jury selection come from stereotyping jurors, at the same time as we are concerned and horrified at the prospect that the jurors will stereotype our clients.

Not all computer nerds are out of it, not all rich people identify with the power structure, not all government workers are hopeless bureaucrats.

But of course, none of us can function without stereotypes, the trick is to be aware of what our stereotypes are and make sure that the juror actually fits the stereotype.

In the heat of jury selection, it is sometimes hard to remember that it is attitudes, not demographics that are important; that it's the impact of the experience, not the experience itself that shapes attitudes; that some, if not most, jurors will have some attitudes which are helpful and some which are dangerous; and that letting them talk will provide the attorney with essential information.

Attorneys who understand the competing stories in their cases, develop a theory for jury selection, thoroughly identify relevant experiences and attitudes and compose open-ended questions to ask will have much more success both in getting cause challenges and in not wasting their peremptory.

<sup>1</sup>Civil Rights Litigation and Attorney Fees Annual Handbook, (Clark Boardman Callaghan, 1995) Volume 11, 15-1.