



Challenging legal assumptions about juror bias

A jury consultant culls the latest research into practical advice on winning challenges for cause

By SONIA CHOPRA

Jury selection is jury de-selection and a primary goal of the process is identifying and removing potential jurors who will be unfavorable to your case and your client. There are two means by which jurors are excused: peremptory challenges and challenges for cause. The more challenges for cause you can get granted the better, as more successful cause challenges allow for greater leeway in the use of your scarce peremptory challenges. Maximizing cause challenges can be easier said than done, however, because of assumptions in the law about the nature of juror bias and the nearly unfettered amount of judicial discretion in the decision to grant or deny challenges.

Starting with the first point, within the legal system there is a belief that potential jurors can recognize and will accurately report their own biases and the impact that their life experiences, attitudes and beliefs will have on their decision-making at trial. Anyone who has picked a jury has seen the judge or attorneys ask potential jurors if they can “set aside” their experiences or biases in order to be “a fair and impartial juror in this case.” How a juror answers this question is typically given great weight in a challenge for cause ruling.

Along with asking jurors to self-report bias and ascertain what impact said biases would have on their jury service, judges and attorneys often engage in a practice known as “rehabilitation” of potential jurors who express experiences or beliefs that call their impartiality and fairness into question. Rehabilitation

typically takes the form of asking jurors if they would agree to follow the judge’s instructions and the law, despite what they may personally believe or feel. (This, of course, is a very difficult proposition to disagree with unless one is actively seeking to get out of jury duty.) The assumption is that once a juror says that she will be a fair and impartial juror, she is to be taken at her word and permitted to serve – regardless of how that proclamation might have come about.

Research and jury bias

Research on real trials in California supports what we have all seen in practice, that once a juror says, “I can be fair and impartial,” the judge is significantly less likely to let that person go.

Hannaford-Agor and Waters collected data via courtroom observation of the voir dire process for 704 prospective jurors in 18 criminal trials across eight superior courts in California.¹ Part of the reason for the research was the debate on whether or not peremptory challenges should be abolished and the relationship between challenges for cause and peremptories. Many who are opposed to reducing the number or eliminating peremptory challenges cite the disparities in judicial decision-making on cause challenges as a reason why peremptories must remain a failsafe for attorneys. Anecdotally, most experienced trial lawyers have witnessed incidents where biased jurors were left in the box by the judge and had to be removed peremptorily, but prior to this study there had been little systematic study of the challenge for cause procedure in actual trials.

Hannaford-Agor and Waters found that across the trials, jurors’ self-assessment of bias was the most predictive factor in whether or not they were removed for cause by the judge. When jurors unequivocally said they could not be fair and impartial, they were almost always excused for cause. For prospective jurors who responded to questioning in a manner that indicated a potential bias, saying they could be fair resulted in a 71 percent less chance that they would be removed for cause.² However, of the 177 prospective jurors who were not completely confident in their ability to be fair and impartial, only 50 percent were removed for cause. As a result, many who expressed hesitancy or uncertainty about their impartiality remained in the pool and had to be removed by peremptory challenge or be seated. The researchers also observed inconsistency in cause challenge removal for jurors in similar circumstances, and for different categories of potential bias (e.g. those who expressed concerns based on a relationship with another criminal defendant were much more likely to be removed than those who expressed concerns based on their views about the law). This goes back to a point made earlier about the problems associated with the broad discretion granted to trial judges in ruling on challenges for cause.

The reality as we all know, is that judges rely to a large extent on jurors’ reports of impartiality regardless of how biasing their life experiences or attitudes appear to be on their face. Another study found that in 13 felony trials, not one single juror who said they could be fair was



removed for cause, even when the potential for bias was readily apparent – e.g., a potential juror on a rape case who disclosed she was raped as a child, a former correctional employee who knew the defendant as a prior inmate.³

More recent research has demonstrated that the manner in which a potential juror proclaims her ability to be impartial influences decision making about her ability to fairly serve. *Rose and Diamond* (2008) found that subtle variations in juror language designed to reflect more or less confident proclamations of fairness affected not only beliefs about the individuals' actual impartiality, but also about the likelihood that she would be removed for cause.⁴

The researchers had experienced prosecutors, public defenders and judges read eight jury selection vignettes based on actual cases where there was a real possibility for juror bias but the juror asserted they could be fair and impartial. They hypothesized that the jurors' level of confidence with which they said they could be fair and impartial would influence decision-making on challenges for cause. The authors varied the level of confidence by having potential jurors' in the vignettes give either an equivocal (e.g. "I would try" "It would be difficult but I think so," "I'm pretty sure I could be fair") or unequivocal (e.g. "Yes," "Yes, yes I can," "I would be fair") response to the question of whether or not they are able to decide the case on the facts and evidence and nothing else. The attorneys and judges were asked to indicate how likely they thought it was that the juror would be fair and impartial in the case, and if one of the attorneys asked the judge to remove the juror for cause, what would the average judge do – excuse the juror or deny the request?

The judges and attorneys both expected jurors to be excused less often when they unequivocally said they could be fair and impartial as opposed to when they were more confident in their responses. Judges (but not attorney respondents) were also more likely to believe the

juror was in fact impartial when the juror was more confident in their response. Interestingly, the judge sample believed that almost all of the potential jurors would have been excused for cause by the average judge, as compared to the attorneys' expectation that just half would be let go. The authors suggest that the discrepancy may be because of the nature of the study and that in a real voir dire where judicial decisions have implications for the remaining jurors' responses there probably would be fewer challenges granted – something experienced attorneys would have been accustomed to seeing.

In another round of the study the researchers surveyed prospective jurors. These participants first received a description of the jury selection process including the potential for jurors to be excused for cause. They then read the same vignettes given to the attorneys and judges in the prior studies and were asked whether or not the judge should excuse the potential jurors in the examples. Interestingly, for the non-legal professional sample, the confidence expressed by jurors in the vignettes was unrelated to beliefs about whether or not that person should be removed for cause.

The authors suggest that judges, as opposed to laypeople, use confidence as a cue to actual ability to be fair because they are faced with a difficult decision that has implications for the immediate jury selection as well as appellate review. If the judge grants a cause challenge when a juror has unequivocally said they can be fair, the message is that the judge does not believe the person or somehow knows better. In cases where judges grant cause challenges despite jurors assurances they can be fair, I typically see the judge highlight the nature of the experience and relevance to the facts in the case in making their record, sometimes citing "body language" of a juror to supplement their decision while acknowledging but downplaying the jurors' own assurances of impartiality. The idea is that judges use whatever "evidence" is before them – even if that evidence may be flawed,

including the use of confident vs. equivocal language when a juror expresses their ability to be fair.

Speaking of the record, some judges like to help the record along by suggesting to the potential juror that they "can be fair and impartial, follow the law and decide the case only on the evidence at trial," a technique known as "rehabilitation." While attorneys often engage in rehabilitation as well, there is reason to believe that judicial rehabilitation may be more influential and distorting because of the high status of the judge and the perception amongst potential jurors that what the judge suggests is the "right" and "lawful" response.⁵ I have frequently heard jurors say things like: "I guess I have to, right?" or "I don't want to get into trouble so I would" in response to rehabilitation-style judicial questioning about whether they would follow the law and instructions to be a fair and impartial juror. Taking these types of impartiality proclamations at face value is questionable at best.

Why is the approach of relying on jurors to tell the court when they can't be fair problematic? Because it assumes that jurors a) understand and recognize the powerful impact that life experiences and attitudes can have on their decision making and b) that they will fully and honestly disclose their concerns about being fair and impartial to a judge in front of a room full of people they do not know.

Common sense suggests that juror self-assessment of bias is a less-than-perfect barometer of their ability to be fair and impartial, not only because of jurors' inability to accurately assess the ways in which they might be affected, but also due to the demanding characteristics of being questioned by a high status person in a new situation where it is clear that there are socially desirable answers. This line of argument, however, is not always persuasive in convincing trial judges about the error of their ways.

Jurors' ability to recognize their own biases

Surprisingly little research has been directed at finding out whether or not



jurors truly can both recognize and “set aside” biases to be fair and impartial jurors. While the applied research that has been published to date has consistently found that jurors are unaware of their biases, these studies have focused on criminal trials and the question about jurors’ ability to recognize bias and either disqualify themselves or set aside their beliefs has been reported as a side note as opposed to being the primary focus of the research.⁶ Exciting, brand new research coming out of the University of Arizona Law School takes up where previous studies have left off, putting jurors’ ability to self-diagnose bias center stage. Moreover, as far as I’m aware, this is the first study to look at bias recognition in the context of a civil trial.

Robertson et. al tested whether or not mock jurors exposed to negative, pre-trial publicity in a civil malpractice case were able to identify the influence the biasing material had on their decision-making.⁷ Study participants either read a control article about employers and preventative health maintenance which had nothing to do with the trial, or an article that named the defendant in the trial and discussed prior incidents of malpractice involving the defendant doctor. The information in the article would have been precluded from trial under various rules of evidence and was prejudicial to the defense. Participants were given written admonitions from a judge about the importance of being impartial and were questioned about their ability to be fair and impartial. This series of questions, which was based on the language affirmed in *Skilling v. U.S.*, will be familiar to trial lawyers:

1. Did you read a news article about Dr. John Dennis?
2. Do you have an opinion about Dr. John Dennis?
3. Would any opinion you have prevent your impartial consideration of the evidence at trial?
4. Could you base a verdict only on the evidence at trial?

Participants who admitted that their opinions would prevent their impartial

consideration of evidence and those who were “unsure” were coded as being disqualified under the *Skilling* analysis, as were those who said they could not base their verdicts solely on the evidence or who were unsure about their ability to do so. Regardless of how they answered the questions, all participants then watched a video of a medical malpractice trial which included opening statements, expert testimony and closing arguments.⁸ Mock jurors were asked to reach individual verdicts on negligence and to award pain and suffering damages if they found negligence. The authors propose that if the *Skilling* procedure of asking jurors to ascertain their own biases is effective, then removing those who indicated they could not be impartial or were unsure about their ability to do so should result in similar verdicts between the control and pre-trial publicity questions.

After an initial pilot study using law students, the researchers conducted a larger study using community members. They found that, as expected, those exposed to pre-trial publicity were significantly more likely to find the defendant negligent than those in the control condition. In fact pre-trial publicity exposure doubled the odds of a plaintiff’s verdict. Mock jurors who read the pre-trial publicity also awarded significantly higher pain and suffering awards.

What the researchers were really interested in, however, was whether or not mock jurors could accurately assess the biasing effects the pretrial publicity exposure had on their decision making. Again, if what the courts have proposed is true and jurors can in fact accurately assess the influence of their own biases then removing those who express bias should result in similar verdicts between the control group and pretrial publicity group.

This did not occur. Very few participants admitted bias to begin with – 87 percent of those exposed to the negative pretrial publicity said they could view the evidence impartially. Even after removing those who did admit bias or were unsure about their ability to be impartial, the

odds of a negligence verdict were doubled when participants were exposed to pre-trial publicity, and pain and suffering damages awards were significantly higher compared to the control condition.

Because zero exposure to pre-trial publicity may not be realistic in some cases the researchers also decided to look only at the verdicts of participants who had been exposed to pre-trial publicity to see if removing the biased jurors would make a difference in verdicts. In other words, they compared negligence findings and damage awards of the exposed group as a whole to the exposed group with the self-identified biased jurors removed. When looking only at the group who had read the pre-trial publicity, removal of jurors who admitted bias actually resulted in even higher percentages of plaintiff verdicts and larger damage awards – a reverse effect of what would be expected under the presumptions of the *Skilling* procedure.⁹

The bottom line was that, contrary to prevailing judicial opinion, these individuals were not at all able to accurately assess the impact that biasing pre-trial publicity had on their decision making in a civil case. As mentioned above, this research replicates a fairly robust finding in the literature. The fact that jurors are not aware of their biases has implications for arguments that judicial instruction can cure bias and that a promise to “follow the law” is all that is required to serve. If one is not even aware of one’s own biases or the capacity for the bias to influence their decision making, they cannot accurately report on their ability to be fair and impartial *or* to follow the law. If you don’t believe you have a bias, you are unlikely to believe that judicial instruction to ignore that information even applies to you.

The author suggests that challenge for cause standards for jurors be made similar to those governing disqualification of judges in that the juror is removed whenever his or her “impartiality might reasonably be questioned”¹⁰ as opposed to relying on the juror to accurately judge



and report his or her ability to be an impartial trier of the facts.

Implementing research into practice

Now that you have this information, what can you do with it? The following suggestions are designed to not only maximize your successful challenges for cause, but also serve to begin educating the judiciary and legal community about the chasm between legal assumptions about the nature of jury bias and the evidence provided by research.

- The studies described in this article can be cited in pre-trial motions on jury selection procedures to request that the judge put less weight on jurors' self-assessment of bias as compared to an objective analysis of the likelihood that the jurors' attitudes, beliefs and experiences will impact their thinking.
- Research on perceptions of confidence and beliefs about impartiality suggest that getting potential jurors to interject hesitancy or to equivocate in their responses to questions on their ability to set aside experiences, attitudes, or beliefs may increase successful challenges for cause. When a juror says, "I would try" or "I hope so" in response to questions about impartiality and fairness, highlight the response to the judge when arguing the challenge.
- Depending on the personality of the potential juror, you may want to get the juror to expand on an equivocal response to questions of fairness and impartiality. For some jurors this will backfire and they will become more confident upon re-questioning, but others will welcome an opening to express the difficulties they may have in remaining impartial. Typically this works best when a juror has hesitantly expressed an ability to be fair and impartial in response to leading judicial questions. You can follow up with:

When the judge asked you if you could set aside the fact that you were in a similar situation as the defendant and be a fair and impartial juror in this case you said that you 'thought so,' and that

you would 'certainly try.' I understand that you want to do your duty as a juror and no one doubts that you are a fair person. What I'm hearing though is that there is some question in your mind about really being able to totally set aside your own very similar life experience and be completely fair and impartial, am I right?

- When you have obviously biased jurors who nevertheless declare unequivocally that they can be fair, cite research to the judge that suggests juror confidence in response is an arbitrary factor that should not unduly influence their decision-making. There is a great deal of literature in the eyewitness identification field that suggests that witness confidence has no correlation to the accuracy of their testimony.¹¹
- Don't waive the court reporter. Having a record allows for a read back when there is a disputed response, and it keeps everyone honest. Often the judge will want to discuss cause challenges off the record then put them on the record later – resist this and request that cause challenges be recorded. Too much gets lost in those bench discussions.
- When making your record, be sure to include descriptions of the jurors' "demeanor" and "body language" where applicable. The appellate courts cite demeanor evidence as reasons to give judicial discretion to challenge for cause decisions¹² – you want to get your perceptions of demeanor and body language in the record first rather than wait to have opposing counsel or the judge interject demeanor evidence to support a denied challenge.
- Know the statutes and case law on challenge for cause. (See Rouda and Koonan this issue for an overview). When you can get jurors to use language that mimics the statute (or cases) you have a better chance of success. The Code of Civil Procedure section 225 (b)(1)(C) requires jurors to be able to act with "entire impartiality." If the juror says, "I would try but can't say for certain" or "it may still be in the back

of my mind," you can argue that they are not "entirely" impartial. Remind the judge and opposing counsel that the statute says nothing about agreeing to "follow the law and the judge's instructions" as being the litmus test for bias.

- Despite the codified definitions of juror bias there remains substantial variability from courtroom to courtroom (and sometimes even within the same jury selection) in terms of what arguments and language will be persuasive to the judge. Some judges will let a juror go if they say one side "starts behind" the other, while others say that is not sufficient. Other judges like the "if you were in plaintiffs' shoes, would you feel comfortable with a juror in your state of mind" line of inquiry, but some say the question is improper or non-dispositive. Ask around to find out what your trial judge's "magic words" are.
- Be persistent and don't give up. It is really difficult to keep arguing cause challenges and keep getting denied. There is a tendency to believe you are antagonizing the judge, delaying the process, and engaging in a fruitless venture. But zealously pursuing challenges for cause is a service you owe your client in your role as an advocate and in reality you might get five or six denied challenges then get one granted that you weren't even expecting.



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Endnotes

¹ Paula L. Hannaford-Agor and Nicole L. Waters, National Center for State Courts, Examining Voir Dire in California. (2004).

² *Id* at 37.

³ Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 Law & Soc'y Rev. 513 (2005)

⁴ Mary R. Rose and Shari Siedman Diamond. *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*. 42 Law & Soc'y Rev. 513 (2008).

⁵ For a fantastic analysis of the problems associated with judicial rehabilitation and the differing legal responses to the problem across jurisdictions, see Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 Ga. L. Rev. 1471.

⁶ See, e.g., Kevin Douglas, David Lyon, and James R.P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* 21 Law & Hum. Behav. 485 (1997) (reporting that exposure to graphic crime scene photos increased guilty verdicts but participants were unaware of the biasing influence of the photos.); Lorraine Hope, Amina Memon, and Peter McGeorge, *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 J. of Exp. Psych. 111 (2004) (reporting that despite the fact that participants exposed to negative pretrial publicity were significantly more likely to find the defendant guilty, participants' self-reports of bias were unrelated to verdicts); James R.P. Ogloff and Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 Law & Hum. Behav. 507 (1994) (noting that participants who were clearly biased by the exposure to negative pretrial publicity and other biasing stimulus materials were no more likely to indicate that they could not be a fair juror on the case than those who had not been exposed.)

⁷ Christopher Robertson, David Yokum & Matt Palmer. *Can Jurors Self-Diagnose Bias? Two Randomized Controlled Trials*, Arizona Legal Studies Discussion Paper No. 12-35 (2012). Available online at: <http://www.law.arizona.edu/AZLFDocs/Robertson%20Yokum%20Palmer%20CAN%20JURORS%20SELF%20DIAGNOSE%20BIAS%20Sept9b.pdf>

⁸ Real doctors played the role of the experts and helped draft the mock trial materials. An experienced arbitrator played the judge. The attorneys were played by two of the co-authors, one who is a law professor, the other a law student. The case involved failure to diagnose possible lumbar radiculopathy and refer the patient for imaging.

⁹ This result, while interesting, was not statistically significant.

¹⁰ Robertson et. al., *supra* note 7 citing 28 USC §455.

¹¹ See, e.g., Siegfried Ludwig Sporer, Steven Penrod, Don Read, and Brian Cutler. *Choosing, Confidence and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies* 118 Psych. Bul. 315-27.

¹² See *Uttecht v. Brown* 127 S.Ct. 2218 (2007)

