



Getting Beyond “Can You Be Fair?” Framing Your Cause Questions

by Ken Broda-Bahm

THIS SCENARIO HAPPENS at some point in nearly every voir dire. First, a juror reveals a bias for or against one of the parties.

Juror: I just really don't trust big companies. What with all the media stories and all the scandals, well, I just think that they are in it for the money and they aren't honest.

Then the attorney that would be disadvantaged by that bias moves in to clarify and, in effect, to convince the juror that this bias really wouldn't apply to their client.

Attorney: But you understand that companies aren't all the same, don't you?

Juror: Well, sure.

Attorney: And if the judge instructed you in this case, to just focus on the facts and the testimony about this company, and not your view of companies in general, you would be able to

do that, wouldn't you?

Juror: I would try my best.

Yes, the juror has made a verbal commitment to try to set aside bias. But no, there is no reason to believe that the juror has in the process recovered from their bias. The most pernicious juror biases are worldviews: frameworks that jurors will use to understand facts, reconstruct stories, and interpret testimony and other evidence. Jurors do not come equipped with an on/off switch, and they cannot escape such a bias just by making a solemn promise. In all likelihood, the juror in the scenario above will still be all too ready to presume that the corporate party is dishonest and greedy, and to disbelieve that company's representatives.

Experienced trial attorneys know that, of course. And the attorney in this case may indeed use one strike on that juror. However, what has been lost is the opportunity to use the cause challenge for its true and intended purpose: to remove a juror who cannot reliably be fair in evaluating the facts of the case. While any questioning attorney is subject to a judge's reluctance

to allow cause challenges, and at the mercy of a juror's tendency to give the safe answer, attorneys too often compound these disadvantages by asking truly biased juror questions that lead them away from an admission of bias and not toward one.

The fundamental barrier that attorneys must confront is the very human tendency on the part of jurors to want to portray themselves in the best possible light. This "social desirability bias"^[1] serves as a standing encouragement for jurors to answer all questions with what they take to be the "right" or the "good" answer. The courtroom itself, with its many trappings of official power and formality, can heighten for jurors a preference for an answer that they believe will satisfy the judge and the attorneys over an answer that honestly conveys a bias.

To ferret out the worst forms of bias, attorneys need to prepare for cause questioning with an eye toward the tendency to give the "right" answer. The task of developing these questions, however, can be tricky. To avoid evoking the socially desirable response, attorneys should start by dispensing with several old standbys:

- Leading questions: *Wouldn't you agree that...?*
- Instruction based questions: *If the judge were to tell you that...?*
- Ultimate conclusions: *Can you be fair to my client?*

While those questions can be quite effective at rehabilitating a desirable juror, they are counterproductive if the goal is to discover and expose actual bias that could hurt your case. The average juror will tend to agree with you, to say they will follow the judge's instructions, and promise to be fair to everyone in the courtroom, while still maintaining a biased worldview.

To create the best possibility for a successful cause challenge, consider using a four-phased approach designed to increase the chances that a biased juror will honestly admit to their bias.

Phase One: Modeling

First, create a climate for effective cause questioning by modeling the types of undesirable juror attitudes for your particular case. Show that it is acceptable to hold such views by modeling through some of your own self-disclosure. A light-hearted approach might sound as follows:

Let me explain a bit about what this questioning is for. Like many of you, I'm sure, I am a basketball fan, and around here that means that I'm a big fan of the Miami Heat and Shaquille O'Neal. If there were a court case in which someone was suing that basketball team, or suing Shaq, I would be the wrong juror for that case. I would be the wrong juror because I would have a hard time setting aside my loyalty to the team and being fair to

the person who was suing the team. And there would be nothing wrong at all for me to admit that opinion—to be fair, I would really want to admit that opinion because maybe I should be a juror for a different case.

The important part of this modeling phase is that it be genuine and that it establishes a comfortable climate of rapport in which jurors understand that they are *fulfilling* the requirements of the system and not *failing* the test when they disclose bias.

Phase Two: Priming

When a juror has provided an indication of a possible bias, avoid the temptation to immediately jump to the ultimate legal question of whether that juror can set aside that experience or attitude and render a verdict solely on the evidence. Asking that question too soon will simply prompt the juror to provide what they believe to be the correct response: "Yes, I can set aside that bias." Before asking the ultimate question, set jurors up for a more thoughtful and accurate response by sensitizing them to their own attitudes. Do this by inviting the juror to wear the mantle of that belief: to speak about the sources and depth of their feelings on the issue.

- *How long have you felt that way?*
- *Was that experience an important one for you?*
- *What experiences helped you form that opinion?*
- *Is this a belief that you feel you have good reasons for?*
- *Why do you feel this way?*

Naturally, in group voir dire, you want to be wary of effectively handing that juror a microphone to broadcast their negative views to the remaining venire. If possible, it is always better to handle important cause issues through individual voir dire or at the bench. However, if you are faced with a choice between (a) allowing a biased juror to inject a small amount of poison into the venire by speaking candidly prior to being dismissed for cause during voir dire; or (b) allowing that same juror to inject a potentially fatal dose of poison into the actual jury, by allowing them to stay; then option (a) is clearly the better option. Jurors do listen carefully to their peers during jury selection, but the harms of a few negative comments at that stage pale in comparison to the harms of that juror's sustained influence during deliberations.

Phase Three: Building the Case

Before moving on to confirm that juror's bias, use additional priming questions to explore all other potential sources of bias for that juror. Fully building the case on all possible sources of bias, then asking jurors whether they could lay aside these attitudes, works better than asking that confirming question for each source of bias. If possible, before moving on to the

final phase, work to connect the sources of bias.

Ms. Jones, in your questionnaire you noted that you have some negative opinions about people who bring lawsuits against large companies. Your exact words were, “Too many plaintiffs are just after money.” You also noted that your husband’s company was sued two years ago and lost a large sum defending and settling that suit. You also answered that you would tend to trust the science conducted by a large company like Smithco more than you would trust science conducted on the plaintiff’s behalf. So, you have had a negative personal experience with lawsuits, you believe that too many plaintiffs are just after the money, and you would be less likely to trust the plaintiff’s evidence. Is that right?

Phase Four: Confirming

Once a juror has provided an indication of possible bias *and* has had an opportunity to “own” all of their potential biases a bit by speaking about them, conclude questioning for this juror by asking the legal question of whether these biases could be set aside in order to focus on the evidence. Still, at this phase avoid suggesting the socially desirable response by asking the question in a straightforward “Can you be fair?” fashion. Instead, consider some of the following options that may create a more comfortable space for jurors to say “yes.”

- *In what ways will this experience/attitude affect the way you view the plaintiff/defendant?*

- *How likely do you think it is that you would change your opinion in the next 24 hours?*
- *Knowing that you wouldn’t automatically decide the case based on this experience of yours, is it safe to say that with you, I would start off a step or two behind my opposing counsel on this issue?*

Finally, end this section by providing the judge with the language she is looking for.

- *So based on everything you’ve said, how difficult would it be for you to just set aside what you know and what you believe and render a verdict solely on the evidence?*

Note that you are asking not whether the juror can set aside that bias (it is still too easy to say “yes”), but rather you are asking *how difficult* that would be, and in the process setting the stage for the juror to frankly talk about that difficulty. Naturally, your selection and phrasing of these questions will vary based on what you know of the judge’s preferences. But the common thread of the strategy is that you are undercutting the strong pull of social desirability in order to enable a truly biased juror to admit their bias. And that admission provides the best and most reliable answer to the basic question, “Can you be fair?” ☺

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References

[1] Fisher, R. J. (1993). Social desirability bias and the validity of indirect questioning. *Journal of Consumer Research*: 20, 303–315.