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Jury selection for sexual harassment and sexual-assault cases

BE PREPARED FOR A MENTALLY AND EMOTIONALLY DRAINING JURY SELECTION

When trying to win a plaintiff's verdict in a sexual-harassment or sexual-assault case, a good jury selection is critical. In fact, I would argue that a good jury is the *single most important* factor in winning a sexual-harassment or assault case. If you have a great plaintiff and great facts, but a cynical, skeptical, or unfeeling jury, you could still get defended, or, perhaps just as bad, get a verdict that is a tiny percentage of what a good jury would give you. As plaintiffs' lawyers and true victim advocates, I'm sure it is hard to believe that good, deserving plaintiffs with compelling stories cannot prevail on their own, but there are tons of jurors out there who are waiting to tear your client's story to shreds, and if you don't ask the right questions during jury selection, they could end up on your jury.

Are certain demographics good or bad for you?

Whenever I am consulted about an upcoming sexual-harassment or assault case, the first question I get asked is, "Are men or women good (or bad) for me?" The answer is always, "It depends." Lawyers seem to think that female jurors are bad for female plaintiffs in the sexual-harassment cases, and that female jurors are usually good for plaintiffs in sexual-assault cases. I've also been asked, ad nauseum, if I would prefer older or younger jurors – with most lawyers thinking that young jurors are bad for them. I can say, without a doubt, that these general statements are just not true and can do you a great disservice if you don't give each individual juror, female or male, individual scrutiny.

I picked a jury last summer on a sexual-assault case that was a male majority (and mostly Caucasian) and under the guidance of a 20-year-old male foreperson (!), they gave over \$13 million. I'm not saying most of the men were good – I struck and cause-challenged many male

jurors, but these particular male jurors were good because they were all caring and principled, the right combination to get mad at the male defendant's actions. Truthfully, as I picked the jury, the gender composition of the jury didn't matter to me at all. When I pick a jury, attitudes and experiences matter, not gender, race, or even age. And as for the dreaded millennial jurors, some millennials can be great for sexual-assault or harassment cases because they have been raised in a more politically correct world and have a better understanding about the importance of obtaining consent.

The importance of the questionnaire

The most helpful tool for you in jury selection in a sexual-assault or sexual-harassment case is a well-crafted questionnaire. I'm not always an advocate for questionnaires. In fact, I will often disagree with their use, knowing that they can take a lot of time and can often benefit the other side by providing them information that an attorney who is less skilled (as defense attorneys often are) wouldn't usually get during voir dire. However, in a case of a sensitive, personal nature, like a sexual-harassment or sexual-assault case, I try to use one every time. In my experience, there is little pushback from judges regarding a questionnaire in these types of cases, most judges immediately agree to the request or even suggest them themselves.

Questionnaires are useful because they allow you to ask personal, difficult questions in a private manner. A good jury selection in these kinds of cases needs to ask personal questions such as, "Have you or a loved one ever been a victim of sexual abuse or sexual harassment?" These questions are sensitive, and no lawyer wants to ask a juror they just met about their sexual experiences in front of 50 other jurors, if they can help it. A questionnaire allows a juror to feel like they're answering more

privately. It is my experience, and I am not exaggerating in the slightest, that perhaps two-thirds of your jury panel has been exposed to sexual abuse in some way – either them or a family member – and if you have to handle that mid-voir dire, you will lose momentum and jurors' attention fast. If you use a questionnaire, the judge will likely still question them, but will do it early in the process, before you get up, therefore not taking up your valuable voir dire time.

A questionnaire is also helpful because it invites more honest answers. When I write questionnaires in these types of cases, I always have to ask, "Have you or a loved one ever been *falsely accused* of sexual harassment or abuse?" and that question, in particular, can be very hard to answer in public. Picture this: you have the good luck of an amazing bunch of jurors talking about how victims are not being believed and people are nodding in agreement during your voir dire... do you think the juror who feels that they have been wrongly accused will feel comfortable speaking up about his or her experience? Perhaps, but probably not. Questionnaires provide a safe forum for feelings that might seem out of the norm or publicly frowned upon, and jurors will give more blunt answers since they don't have to soften it for the others who might disagree. Don't just use the proposed civil questionnaire, add case-specific questions that are crucial to your case, and this sounds silly, but leave enough room to write sufficient answers – one little line is not enough.

Questionnaires also are helpful in jury selection because they enable you to know who is coming up. When utilizing questionnaires, I always try to have them filled out the day before voir dire starts, so I have an afternoon and evening to review them. I always go through and grade jurors and try to recognize a pattern, if there is one. For example, if

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I realize jurors 18-22 are mostly bad, I have to make sure to keep some strikes for that rough patch, and so on. When you do use questionnaires, though, use them to ask follow-up questions, but do not ask repetitive questions. Simply repeating the questions is annoying for the jurors, and angers the judge, since questionnaires are usually suggested for the sake of efficiency during voir dire.

PREHAB your good jurors and work for CAUSE

When using a questionnaire, you have the advantage of already seeing who has strong feelings about your case, good or bad, before your voir dire. This can be very helpful for getting cause challenges and figuring out who you might need to rehab during voir dire. Getting cause challenges granted – and rehabbing your good jurors – is very important in these sexual abuse and sexual-assault cases. Unlike a patent case, or a complex business case, most jurors have opinions, one way or another, about sex cases. If you don't do a good job of "prehabbing" your good jurors, the defense will easily pick off people who are strong victim advocates. The typical question, "will you have sympathy for the plaintiff?" will inevitably cause several sweet jurors to cave and agree that they can't be fair, and you will lose some of your best jurors. You need to decide, before you get up, that you will fight to keep your advocates, and you have to work to keep them – it may not be easy. These are good, well-meaning people who want to do the right thing, and you just need to show them that there is nothing wrong with a sensitive, caring person being a juror.

The best way to "prehab" a victim or a victim advocate is to help arm them against the inevitable sympathy questions and define fair for them. Jurors don't know what fair means! I usually have lawyers tell jurors, "in a case like this, it's normal to get angry about these issues, or feel sympathetic to victims of assault. No one is telling you not to have emotion and be a robot, or to be indifferent to sexual assault. What we are telling you

is you need to decide if sexual assault happened or not.... Can you do this?" I have had lawyers ask this first, to each juror individually. This question really works, especially if several other jurors have already said they could. On my last sexual assault case, when the lawyer used this question right away to each person, almost every juror who had written "I can't be fair because I feel for victims," immediately said that they could be fair and follow the evidence to decide the case. Not every juror will agree easily, some might still waver, but keep trying. Another question that helps is asking, "If I don't prove my case, can you send me home with nothing?" It's very hard for defense counsel to get a juror off for cause when the juror agrees that they could give a defense verdict. I can't reiterate enough how important "prehabbing" is.

Jurors who have themselves been assaulted

Now, it is important to note that it is likely that some of the jurors who have been assaulted will be excused by the judge. Usually the judge will question anyone with a personal sexual experience in chambers and many of them end up being excused. As you might already know from other cases, jurors who cry in questioning are almost always excused by the judge. For many of these victims, recalling these situations is so painful that a juror is incredibly uncomfortable during questioning and the judge ultimately asks you to stipulate. When a juror is crying, or demonstrably uncomfortable during voir dire and my side is asked to stipulate in front of them, don't fight it. I've seen attorneys continue to question or fight to keep someone who is clearly miserable, and I don't recommend it. You lose credibility in front of a judge trying to keep someone who is so clearly unfit to be a juror in this case – this case truly may not be right for them.

For a victim who isn't completely beyond themselves, you can try to rehab them in the same way. If they are successfully rehabbed, the defense will

almost surely strike them. The more you rehab, the more jurors the defense has to worry about. Keep in mind, at the end of the day, whether you lose a victim to a cause or a peremptory challenge, there are likely better jurors in your panel for you. Victims aren't always the best jurors – some jurors who have been sexually assaulted offer lower damages – they've lived it, they've gotten past it, it's not unthinkable to them. Most of the time your best jurors have never been assaulted and cannot even fathom how awful it would be.

Though prehabbing is important, you can't forget to work hard to get cause challenges on your bad jurors. Find your outspoken jurors from their questionnaires, and don't be shy to question them about their negative opinions. Negative opinions are *not persuasive* to good jurors. After they have expressed their negative opinion, thank them for it, and then express your concern at them being a juror in this case. Make sure to ask them if they can be 100% neutral, or entirely impartial. I have found the "are you already siding with the defense?" question as effective cause grounds as well. *Do not* ask them if they can be fair. Jurors want to say they can be fair, and most will say it (and then you lose your chance at cause). Don't forget to ask if anyone else agrees with the negative juror. Negative jurors are helpful in voir dire – if you don't hear anything negative, you should be worried that people aren't being forthright with you. Don't forget to go after cause challenges, even if it takes a little while. In writing this article, I looked back through my past cases, and most of my best verdicts have been after the judge granted many cause challenges, some upwards of 15.

The effect of the Me-Too Movement on your jurors

The Me-Too Movement has made this a unique time to be a plaintiff's attorney for sexual-harassment and sexual-assault cases. Jurors are more informed about consent, angrier at

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someone who doesn't listen to the word "no," and are more empowered to stand up for victims in a way that they weren't before. I have heard groups of jurors enthusiastically agree that they understand when victims don't report right away, which used to be a huge negative jury-selection issue in these kinds of cases. However, although you may have more advocates in your panel than before, don't think your jury selection will be easy.

The Me-Too movement has had a very polarizing effect on the population, liberal downtown Los Angeles included. Though the number of vocal advocates has surely increased, there are many jurors who feel that the Me-Too movement is overblown, that victims are too easily believed, and that people who have been accused have been unfairly targeted. Many jurors now believe today's victims are fakers just looking for a windfall, since the public perception seems to be that people believe harassment claims these days, whether or not they are valid. The question, "How do you feel about the Me-Too movement?" is simple and incredibly effective. If you are doing a questionnaire, this is a great question to add. You might be shocked at the number of negative responses you get. I have looked at previous questionnaires and I have the following responses (actual quotes from jurors – some female, by the way).

How do you feel about the Me Too movement?

"Seems like all the kids are doing it these days. We are all followers."

"It paves the way for people to lie about something that didn't happen to get attention or hurt somebody"

"I feel like people feel they are owed something instead of having to work for it"

Now remember, when questioning about these negative feelings, whether on the questionnaire or in voir dire, make sure to ask about these feelings as if they are normal and justified. To get these jurors comfortable talking about these unpopular feelings, you have to talk like your defense jurors, not like an advocate for plaintiffs. If your questions sound judgmental or disgusted, you will not get the important responses you need. You need to use questions like, "Who thinks the Me-Too Movement has gone too far?" or "Who has seen someone *overreact* to something harmless or misinterpreted in the workplace?" Words like "oversensitive," "overreact" or "too politically correct" will resonate with your bad jurors. Asking questions in this way will make your bad jurors feel like you understand them and they will be more willing to give you a response.

Be mentally and emotionally prepared for a long haul

Lastly, be prepared for a mentally and emotionally draining jury selection. Because of the amount of cause challenges and the sidebar questioning, jury selection in sexual-assault and sexual-harassment cases can take significantly

longer than your average jury selection. I've had week-long jury selections in sexual-assault cases. Don't worry about the length; there isn't much you can do about it. If you are asking your questions quickly and efficiently when you get the opportunity to speak, the jurors won't blame you. However, it is very important to remember that jury selections that are longer than a day or two take stamina and prolonged focus. Your later jurors are often more important than your earlier jurors, because you may be several strikes in when you get to them, and you are tasked with the crucial decision of whom to keep and whom to strike with only a couple strikes left. Don't fall into the complacency of asking few questions or just basic questions to your later jurors. Though you might be moving more quickly with them, prepare your handful of most important questions, and make sure to ask all of them to each juror. Some of my best verdicts have come from insanely long jury selections where we have questioned many jurors – patience and thoughtfulness are key.

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