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# Trying the school-bullying case

## METHODS THAT ARE OUT-OF-THE-BOX FOR PI CASES CAN MAKE ALL THE DIFFERENCE IN AN EMOTION-CHARGED CASE SUCH AS SCHOOL BULLYING

In late August of 2022, a jury found in favor of our client, Eleri Irons, and against a school district that failed to protect her from bullying. Classmates had severely bullied Eleri over the course of her eighth-grade year while administrators in the El Segundo School District virtually sat on their hands. She was so tormented throughout the 2017-2018 school year that she ate lunch almost every day in the nurse's office and engaged in self-mutilation. The next year she moved to a different school because she did not feel safe in El Segundo schools.

That we obtained a verdict against such a well-resourced governmental entity speaks to the strength of Eleri's case. The fact that the award was substantial speaks to the unconventional methods we used at every phase of the trial to win our case. Although Eleri's case was full of surprises, we ourselves were never surprised. Because we engaged in out-of-the-box thinking throughout the course of the trial, we were able to spot potential issues and stumbling blocks long before the defense recognized that they might be challenges. Conventional wisdom tells us that litigation is no different from a game of checkers or chess. A strong legal team plays several moves ahead.

### Jury selection

Selecting a jury in a bullying case is considerably different from choosing one for most other types of cases. The closest comparison, in our experience, are cases involving injuries to minors in which adults failed adequately to protect the victims.

When a minor has been bullied, the most severe injuries are emotional, not physical. Victims can suffer diminished self-esteem and even self-loathing, and they live with a level of post-traumatic stress disorder (PTSD) that may require years of therapy to overcome. Defense counsel, if they're worth their salt, will drill down into the victim's history to examine pre-existing trauma and will work hard to convince a jury that their clients should be absolved of liability for the victim's injuries. These same types of issues and methods might arise in actions for sexual assault, death, emotional abuse or other tragedies.

Eleri's case was no different. We knew that her past, which involved prior traumas and challenging family issues, would be presented to the jury as mitigating factors. If we wanted to find the right jurors for Eleri's case, we would have to directly address the elephant in the room. We had to lean into the trauma issues rather than obliquely referencing them.

Most people have experienced trauma at some time in their lives. Recognizing that trauma is both universal and extremely painful, we deliberately tapped into those experiences as we searched for a common thread that would weave prospective jurors into the tapestry we planned to construct around Eleri's story.

### Using shared experience to build empathy

Perhaps fortuitously, our case came to trial during the COVID pandemic. This enabled us to capitalize on the shared experience that everybody – including members of the jury pool – had endured as a result of the virus. We had all struggled with isolation, separation, and stressful family dynamics because of the pandemic, and we knew that we needed to address these issues if we hoped to strike a nerve by sharing Eleri's school-bullying experience. The jurors, we knew, would be able to relate to the stress her family experienced as they helplessly listened to her stories and watched her self-destructive behavior.

It is a truism of trial attorneys, but it is nonetheless true: You must genuinely listen to jurors, you have to explore areas that may be extremely sensitive or personal, and you must dig deep even when it is uncomfortable. Superficial information is neither helpful nor useful. Victim's counsel cannot be afraid to engage in trauma-informed questioning of prospective jurors. This is the only way to understand their triggers, to recognize signs pointing to trauma in their lives, and to approach their issues with sensitivity and respect.

Just as unburdening oneself in a therapy session can jump-start the healing process by opening a person up to new ideas and perspectives, so too can trauma-informed questioning help jurors move beyond their own experiences to understand and appreciate those of others. But such questioning must be done carefully so as not to retraumatize the juror or expose his or her issues to the judgment of strangers.

We saw defense counsel doing exactly the opposite. They showed complete insensitivity when questioning jurors, failing to recognize when a juror was experiencing something painful or troubling and proceeding to probe them in front of the entire panel. When this occurs, it is incumbent on victim's counsel to inform the judge so that the court can proactively address these issues.

The most important lesson we learned during jury selection was that we

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2023

should never be afraid of these conversations with prospective jurors. When a juror begins to feel comfortable talking about a difficult issue, others are more inclined to share their own experiences and issues. The jurors in our case began to acknowledge and recognize what the issues were, and some of them instinctively expressed sympathy and protective instincts that favored our client.

Don't be afraid of this. Because of our thoughtful interactions with them during the selection process, the jurors on Eleri's panel were already conditioned to think about what our client had gone through and to recognize how seriously the school failed her.

### *Wheeler/Batson* challenges

As a civil attorney, I had never previously had the opportunity or cause to assert a *Wheeler/Batson* challenge to the other side's use of peremptory challenges. That changed with Eleri's case, thanks to the insights and experience of my co-counsel Siannah Collado. Siannah's background is in criminal law, so she was familiar with such challenges and understood their purpose and value.

In *People v. Wheeler*, the California Supreme Court ruled that the use of peremptory challenges to remove prospective jurors on the sole ground of "group bias" violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. Such bias "presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds ... "

In 1986, the United States Supreme Court held in *Batson v. Kentucky* that jury challenges based on group bias violate the Equal Protection Clause of the Fourteenth Amendment. The court ruled that prosecutors are barred from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group cannot impartially consider a case against a black defendant.

In 2000, the *Wheeler* holding was codified in California's Code of Civil Procedure. Section 231.5 states that "[a] party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."

Critically, section 231.7, added to the code in 2020, states that "[a] party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups."

After defense counsel used peremptory challenges to remove four women in a row from the jury pool, we recognized that we were in a unique position. We had only used two of our challenges at this point, but before we took lunch and before our next opportunity to issue a peremptory challenge, defense counsel was kind enough to inform us that they were planning to exercise a peremptory challenge with the next woman.

We saw our opportunity and asserted a *Wheeler/Batson* claim on the basis of group bias because of gender. Such bias had been ruled impermissible by the *Wheeler* case and reaffirmed in the 2000 *People v. Williams* decision, which stated that "Peremptory challenges may not be used to exclude male jurors solely because of a presumed group bias." We successfully argued that the defense was impermissibly striking jurors solely because of their gender. We also pointed out to the court that two of the women excused had not even been questioned by defense counsel. In other words, other than gender there was no obvious basis for their challenges.

The defense clearly did not see the challenge coming and was unprepared to respond. Not only did opposing counsel not exercise any further peremptory challenges, they actually left a juror on the panel whom they had earlier tried and failed to remove for cause. This put us in the driver's seat and enabled us to pick the balance of the jury.

Although the cited cases involved criminal defendants and were targeted at prosecutorial peremptory challenges, the same logic applies in civil cases. State law does not limit the proscription to criminal cases; the harm is just as great for victims of civil wrongdoing. As women were systematically stricken from Eleri's jury, we could see group bias at work. Of course, women would be sympathetic, but no more so than male jurors who heard the facts of our case.

In fact, two of our best jurors were white men whose wives were educators. These two jurors might seem problematic for the typical plaintiff's personal-injury type case, but both were dads, and one had a family member who suffered from PTSD. Our client liked them both, and her instincts were spot on. We called them "the dads" during trial, and one of them was the jury foreman.

### Adverse witnesses

California Evidence Code section 776, sets forth the rules allowing a party to question an adverse party: "A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness."

It is always a tricky call to start the case in chief with a defense witness, but it can actually be one of the best ways to show the jury your case. In our trial, that witness was the school's principal. This witness had submitted a declaration in support of the defense's motion for summary judgment and had also been deposed. In both instances, she claimed that she had immediately called the police as soon as she was notified about a petition being circulated around the school calling for Eleri's death.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2023

In preparing for trial, we found evidence that directly contradicted the principal's assertion. We concluded that although Eleri's parents had gone to the school on the day after the petition was circulated, the police had not yet been notified. The principal had in fact lied about this under oath. We called the police to confirm that no calls or reports were made the day before the parents' visit, and both the reporting officer and the investigating officer confirmed that no such reports existed.

During the principal's testimony, we went over the school's policies. We highlighted the fact that she had since been promoted to Executive Director of Human Resources for the school district. We then had her confirm the story she told during her deposition and in the motion for summary judgment regarding contacting the police, and we proceeded to use her own emails to show that what she had said was false. Later in the trial, we called a police witness to impeach her. When the first witness lies about such a material fact, it highlights all the conduct of the school and employees through the lens of untruthfulness. It suggests to the jury that they have been untrustworthy from the beginning of the case.

## Motive is important to the jury

The lynchpin for establishing a cause of action of this magnitude and complexity is to identify and prove to the jury the underlying motive. It can be a tall order. Although it is not necessary to prove a motive, similar to a criminal trial, it is still important for the jury to understand and appreciate what motivated the defendant's behavior, because that motive will help the jury understand why the bad acts happened.

In our case, the defendant's motive was clear but complicated. Even though we had identified it, we needed to be strategic about getting it in front of the jury in a way that made sense. The school had gone to great lengths to protect the student bully. Even after she circulated a petition to end Eleri's life, she faced no suspension or other discipline until after the school year came to an end. She and her co-conspirators were not only allowed to attend promotion at the end of the year, but her family occupied the first row at the event.

Plaintiff's mother had told us that their front-row seating was traumatizing to her family, and before the trial, we discovered that the bully's family had connections to people in positions of power and influence. The bully's mother was not only a major donor whom the school did not wish to offend but was also someone with considerable influence in her own right.

It came to light during our trial preparation that the bully's parents were heavily involved with the El Segundo Education Fund and that the fund's director was a close family friend, as well as a member of the city council. We therefore asked every witness during the trial who this person was and what role she played with the district. Defense counsel did not appear to know who this person was or to grasp the reason for our questions about her, but we understood that our case might hinge on this information. We had to find a way to get the information before the jury.

Although we recognized that we might not be able to get donor connections on the record through our witnesses, we believed it was important for the jury to know that the bully's mom sat on the school's Education Fund and was a major donor. As we looked at the organizational chart for the Education Fund, we suddenly realized that it would be important to our case to put the school district's superintendent on the witness stand.

The superintendent was not only part of the school's organizational chart, she had in fact been sitting in court every day as the school district's party representative. Granted, she had never been deposed or subpoenaed, and she was not included on the witness list, but this did not mean that she was off-limits. Even though we were basically done with presenting our case, we had not yet officially rested. The door might still be open for us to get this critical information before the jury.

Before the defense could call their first witness, we approached the bench and asked to be allowed to call the superintendent pursuant to Code of Civil Procedure Section 1990, which states that, "A person present in Court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such Court or officer."

As civil litigators, we are used to deposing people and knowing more or less what they will testify to in court. It helps us predict how things will or should play out in trial. The element of surprise is typically discouraged or frowned upon, but sometimes taking those risks can yield big rewards. The court allowed us to call the superintendent to the witness stand, over the defense's objections.

The superintendent was understandably surprised at being called as a witness, right before lunch. We asked her a series of questions about the Education Fund, and she established who the parties were and how she personally knew the parents of the bully. Her testimony in essence gave the jury the motive for why the district had failed to take action when Eleri was bullied.

Although we did not explicitly ask the superintendent about what we eventually called the "triangle of privilege," the defense asked that exact question. Defense counsel actually asked her if being a part of this fund gave students a pass in terms of discipline. Even though the superintendent predictably said no, the damage was done: Defense's question highlighted the point we had been hoping to make. Sometimes being subtle is the most effective approach; it allows the jury to come to the correct conclusion on their own.

We did not roll the dice as we litigated Eleri's case. We took thoughtful and calculated risks. Even though we had no idea what our surprise witness would actually say, the end result speaks for itself. Thinking outside the box and taking chances – with jury selection, witness questioning, and motive

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2023

development – can pay off in spades. In our case, it was well worth the effort.

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