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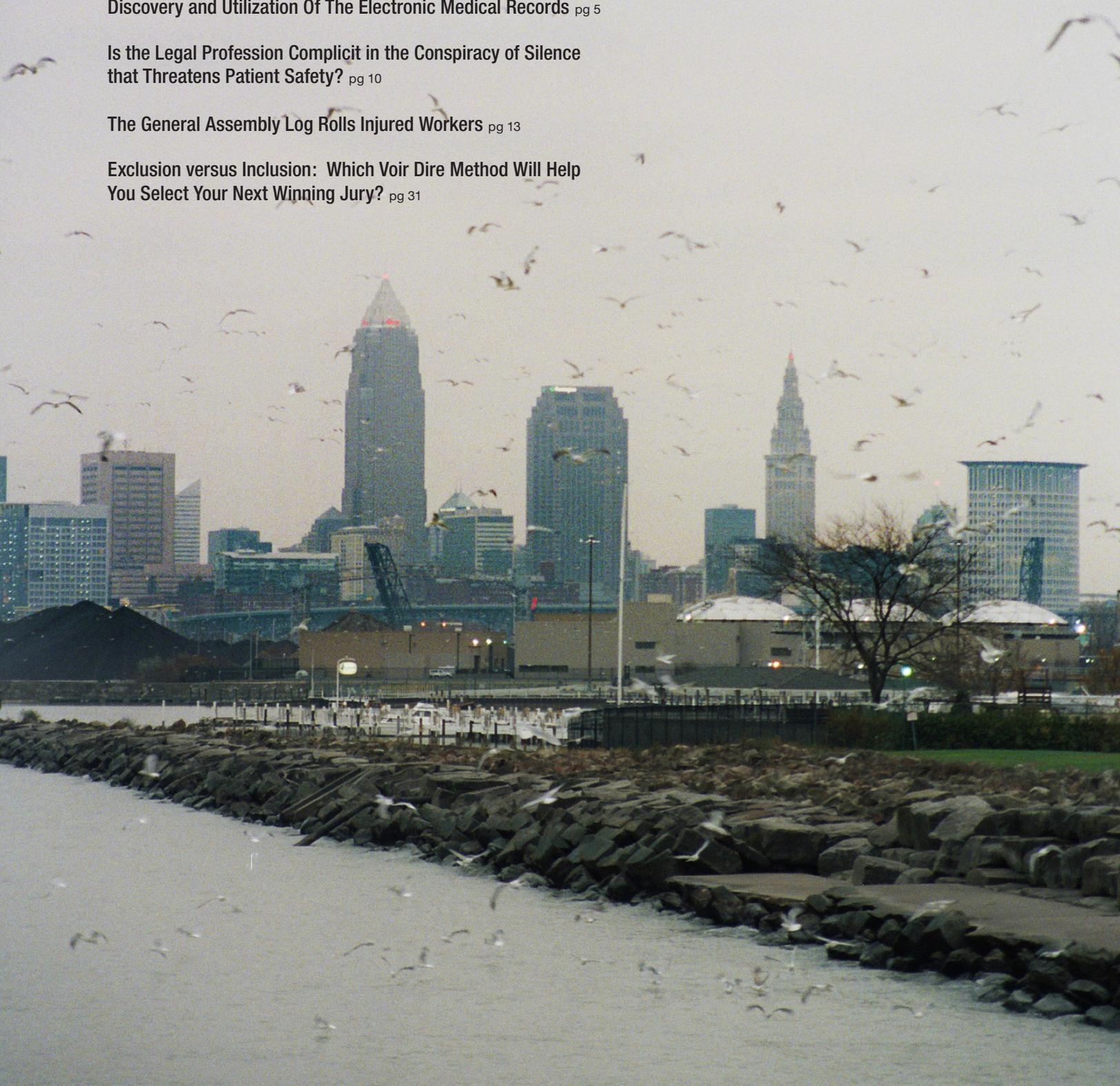
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Exclusion versus Inclusion: Which Voir Dire Method Will Help You Select Your Next Winning Jury?

by Susan E. Petersen

"The only place where a person ought to get a square deal is in the courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into the jury box." -- Atticus Finch, To Kill a Mockingbird

Early in my career, I learned the difference that eight people can make. I had the privilege and pain of trying the same injury case *twice*. At trial #1, the defendant admitted negligence relative to a delay in diagnosing and treating a jaw-eating tumor. In trial, the defense expert admitted the defendant's negligence caused some harm. Our expert testified that the delay caused significant harm. During deliberations, when the engineer who we opted to leave on the jury asked the court for a ruler so he could measure the x-rays (taken at different magnifications), we knew it was not a good sign: defense verdict. Because of the expert's admission of "some harm," the judge awarded a new trial. After taking a ride up and down the appellate roller coaster, we tried the case again. At trial #2, it was déjà vu. The only real difference was the eight individuals who sat in that jury box. This time, the jury returned a sizeable plaintiff's verdict. At that moment I realized jury selection is the most important part of trial.

Research shows that eighty percent of jurors reach a verdict by the end of voir dire.¹ It is your chance not only to make a critical first impression, but to select a group most favorable to the issues in the case. What's the secret? Is there a method of jury selection that will improve your odds of selecting a winning jury? This article will provide you with an overview of two very distinct approaches to jury selection being used in our courtrooms today. One method aims to exclude: uncovering and removing all jurors who possess biases detrimental to getting a fair trial. The

other aims to include: uniting individual ideas to form a cohesive group whose mission becomes providing justice to your client.

"Cause Is King": The Exclusionary Method

The goal of the exclusionary method of jury selection is to seek out and dismiss those jurors who do not see things our way or who we fear will harm us and our clients. We practice in a politically charged climate where jurors voice contempt for the civil justice system, trial lawyers, and plaintiffs. The reality of our polarized world is there are certain individuals who, no matter how compelling the evidence or arguments, will have made up their mind before voir dire even begins. For you, as an advocate, to have any real chance at winning, you must remove all jurors whose inner scripts would prevent them from fairly weighing the evidence.

Past OAJ President Dennis Mulvihill is a strong advocate for the exclusionary approach. Through his popular seminar "Cause is King," Mulvihill teaches us that because peremptory challenges are just too few in number, the goal of voir dire must be to remove for cause.² Mulvihill says, "Typically, those people are not consciously aware of that strong feeling, because they really believe they can be fair in any case. But the reality is that when they start to deliberate, they will evaluate the evidence through their ideological lens that disapproves of lawsuits. Thus, it will be very difficult to persuade them. The best way of making sure you have maximized your chance

of getting a fair jury is to find and get those people excused for cause. In most venues, you will have more biased people than you have peremptory challenges, so you will need to excuse a number of jurors for cause." Mulvihill says, on average, he is successful in removing five to eight people for cause in a typical trial.

The key to exposing biases and prejudices is to ask open-ended questions to find out how jurors truly feel about the issues critical to your case. Your questions must be geared toward uncovering their true attitudes and belief systems. National jury consultants Lisa Blue and Robert Hirschhorn suggest that one way to achieve this goal is to use scaled questions --

An example of a scaled question is: "If a company does something wrong and a person suffers harm or injury because of the company's conduct, how important is it that the company be held responsible for that conduct?" Then you give the prospective jurors options: very important, important, somewhat important, or not important at all. Another way to ask a scaled question is to read a statement and determine how strongly individual panel members feel about the statement. For example, the statement could be: "People in America are too quick to sue." You then ask each potential juror which of the following options best describe their opinion of this statement: strongly agree, agree, somewhat agree, strongly disagree, disagree, or somewhat disagree. A scaled question gives you some sense of the prospective juror's belief system. You might ask prospective jurors: "How comfortable would you be awarding millions of dollars to a plaintiff?" Again, you should give panel members a range from very comfortable to very uncomfortable.³

Another critical element to the success of this method is to listen twice as much as you talk. The wise advocate will remember the old saying, "You have two ears and one mouth and you should use them in that proportion." When you hear an answer that could well be a challenge for cause, you must build the foundation for a cause challenge. Blue and Hirschhorn recommend -- thank the juror for his/her honesty and then say, "[Juror's name], is it okay with you if we visit (talk) some more about this later?" When a juror has expressed a strong opinion that gives rise to a challenge for cause, ask the juror: (1) "[Juror's name], would it be fair to say that this is a strong opinion you have about this issue?" and, (2) "You'd agree with me that you have had this opinion or feeling for quite some time?" Conclude the challenge for cause questioning by asking the juror the following final question: "Given what you have just shared with us, do you mind if I ask the judge to excuse you from serving as a juror in this case?"⁴

For "cause" to be your "king," be armed with the proper interpretation of Ohio's statutes on removal of prospective jurors for cause: Revised Code §2313.42 and §2313.43. The cause challenges enumerated in Revised Code §2313.42 (A - I), are called principal challenges. If proven, they lead to a *per se* disqualification. Cause challenges under Revised Code §2313.42 (J) and §2313.43 are called favor challenges. These are up to the trial court's discretion to disqualify for good cause.⁵ The exclusionary method requires the lawyer to work as hard as possible to make sure that no juror is seated so long as there is "any" doubt as to the juror being entirely unbiased, as R.C. §2313.43 instructs.

We Are A Tribe: The Inclusion Method

This method shifts the paradigm during voir dire from one of exclusion

to inclusion. The goal is to take the individuals in the jury pool and form a united group by sending the message that we are joined together in a common cause. To form a tribe, you must accept what each juror has to say, show them they are important, and tell them the truth. It requires you to think in terms of "we" instead of "I" and "you."

This tribal philosophy is the brainchild of Gerry Spence, a trial attorney from Wyoming who is recognized nationwide for his powerful courtroom victories. He founded the nationally acclaimed Trial Lawyers College which established a revolutionary method for training lawyers, including the subject of voir dire. CATA brought Spence to Cleveland in 2011 as a speaker for its Annual Dinner and a half-day seminar on voir dire. Spence educated us on his philosophy that, at our core, we are all cavemen and people instinctively want to be part of a tribe. People don't want to be judged. People don't want to be cross-examined. They want to be understood. They want to be liked. They want to be respected.

Spence says the goal of voir dire is to form a tribe where you ultimately become its leader. To form a tribe, you have to create an environment in which the jurors are willing to listen to you, and you are willing to listen to them. The most effective voir dire takes place when the jurors are openly discussing issues in the case as a group -- like they would during deliberations. This conversational approach happens only when you allow individual jurors to honestly express their feelings about the case issues, and to feel free to weigh in with their own opinions and attitudes about what the other jurors have said.

The key to this working begins with you being completely open and honest. You can show no judgment. You do not argue with what they have to say. You must come to terms with this being their

valid opinion. It must be acceptance and not rejection. You cannot cross examine them, but instead understand their perspectives. Even if you completely disagree with what they say, you must show that you appreciate their candor, respect them for voicing their opinion. In doing so, you will make them feel important and work toward forming a cohesive group.

Spence advises – “the mirror is always at work.” If you are truthful, the jurors will be truthful with you. If you are loving to the group, it will return the love to you. If you are spontaneous, they will be spontaneous. It must be respected and accepted. It is a process of sharing opinions and ideas.

Before addressing any of the issues in the case, this method requires you to get in tune with where you are at when you stand before the jury for the first time. Are you anxious, excited, fearful? This is where the voir dire should start: sharing with the panel the honest feelings that you have in that moment. In doing so, you show a truth about yourself and you create an environment where the jurors will be freed to share their truths. The goal is for the jurors to see you not as a lawyer, but as one of them.

After attending the Spence seminar, I decided to give his method a try last summer in a soft tissue auto case involving a 72 year old woman. I dedicated myself to being completely open, caring, honest, and spontaneous. I began by disclosing to them that no matter how many cases I try, I am always nervous at the start and that’s because I’ve worked so hard; I want to do a good job for my client; and I know this trial is their one chance to get justice. I opened up to them about all the parts of my case that had me worried (the danger zones): the 8 month lapse in my client’s medical treatment; the defense theory that her neck hurts because of her age; my past

experience with jurors ignoring the law when considering future damages. Voir dire took a half day. The trial was only a day and a half. I didn’t appreciate that I had actually formed a “tribe” until it was all over. The jury awarded significantly more than I suggested in close and more than 31 times the pre-trial offer. My client and I stood in the hallway a bit overwhelmed. The jurors began coming out and the first one walked over and wished my client all the best. He then asked – do you mind if I give you a hug? By this point, the other jurors had formed a line. One by one, they came by and hugged my client. One told me – “We just wanted to make sure she was protected.”

For more information about Trial Lawyers College and the Spence method, visit <http://www.triallawyerscollege.com>.

Conclusion

Recognize that what works for one trial attorney doesn’t necessarily work for another. Be true to who you are and figure out a method which fits your personal style. The more juries you select, the more comfortable you will become with voir dire. So here’s to fighting for justice and to getting out there and selecting a jury ■

End Notes

1. See Susan E. Jones, Voir Dire and Jury Selection, TRIAL, Sept. 1986, at 60.
2. The phrase “Cause is King” was first used by Florida jury consultant, Jay Burke, to describe the importance of challenges for cause as to jurors who possess biases detrimental to ones’ ability to get a fair trial.
3. See “Trial Techniques: Goals and Practical Tips for Voir Dire”, Lisa Blue & Robert Hirschhorn, American Journal of Trial Advocacy, Volume 26:2, Fall 2002.
4. “Ten Tips for an Effective Voir Dire”, Lisa Blue & Robert Hirschhorn, State Bar of Texas: 14th Annual Choosing and Courting a Jury Course, March 26, 2010, Chapter 9.
5. *Hall v. Banc One Mgt. Corp.*, (2007), 114 Ohio St.3d 484.