HARDSHIP AND CAUSE CHALLENGES

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In preparing for trial, lawyers defending "bet your company" cases frequently spend hundreds of thousands of dollars exploring how demographic characteristics, attitudes, and experiences correlate with verdict orientation. The objective is to develop a plan for striking a jury that will be favorable to your client's position – or at least not biased against you. But amidst all this time consuming and expensive research, it is easy to lose track of one essential point. The pool of jurors from which you will draw your panel consists of those veniremen who are left after the Court disposes of **hardship** and **cause** challenges.

I have practiced in state and federal courts all over the country. What I have found is that the standards for dealing with hardship and cause vary from court to court and even among judges on the same court; you cannot even be certain that the judge will apply the same standards from case to case. So, unless you know what you expect, you may lose some jurors whom you would like to retain and/or find yourself forced to use a precious peremptory challenge on a juror who could have been eliminated earlier in the process.

In the time available, we can do no more that scratch the surface on these topics. My objective today is to flag a few issues to consider as your confront hardship and cause challenges in your next trial.

A. HARDSHIP CHALLENGES

1. Divergent Interests. The parties' interests are not the same as the Court's. The parties are looking for jurors who are friendly or at least not biased against them. The Court wants to seat a jury as quickly as possible, get on with the trial, and move to the next case. This is especially problematic in cases projected to take weeks or even longer to try. Most jurors called to the courthouse will submit to

serve in a case expected to last a day or two. When, however, the pool is informed that the case will take considerably longer, the excuses start popping out of the woodwork.

2. Why does the disposition of hardship excuses matter? Most courts rule on hardships at the beginning of jury selection. Even then, however, you may have learned something about a juror – e.g., from a written questionnaire – that makes you want to get rid of him. A hardship excuse is a way to rid yourself of a bad juror without having to use a peremptory challenge (although there is always a danger than the opinion you formed on the basis of limited information was wrong).

3. The Governing Standard. The standard for excusing a juror for hardship is sometimes prescribed by statute. Other times, the standard is set by local rules or emerges from the case law.

a. Where the standard is set by statute, there are generally carve outs for specifically defined categories of people – e.g., seniors. persons with child care responsibilities, and persons with prescribed disabilities.

b. Typically, there is a catch all phrase for persons not specifically covered – e.g., "**extreme physical or financial hardship."**

c. The precise language used to set the standard is, however, less important than how the language is interpreted/applied.

d. Grounds recognized as an **automatic** basis for dismissing a juror by one judge might be categorically rejected by another judge.

4. Recurring Situations. The inconsistencies in the hardship standard applied from court to court are illustrated in the following situations:

a. Work Responsibilities. Typically, this is a hard sell for a juror. The more a juror insists that he is indispensable at his work site, the more likely the judge is to find that someone else can

substitute for him. Most judges' mindset is that no one wants to miss work. So, the successful juror needs to establish that his situation is special. This can be done is a couple of ways:

(1) The juror can demonstrate that there is something unique and important happening at work **right now** that requires his attention – e.g., completing a project – even though he would be available to serve at some later date.

(2) The juror can demonstrate that service would be a financial hardship. Many states by statute forbid companies from firing workers for jury service. In only a few places, however, are employers required to pay the juror for time spent serving. So, if the juror is living hand to mouth, the court might let him go.

b. Jurors working on commission. In virtually every jurisdiction where I have practiced, commission salesmen are automatically excused from service.

c. Teachers. Courts vary widely in their treatment of teachers. Some judges excuse them automatically if they are called to serve during the school year. Other judges reason that there are ample substitutes available to take their place. Where judges do not have a firm policy, teachers must proffer a special excuse – e.g., preparing a class to take an AP exam – to be excused.

d. Government workers. There is virtually no chance that they will be excused from service. The prevailing attitude is that any government worker at a level lower than the governor can be replaced. There also seems to be a feeling that government workers have a special obligation to serve.

e. Young mothers. In courts where there is no statutory basis for excusing young mothers, they have a surprisingly difficult time persuading courts to let them go. Judges typically quiz these jurors on whether there is some relative or neighbor who can care for the child while the mother serves. It is particularly difficult for a young mother to avoid service if her child goes to kindergarten or

preschool for part of the day; the judges reason that there are fewer hours to cover in such circumstances.

f. Vacations. It seems perverse that, while prospective jurors typically find it difficult to use work as an excuse for serving, few judges will tell jurors that they must sacrifice their vacations to serve. Pre-paid vacations are virtually sacrosanct.

5. Procedure. I have never seen a situation in which how a court handles hardship challenges is spelled out by rule or statute. There are many variations in procedure, and they affect the outcome.

a. Most judges do not allow the lawyers to participate in the hardship screening. Where they do, the lawyers have an opportunity to shape the process. In particular, lawyers who are allowed to participate in hardship screening can insist that the judge apply his rulings – whatever they are – consistently.

b. Hardship screening is generally conducted in open court. The exception is for jurors who seek to be excused for highly personal reasons. Conducting the process openly affects the outcome because, as jurors seeking dismissal are heard, the others in the courtroom learn what they need to say in order to be excused.

B. CAUSE CHALLENGES

There are many bases for challenging a juror for cause – e.g., he know or is related to a party or he was a witness to the underlying events. Today, however, we deal only with challenges for **bias.**

1. Why are cause challenges important? There is no limit on the number of jurors a lawyer can excuse for cause. If the judge rejects your challenge, your only recourse is to use a peremptory. There may not be enough of them to get rid of all the bad jurors.

2. The Standard. Grounds for excusing a juror for bias generally emerge from the caselaw.

a. The precise language varies across jurisdictions, but generally requires dismissing a juror if there is **"any reasonable doubt as to the juror's ability to render an impartial verdict."**

b. The cases generally hold that close cases should be resolved in favor of excusing jurors. Stated otherwise, the official advice is don't take a chance.

c. The cases also generally hold that, where the juror gives *conflicting statements* about his ability to be fair, that alone is enough to create the required "reasonable doubt."

3. Specific Applications. As with hardship, the problem is not so much with the standard as it is in how the standard is applied. By and large, judges apply the standard leniently. They are anxious to seat a jury, and they look for ways to keep questionable jurors in play. Here is a list of some specific comments made by jurors during voir dire that raised questions about their impartiality but did NOT result in their dismissal for cause.

a. "I don't like lawyers" or "I have negative feelings about the legal system."

b. One of the parties would "have to overcome my resistance" to its position.

c. I have a "tiny bit of prejudice."

d. I "guess" that my feelings about the issues would stay with me.

e. "I will try to keep an open mind."

f. I would be "uncomfortable" holding an employer 100% accountable for its employee's actions.

g. I have "difficulty" with the greater weight of the evidence (as opposed to beyond a reasonable doubt) standard.

h. "The two sides are not starting out on a level playing field" or one party "may be starting out with one strike against him."

i. I can "probably" follow the judge's instructions.

j. I "have a problem with" or "I am bothered by" large damages awards because of their effect on insurance rates.

k. "I feel uncomfortable about serving" or "I would rather not serve."

4. Recurring Issues.

a. Self Certification. Many judges will rely on the juror's own assessment of his ability to be fair in determining his fitness to serve – at least in doubtful cases. Among the appellate courts which have considered the issue, however, it seems well established that a juror cannot determine his own competence. As the courts have recognized, it is difficult for any person to admit that he is incapable of judging fairly and impartially. [ASIDE: This is why it is generally futile to ask a prospective juror during voir dire if he can be fair. The answer almost invariably will be "yes."]

b. Rehabilitated Juror. Not infrequently, a juror will initially express doubts about whether she can be fair or say only that she will "try" to be fair. Later, however, the juror – either on her own or after prompting by counsel – will claim that she has thought further about serving and concluded that she can weigh the evidence and impartially decide the case. Despite mounds of caselaw holding that inconsistencies are alone grounds for excusing a juror, many judges will deem such jurors rehabilitated and allow them to remain in the pool.

c. Judicial Rehabilitation. A particularly pernicious form of juror rehabilitation occurs when a judge confronts a wavering juror directly and asks whether the juror can obey the court's

instructions to set aside her opinions and decide the case solely on the evidence. How many lay persons have the gumption to say "no" when a robed judge leans over the bench and poses that question?

d. Expert Jurors. Sometimes a juror has expertise in one of the technical issues in the case – e.g., a nurse in a fetal monitoring case. Even if the juror vigorously denies that she will bring her special education and training into account, you know that she will and you know that the other jurors will look to her during deliberations. They become more important to the outcome than the experts called by the parties. Although this seems to be common sense, we have been singularly unsuccessful in persuading court to excuse jurors with special expertise.

e. Gung ho and Reluctant Jurors. Special care is required in dealing with jurors who seem either too anxious to serve or not at all interested in serving. [ASIDE: I am not referring to so called "stealth jurors," which is a wholly different category.]

(1) It clearly seems dangerous to seat a juror who really wants to serve. One cannot help wondering if that juror has a hidden agenda – which may not be to your liking. Such jurors invoke W.C. Fields' famous line: "I would not want to belong to a club that would have me as a member."

(2) But what of the juror who clearly does **not** want to serve? A surprising number of such people end up serving. If peremptories are in short supply, lawyers reason that – even if they lose this juror – he is not likely to be a leader and persuade other jurors to join him. The principal risk with such a juror is that he will blame you for prolonging the trial and take out his anger in his verdict.

5. Procedure. Effective voir dire techniques are beyond the scope of this presentation. In the time available, however, I wanted to address two discrete issues:

a. Extracting Admissions of Bias. Getting jurors you don't like to admit that they are biased can be challenging. You want to get them to utter one or more of the catch phrases that force the court to dismiss them and save you a peremptory. At the same time, you risk alienating the juror if you push too hard for an admission of bias. That could be fatal if you are forced to use your peremptories elsewhere.

b. Make your record. Although appeals based on jury selection are not often successful, you need to make your record. That requires at a minimum that you take your juror as far as he will go in confessing bias. In most jurisdictions, however, if your cause challenge is denied, you are deemed to have waived your objection unless (1) you have used all your peremptories **and** (2) you have been denied a request for additional peremptories.

CONCLUSION

Make sure you know going into a trial how your judge handles hardship and cause challenges. Be prepared to use those challenges as part of your overall jury selection strategy.