

HOT BUTTON ISSUES IN JURY SELECTION

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Jury Selection

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During law school, Joel developed his jury trial skills prosecuting criminals with his third year practice card in Jefferson County, Alabama. Over the course of his 12 year legal career, Joel has recovered nearly 100 million in verdicts and settlements for his clients in cases involving automobile wrecks, negligent security, trip and falls, professional malpractice, products liability, and even business fraud.

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INTRODUCTION

Throughout the history of American jurisprudence, trial lawyers have contended with “hot button” social issues during jury selection. Even when tobacco juice saturated courthouse floors and legal fees were paid with livestock, jurors came to court with their biases, prejudices, and preconceived notions of what was “fair.” It is true that jurors are no longer limited to white men summoned from a crier’s balcony. Modern day juries include people of all races, genders, religions, and political persuasions.

Each of us believe we know what is fair. But what is fair? “Fair” means a lot of different things to different people. After a verdict was reached in a focus group we recently conducted, I asked all of the participants to imagine they were responsible for assigning the title to a book about the case. Here are a few examples of the submissions:

- In A Moments Time: Life Can Change in a Moment
- Hit and Not Properly Compensated
- Abuse of the System - \$
- How We Want to Not Understand!
- When School Buses Attack: The [Jane Doe] Story
- Robbed by a Civilian

As we can see, the jurors held widely different views of the case. Each heard the same presentation of the facts that were presented by the same lawyers. Some thought the Plaintiff was being robbed by the size of the verdict while another thought the Plaintiff was abusing the system for money. This example alone shows why voir dire is such a critical part of a jury trial. An effective voir dire allows us to flush out jurors who are biased against our client or our cause.

But how do we flush out these biased witnesses? We have to be honest about our own biases and create a relationship with the jurors. We have to acknowledge that it is ok to have biases and reservations about certain issues even if the juror's bias offends us. In today's world of "news" that is peddled by some that Gerry Spence refers to as "Bloodthirsty Bitches and Pious Pimps of Power," it is more important than ever to have honest conversations with prospective jurors about their beliefs. These beliefs are strong and in many cases are defining characteristics of who we are, or at least who we think we are. We do not let go of our beliefs easily. If you need a quick reminder of this, take a second to check your twitter or Facebook feed.

With that in mind, lets discuss a few "hot button" issues in America and how we can deal with these topics during jury selection.

I. Immigration Status

One of the most controversial issues in American politics today is immigration. Throughout his campaign, President Trump promised to build a wall along the country's southernmost border with Mexico. A couple of the President's quotes during his campaign are as follows:

"When Mexico sends its people, they're not sending their best." "They're sending people that have lots or problems...They're bringing drugs. They're bringing crime. They're rapists."

"I would build a great wall, and nobody builds walls better than me." "I'll build a great, great wall on our southern border, and I'll have Mexico pay for that wall. Mark my words."



The President has also signed multiple executive orders dealing with immigration. The latest order was signed on March 5, 2018, and its intent was to subject the citizens of Iran, Somalia, Sudan, Yemen, Syria, and Libya to a 90 day travel ban to the United States. The white house claims these orders are necessary as part of the United States' ongoing efforts to eliminate vulnerabilities that terrorists will exploit for destructive ends. Opponents have criticized the orders as mean-spirited and un-American.

How does this debate effect our approach to jury selection? Obviously, we have a legitimate reason to worry in cases where we represent a client from Mexico, the Islamic faith, or just about any individual from another country that does not look or sound like he or she is "from around here." If our client only speaks Spanish or wears traditional Islamic attire, we cannot not hide from the issue of immigration. Of course, there are numerous cases supporting the proposition that one's immigration status should not be admissible but that does not solve the dilemma we face at jury selection.

So what do we do? If our client is here legally, we make it known but express our fears that his or her nationality may result in the opposing party seeming more believable. We can use real world examples to express our own prejudices. I may use the example of boarding an airplane with a man of middle eastern descent who is wearing a turban. Do I feel the slightest bit nervous? Sadly, yes. It is not something I am proud of but it is a very real feeling that I have to intentionally suppress. I have never experienced that feeling while boarding a plane with a white man wearing a baseball cap. Why? Because somewhere, for whatever reason, I harbor a prejudice that causes me to trust the white man and distrust the man wearing a turban. Am I the only one who has ever felt this way? By being honest about our own biases, we can begin to have an honest conversation with the jury about theirs.

What if our client is here illegally? What do we do in this situation? There is no easy answer to this question. Some experts will tell us to file a motion in limine to prohibit any comment, suggestion, or innuendo that our client is here illegally. Other experts will tell us to embrace the fact and explain how the client's legal status has nothing to do with the case before the Court.

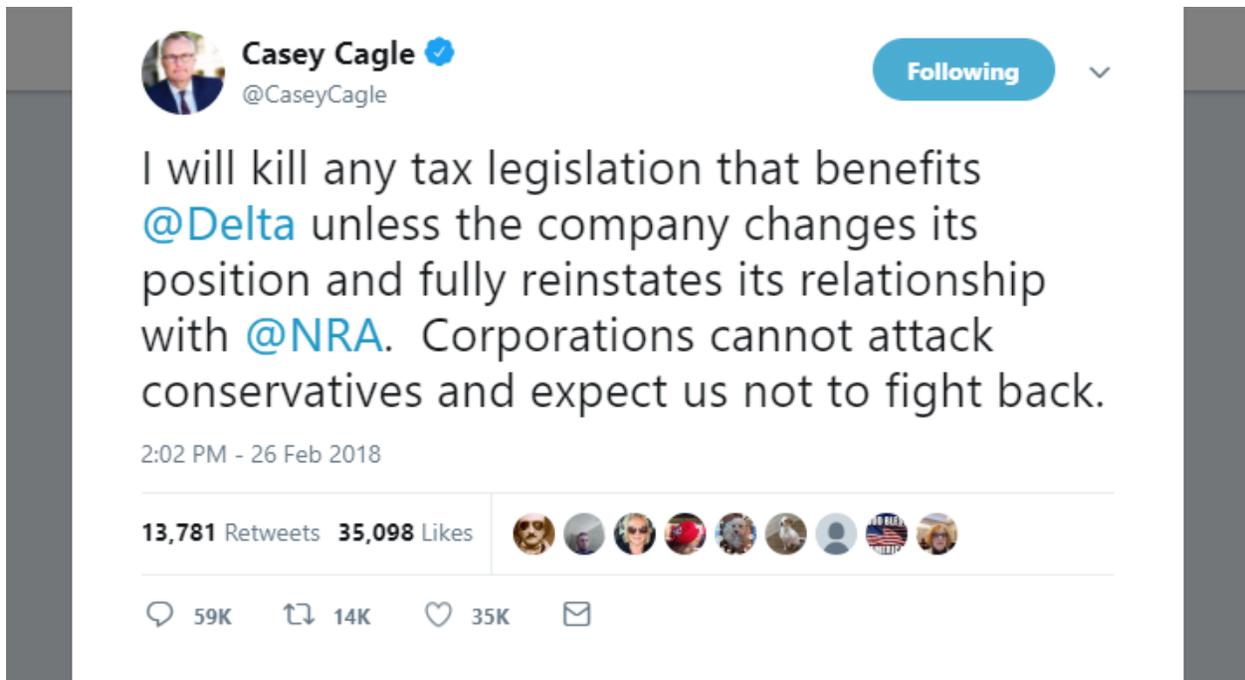
I do not claim to have the best or even a good answer to this conundrum, but I believe we should seriously consider filing a motion in limine to exclude the issue and approach voir dire in the manner outlined above without crossing the line and opening the door to citizenship questions. If a juror mentions it, we should thank them for their concern and willingness to share their feelings without disclosing our client's citizenship status. Simply ask if anyone else feels the same way. If we get any other hands, we move those to the top of our list to strike. Rest assured that if anyone suspects our client is undocumented without evidence that he or she is, they will not treat him fairly. The suspicion is likely rooted in a distrust of any person who looks and sounds like our client. But always remember, every prospective juror that expresses this suspicion has given us a

wonderful gift. We know their feelings and have a better chance of securing a fair trial for our client.

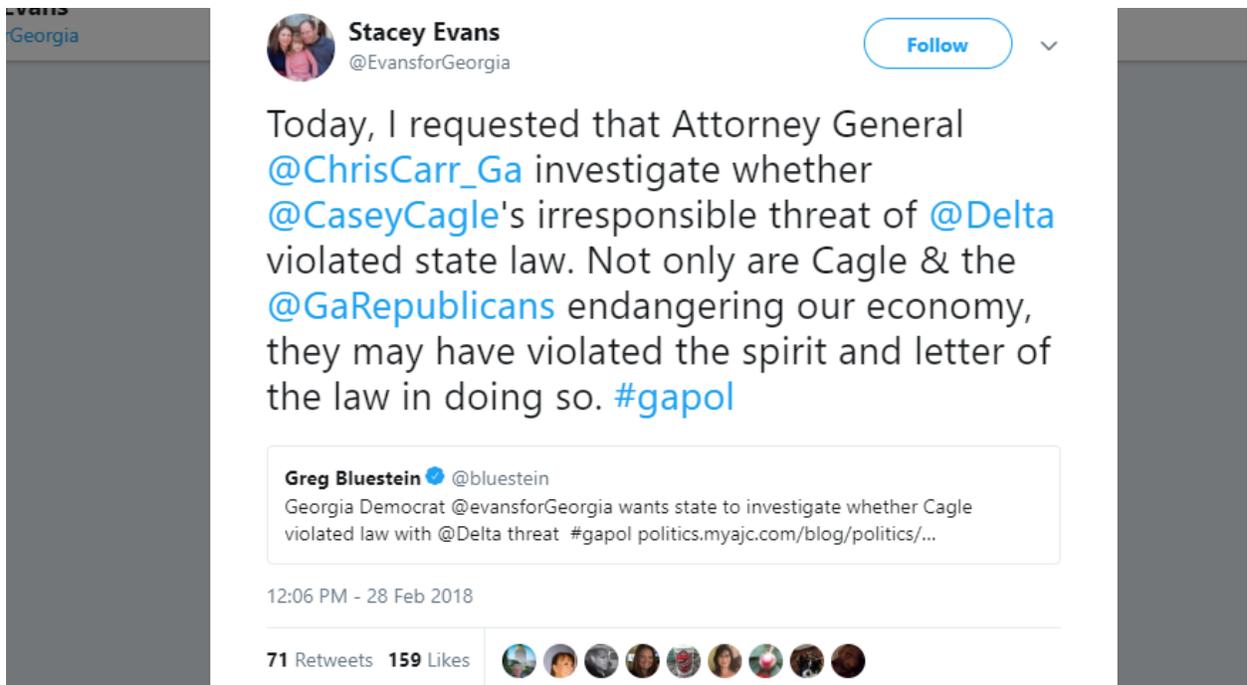
II. Guns

- Parkland
- Virginia Tech
- Sandy Hook
- Sutherland Springs, TX
- Las Vegas

These are just a few mass shootings that led to the intense debate on gun control in America today. Of course, Georgia has been deeply involved in this debate. Proponents and opponents of gun control have very strong opinions. For example, republican gubernatorial candidate Casey Cagle tweeted this on February 26, 2018:



Democratic candidate, Stacey Evans, responded quickly:



Our political leaders are not the only ones getting in on the debate. This meme is circulating around Facebook right now:



Recently, I was discussing how apportionment affects negligent security cases with a friend of mine who also happens to be a gun control opponent. His response to me was “Are you kidding

me? You can't blame a lion for killing a person if the zookeeper doesn't lock him up. The next thing you know, slumlords will try to apportion fault to the gun manufacturer!" I was floored. This is a man who would normally be my first strike in a negligent security case; yet, he was expressing more concern about protecting the gun manufacturer from blame than a criminal who intentionally harmed someone.

How does the gun control debate impact jury selection? Obviously, in cases involving gun violence we must explore the idea pushed by the NRA that "Guns don't kill people. People kill people." A criminal defendant facing gun related charges would likely find the prospect of having a diehard NRA member on the jury that lives by this quote to be a hard pill to swallow. On the other hand, if we are trying a negligent security case, the idea of having a similar person on the jury may be appealing if we are claiming that the property owner should have hired armed guards to patrol the property.

We may consider exploring this hot button issue in a negligent security case in the following way, "I am sure we have some very strong feelings about what can be done to improve school safety in light of the school shootings that have taken place in recent years."

"Is there anyone here who feels like having armed guards at the entrances to our schools will help improve the safety of our students?"

"Is there anyone here who believes that we should arm teachers?"

"Is there anyone here who believes that tougher gun control laws would make our schools safer?"

"Is there anyone here who feels like the majority of mass shootings are the result of our country's failures in the area of mental health?"

The answers to these questions will tell us a lot about what the prospective jurors feel would help deter criminal activity. When we get the answers to these questions, we must respect the bravery of the jurors who provide us with meaningful responses. We should never engage them in a debate or cross examine them even if we disagree with their feelings. It is much tougher to express an opinion in a room full of strangers than it is to spread propaganda on social media.

III. Race

Unfortunately, the color of one's skin continues to effect the way in which evaluate prospective jurors. I doubt there is a single one of us who has represented a black client suing a white defendant in a predominately white county that hasn't been nervous about the role race will place in the trial. Why do we feel nervous? Because we know that racism is still present all around us and yes, even within us. We are taught to be politically correct but being politically correct does not eliminate the distrust we sometimes feel for people that look or sound differently than us.

Most often racial prejudice is not blatant; rather, it is buried, masked, and disguised behind our effort to be socially accepted. After all, we view racial prejudice as a bad thing and presume that if we harbor racial prejudice, we must be a bad person.

So how can we ever address this issue with prospective jurors if we are not honest with ourselves about the racial prejudices we harbor? Consider these pictures:



If you are a black man man, what goes through your head when you see this photo of a white police officer making a traffic stop?

How about this one?



If you are white and you see this man riding a MARTA bus, is your initial instinct to sit next to him or find a seat on the other side of the train?

No matter how much we wish it otherwise, a truthful answer to these questions is probably something we don't like about ourselves. But yet, the feelings are real. We can debate all day about nature vs. nurture but the reality is that these images likely conjure up a feeling of fear.

If we have these feelings, our prospective jurors do too. So how do we get them to admit it? First, we have to admit our own prejudice. It is ok if our prejudice makes us feel ashamed. If it does, we must admit it and confess how we have struggled to overcome it. Then, we simply ask the prospective jurors, "Am I the only one who feels this way?" Initially, we may get silence but we must not run from the silence. The first time a juror gives us a nod or sign acknowledging that we are not alone, we should thank the juror and let he or she know that we are glad we aren't the only one with these feelings. Once the ice is broken, other jurors will feel more comfortable acknowledging their feelings and open and honest discussion can begin.

Unless and until we have this conversation in cases where race may be an issue, a fair trial is nothing more than a fantasy.

IV. The "Me Too" Movement

The "Me Too" or #MeToo movement is a movement against sexual harassment and assault. It went viral in October of 2017 soon after sexual misconduct allegations were brought against Harvey Weinstein. The speed in which this movement began to spread around the world was mind boggling. According to twitter, the hashtag #metoo was tweeted nearly a million times in 48 hours. Facebook reported more than 12 million posts, comments, and reactions in less than 24 hours by nearly 5 million users around the world. Supporters of this movement have many goals which include, but are not limited to:

- Helping women who have been victims of sexual violence know that they are not alone and shouldn't be ashamed;
- Encourage men to call out demeaning behavior when they see it;
- Changing the laws surrounding sexual harassment and assault;
- Reducing sexual abuse in school age children

This movement also has its share of critics:



Other more serious critics of the movement claim that the movement trivializes sexual abuse and that it is all talk and no action. Still others find themselves in a state of disbelief that so many women could actually be harassed, abused, or raped.

Regardless of how one feels about this movement, the feelings are likely strong and deeply rooted in personal and/or professional experiences. As lawyers, we must examine the question of how we should approach this issue in voir dire in cases involving sexual harassment or assault. Perhaps it is a case that arises out of an employer-employee relationship or maybe it is a negligent security rape case. Either way, we must be cognizant of the Me Too movement and how it has

brought the issue of sexual misconduct back to the forefront of American thought. The movement has likely emboldened some members of our panel to go public with their own story of sexual abuse. Yet, it has also caused some members of the pool to be more skeptical of sexual assault claims because they believe that women are just riding the newest wave of feminism.

When addressing this issue, we should be cautious of the order in which we broach the subject. I highly recommend reaching out to those jurors who may be offended by the movement first. We may consider asking the following questions before we mention the Me Too movement:

- Does anyone believe that a woman should report sexual assault as soon as it happens in the workplace? (If hands are raised, we must follow-up with a thank you and request that the prospective juror explain why he or she feels this is important)

- Would anyone here have a hard time believing that a woman has been raped if a forensic exam is not done to verify the rape?

- Does anyone believe that women should avoid wearing revealing clothes if they don't want to receive sexual attention?

- Does anyone believe that women should not wear skirts in the workplace?

Questions like these may help us discover those individuals who may be skeptical of claims involving sexual harassment. After we ask these or similar questions, we may consider asking the prospective jurors if they are familiar with the Me Too movement. For those who are, we should follow up and ask how they feel about it.

Anytime a particular subject is dominating the news and we find ourselves selecting a jury who will decide issues related to the news story, we must not be afraid to address the issue. The conversation may make us uncomfortable and it may leave us vulnerable but it is essential to ensuring a fair trial for our client.

V. Worker's Compensation Issues that Poison the Panel

Most of us who have tried a case where our client received worker's compensation benefits for the injuries we are claiming the defendant caused have heard defense counsel try to indirectly poison the jury pool with questions like:

- Has any member of this jury panel ever made a workers' compensation claim and at the same time tried to sue a third party for the same injury?

Do not let defense counsel get away with this! Print *Harper v. Barge Air Conditioning, Inc.*, 313 Ga. App. 474 (2011). Put it in your trial notebook. Memorize it if you have to because it holds that this type of questioning is inherently prejudicial and impermissible. If defense counsel asks the question before an objection can be made, move for a new panel.

VI. Right to be Present when Jury is Qualified regarding Insurance

Recently, defendants have been placing language similar to this in their portion of pre-trial orders:

Defendant objects to any juror qualification regarding the officers, directors, and employees of Allstate Insurance Company above and beyond what is already conducted by the Court before a prospective panel is brought into the courtroom. Defendant submits that such pre-qualification is sufficient and that any additional qualification is unnecessary, prejudicial, and injects the issue of liability insurance into trial of this matter. See *Goins v. Glisson*, 163 Ga. App. 290, 292 (1982); *Whaley v. Sim Grady Machinery Co.*, 218 Ga. 838 (1963).

If the Plaintiff requests that the qualification of prospective jurors be done during voir dire and in open court to ensure that they are placed under oath in the presence of the parties before answering questions during voir dire, the trial court has no discretion to deny Plaintiff's request.

See *Mordecai, et al. v. Cain*, 338 Ga. App. 526, 530 (2016) ("qualifying each prospective juror as to insurers if requested must be done in open court in the presence of the parties (and

counsel), because a party has the right to examine prospective jurors upon the questions of their qualification, including questions regarding disqualifying ties to insurance companies”).

VII. Right to Individual Examination of Panel

Recently, I have been troubled by several trial judge’s reluctance to allow a fair individual examination of prospective jurors. First, O.C.G.A. § 15-12-133 gives counsel a right to “inquire of the individual prospective jurors examined touching any matter or thing which would illustrate **any interest** of the prospective juror in the case, including any opinion as to which party ought to prevail...**any fact or circumstance indicating any inclination, leaning, or bias** which the prospective juror **might have** respecting the subject matter of the action or the counsel or parties thereto...”

It is completely understandable for the trial court to require us to be efficient and calculated with voir dire questions. After all, the court likely has many other civil and criminal cases that must be heard. However, speed should never supersede a litigant’s right to a fair and impartial jury. There is no possible way for a party to discover any bias a prospective juror **might have** if that party is not allowed the opportunity to have a frank and truthful conversation with each juror about his or her feelings. This includes the right to inquire into **any circumstance** that could reveal any bias the juror **might have**. The statute is very broad and we must remind trial court’s of the statute’s breadth anytime we are unduly constrained in our efforts to properly voir dire a jury panel.

VIII. Credibility of Witness based on Profession

We often hear creative ways that counsel will attempt to get the jury to prejudge the credibility of witnesses. A common way I’ve seen is for counsel to ask the jury pool something to the effect of “Would anyone put more weight on a police officer’s testimony because of his occupation?” Questions of this nature are not allowed. *See Leonard v. State*, 292 Ga. 214 (2012).

We should not let opposing counsel get away with such questions and we should avoid asking them so we will not lose credibility with the Court.

IX. Would you allow X in damages?

Finally, do not be afraid to ask the prospective jurors whether they would hesitate to award a specific sum of money if it is warranted by the evidence. This question can be useful in discovering which jurors have prejudice against those who may ask for large monetary awards in jury trials and it is within the trial court discretion to allow such questions. *See Atl. Zayre v. Meeks*, 194 Ga. App. 267, 270 (1990).

CONCLUSION

The hot button topics we deal with during jury selection are often the most uncomfortable issues we handle during trial. Most of us dread discussions involving controversial issues in normal conversation. But if we are going to be truly great trial lawyers, we cannot shy away from uncomfortable issues during jury selection. If we are honest about our own feelings and fears and we respect and honor the jurors' opinions, we will gain the jury's trust. We will become their leader and we will win.