MAXIMIZING STRIKES FOR CAUSE IN CRIMINAL CASES

BY
ROBERT R. SWAFFORD

I. INTRODUCTION

This paper will introduce an approach to jury selection that is radically different from previous methods. Historically, lawyers used Voir Dire as an opportunity to try to sell their case. With the advent of jury consultants trained in psychology, methods arose which emphasized using Voir Dire as an opportunity to obtain information that would be useful in exercising preemptory strikes. While both of these approaches have laudable goals, they are limited in their effectiveness.

The approach proposed in this paper places as its primary goal maximizing strikes for cause. By careful drafting and utilization of questions and appropriate follow-up, a lawyer can significantly and consistently increase the number of strikes for cause he can obtain. The steps required to achieve this result are the following: accurately analyzing the hot-button issues in a case; drafting appropriate questions; effectively asking the questions; and, finally, nailing down the strike for cause.

This method is effective in any type of case. However, it is especially important for a lawyer who is trying criminal cases. There are few types of cases that arouse such strong emotional reactions as criminal cases. Both because of intense media coverage and because of many individual's intense personal experiences, the criminal justice area is one in which is it especially important to control the jury selection process.

Before explaining the "Strike for Cause" method of jury selection, it is important to address the reasons why this approach is superior to previous strategies. The traditional approach to jury selection was primarily concerned with two things: first, getting a head start in placing a litigant's theory of the case before the jury, and, second, not poisoning the jury pool with attitudes that are contrary to one's position. This concern with persuading the jury pool during Voir Dire was fueled in part by a misreading of a study which indicated that jurors had made up their minds as to who should win a trial by the end of Voir Dire. Many people took this to mean that the

lawyer must persuade the jury in Voir Dire, or they have lost the case. A more accurate reading of that study would indicate that the venire persons had made up their mind about the issues of the case before they had walked into the courtroom. It is absurd to think that what a lawyer says in a brief address to a jury pool can come close to being as important as the life experiences and attitudes that the potential jurors brought with them to the courthouse. To give an example that would resonate with a trial lawyer, ask yourself if you would rather have a jury made up of members of the ACLU, or instead be given an opportunity to present a one and a half hour speech. Any criminal defense lawyer would choose to have a jury that is prejudiced in his favor than to have yet another speech. The same is true for prosecutors. There is an inherent conflict, however, between the desire to maximize strikes for cause and the desire to persuade a jury panel. It is essential in order to obtain strikes for cause to get jurors saying bad things about your side of the case. This is the only way to expose prejudice and, ultimately, to have them struck for cause. Not only do you have to risk poisoning the jury pool by venire persons making statements antithetical to your theory of the case, you must also restrain yourself in selling your case. Individuals are much less likely to express their strongly held opinions if they believe they are going to get into an argument with a lawyer in public. These dangers inherent in the "Strike for Cause" method are more than made up for by the advantage of having ten, fifteen, and, in some cases, as many as twenty strikes for cause, while your opposing counsel is limited to one or two. Through the process of elimination, you can guarantee the best jury possible out a given panel.

II. IDENTIFYING HOT-BUTTON ISSUES

The first step in any case is to identify the emotional issues on which jurors will be deciding your case. If one has tens of thousands of dollars to spend on a case, this information can be obtained through the use of focus groups, mock trials and polling. It is dangerous, however, to rely too heavily on the information gleaned from these methods.

There is a temptation to believe that if an individual in your focus group holds a certain opinion, then someone on a jury panel with similar demographics will hold the same opinion. There are no focus groups that have a large enough sample size to be predictive of what individuals on a jury panel are likely to believe. The only purpose of a focus group is to discern what issues may be of importance to a jury that would not be important to an attorney.

If a case does not justify the expense of a focus group, there are other alternatives that are at least as effective. One option is to develop a brief summary of the case, and then ask friends and family members what they think about the case without revealing your role in the case. Try to be as neutral as possible and include facts that you don't think are relevant, but might be important to a non-lawyer. Have staff members do the same thing. If you are a criminal defense lawyer, call your one Republican friend, and ask his opinion. If you are a prosecutor, call your one Democrat or Green Party friend and ask her opinion. Be careful not to argue with the individual who is helping you. Encourage them to express their opinions fully with follow-up questions. Listen more than you talk.

Another very effective technique is to interview former jurors who have heard and decided cases similar to yours. For example, send out a query on a listserve asking if anyone has had a case go to trial with facts similar to yours. Obtain the list of jurors, then phone them and interview them about their service. This is superior to any mock trial or focus group because you are interviewing actual jurors and finding out the basis of their decisions.

In making your notes, be sure to rely on what the non-lawyers say, rather than the lawyers, as to what issues are the most important. If non-lawyers seem to think that the fact that the Defendant liked to dance is important, then you need to focus on dancing, regardless of its relevance as to any issue in the case.

Once you've identified the hot-button issues, you are ready to start drafting questions.

III. DRAFTING QUESTIONS

Historically, lawyers would ask jurors "selling questions" such as, "Does everyone here agree that they will follow the law and make the prosecution prove their case by beyond a reasonable doubt? I take it by your silence that everyone agrees that they will require the prosecution to prove their case beyond a reasonable doubt."

This approach was replaced by the open-ended questions such as, "How do you feel about the burden of proof being beyond a reasonable doubt?" Open-ended questions were introduced to try to find out jurors attitudes so that the lawyers could intelligently exercise their preemptory strikes.

The approach advocated in this paper relies upon loaded questions. These are questions that make it easy for a juror to express opinions which result in them being struck for cause. For example, "People have strong feelings about the burden of proof in criminal cases. Some people, if they were on the jury, would require the state to prove their case beyond a reasonable doubt. There are other people, if they were on a jury, feel that, in cases like child sexual assault, is too high a burden. They would only require the state to prove their case by clear and convincing evidence. Which of those best describe you?"

This question works on many levels. First, by suggesting that there is a group of people that has one set of opinions and another group of people who have a different set of opinions, a juror feels comfortable in expressing his opinion because it will be consistent with one group or the other. He is not out there alone in opposition to the law. The second level on which the question works is that the language makes saying "yes" to the second half of the question seem more reasonable by using the words "clear" and "convincing."

The question on its face looks neutral, but to someone with a strong law enforcement bias, the question is heavily loaded toward lowering the standard of proof in a criminal case.

This is not to say that loaded questions are the only questions to be asked

during Voir Dire. They are simply the most important weapon in your arsenal. Certainly, open-ended questions such as, "How do you feel about sexual assault cases?" are useful in gaining information and in opening up a discussions about critical issues.

The first step is to list all the hot-button issues you have distinguished from your formal or informal focus groups. You then begin to write out word-for-word the questions which reveal the attitudes of the venire persons with regard to each hot-button issue. Some lawyers resist the idea of scripting out the language of the questions. This resistance is accompanied by the justification that scripting would somehow impede the natural delivery of the Voir Dire. A lawyer might say, for example, "I have to put it in my words; otherwise, it won't work." I would suggest that almost everything a lawyer says in a Voir Dire is unconsciously scripted. Lawyers repeat what they have heard other lawyers say, or what they have said in the past. The only reason that it seems natural is because they've repeated it so many times. A new, carefully crafted question will feel natural if you say it enough. I therefore recommend that on key questions that you memorize them and practice saying them until they are as natural as anything else you say over and over again.

As I have pointed out before, there are several forms in which questions can be drafted. One is an either-or form. Ex: "Some people believe x, other people believe y. Which best describes you?" Another form is the open-ended question. Ex: "How do you feel about y?" "What have you heard about x?"

Once you have written questions covering all of the hot-button issues in your case, then examine the court's charge and the applicable law in the case to see if there are opportunities for strikes for cause.

An example of a series of questions for a defense lawyer would be as follows:

People have strong feelings about police officers. There are some people who so admire and respect police officers, they simply wouldn't believe that a police officer would lie under oath. There are other people who believe that a police officer is just as likely as anyone else to lie under oath. Which of those best describe you? Mr. Smith, tell me more about that.

Now I want to be clear that I am not talking about believing a police officer of his superior education, training or experience. I am simply asking: do you believe that police officer is more likely to tell the truth?

Is it fair to say that regardless of the law, the facts, or the judges instructions, you would give more credibility to the testimony of a police officer?

This question will result in many state's-oriented jurors being struck for cause. This example also demonstrates the next step in obtaining a strike for cause, which is drafting effective follow-up questions. By asking Ms. Smith to tell you more about that, she will provide personal experiences and statements that will be useful in seeking a strike for cause. The question that begins, "Is it fair to say . . ." makes it easy for Ms. Smith to agree that she cannot follow the law. Adding the phrase, "Is it fair to say . . ." softens the question and is less confrontational than if you had worded the question, "Isn't it true that you can't follow the judges instructions?" By telling Ms. Smith that she could follow all the other judge's instructions but simply couldn't follow this one, it makes it appear as if she's getting a B+ or an A- rather than failing as a juror because she could not follow one of the judges instructions.

The important point is to draft follow-up questions which give the potential juror permission to express prejudices. Another way to make it easy for a venire person to slide off of the panel is to say, "Is it fair to say I'm starting out behind with you with regard to x?"

IV. SELECTING THE JURY

Once you have drafted the questions and practiced saying them, you are ready for the day of trial. If your jurisdiction allows for you to request a larger panel, by all means do so. Judges are more likely to grant your legitimate strikes for cause if they are not afraid that you're going to burn the panel.

In most jurisdictions, you will have some period of time in which to review the juror cards before the beginning of trial. Quickly assign each juror a rating of "Leader" or "Follower," and an additional category of "For Me" or "Against Me." Obviously, you will have to rely on stereotypes for this initial categorization. An obvious example would be the President of

the local MADD Chapter, who would be categorized as a "Leader" and "Against" the Defendant's side. There may be a student or file clerk that turns out to be a leader on a jury, but for the purposes of your initial evaluation, use your stereotype, and place them in the "Follower" category. Do a quick count, and if there are more "Leaders" who are against you in the first half of the jury pool than there are "Leaders" who are for you, and there are more "Leaders" who are for you than there are "Leaders" who are against you in the second half of the jury pool, request a shuffle.

Do your best to rank the jurors using the criterion of "Leaders" who are against you first, "Leaders" who are you don't know whether they are for you or against you second, and then "Followers" who are against you third. Begin the questioning with the "Leaders" who are against you and work down the list. This is also the order in which to use your preemptory strikes. Even if someone is against your case, if they were a follower, they're not nearly as dangerous as someone who is a leader that turns out to be against you in a jury room.

I like to begin Voir Dires by providing a context to the panel, which encourages full participation. The following is a good introduction:

I am going to start out by asking if there is anyone here who's ever watched one of those daytime talk programs, like Oprah Winfrey, Sally Jesse Rafael, Donahue, when he was on the air, Jerry Springer . . . go ahead and get your hands up. Do people in the audience on those shows have any difficulty expressing their opinions?

Juror: *No, people will speak right out.*

Well that's exactly how people should express themselves during voir dire. When either I or the lawyer for the defense asks a question, everyone needs to feel free to tell us exactly what you think.

Depending on how flamboyant you are, you can add jokes about not throwing chairs.

Always have someone taking notes for you. It is difficult, if not impossible, to listen to jurors and take notes. Have the person who is taking notes put a big "C," or a star, or an "X" to remind you who has made a statement that would support a strike for cause. Encourage the jurors to express their prejudices against your case. When a juror makes a statement that evidences bias or

prejudice, ask the panel, "Who else agrees with this statement?" You want to create a feeding frenzy that results in ten or fifteen strikes for cause for your side.

Depending on the judge, you will either have to make your strikes for cause known as they occur in the panel, or at the completion of the Voir Dire. If the judge gives you an option, make your strikes for cause at the end of the Voir Dire. If the judge requires additional questioning at the bench of anyone who you are seeking to strike for cause, begin by reading the jurors words back to them from the notes. Then, follow-up with, "Are my notes accurate?" Nail the strike down by saying, "Is it fair to say that we are starting out behind with you with regard to issue x?"

After obtaining many strikes for cause, the choices you must make with your preemptory strikes should not be as difficult as in the past. As mentioned earlier, "Leaders" who are against you are struck first, "Leaders" we have questions about are struck second, and then "Followers" who are against you are struck third. In order to efficiently use the time allotted for exercising your preemptory strikes, run the discussion like a meeting. Ask all of the decision makers to list which six venire persons they would strike. Go around the table, one by one, and write down the six juror numbers for each decision maker. Do not allow discussion at this point. You only want each person to give the numbers of the six people they would strike if jury selection was entirely up to them. If some venire person's number shows up on everyone's list, use a preemptory strike for that person without discussion. You then will have plenty of time to discuss the remaining venire persons upon whom there was not initial agreement. This system saves time and provides more clarity.

Hopefully, at the end of the process, you will look and see twelve people in a jury box with whom, if you do not have a head start, you at least are not behind the eight ball.