Trial Law TIPS

Roy D. Wasson's
TIP #45

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Don't Let Jurors Conceal Prejudicial Litigation Experience

Introduction

During voir dire, tailor your questions to uncover potentially prejudicial litigation experiences by jurors. This can be a fruitful area for reversible error if jurors conceal prior litigation history and is necessary to enable you to learn which jurors to strike as a result of their previous experiences in the court system. A juror might be bad for you whether he or she has won or lost prior litigation. A juror who lost his own case might still hold a grudge, and even a prior winner might unfairly compare your case to his own.

It is important that your voir dire inquiry be broad enough to uncover jurors' involvement in all kinds of litigation. Although you are trying a personal injury case, jurors' prior involvement as litigants in commercial cases, family cases, and other litigation is

highly relevant to the question of juror impartiality. And don't just stop when asking about the juror's individual status as a litigant. Also ask about family members' experiences and lawsuits involving employers in which jurors participated.

Three-Part Test Under *De La Rosa* Case

The roadmap for establishing grounds for reversal based on juror nondisclosure of litigation experience is contained in De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995). In that case, the Supreme Court quashed the Third District's reversal of a new trial order in a medical malpractice case, and established a three-prong test for requiring a new trial where prior litigation involving jurors is not disclosed.

The first prong is "that the information is relevant and material to jury service in the case" Id. at 241. Your opponent may take the position that only prior personal injury cases are relevant, but that is not the law. The juror in De La Rosa had been involved in prior domestic and collection cases, and that litigation history was held to be material in the malpractice case. See also Roberts v. Tejeda, 814 So. 2d 334 (Fla. 2002)("no 'bright line' test for materiality has been established").

The second prong is that "the juror concealed the information during questioning." Id. That prong does not require any showing of a subjective intent to mislead on the part of the juror. So long as the juror can hear the questions and does not truthfully respond to disclose prior litigation, the concealment prong of De La Rosa has been established.

The last prong of De La Rosa which supports grant of a new trial based upon jurors' non-disclosure of prior litigation is "that the failure to disclose the information was not attributable to the complaining party's lack of diligence." Id. at 241. That prong means you must use specific questions to try to uncover the facts of jurors' prior litigation history in voir dire. You also must uncover the withheld information soon enough after trial to include that issue in your motion for a new trial.

Crafting Questions Carefully to Uncover Potential Prejudice

First, ditch the "Legalese" when asking your questions. A discussion of how to phrase questions is contained in the *Roberts* case:

> Of course, attorneys must be mindful in this process to ask such questions in terms which an average citizen not exposed to a panoply of legal processes would be capable of understanding. Trial counsel must take special care during the interrogation process to explain in a lay person's terms all the types of legal actions which may be encompassed by the term "litigation," or other similar words commonly used by attorneys. However, as determined by the trial court, the questions posed here met that test, and we agree that the record supports such conclusion.
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> During voir dire, while the trial court spoke of litigation in more general terms as bringing "a court action against somebody else seeking money from them or if someone brought an action against you, seeking money from you," Roberts' counsel clearly clarified the extent of inquiry. He explained that the subject matter addressed "any kind of lawsuit, a divorce, a collection of a debt, a breach of contract, an assault and battery, an auto accident, a defective product, a medical negligence case, such as this case, a divorce, anything at all." Although the specific words "domestic assault" or "injunction" may not have been voiced, the inquiry was sufficiently clear and broad to generate a truthful response, as the trial court concluded.

814 So. 2d at 344 (emphasis added).

Of course most trial lawyers already ask all the panel members if they or their family members have been involved in prior litigation. But don't stop there. The third *De La Rosa* prong

has been interpreted to deny a new trial where a juror should have revealed an employer's prior litigation, had he been totally candid and helpful, but where all the specific questions concerning involvement in litigation were answered technically and accurately.

In *Mazzouccolo v. Gardner, McLain & Perlman*, *M.D., P.A.,* 714 So. 2d 534 (Fla. 4th DCA 1998). Plaintiff's counsel asked questions of a juror during voir dire (which also had been asked on a juror questionnaire) "directed at whether he or a member of his immediate family had ever been a party to a lawsuit or made a claim for personal injury." *Id*. The juror responded by disclosing his and his own family's experience with litigation or injury claims. But he did not reveal the fact that, while he was the Chief Operating Officer of an organization called the Visiting Nurse Association ("VNA"), there was a malpractice case against the VNA and other defendants of which the juror was well aware.

Notwithstanding the juror's failure to disclose the obviously-relevant prior malpractice case (the *Mazzuouccolo* case also was a claim for medical malpractice), against the very company the juror managed, the Fourth District held that the plaintiffs failed to satisfy the third prong of the *De La Rosa* test, stating: "They never squarely asked for the concealed information." *Id*. The court noted that "[t]here were no broad questions calling for 'experiences . . . where lawyers were involved' or any indirect involvement in a lawsuit," such as had been asked in *Castenhol v. Bergmann*, 696 So. 2d 954, 955 (Fla. 4th DCA 1997). *See id.*

Because the plaintiff's counsel in *Mazzouccolo* did not follow up with specific questions asking whether the juror's ***employer*** had been involved in litigation during his association as a managing executive with that organization, the failure to disclose that information was not grounds for grant of a new trial. Don't let that sort of thing happen to you! Another case on the subject states as follows:

> Information is considered concealed for purposes of the three-part test where the information is "squarely asked for" and not provided. See *Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A.*, 714 So. 2d at 536; *Bernal v. Lipp*, 580 So. 2d 315, 316 (Fla. 3d DCA 1991); see also *Mitchell v.*

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> *State*, 458 So. 2d 819 (Fla. 1st DCA 1984)(in order for a juror to be held to have concealed information, the question propounded must be straight-forward and not reasonably susceptible to misinterpretation).

Birch v. Albert, 761 So. 2d 355, 358 (Fla. 3d DCA 2000).

Time To Uncover Truth

Of course, the most skillful voir dire questioning in the world will not help you uncover a deliberate misstatement by a juror. Where you have doubts about a juror, research the court files for evidence of prior litigation before your case is over, and move for a mistrial if you should uncover a prior case which was not revealed. But if you cannot take the time to do that research during trial, do it as soon as the verdict is returned and include juror concealment as a ground for your motion for new trial.

A Third DCA case which had held that it was too late to raise the issue after trial has been overruled by the Supreme Court.

> [T]he Third District's holding that, to satisfy *De La Rosa's* "due diligence" prong, trial counsel is required to conduct an investigation of the venire during trial is directly contrary to this Court's opinion in *De La Rosa*. See *De La Rosa*, 659 So. 2d at 242 (approving and adopting as its own the dissenting opinion in *De La Rosa*, and quoting Judge Baskin's observation therein, *De La Rosa*, 627 So. 2d at 534, that "***Bernal does not require counsel to discover the concealed facts prior to the return of a verdict"***). Often, a search of the index may impose a futile burden, because it may fail to disclose prior litigation history which only a more extensive search of court files (some of which may be located in storage) would uncover. Even if an index may disclose some information, access to that important information may take additional time.
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> The Third District held that public records must be consulted at the time of jury selection, but

> then proceeded to note that chief judges should consider the problem and determine if it is feasible to have such information available. This internal contradiction reflects the vulnerability of the holding in the context of present reality. In a perfect world, access to the information would be immediately available in all courtrooms or actually provided as jury pool information. However, such circumstances do not presently exist and the diversity of resources available in our vast and diverse state to accomplish the task as ordered at this time creates an unacceptable burden that cannot have uniform application. Our court system does not yet have the uniform capacity to provide a readily accessible system for undertaking a review of the court index together with ready access to the court files. Under present circumstances, ***the burden of imposing such a prerequisite to a later valid challenge to juror nondisclosure would be onerous, most particularly to sole practitioners*** representing clients in litigation.
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> *Roberts, supra,* at 344-45 (emphasis added).

Conclusion

In summary, use voir dire as an opportunity to uncover potentially prejudicial litigation experiences by jury panel members. And do it in a way which will protect the record and allow you to obtain a reversal, when such information is concealed.

As always, if at first you don't succeed, just . . .

Keep Tryin!

Roy

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