

Assessing Sympathy in *Voir Dire*:

Exploring Jurors' Intention-Behavior Gap



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INTRODUCTION

Cervantes (1547-1616) said long ago that “It’s a long step from saying to doing.” He was describing what is referred to today as the intention-behavior gap: knowing what to do, but struggling to actually do it. In today’s courtrooms, the intention-behavior gap is most apparent during the jury selection and jury deliberation phases of trial. During jury selection, the overwhelming majority of jurors say that they will put sympathy aside during the trial, then proceed to award high money damages to the plaintiff during deliberations. In post-trial interviews, these jurors commonly admit that sympathy drove their decision-making, despite their earlier assurance that they would put sympathy aside. In reality, jurors who express strong intentions to follow the law often fail to act on them during deliberations because the emotional aspects of the case are overpowering. This scenario is every defense attorney’s nightmare, when even the most thorough *voir dire* efforts are not enough to prevent sympathy from trumping the law.

Defense attorneys typically use two types of questions during the *voir dire* process to ascertain whether jurors will be able to put their sympathy aside when making decisions about the case. First, jurors are usually individually asked if they are willing to make decisions about the case while concurrently eliminating sympathy from the equation. Most jurors instinctively respond “yes” with the judge, attorneys, parties and other jurors staring at them. However, some defense attorneys realize that such basic questions regarding sympathy are insufficient, and therefore ask jurors to go a step further. Specifically, some defense attorneys ask the juror to agree to a verbal contract to “promise” to not let sympathy impact their decisions during deliberations. Again, with the entire courtroom watching, the vast majority of jurors instinctually agree to the verbal contract.

Asking jurors if they can put sympathy aside or asking them to keep a promise to do so are deeply flawed *voir dire* strategies. First, the incredible social pressure placed on jurors during these questions almost always results in a socially desirable response rather than a truthful response. Social desirability bias is very powerful and refers to the strong tendency of people to present themselves in the best possible light on sensitive topics.¹ Secondly, such *voir dire* questions actually result in measurement of the wrong psychological variable. These questions ultimately measure jurors’ intention to follow the law, rather than measuring their likelihood of following the law. Intentions are notoriously weak predictors of human behavior outside of purely volitional decisions that lack emotion. Years of psychology research has shown that the correlation between intentions and behavior is modest at best. Meta-analyses have revealed that intentions only account for approximately 30% of the variance in social behavior.^{2,3} These findings suggest that defense attorneys need to go well beyond assessment of a juror’s intentions to determine whether or not a juror is capable of following the law with regard to sympathy. Since sympathy is such a powerful factor in jury decision making, defense attorneys need a more sophisticated procedure to assess jurors in jury selection.

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SELF-EFFICACY

To accurately assess a juror's likelihood of abiding by the law regarding sympathy, defense attorneys should assess a juror's confidence in their ability to complete the actual task rather than merely their intention to do so. Self-efficacy is the belief in one's abilities to execute a course of action in a given situation.⁴ More specifically, self-efficacy measures individual perceptions of how easy or difficult performing a task is likely to be and how much confidence they have in their ability to perform that task. People who have a stubborn belief in their capabilities will persevere in their efforts despite difficulties and obstacles that may surface. People with high levels of self-efficacy are not easily dissuaded by adversity. As such, the stronger the sense of personal efficacy, the greater the perseverance and the higher the likelihood that the chosen task will be performed successfully.⁵ Therefore, it is imperative that defense attorneys learn how to accurately assess jurors' self-efficacy ratings related to their ability to perform the specific task of putting sympathy aside in their decision-making on liability and/or damages questions.

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MEASURING JUROR SELF-EFFICACY

QUANTITATIVE DATA

In the standard methodology for measuring self-efficacy beliefs, people rate the strength of their belief in their ability to execute the required activity on a 10-point interval scale, ranging from 0 ("Cannot do"); through 10 ("Highly certain can do").⁵ The interval scale has equal units of measurement, thus making it possible to interpret not only the order of scale scores but also the distance between them. It is possible to add or subtract the scale values without affecting the form of the scale, but one cannot multiply or divide the values. For example, it can be said that two jurors with scale positions 1 and 2 are as far apart as two jurors with scale positions 4 and 5. However, it does not mean that a juror with score 10 feels twice as strongly as one with score 5. Importantly, this approach deflates social desirability bias as jurors are given a flexible response scale rather than being forced into an inflexible, "all in" type of response in which the influence of social desirability is very powerful.

QUALITATIVE DATA

While quantitative data is very useful, the ability to acquire meaningful qualitative (i.e., descriptive) data from jurors is essential for cause challenges. Measuring self-efficacy on a scale as a continuous variable allows defense counsel to follow up with critical "why" questions that will extract the reasoning behind jurors' beliefs in their ability to put sympathy aside. The goal of jury selection should not be persuading jurors to put sympathy aside, as that is an impractical task. Rather, the defense attorney's overall goal is to build a case for a successful cause challenge against a highly sympathetic juror. While having a juror openly admit that they are unable to put sympathy aside is an obvious strong case for a cause challenge, the odds of such an occurrence is very low due to social desirability bias. By allowing jurors to rate their self-efficacy regarding sympathy and then provide specific reasons to justify such a rating gives defense counsel multiple ways to develop a persuasive cause challenge.

QUESTION CONSTRUCTION

Self-efficacy is concerned with perceived capability rather than intention. Therefore, *voir dire* questions related to sympathy should be phrased in terms of “can” do rather than “will” do. “Can” provides a judgment of capability, while “will” is a statement of intention. Additionally, behavior is better predicted by people’s beliefs in their capabilities to do what is specifically needed to succeed than by their beliefs in their ability to accomplish a general task. For example, asking jurors “can you put sympathy aside in this matter” is a general question that lacks specificity. However, asking “Ms. Jones, this is obviously a very sad case; I need to be sure that you can put any sadness for Mr. Smith aside when you decide whether or not my client is liable in this case; please rate your ability to do just that on a 0-10 scale, with “0” meaning completely incapable and “10” meaning entirely capable” defines a much more specific task that will result in more accurate data collection. Sole reliance on a juror’s self-efficacy rating of a general task is not as effective as a rating relating to the specific actions that will need to be taken.

CASE EXAMPLE: BIRTH INJURY CASE

DEFENSE COUNSEL INTRODUCTION TO SYMPATHY TOPIC

“As you know this is a very sad case involving a child that was injured during the birth process and an emotional response from you is completely normal and expected. Please understand: feeling sympathy for the plaintiffs in this case is NOT wrong or bad in any way, and if you do feel sympathy, you are not going to be in trouble or disappoint the court in any way - it is understandable. But, feeling sympathy may mean that this may not be the appropriate case for you to serve as a juror - and that a different case, with different circumstances, may be a better fit for you.”

DEFENSE COUNSEL TO JUROR #1

“Juror #1, like I just mentioned, this case involves an injured child. I need your honest thoughts about your confidence to not only reduce sympathy, but eliminate sympathy from the equation as you listen to both sides and then deliberate on this case. Please rate your ability to eliminate sympathy on a 0 to 10 scale, with zero meaning that you absolutely could not, and 10 meaning you absolutely can. Again, I am just looking for your honest feedback here; there is no right or wrong rating.”

SCORING AND DEFENSE COUNSEL FOLLOW-UP

<5 *“I understand; and why do you feel that way?”*

Record the response and move for an immediate cause challenge.

6-7 *“Why are you a 6/7, and not a 9/10?”*

These jurors have reservations and uncertainty about their ability to follow the judge’s instructions regarding sympathy, but they fear showing it. Keep asking “why” questions to illuminate their concerns, then move for a cause challenge when you have enough information from the juror. In other words, keep digging to develop a solid case for a cause challenge.

8-9 *“Why are you not a 10?”*

These jurors tend to be level-headed and realistic about their ability to put sympathy aside. Defense counsel should still ask the follow up question as to why they are not a 10, in an effort to identify a belief or attitude that may be grounds for a cause challenge. However, many of these jurors benignly respond with “I can’t say 10 because I am not perfect; no one is perfect; I promise to do my best” which is a genuine, realistic response.

10 *“OK, why a 10? What makes you so absolutely sure you could remove sympathy from your decision making in this matter?”*

These jurors are dangerous as they insist they can be perfect in a situation in which perfection is clearly impossible. When questioned, these jurors tend to state that following the law and judge’s instructions is the “right thing to do” and that they could never do otherwise, giving defense counsel a false sense of security. Jurors who respond with a 10 are often narcissists who “want” to be on the jury, and during deliberations will enforce their idealistic, perfectionist attitudes upon other jurors to get their way. These “10s” should be strong candidates for priority preemptory challenges.

TIMING

Timing of self-efficacy questions is critical, as jurors must first be exposed to key plaintiff case issues (i.e., sympathy) prior to being asked if they can follow the law. During judge-conducted *voir dire*, many judges mistakenly ask questions about sympathy far too early in the process, resulting in jurors providing premature assessments of their abilities to follow the law. Self-efficacy questions regarding sympathy need to be placed at the very end of the *voir dire* script, as the sympathetic, emotional information about the case needs time to weigh on jurors' minds and hearts before they provide any self-assessment data. This premise begs the question of what plaintiff evidence defense counsel should try to expose to jurors during the jury selection process. To get accurate self-efficacy assessment, it is vital that defense counsel insist that the plaintiff is present during jury selection, or at the very least insist that a clip of the plaintiff's "day in the life" video be played to jurors instead. Sympathy is a complex emotion that takes time to surface, and therefore defense counsel should wait until the very end of *voir dire* to explore it.

CONCLUSION

The impact of juror sympathy on verdict and damage awards should not be underestimated. This is particularly true when the defense has a strong causation defense based on complicated scientific relationships. Even when the science is compelling, sympathetic jurors are infamous for making the leap from negligence to causation purely out of compassion for the plaintiff. Fortunately, solving the intention-behavior gap problem is indeed possible by using more scientifically-based *voir dire* questions designed to tap juror self-efficacy rather than mere intentions. Defense attorneys who are serious about preventing juror sympathy from derailing their case will need to significantly adjust their *voir dire* strategy in order to adequately assess juror self-efficacy. Otherwise, juries will continue to unanimously indicate that they will follow judge's instructions on sympathy, yet will subsequently go on to award an undeserving plaintiff millions in the end.

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