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Jury Selection in the First Opioid Trial

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JURY SELECTION IN THE FIRST OPIOID TRIAL

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Jury selection in a high-profile case always presents challenges for the parties and the trial judge. Typically, the concern is that extensive media coverage about the subject matter of the trial or the trial itself will taint the jury pool, resulting in many of the prospective jurors coming in with preconceived notions about liability.

This was certainly the case as we prepared for the first bellwether trial in the Opioid MDL, slated to start October 21, 2019.[1] The plaintiffs in the case were Cuyahoga County and Summit County, Ohio (the Counties covering Cleveland and Akron). The defendants were several manufacturers of prescription opioids and several distributors of these drugs. Plaintiffs' main allegation against the manufacturers was that they aggressively marketed and promoted prescription opioids as being safe and effective, when in fact they were highly addictive. The principal allegation against the distributors was that they did not do what the law required to ensure that the prescription opioids went only to the people who were supposed to receive them. Not a day passed without a story on TV or radio, or an article in the national or local press regarding the opioid epidemic or the upcoming trial. In addition, there were stories and articles about settlement discussions.

While this extensive pretrial publicity was a concern, I did not foresee it being an insurmountable problem. As a result of my experience picking civil and criminal juries over the course of nearly twenty-two years on the federal bench, I have come to understand that each of us is inundated with so much information that it literally goes in one ear and out the other; very little sticks. Countless times when I have asked a prospective juror: "Do you recall seeing, hearing or reading anything about this case or the subject matter of this case?" I have received an affirmative answer, but when I have posed the follow-up question: "Tell me what you remember hearing, seeing or reading?" the answer has been "I don't recall anything specific." The far greater concern is that, in Ohio, there are very few people who *don't* have a family member, a friend, a parent of a friend, or a child of a friend who has been impacted by drug addiction, drug overdose, and even death. That personal connection to the opioid epidemic is something no one can forget, and that personal connection can easily lead to ascribing blame or liability. If that happens, one can no longer be a fair and impartial juror; one comes in with the scale tipped one way or the other, meaning that one of the parties has a hidden burden to overcome just to get to neutral.

I was very worried about finding a group of people who could be fair and impartial to both sides in this case, and I had no idea what I would do if we could not find them in the jury pool. While judges have occasionally changed the venue of a trial in order to minimize the impact of extensive pretrial publicity, Ohio and the surrounding states are considered the epicenter of the opioid crisis. Further,

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* Judge Polster served as a federal prosecutor for twenty-two years before being appointed to the federal bench in 1998. He has been appointed to preside over the Opioid MDL and continues to serve in that capacity.

[1] Judge Polster is presiding over the Opioid MDL, 1:17-MD-2804.

every part of our country, urban and rural, has been impacted, so I did not know where I could move the trial to find a less biased jury pool.

Accordingly, I set about devising with counsel a procedure that maximized the likelihood that we could seat a fair and impartial jury. The first issue of course was finding jurors who could sit for an eight-week trial. Many people have professional or personal obligations that would create a real hardship were they to be compelled to sit for that long. I asked the jury department to contact a pool of approximately 500 prospective jurors, and we asked them only one question: Would sitting on a jury for approximately eight weeks beginning October 21, 2019 cause you or your family a significant hardship? About half of the pool had legitimate excuses, leaving us with about 250 prospective jurors.

I then asked the lawyers to develop a case-specific questionnaire, which we would send to this group of 250 people. They gave me their proposal, which I reviewed and edited. The Jury Department sent this nineteen-page questionnaire to the 250 prospective jurors, asking them to respond either electronically or by hard copy. Once we had the completed questionnaires, we sent them to all counsel. I asked counsel to meet and confer, and to place the prospective jurors into four groups: those who both sides agreed should be excused for cause, those that only the plaintiffs wanted to excuse, those that only the defendants wanted to excuse, and those that both sides agreed could go forward, noting any questionnaire responses that needed follow-up questioning. On Friday, October 11, 2019, I summoned all counsel to court, and we spent about two hours reviewing the pool. Those prospective jurors that both sides agreed should be removed were excused at that point. After we started discussing jurors that only one side wanted to excuse, I made it clear that I would employ the same strike zone for each side. Once this became clear to everyone, most of the objections vanished, and I only needed to make a decision in a handful of cases. We ended up with approximately 150 jurors to summon.

While I typically pick a civil or criminal jury in a single morning or afternoon, I had previously blocked out three days with counsel, Wednesday-Friday, October 16-18, 2019. I foresaw the difficulty of seating an impartial jury in this case, and my courtroom cannot accommodate more than fifty prospective jurors at a time. Consequently, our jury department summoned fifty prospective jurors for Wednesday, fifty for Thursday, and fifty for Friday.

In a typical case, I have a list of approximately forty questions I pose to the panel at voir dire. When I need to ask a follow-up question that is best asked privately, I bring the juror up to sidebar for a few minutes, and my courtroom deputy puts on the white noise in the courtroom. I determined that this procedure would not work in this case. First, we had a very large number of attorneys, and I felt it would be intimidating for a juror to be surrounded by that many people during sidebar. Further, the questioning might be extensive. I didn't want to make everyone stand for that long. Plus, the white noise begins to get unpleasant and I thought the rest of the prospective jurors would become impatient. So, after I finished asking the panel my general questions, I told them that I had some follow-up questions for each juror that I needed to ask privately, and that it would be more comfortable for everyone if I did that in my chambers.

My staff suggested that I limit the number of lawyers for the private questioning, both because of space and to make it less intimidating for each juror. Accordingly, I said that only one attorney per party could participate. Again, at the suggestion of my staff, the only people sitting at the rectangular table in my chambers were myself, the court reporter, and the juror, along with two members of my staff. I sat at the head of the table with the court reporter to my left, and the juror to my right. The lawyers were all seated in chairs toward the back of the room, well away from the juror. I did most of the questioning, focusing on the one or two responses to the juror questionnaire that posed concerns about the juror's ability to be fair and impartial. Most of the questioning concerned a family member's experience with drug addiction, overdose, or treatment, or the employment of the juror or family member with one of the plaintiff counties or with one of the defendants named in the MDL. While I had been concerned that this questioning in chambers would feel very intimidating to the jurors, in fact, they generally seemed to be at ease. I felt that prospective jurors perceived my questioning as more of a conversation than an interrogation, and that the jurors were being very candid. The key question I usually posed at the end was: "If the situation were reversed, and you were one of the lawyers or parties in this case, would you have any concern about your fairness or impartiality as a juror?" Most answered no, a few answered yes, and some said they weren't sure.

After I concluded my questioning, I asked all the lawyers whether they had any additional questions. This process did not take long because they did not have many questions. After that, I asked the juror to step outside my chambers, and then the lawyers and I had a brief discussion about the juror. There was very little disagreement. Either both sides readily agreed the juror should be excused, or neither side had any challenge for cause. In the few cases where there was disagreement, I heard brief argument and then made a decision.

The Rules of Civil Procedure mandate a jury of between six and twelve jurors,[2] and I had previously told the parties I planned to seat twelve jurors, making sure we would have ample jurors to deliberate should some need to be excused during the lengthy trial. I told the lawyers that any juror remaining at the end would be part of the deliberations. The Federal Rules of Civil Procedure give the judge latitude in setting the number of peremptory challenges in a multi-party case.[3] We had six defendants, so I gave the defense six peremptory challenges, and I told them they could exercise them individually or collectively. I correspondingly gave the two plaintiff counties a total of six peremptory challenges. This meant we needed to qualify twenty-four jurors for cause. The process proceeded very expeditiously. By the end of the first day, we had twenty-one jurors, and nine of the initial group of fifty jurors remained to be questioned. I asked those jurors to return the next morning and I told the Jury Department that the next group of fifty jurors summoned for Thursday did not need to report to court.

In a short period of time on Thursday morning, we had selected the remaining three jurors needed to give us twenty-four jurors in total. I then allowed

[2] FED. R. CIV. P. 48(a).
[3] FED. R. CIV. P. 47(b) (citing 11 U.S.C. §1870 (2020)).

the attorneys to exercise their peremptory challenges. When that process was concluded, I swore in our twelve jurors, admonished them to avoid watching, reading, or listening to anything about the trial, and excused them until Monday morning.[4]

From my conversations with counsel, it was clear that they were pleasantly surprised at how smoothly and expeditiously the jury selection process was completed. Everyone believed that we had selected jurors who could decide this difficult case fairly and impartially. We received no complaints from the jurors themselves. I believe that the prospective jurors were far more comfortable sitting in the courtroom without the white noise while we brought them individually into chambers.

The individual questioning proved to be particularly effective. We ended up excusing slightly over half of the jurors, largely by agreement. Almost nobody seemed to be purposely trying to get off the case; to the contrary, most people seemed very interested in serving. At the same time, they appreciated the importance of the process we were undertaking to make sure everyone could be fair and impartial. When the lawyers asked questions, they followed my lead and did so in a conversational tone. As a result, the jurors did not become defensive. While there is, of course, no way to know for sure if a prospective juror was being fully candid with the court and the parties, the collective impression was that these jurors were doing their best.

I will definitely employ this jury selection process for future bellwether trials in this MDL, and I will consider using it should I have another high-profile trial in the future. I was very pleased that, notwithstanding the tremendous amount of pretrial publicity on top of the devastating and pervasive impact the opioid epidemic has had on my part of the country, we showed that we could seat a fair and impartial jury.

[4] Over the weekend, the parties settled the case, so I excused the jury Monday morning.