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## Voir Dire for Sexual Harassment Cases in the Era of Pink Hats and “Me Too!”



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By Nancy Richards-Stower and Debra Weiss Ford

### A conversation between Nancy Richards-Stower, employee advocate, and Debra Weiss Ford, employer advocate.

For generations of New Hampshire lawyers, voir dire (questioning) of potential jurors was conducted by the trial judge. More recently, pre-trial procedures invited (or required) trial counsel to submit proposed questions to the judge, who may or may not include them with the judge’s own. The legislature authorized pilot programs for attorney-conducted voir dire in civil cases beginning in 2001 in Cheshire and Rockingham counties. The lawyers liked it, and the legislature authorized state-wide attorney voir dire starting in January 2005 (RSA 500-A:12-a). It was extended to criminal cases as of January 2015.

What can lawyers ask? Their questions are restricted only by the discretion of the trial court, and counsel’s own creativity. Further, counsel are promised a “reasonable amount of time” and “[s]pecific unreasonable or arbitrary time limits shall not be imposed.” Unfortunately, some superior courts hold several jury selections on the same over-scheduled day, and so limit attorneys to a half-hour (or less) for their voir dire.

Sexual harassment cases are unique to try because the disparities in power between the genders plays out in all aspects of life, and polling statistics make clear that the stories of workplace harassment will be very familiar to female jurors. While roughly 50 percent of the jury panel will be female, most of them have not been involved in a botched surgery, a failed business deal or a head-on collision, so those cases will require jurors to focus attention on the evidence in order to gain empathy. However, many female jurors have experienced gender discrimination or sexual harassment prior to arriving in court.

According to a Pew Research Center survey in the summer of 2017 (before the spate of media celebrities’ stories this fall) 42 percent of women said they had experienced some form of gender discrimination at work. An ABC News/Washington Post poll published in October 2017 showed that more than 33 percent of American women endured unwanted sexual advances from male co-workers, and 95 percent of them believed that male harassers usually go unpunished.

Further, the poll noted: “83 percent of the victims say they are angry about it, 64 per-cent felt intimidated by the experience and 52 percent say they were humiliated by it...” In January 2018, a new ABC News/Washington Post poll showed that 72 percent of Americans call sexual harassment at work “a serious problem.”

Since this fall, when movie mogul Harvey Weinstein was outed as a serial sexual harasser, American media has been saturated with sexual harassment allegations made against the rich and the famous, including: journalists Mark Halperin, Charlie Rose, Bill O’Reilly, and Matt Lauer; actors Ben Affleck, Kevin Spacey, and Louis C.K.; chef Mario Batali; music maven Russell Simmons; U.S. Congressmen John Conyers and Blake Farenthold; Senator Al Franken, U.S. Senate candidate Judge Roy Moore, and Ninth Circuit federal judge Alex Kozinski. Additionally, dozens of other rich and famous men were accused of sexual misconduct including, of course, the President of the United States (whose inauguration in January 2017 was followed one day later by several million American women, joined by women worldwide, in marches for gender equality, many sporting pink hats in an unprecedented explosion of determination to end the gender discrimination they had experienced and/or observed).

In short, at least half the members of your jury pool will be exploding in emotional responses to these events. So, consider: you are about to try an employment discrimination case involving allegations of sexual harassment. What questions will you ask in voir dire?

Nancy: One skilled trial attorney suggests breaking the ice by asking one or two of the jurors what their favorite movie is and then asking one, “Do you want to know mine?” (and hope that the juror expresses interest and that my answer gets some nods of recognition).

Deb: What is your favorite movie?

Nancy: Probably “ET” or “Close Encounters” — but my affection for those alien space-travelers might raise concerns about me.

Deb: I thought your favorite movie was “Legally Blonde!”

Nancy: That’s only when I’m depressed; it’s a picker upper ... but back to sexual harassment and voir dire. To those in the jury box from which we can cull “for cause” or with peremptory challenges, I’d ask, “Who has seen the news on TV about sexual harassment? Please raise your hands.” (The first hands to shoot up strongly may be “leaders” and I want to follow up with them as they will be leaders in the deliberations.)

If someone doesn’t raise their hand, they are either difficult, shy, have been living in a cave, are not being honest and/or don’t want to serve. They’d go at the bottom of my list.

Next, I’d say to the panel, “If you’ve see reports on TV about sexual harassment, or read about sexual harassment in other media, how do you feel about it?”

Hopefully that would prod a wide-ranging conversation between jurors and me and would be followed up with, “Why?”

I would expect that women will express that they relate to or believe what they have seen on TV; some will opine that the media has it “overblown”; some men will express their fear of being falsely accused; perhaps one of the men will relate his own victimhood by a harasser. All answers would be respectfully acknowledged. I would need an hour to do it right.

Deb: I’d want to ask some basic questions such as, “Have you or has any member of your family or a close friend ever experienced harassment or verbal abuse in the workplace by a manager or a co-worker?” and “Have you or any member of your family or a close friend ever filed a claim of harassment or retaliation in the workplace?”

I would ask the potential jurors to then describe the situation and how it was resolved — if he/she was satisfied with the result and believed the outcome was fair. I may also ask if he/she knew about the Anita Hill case or other well-known sexual harassment cases. I would ask these questions to determine the jurors’ potential bias and pre-disposition to a verdict.

Nancy: If there was time left (doubtful due to time constraints), I’d try to find out jurors’ media sources by asking, “What’s your favorite evening TV news program?” and “What’s your favorite internet news site?”

Deb: I also would follow up to Nancy’s question and ask whether the juror can separate out recent cases in the news regarding alleged sexual harassment when he/she is considering the facts of this case.

In short, voir dire is an excellent way for attorneys to explore a juror’s feelings and responses to an answer.

*Nancy Richards-Stower is owner of the Law Offices of Nancy Richards-Stower in Merrimack and creator and owner of TrytoSettle.com®. Debra Weiss Ford is Office Managing Principal and Litigation Manager of the Portsmouth office of Jackson Lewis P.C.*



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