

## Arguing Hardship: You Can't Have It Both Ways

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Jury selection is quickly approaching, the panel is large and the trial is scheduled to last over the course of several weeks. The judge has allowed counsel to submit a Supplemental Juror Questionnaire that contains questions regarding hardship and those hardship claims will be considered prior to the start of jury selection. While it is certainly an advantage to identify ahead of time those jurors who, for one reason or another, would have difficulty serving, it can also be a burden.

Because of the current difficult financial environment, we are seeing up to 70% of a given panel seeking hardship excuses. Not surprisingly, that 70% often contains those jurors who may end up being the best defense<sup>1</sup> jurors<sup>2</sup>. While the hardships claimed by jurors in a questionnaire can be helpful for “getting rid of” a juror the defense does not like, those same responses can also make it difficult to keep those members of the panel the defense *does* like. With such a large number of jurors seeking hardship, how can you be sure you're not being perceived as trying to “have it both ways?”

In the spring of 2009, Litigation Insights assisted a client in preparing for jury selection where the trial was expected to last for several months. Because the judge expected the hardship rate to be high, over 100 jurors were summoned and asked to fill out a questionnaire that provided several ways for the jurors to claim hardship. This level of information, while very helpful in arguing for or against hardship, was a challenge to organize in a way that would ensure we were arguing for our “pro-defense” jurors and against the “pro-plaintiff” jurors while maintaining consistency in our arguments.

In order to address this situation, Litigation Insights developed an organizational method that allowed counsel to maintain consistency in argumentation, and to make “on the spot” determinations of which jurors to fight for and against. Below we describe this method and explain how, when faced with a very large panel (or even a small one), counsel can be confident that he or she is not trying to “have it both ways.”

- **Review and identify all categories of hardships.** In this step, create several different “basic” categories (e.g., travel, financial, work-related, child care, etc.), then break those “basic” categories into more specific groupings and see where jurors fall (e.g., travel – work-related, travel – paid vacation, travel – non-paid vacation, etc.). This can be done using a chart where you have a column for the juror's name, ranking, hardship category and hardship explanation. The chart can then be sorted by hardship category revealing each grouping.

If you have already determined your profile for “pro-plaintiff” versus “pro-defense” jurors, you can then see where your conflicts are by looking at each category grouping. In the best of circumstances, your defense-leaning juror will have a vacation planned

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<sup>1</sup> In this article, we define “defense” as those parties in a suit against a traditional plaintiff and not a plaintiff company in a commercial case or intellectual property case.

<sup>2</sup> Often, the best defense jurors are those who are gainfully employed, have significant responsibilities at their jobs, cannot be replaced easily, do not have flexible schedules and often have either the wisdom or the articulacy to “talk their way off” a jury.

where he/she is driving to Canada to go fishing with some friends, while your “pro-plaintiff” juror will have a vacation planned where he/she has already paid for airfare, lodging and a seven-day pass to Walt Disney World. You can then argue to the judge the difference between the vacations and why your “pro-defense” juror should not be dismissed, while it makes sense to grant the hardship of the “pro-plaintiff” juror.

Given your defense jurors are most likely few and far between, saving everyone possible is important. Rather than lose them all to a mass exit (e.g., dismiss all jurors with planned vacations), we can tease out the types of hardships to allow you to effectively argue for or against hardship in a concerted effort to save as many of the jurors who are friendly to your case as you can. Saving just one juror might make all the difference.

- ***Know when to “cut your losses.”*** Once the jurors are placed in their categories, there will undoubtedly be some instances where a “pro-defense” juror and a “pro-plaintiff” juror will have the same hardship. For example, the plaintiff juror might be the sole wage earner for his family of eight, while your defense juror works exclusively on commission and his wife gave birth to their new baby a month ago. In this instance, you may have to “cut your losses” and let your “pro-defense” juror go because there is no way to argue to keep him, while arguing to let go of the “pro-plaintiff” juror. This is even more important when the “pro-plaintiff” juror is believed to be a strong advocate. Let’s say you have five people in the “child care – none available” category. Three of them have been coded as plaintiff-leaning jurors (one being strongly “pro-plaintiff”), while two additional jurors have been coded as defense-leaning. In this case, it might be best to sacrifice the two defense jurors to eliminate the other three “pro-plaintiff” jurors.

If you do not have the benefit of SJQ answers beforehand and are faced with determining hardship in court, keeping these fine distinctions among categories clear will maximize your ability to argue for or against hardship, providing you one more strategic advantage. That said, another advantage to the method outlined above is that it allows you to keep opposing counsel on the straight and narrow and not allow them to “have it both ways.” In either case, your team’s use of this process to prepare for arguing hardship claims can only improve its chances of obtaining a jury panel favorable to your case.