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What's Your Juror Taking?

Julie Kay
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As the percentage of Americans taking various medications skyrockets, some jury consultants and lawyers have begun asking potential jurors what kinds of medications they are taking.

They're concerned about potential side effects associated with medications that can affect a person's ability to concentrate, sit for long periods of time and otherwise act as jurors.

A secondary reason for asking is strategic — to bounce jurors they don't want and use medications as an excuse.

But the practice is controversial. Some consider the line of questioning a violation of privacy. Judges, in general, are reluctant to allow such personal questions to be asked of potential jurors, say lawyers and trial consultants.

Some consultants and lawyers now ask a general question about whether the potential jurors are taking any medications that might affect their jury service. Then, if the jurors answer yes, the lawyers ask for a private sidebar with the judge and the potential jurors to ask specifics in private.

Joel Hirschhorn, a longtime Miami criminal defense lawyer, has, in recent years, begun asking judges to query potential jurors about medications they're taking.

"It's become pretty standard for me," Hirschhorn, of Hirschhorn & Bieber, said. "There's less of a stigma about medications, less community reaction."

Hirschhorn put the question to jurors on a recent, massive Medicare fraud case he handled in West Virginia. Of some 20 people in the jury pool, about five acknowledged taking drugs including Xanax, Prozac and OxyContin, a powerful painkiller. Hirschhorn said he didn't care whether jurors were on Xanax or Prozac, but he moved to have the person taking OxyContin removed over concerns that the juror would have trouble concentrating.

50 PERCENT ACKNOWLEDGE MEDICATIONS

Atlanta lawyer Lori Cohen, chair of Greenberg Traurig's pharmaceutical practice, has an advantage in asking jurors about medication because the issue is directly related to her cases. "It gives me a nice entrée to ask," she said.

But she emphasized that the question must be asked "in a gentle, polite, considerate way, preferably in private ... or you risk offending the entire jury."

In her experience during the past few years, Cohen has found that 50 percent or more of jurors acknowledged taking medication.

Veteran trial attorney Richard Sharpstein of Jorden Burt's Miami office said that it's vitally important for lawyers to know what medications, if any, a juror is taking.

While Sharpstein acknowledges that it's difficult to find a juror who isn't taking some form of medication, particularly in South Florida with its high population of elderly people, "you just want to know what they're taking. If they're taking

high blood pressure medication and they're going to get to a high stress level in the trial, you want to know."

Sharpstein has another reason for wanting to know, however. He said that he has used a jurors' use of medication to get a juror he dislikes for other reasons dismissed.

"The majority of time we use it as a reason to exercise a peremptory strike," he said.

Amy Singer, a 30-year jury consultant who founded Fort Lauderdale, Fla.-based [Trial Consultants Inc.](#), said she doesn't routinely ask jurors about medication, but may from time to time when warranted. She did so recently in a case in which a juror appeared "out of it, not quite right."

"She wasn't interacting with other jurors in the hallway; she had a flat affect," Singer explained.

Singer urged her client, a plaintiffs attorney, to conduct a private voir dire and ask the juror, "Is there anything you want to say in private?" The woman responded, "To tell you the truth, I'm going through menopause and taking antidepressants." The juror was excused.

"Let's put it this way," said Singer. "I'm concerned if someone is taking antipsychotic medication. If they're taking high blood pressure, that's none of my business."

The issue struck home last year for Neil Kodsi of Carlton Fields in Miami.

The defense lawyer in a products liability trial in West Palm Beach, Fla., Kodsi asked whether anyone had health issues that could interfere with the trial. One juror rose his hand and asked to speak privately with the two attorneys and judge. He said that he was taking medication for a urinary tract infection and had to go to the bathroom every 45 minutes. Lawyers for both parties agreed to excuse him.

"I think lawyers have a right to know anything that could conceivably affect their clients' cases," said Kodsi, adding that jurors don't have to be specific about the types of medication they're taking. "I'm comfortable with a juror saying in general, 'I'm on medication.' "

[SunWolf](#), a Santa Clara, Calif., jury consultant who lectures and has written books on jury selection, advises lawyers to ask all jurors on questionnaires whether they are taking any medications.

At the recent Florida Bar annual conference, at a session entitled "Juiced Jurors," SunWolf, an associate professor at Santa Clara University, passed around full-page drug ads torn from magazines listing a myriad of side effects for such drugs as Viagra, Claritin and Valium. The side effects can interfere with a jurors' ability to sit and concentrate during long trials, SunWolf said. She urged lawyers to use the information to bounce jurors.

In a later interview, she said, "What is a juror's job? It is to pay attention and be able to retain information and follow jury deliberations. People's competency is impaired by the drug they're taking. Lawyers can demonstrate a challenge for cause as a result."

After attending SunWolf's talk, Paul O'Connell, a solo trial lawyer from Lighthouse Point, Fla., said that he planned to start asking jurors about medication.

"We're inundated with the commercialization of drugs without knowing the side effects," he said. "This was an eye-opener."

'A TOUGH ONE'

Some, however, are clearly conflicted on the issue and concerned about a juror's privacy rights.

"That's a tough one," said Dan Small, a litigator with Holland & Knight in Boston and Miami and former federal prosecutor. "As a trial lawyer, I would love to have the information. The reality is there are people walking around on very serious medicine. It might interfere with their perception and judgment and ability to stay awake. But how far do you want to go down that road?"

Small noted that there is a great likelihood that a juror will not answer the question truthfully.

[Hank Asbill](#), a Washington, D.C.-based trial attorney who was recently named one of the most "Winning" attorneys of 2007 by *The National Law Journal*, is not a fan of asking jurors about medication, other than the routine health question on juror questionnaires.

"I've never had a judge allow me to randomly ask about taking medications unless it directly relates to attention

deficit," Asbill, of New York-based Dewey & LeBoeuf, said.

Singer, the jury consultant, noted that asking jurors about their use of medication is "quite controversial" due to the privacy provisions in the Health Insurance Portability and Accountability Act. "People have a right to privacy," she said. "Usually if you ask such a question, the other side objects, you piss off the judge and it makes you look horrible."

Susan Powell, a jury consultant with Strategic Litigation Research in New York, said she, too, would feel uncomfortable asking jurors about their medications and then using that information to strike them.

"You would wind up eliminating everyone over 40," she said. "That strikes me as extreme."

She added, "No one's going to raise their hand and admit what drugs they are taking."

Anne Reed, a trial lawyer and jury consultant with Wisconsin-based Reinhart Boerner Van Deuren, shies away from asking jurors about medications for an entirely different reason -- fear they may be used to get excused.

"The drawbacks might outweigh the benefits," said Reed, who runs a popular blog on jurors called "Deliberations."

Paul Bondor, a New York partner at Chicago's Kirkland & Ellis, said the issue was a new one to him. He said he has never asked jurors about medications they may be taking, and didn't ask during a recent jury trial in which he and colleagues won a record-setting \$1.54 billion on behalf of Lucent Technologies Inc. against Microsoft Corp. *Lucent Technologies Inc. v. Microsoft Corp.*, No. 02-CV-2060 (S.D. Calif. 2007).

"It's not something I would rule out," Bondor said. "The risk is to make someone not feel that they are on the spot."

Still, the practice clearly has some validity. In 2007, a juror in a Cleveland murder trial was dismissed after it was discovered that he was not taking medication for a mental illness. The issue came to light after the juror fell asleep and appeared lethargic during trial. *Ohio v. Lorenzo Collins*, No. CR-06-482881-A (Cuyahoga Co. Ct. of Common Pleas 2007).

In another case in 2007, a juror in a sexual harassment case against the city of Chicago disclosed during voir dire that he had taken medication for anxiety for six months but discontinued it. The juror said in a note to the court later that questioning by the plaintiffs attorney started triggering anxiety and he wound up consulting his physician. *Ammons-Lewis v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 488 F.3d 739, 2007 WL 1544139 (C.A.7 (Ill.)).

Additionally, the issue of whether a juror took medication sometimes finds its way into appeals -- so far, without much success.

In an appeal decided in June, lawyers for a man convicted of murder argued before the Georgia Supreme Court that the verdict should be overturned partially because one of the jurors was sleeping during the trial. The juror acknowledged that she was on medication. But the trial court declined to ask the juror what medication she was taking or to excuse the juror.

The Georgia Supreme Court ruled against the appellant, saying the trial court did not err. *Smith v. State*, No. SO8A0018 (Sup. Ct. Ga.).

In 2003, a similar complaint was the basis for an appeal before the Michigan Court of Appeals. Lawyers for a defendant convicted of marijuana possession argued that the trial court erred by refusing to excuse a juror who did not disclose during voir dire that she needed anxiety medication. In fact, a police officer was sent to her home to retrieve her medication during the trial.

Because defense lawyers themselves did not request a mistrial, the appellate court affirmed the conviction. *Michigan v. Bradley Scott Lasco*, No. 239278 (Mich. Ct. of Appeals.).