



A Better Approach to Jury Selection

Harry J. Plotkin, Jury Consultant

Too often, I notice attorneys relying heavily on superficial and irrelevant juror characteristics in voir dire and jury selection. Because uncovering and removing juror bias is so critical to the success of your case, every attorney must focus on the experiences, opinions, and values that create and reflect biases and not be sloppy in making simplistic (and often faulty) assumptions.

Characteristics that create and reflect biases may include experiences like having to battle an insurance company over a property damage claim, opinions such as a strong distrust of doctors, or values such as a strong belief for—or against—awarding money for emotional distress. These examples are each experiences that have directly caused a juror to form a bias or opinions and values that, when expressed, reveal an obvious bias.

But too often, I see attorneys focusing on stereotypes and faulty assumptions such as demographics. Age, education, income, gender, ethnicity... none of these account for a direct relationship between an experience or value and a bias. Not all Hispanic males feel the same way about employment discrimination, but most people who feel they have been wronged by a former employer probably do.

Not all biases are obvious or easy to uncover, so it is crucial to probe for the most insightful experiences, opinions, and values during voir dire, depending on your unique case issues. But although every case is different, here are a couple of general techniques you can use to gauge your jurors' feelings on liability and damages in your next trial.

Responsibility Scale and Liability

When jurors disagree with the actions taken by both sides in a lawsuit, a not-too-uncommon situation, feelings of sympathy and identification are difficult to come by, and the jurors become emotionally objective. That is, because both litigants have failed to establish instant credibility, the jurors will intensely and cynically scrutinize the actions of both sides. When jurors believe that neither side has done the right thing, they tend to focus largely on issues of personal responsibility.

For the jurors, the trial then becomes less about which party took the wrong action and more about which party was obligated to take the right action (and didn't). If a pharmacist fills a wrong prescription and a patient suffers, should the pharmacist be responsible for the patient's injuries or should the patient be responsible for failing to check the prescription, read the label, or switch medications when the symptoms or injuries began? If a house is sold with undisclosed defects, is it the realtor's fault for failing to warn or the homebuyer's fault for failing to adequately inspect the house?

Not surprisingly, jurors' views on personal responsibility are perfectly aligned with their own patterns and practices. Jurors who are hands-on in every aspect of their affairs tend to be very unforgiving toward plaintiffs who made mistakes and failed to do everything they could have to avoid the injury suffered. I call this group of jurors "DO-IT-YOURSELFERS," because they tend to be pro-active, involved, and knowledgeable in every aspect of their lives. These are the jurors who balance their own checkbook and do their own taxes, who read every line of every contract or lease they sign, and who are just as familiar with the blueprints, city planning codes, and power tools as their architect and contractor when they are renovating their home. Do-it-yourselfers tend to be strongly pro-defense because they find it difficult to relate to and sympathize with plaintiffs who made mistakes that they themselves would not have made. Do-it-yourselfers take great responsibility in their own affairs and subscribe to the theory that "if you want something done right, you have to do it yourself." In trial, do-it-yourselfers can on occasion be sympathetic toward plaintiffs who had little opportunity to avoid injury, but are generally unforgiving toward plaintiffs who were not proactive enough in avoiding or correcting a potentially disastrous situation.

On the other hand, jurors who are hands-off in their affairs tend to be very forgiving of litigants who made mistakes or didn't do their due diligence; these jurors tend to be very sympathetic toward plaintiffs who have been wronged, even when those plaintiffs made foolish mistakes. I call this second group of jurors "DELEGATORS;" these jurors tend to delegate responsibility to trusted agents of their affairs, and they put blind trust and sole responsibility for their affairs in these agents. Delegates regularly rely on others to take care of their affairs and are unforgiving when these agents fail in their duties. Delegates hire doctors to care for their health, accountants and financial planners to care for their finances, contractors or painters or plumbers to care for their homes, and lawyers to care for their liability and legal health. They subscribe to the mentality that "I hire these people to take care of me; if something goes wrong, it's their fault." In trial, delegates tend to be highly pro-plaintiff and easily angered by defendants because they do not view victims as having to be responsible for protecting themselves; as in their own life, they would prefer to blame the person who directly caused the injury, even if it could have been avoided by the plaintiff. Do-it-yourselfers are the practical, defensive drivers in life; delegates expect and demand others to follow the rules of the road.

I have found the distinction in personal responsibility outlined above to be one of the most critical in distinguishing between pro-plaintiff and pro-defense jurors. On which side of the fence a juror falls when questioned about issues similar or parallel to the

central issues of the case will often tell you exactly how a juror would have acted in the situation at hand in trial.

So how can you figure out what your jurors would have done in the situation at hand, and how can you distinguish the delegators from the do-it-yourselfers?

In a medical malpractice case, how proactive are your jurors in their own health? Do they double and triple check their doctors' diagnoses and treatments in medical guides and WebMd? Do they seek second opinions? Do they practice preventative health measures? In a business dispute, do your jurors write their own leases and contracts—or at least read every paragraph and all the fine print? Do they put every contingency in writing, or do they rely on a promise and a handshake? In a sexual harassment case, do your jurors immediately address and report all abuses when they are wronged, or do they wait for their problems to go away or be solved by others? In a fraud case, how rigorously do your jurors do their due diligence when they buy a house, a used car, or make an important investment? Do they hire inspectors, lawyers, or auditors? Do they get their hands dirty and check under hoods, look at plumbing, and pore through financial statements? Or, in any of these situations, do your jurors simply trust a figure of authority and rely on their honesty and judgment?

In every case you try, carefully consider if which actions (or inactions) the litigants took that could be considered a critical mistake by your jurors. Aside from addressing and explaining those actions during trial, think about the types of jurors who might hold your client accountable for those mistakes. You need to know which jurors would have made the same decisions as your client, and to do this you will need to distinguish the do-it-yourselfers on your jury panel from the delegators. Because you cannot ask your jurors how they would have acted in the situation at hand in trial, you need to be creative; think of a few similar or parallel situations that your jurors have found themselves in, and ask them how they dealt with them. Then decide whether the do-it-yourselfers and delegators on your jury panel will relate to your client, or find reasons to hold your client accountable.

Sensitivity Scale and Damages

Distinguishing between high-damage and low-damage jurors, especially in the gray area of non-economic damages, is often best achieved by understanding that juror's emotional reaction and practical response to trauma. No doubt you have noticed that some jurors are sensitive and expressive about difficult situations they discuss during voir dire—injuries, illnesses, emotional or financial difficulties of their own or of others—while some jurors seem to shrug off equally traumatic situations without a hint of emotion or concern. What you may not realize is that these differences are usually your best glimpse into your jurors' attitudes toward damages.

Some attorneys mistakenly believe that harmful, traumatic experiences (especially those similar to those suffered by the plaintiff) predispose jurors to identify with the plaintiff and emotionally invest in high damage awards. They are only half right. What matters is

not the experience itself, but rather the juror's own feelings about the experience—an experience is only traumatic if the individual *feels* traumatized. Never assume that the juror was traumatized by a difficult, harmful experience, no matter how horrific it might seem to you. Some jurors are deeply traumatized by the most trivial of experiences, and some jurors are completely unfazed after being slammed into by a drunk driver and watching their young child sit through hours of brain surgery in critical condition. What matters is how that juror feels about the experience, which has less to do with the experience itself and more to do with the underlying personality type of the juror.

Any time I evaluate a potential juror and his/her likely response to damages in trial, I am most interested in fitting them into something I call a “sensitivity scale.” That is, I want to know how sensitive they are to difficult experiences and trauma. My sensitivity scale starts with the acutely sensitive on the high end—jurors who are intensely emotional, who express sadness, anger, or sympathy on their face during voir dire (especially when another juror is sharing a difficult story), who complain about their own lives and who talk about how incredibly traumatic and distressing and painful it was for them when they were reprimanded at work or their 19 year-old son had the flu. When discussing a more serious or catastrophic experience, their responses are off the charts. These jurors are highly in tune with their emotions, sensitive to the physical and emotional plights of themselves and others, and place a high premium on a person's well-being. They will assume that others are just as sensitive as they are.

At the far opposite end of my sensitivity scale are the insensitive, acutely practical jurors. Depending on how I look at it, I sometimes call this spectrum my “practicality scale.” These jurors put practicality far above emotion and rarely, if ever, feel traumatized or affected by their experiences—and more importantly, the experiences of others. These are the jurors who shrug off harmful situations, who can talk about their mother's Alzheimer's or their broken back with only a few words and a smile on their face as if it was nothing, and who focus on how they dealt with situations rather than emotions. “Deal with it,” “things happen,” and “get over it” are mottos that practical jurors live by. These jurors place a minimal premium on feelings and, even if they have sympathy and compassion for others, they are firmly against indulging misfortune with money. They simply assume that others are just as tough-minded and practical as they are, or insist that others should be.

Plenty of jurors fall between the two extremes on the spectrum of the sensitivity scale, but you may be surprised how few fall close to the middle. Dealing with difficult situations and trauma is a polarizing experience, and the vast majority of jurors are not difficult to evaluate if you ask the right questions and listen carefully. First uncover relevant experiences on your jury panel, the closer to the plaintiff's situation the better. But never stop there; be sure to follow up with questions that probe their responses. What was that like? How did it make you feel? How did it impact your/his/her/their life? How difficult was it for you/them to live with and deal with? How much did it bother you? How did you deal with it?

This technique, although best applied in trials that involve a non-economic damage component, is effective in any type of case with any type of damages. Ask jurors how they felt about an injury (perhaps a car accident), an illness (perhaps a medical malpractice, failure to diagnose or treat), wrongful death (dealing with the loss of a loved one), job difficulty (perhaps a disability, mistreatment, discrimination, firing), financial difficulty (perhaps related to fraud or business litigation), depression or anxiety (nearly any case), or problem with their home (perhaps a construction defect).

The more emotional the juror is in discussing the experience, the more the juror seems to have been impacted or upset, and the more the juror complains or expresses difficulty with the situation, the higher on the sensitivity scale they fall and the higher their damage interpretation is likely to be in trial, liability aside. The less emotional the juror is in discussing a normally-traumatic situation, the more the juror seems to shrug off and downplay difficult experiences, and the more the juror shifts the emphasis toward dealing with loss in a practical way (I've heard many jurors argue against damages for lost enjoyment of life on the basis that the plaintiff could easily replace a lost hobby—the ability to walk, for example—with another alternative), the lower on the sensitivity scale they fall and the lower their damages will likely be in trial.

Next time you uncover a normally-traumatic experience on your jury panel, don't make assumptions—follow up and listen carefully to how your juror *felt* about the experience. Don't focus solely on evaluating jurors based on liability concerns when damages are supreme, and don't underestimate the vast influence of sensitivity on damages.

Harry Plotkin is a jury consultant in Los Angeles. Mr. Plotkin specializes in assisting trial attorneys in jury selection and crafting persuasive opening statements and trial strategies. He can be reached at 626-975-4457 and at harry@yournextjury.com.