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January 2015 Jury Tip: "Distancing your case from your voir dire"

For many lawyers, there is an unavoidable fear of asking the "bad" questions-- the ones that invite jurors to discuss their negative feelings and publicly rip your client or your case or your way of thinking-- during jury selection. The fear is understandable: no one who represents a particular type of defendant (let's say an insurance company) gets excited about the potential answers to questions like "who here has ever felt defrauded or treated unfairly by an insurance company?" or "does anyone here feel that insurance companies are unethical?" Same for any plaintiff lawyer having to ask questions like "has anyone here ever seen someone exaggerate their damages in a lawsuit to get more money than they deserve?" or "does anyone here feel that too many people use lawsuits to milk the system?" And I know where the fear comes from: some fear that too many negative answers from jurors may poison the rest of the jurors, and others fear that simply asking the questions may make your jurors wonder if your client is guilty of whatever you're worriedly asking about.

Whether or not you believe that voir dire questions or answers really do poison the jury pool-- and I've written extensively on why they don't-- the reality is that either way, you need to ask these questions. Uncovering devastating bias is the most important part of jury selection, because there is no better way to poison your actual jury panel than to leave someone on your panel that would have answered the "bad" questions. But the good news is that there are ways to distance your case from the "bad" questions without neutering those questions or inadvertently discouraging your jurors from being candid.

The key to distancing your case from your questions is to embrace the reality that some plaintiffs and some defendants are worthy of your jurors' scorn. Never use your precious voir dire time to argue with your jurors and defend every insurance company, every lawsuit, every business practice, or every claim for damages. You should be learning about how your jurors feel, not trying to change their minds. But at the same time, when you show your jurors that you agree that others may be unethical or that some people who have made accusations similar to your plaintiff may be dishonest or greedy or unreasonable, you won't be reflecting poorly on your client. Instead, you'll be accomplishing two incredibly valuable goals in voir dire: building credibility with your jurors by showing them how reasonable you are, and encouraging candid answers from them by making them feel comfortable expressing their "bad" opinions.

And here's how you do it: when you're representing a defendant, before asking the bad questions, preface your questions by explaining to your jurors that "I'm certainly not here to tell you that every company in America is run ethically, honestly, and responsibly. I think we all know some companies are not. But since I represent a company, I have to ask you..." Or when you're representing a plaintiff, before asking the bad questions, preface your questions by explaining to your jurors that "I'm certainly not here to tell you that every person who files a lawsuit is being honest or reasonable or has a good reason to sue. I think we all know some plaintiffs are not, and that many of the lawsuits filed are frivolous. But since I represent someone filing a lawsuit, I have to ask you..."

And when you ask voir dire questions about specific biases that relate directly to your case-- questions like "has anyone here ever seen a big company steal an idea from someone, or rip off a competitor or inventor?" or "has anyone here ever seen a doctor get unfairly blamed or sued for a patient's death?"-- preface your questions by getting specific. Tell your jurors something like "I'm also not going to tell you that every tech company is run responsibly or respects other companies' patents or inventions. I know that some companies steal, cheat, spy, and rip off their competitors. But since I represent a tech company, I have to ask you..."

By happily acknowledging that bad things do happen, you'll come across as reasonable, which only adds credibility to you and your case. Your jurors won't think "this lawyer has his/her head stuck in the sand, he/she won't admit if his/her client did something wrong." And by communicating to your jurors that you are open to hearing them complain about OTHER plaintiffs or defendants, you subtly persuade your jurors that there is a distinction between their complaints and your client. However, don't stop yourself from striking jurors who have these negative views. Even though you've carefully distanced your case and your client from their attitudes in their minds, once the evidence comes in and the accusations start flying, those biases will more than likely color how biased jurors view your client and case.

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