

### **September 2018 Jury Tip: “How to ask jurors to pre-judge in voir dire”**

One of the cardinal rules of voir dire is you may never ask a juror to pre-judge the case or suggest what their verdict might be. On the other hand, one of my cardinal rules of jury selection is that there’s always an appropriate way to ask an inappropriate question in voir dire. No matter how many times you get shut down on a voir dire question by objections or by the judge, there is always a permissible way to ask that same question. How you phrase and frame the question can make all the difference between a wildly inappropriate voir dire question and an appropriate one... but you have to be creative to find the right phrasing.

The rule that lawyers can’t ask jurors to pre-judge in voir dire makes perfect sense, but there have always been loopholes to get around asking jurors to comment on the facts of a case. Instead of asking jurors blunt questions like “the plaintiff in this case wasn’t wearing a helmet during the crash, what do you think of that?” you can simply ask “how do you feel about motorcyclists who don’t wear helmets?” or “how many of you sometimes don’t wear a helmet when you ride a bicycle?” It’s very easy to ask jurors to pre-judge individual facts and issues in your case, as long as you re-frame the questions to ask the jurors about their own personal approaches and experiences, or by generalizing the questions so you’re not directly asking about the parties in the lawsuit.

What is more forbidden and challenging is finding ways to ask jurors to pre-judge their ultimate verdict. If you were to feed some facts of the case to your jurors and ask them “based on that, who do you think is right in this case?” you’d not only draw a sustained objection, you’d also probably get yelled at by your judge. But there are creative ways to essentially ask the same question that most (or at least, many) judges will allow.

The simplest way is to frame your questions around the premise that pre-judging would be inappropriate bias that can happen. By the time you start asking voir dire questions, your jurors will have already heard a statement of the case and what it’s about, at the very least. And if you live in a venue that allows mini-opening statements, your jurors will have heard a much more detailed summary of the facts and some subtle arguments. And even though jurors are typically told that the summary and mini-opening are “not evidence,” understand that jurors don’t understand the distinction. To them, they’ve definitely heard facts and evidence, so they definitely make pre-judgements.

So when you ask a question like “based on what you’ve heard so far, even though it’s not evidence, does anyone here already feel like this is a frivolous lawsuit?” or “... already feel like the defendant did something wrong?” or “... already feel like the defendant is getting unfairly sued?”, you’re getting away with asking jurors to pre-judge by convincing your judge that you’re trying to identify jurors who can’t follow the rules.

But here’s an even more creative and effective way to ask your judge to pre-judge, that

actually allows you to get jurors to directly comment on an actual fact in your case; ideally your worst fact, so you can identify jurors who won't get over it. Tell them about the fact (very briefly, because if you take too long your judge will think your primary goal is to talk about the facts and cut you off before you get to your question), then ask your jurors if that fact alone would "automatically" cement their verdict. I'll give you a couple of examples and different ways to ask this question in a second, but first know that the key to making this a permissible question is that you have to explicitly ask jurors if they would disregard the other evidence or even the law because of that fact. For a judge to let you ask a question like this—and I've seen judges allow this type of question 90% of the time—your phrasing of the question has to tell your judge "I'm finding jurors who won't follow the jury instructions."

Here's one way to ask this question: "you're going to hear in this trial that my client had a couple of beers the night of this crash, so I need to ask, how many of you feel like you would automatically find a drunk driver at fault for a crash, no matter what the rest of the evidence about who or what caused the crash showed?"

Here's another way to ask this question: "one worry I have is that when you hear that my client had a couple of beers the night of the crash, some people might think 'he must have been driving less carefully than a sober driver, so he must have been responsible for the crash, or would have been able to avoid the crash if he was sober, so there's no way the alcohol could ever be irrelevant.' Does anyone sort of feel that way, or think you might?"

In both of these examples, your ability to ask the question depends entirely on framing your question around your jurors' disregarding evidence. Without that, your judge would certainly cut you off and lecture you for asking an inappropriate question. Another way of asking jurors to pre-judge your case, depending on what your worst facts are, is to frame your question around your jurors' disregarding or contradicting the law itself.

Here's one way to ask this question: "you're going to hear what the law says about requiring companies to give their employees medical leaves, but I want to know how you really feel about it: how many of you feel like any law that says a company can't put limits on a long medical leave, or can't let go an employee for taking months of medical days off seems unfair or wrong to you... or you might have a hard time enforcing it?"

Here's another way of asking this type of question: "a fear I have is that some of us might think "hey, even if it's technically legal to ride a bicycle alongside cars in lanes of traffic, it's so dangerous that if you choose to ride one, it's your full responsibility if you get hurt in a crash, even if it's not your fault." Does anyone sort of feel that way, that road bicyclists should blame themselves 100% even when another person causes a crash?"

Feel free to plug your facts into my formulas or be creative in coming up with your own ways to phrase questions that ask jurors if they've pre-judged your case, but either way, keep two things in mind: first, you need to carefully phrase the questions so that they convince your judge that you're ferreting out jurors who are unwilling to follow the law. And second, never give up on asking a question that you want to ask: remember my mantra, that there's always a way to re-frame or re-phrase any inappropriate question that makes it permissible in court.