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November 2017 Jury Tip: “Why you should talk like opposing counsel in voir dire”

If you’ve been reading my jury tips (or selecting juries of your own) for years, you probably know by now that jury selection is not the right time to sell your case; it’s the time to identify and weed out those jurors who will never buy what you’re going to be selling. Because no matter how hard you try, and no matter how much of a “slam dunk” case you think you have, there will always be jurors who are completely unreceptive. The time for “building a tribe” and winning over your tougher jurors is in opening statement—when you can build credibility by incorporating their beliefs and values into your case—not jury selection.

Instead, your main goal during jury selection should be to identify jurors who think like the other side. Whose beliefs and values and expectations will make them receptive to what your opposing counsel will argue. In other words, jurors who speak the other side’s language, not yours. So how can you get them comfortable answering questions and freely admitting how they feel unless they feel like you’re speaking their language?

Imagine for a moment that you’re a juror with strong biases. Perhaps you believe that it’s disgusting that so many people in today’s society file lawsuits, that people who sue ask for way more money than they deserve, and that greedy lawsuits always seem to target big corporations just because they have “deep pockets.” You firmly believe that you’re right, that plaintiffs and plaintiff lawyers are wrong... and if you’re that person, you don’t think you’re “biased” or unreasonable at all. In your mind, YOU are the fair and reasonable one in the courtroom.

Same thing if you’re a juror who believes that too many corporations these days are greedy, unethical, and are willing to put profits before anything—safety, honesty, ethics, or even the law. If you’re that person, you don’t think you would have a “problem” treating a corporation fairly as a juror... you think you’re fair and objective. And if a lawyer representing a corporate defendant were to ask you voir dire questions implying that someone with your beliefs might have a bias, or be unable to be fair or objective, you’re going to answer “no”... not because you’re lying, but because you DO feel like you’re fair and objective.

But imagine you were one of these biased jurors, and a lawyer who seemed to agree with your beliefs asked you questions. You would feel comfortable agreeing with them... if they used the right words that made you feel like your beliefs were fair and right, not biased and forbidden. Imagine if the corporate defense lawyer asked you (the anti-corporate juror) “do you feel like too many companies these days are unethical, greedy, or irresponsible?” You would feel much more comfortable talking about how you feel... because your views haven’t been framed in a negative way by the question.

The question is judgmental toward the defendant, not the pro-plaintiff juror... which is exactly why the question is a good one. Look at those three adjectives for a moment. Those are all words the plaintiff lawyer would probably use, in opening and closing. Using them in voir dire encourages jurors who AGREE to talk, which is exactly why the best way to identify bad jurors is to talk like the opposing counsel in voir dire. If you're a defense lawyer, use "plaintiff" words.

And if you're a plaintiff lawyer, use defense words. Instead of asking jurors if they believe in "tort reform" or have a "cap" on damages (few defense jurors think about these things) or would be "unable" to do something, use defense words to see which jurors perk up. When you talk about damages, use words like "unnecessary," "ridiculous," "excessive", and "unreasonable." Your questions should imply that the JUROR is reasonable, and that big damages are unreasonable. Questions like "would anyone here have a PROBLEM with awarding money for pain and suffering" don't work, because they discourage bad jurors from talking. First off, they don't think they have a problem. They think they're fully capable of awarding "reasonable" damages. And second, the question makes their values and beliefs seem wrong. They know how you feel about their beliefs, so they won't talk to you.

Now when I say "talk like opposing counsel," I don't mean you should express opinions to the jury. I'm not suggesting that defense lawyers should argue that lots of corporations are unethical, or that plaintiff lawyers should agree that big verdicts are excessive. What I am saying is that, during voir dire, you shouldn't take a position. Be neutral and non-judgmental. And when you're trying to encourage jurors to admit beliefs and judgments that the court knows are biases, don't call them biases (at first)... instead, use the words that bad jurors would agree with; that's what I mean when I say talk like opposing counsel."

Only once you've gotten your bad jurors to express their biases and how they really feel can you get them off for cause. But the tricky part is that, at some point, you're going to have to get them to admit that the beliefs they think are reasonable and fair and objective are in fact biases and prejudices. Don't expect them to agree with you that they are biases simply because you say so, or because they are at odds with the law and jury instructions. Most biased jurors are convinced they're fair, so they'll quickly retreat to saying "I can follow the law" once they get the sense their beliefs are being critiqued. You have to phrase your questions in a way that continues to imply that their beliefs are right, and maybe the law is wrong. Convince them to agree that any law that conflicts with their beliefs seems "unfair." Ask them if they think they might have a hard time "going against what you believe is right, and enforcing a law like that?"

The point being: you can't help but be an advocate for your side, and your goal is to persuade jurors. But once you've started persuading, you've taken a position and lost your ability to convince jurors you want to hear every opinion. If you believe in persuasion during voir dire, that's fine; so do I. But save it until the end of voir dire. Save your persuasion for the end, and for opening... and before you do, spend a little time talking like opposing counsel to see which jurors jump up to agree with you.