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May 2013 Jury Tip: "Are some questions too dangerous for voir dire?"

I'm almost always an advocate for being aggressive in voir dire. I often recommend asking voir dire questions that identify jurors who will potentially have dangerous ways of thinking about our case. I'm not shy about asking questions like, "who has the feeling that a truck driver should be MORE careful than other drivers, because they are the most dangerous?" when I'm defending a trucking company in a crash case. When I work with lawyers who understand the need to identify and strike the worst jurors in jury selection, they agree. But sometimes I work with lawyers who don't want to ask these kinds of questions. They're worried about making jurors think about the negative parts of our case, or the most persuasive arguments against our case, and they don't want to put ideas into the jurors' minds.

Asking questions that identify the worst jurors in voir dire is somewhat risky and definitely scary to a lot of lawyers. One of the greatest fears I hear from lawyers is, "if I ask that question in voir dire, won't I be putting bad ideas into the jurors' heads?" It's a fair question, so let's take a close look at the benefits and risks of asking "bad questions" in voir dire.

As I've often written, the most important goal of jury selection is to get rid of your worst jurors. Naturally, it follows that the most important goal of your voir dire should be to ask questions that identify your worst jurors. If the courts gave each side a certain amount of "keeps" instead of "strikes," my advice would of course be different. I would be recommending that you uncover your best jurors by asking questions that put your case in the best possible light.

But because jury selection will always involve de-selection, the first priority of voir dire will always be to uncover and flush out the bad points-of-view on your jury. And unfortunately, you cannot identify unreceptive jurors without asking questions that encourage "bad" answers. If you're representing an insurance company in a bad faith case, you have to ask questions like "has anyone here ever been treated unfairly by an insurance company?" and "who has the feeling that insurance companies are unethical or dishonest or unfair to customers?" If you truly want to identify the worst jurors, you need to be prepared to let your jurors voice bad answers, in open court.

Whether you like it or not, the process of identifying bad jurors involves asking "bad questions," not just hearing bad answers. If you truly want to identify jurors who are receptive to the other side's case, you need to pose questions that put your case in a somewhat negative light. For example, if you are representing a plaintiff in a sexual harassment case, you need to ask questions like "has anyone here ever seen an employee who overreacted to something harmless and unreasonably complained about sexual harassment?" or "who has the feeling that too many employees are oversensitive about harmless comments at work?" In a way, you are testing out the other side's themes by asking these voir dire questions. But is it dangerous to ask these questions?

The fear from a lot of attorneys is that asking "negative" questions in voir dire plants bad seeds in the minds of the jury. On the other hand, you cannot uncover bad jurors without asking "bad" questions. But is it worth the risk of inundating the jurors with the other side's themes at the beginning of the case?

When it comes to asking about your jurors' own experiences that have created bias against your case, it's always worth asking. If a juror in a medical malpractice trial has been the unhappy victim of bad doctoring, or a juror in a business trial works for a company they believe is often unfairly sued, you need to ask about their bad experiences. Because if you don't ask, and the juror winds up on the jury, the juror will absolutely talk about their negative experience in deliberations. And the opportunity for a juror to "poison the pool" is much greater in deliberations than jury selection.

The tough judgment calls on whether or not to ask a "bad" voir dire question involve questions relating to your jurors' opinions. When you're representing a plaintiff in an intellectual property trial involving patents or trade secrets, should you ask the jurors if any of them "has the feeling that any company that voluntarily shares valuable secrets with another company should only blame themselves if the secrets get misused, no matter what the other company promised?"

For me, the key is to ask yourself this question: will these jurors probably think of these arguments themselves anyway, on their own, during trial? If the answer is probably yes, then you absolutely need to ask these "bad" questions in voir dire. If you're worried about asking a question like "does anyone here think that it's foolish to trust an oral agreement without getting it in writing?" for fear it will turn the jurors against your plaintiff, don't worry: I can guarantee you the jurors are already thinking those thoughts.

But there are some situations in which the jurors might not have thought about some bad ways of thinking about your case on their own. In trials that involve complex subjects that are foreign or unfamiliar to the average juror-- for example, in product liability or patent or trade secret cases that involve highly technical products that jurors aren't familiar with, or business trials involving highly technical business issues like complex investments-- there are often conclusions that jurors won't imagine on their own. In those cases, I would agree that it may be too dangerous to ask a "bad" voir dire question that truly plants some bad seeds in their minds. I'll leave that judgment up to you. But one warning: don't make the mistake of underestimating how sharp and judgmental jurors are. Jurors will almost always find the holes in your case, and think about valid criticisms of your case, even if you don't bring the topics up in voir dire.

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