

July 2013 Jury Tip: "Never let jurors self-diagnose their biases"

Jurors rarely know that they are biased. Unless they are lying or exaggerating to get out of jury duty, almost every juror believes deep down that he or she is "fair" and "reasonable," regardless of their ability to accept and follow the jury instructions.

Have you ever heard the saying, "if you want something done right, do you it yourself?" As a trial lawyer, if you want to demonstrate that a juror is biased, you need to do it yourself because you can rarely count on a judge to uncover juror bias and can never rely on a juror to recognize their own biases.

You cannot simply ask a juror "would you be able to follow the laws as instructed, even if you disagreed with them?" and expect a reliable answer, no matter how honest your jurors and no matter how well-intentioned the question. Here's the problem: 99% of your jurors have no idea what the laws that apply to your case are. And most jurors assume that the laws are fair; and by "fair," I mean that most jurors believe that they will find the laws to be fair according to the juror's own values and beliefs. So it's easy for a juror to believe that they would follow the law when the juror doesn't know what the laws are but assumes they will almost certainly agree with those laws on a personal level.

Yet once these same jurors are explained specific laws and questioned about them, many of the jurors immediately express concerns about following the laws they suddenly realize sound "unfair" to them. Almost every juror will agree with a judge that they will follow the laws as instructed... but many will feel differently when faced with a particular law they actually find disagreeable.

Not to pick on judges too much, but some (especially in federal court) won't allow the lawyers to ask any voir dire questions and won't ask any questions about the jurors' ability to follow specific laws. They will simply ask the one catch-all question ("would each of you be able to follow the laws as I instruct you, even if you disagreed with them?") and assume that the jurors' promises mean something.

Of course, there is little you can do when you are before a judge who does not permit you to voir dire the jurors. But in many federal courts and most state courts, you do have the opportunity to ask your jurors if they might have some biases. And the point of this jury tip is that, whenever your judge gives you that opportunity, be careful to never let your jurors self-diagnose their own biases.

Any time you ask a voir dire question that uses the words "fair" or "unbiased" or "reasonable," you are in some way allowing the juror to use their own subjective, meaningless definition of those words in their answer. Any time you ask a question like "given what you've told me, do you believe that you would be unable to be fair as a juror in this trial?", you are letting the juror self-diagnose their own bias. Now that may seem obvious, but there are less-obvious ways to

accidentally make this mistake. Any time you ask a question like "would you be able to award a reasonable amount of damages for emotional distress, if the evidence proves it?", you are letting the juror define "reasonable." Understand that jurors have their own, subjective definitions of words like "fairness" and "reasonable," and their definition of "reasonable" may not be at all reasonable to you.

Almost every juror believes that he or she is "fair" and "reasonable." But don't be fooled when you hear these words from a juror; when a juror says he is "reasonable," the juror means that his beliefs seem incredibly "reasonable" to himself. Believe me, because I've asked jurors directly: a juror who believes it's "unreasonable" to find a defendant liable of negligence when the negligence was unintentional will absolutely tell you they will be a "fair, reasonable" juror. Every juror has their own unique definition of what "fair" and "reasonable" are, and they have nothing to do with the laws or the jury instructions. A juror who believes that awarding more than \$100,000 seems "unreasonable" in any situation will, if asked, tell you that she can absolutely give a "fair and reasonable verdict." A juror who believes awarding money based on sympathy, regardless of liability, is the right thing to do will usually agree that he can be "fair and reasonable." Even the most unfair, biased, unreasonable jurors who would never follow the law believe that they are "fair" and "reasonable," in their own minds.

The next time you pick a jury, keep in mind that your jurors don't see "fair" and "reasonable" and "unbiased" the same way you do, or the same way the court does. Remember that even the most honest, self-aware jurors don't know when they're biased, because they probably don't understand what laws they'll be asked to follow and can't gauge their ability to follow the law until they find themselves face-to-face with a law they disagree with. Make a note of the key laws you'll need your jurors to follow, and make sure to explain those laws to your jurors before you ask them if they believe they can follow them. And, perhaps most importantly, only use words like "fair" and "reasonable" one way: "do you have the feeling that following that kind of law seems a little unfair or unreasonable to you?"

Harry Plotkin is a jury consultant in Los Angeles but practices nationwide. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements. He can be reached at 626-975-4457 and at harry@yournextjury.com.