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November 2012 Jury Tip: “Demanding answers in Jury Selection”

Congratulations if you have a knack for getting jurors talking during voir dire. Because the truth is that most lawyers struggle (perhaps a little, or perhaps a lot) to get jurors feeling comfortable enough to speak up and debate and argue and tell you how they really feel in open court, in front of a group of lawyers, strangers, and a judge, especially when how they feel might be uncomfortable or controversial. Struggling to get jurors talking is nothing to be ashamed of, it's a challenging task that doesn't come easy for most. And to understand how difficult it can be for you as a lawyer, you need to understand how the jurors feel during voir dire.

Shyness is only one reason that jurors are reluctant to answer voir dire questions, even when they know they have something to say. Some jurors worry that they might offend you if they express an opinion they think you won't like. Some jurors worry about expressing a point of view that might be "against the rules" of being a fair and impartial juror and might therefore offend the judge, so the jurors keep quiet. Most often, the jurors don't want jury selection to last long, and they think that they can speed it along by staying silent. The unfortunate reality is that they're right; too many lawyers and judges ask a question, don't get any answers, and move on assuming that the jurors don't have an opinion. This is almost always a wrong assumption, and you can't let this happen. If you want an unbiased or receptive jury, you're going to have to break the ice and get your jurors talking comfortably.

Have you ever asked a question in voir dire, received total silence in return, and finally been lucky enough to have a single juror volunteer an answer? What happens next? One by one, other jurors start talking. The ice breaks. Eventually, most of your jurors have an opinion and something to say about the question. But if that first juror hadn't been brave, the other jurors would have stayed silent. And you might have missed a heck of a lot.

When you ask a reasonable question in voir dire, you need to expect answers. Never ask a question without getting some answers. Don't be satisfied with silence. You might be surprised at how many lawyers move on and accept silence because they don't want to push the jurors to talk. You might be surprised at how many lawyers actually believe that the jurors have nothing to say. If it's a reasonable voir dire question, your jurors will have some opinion of their own. Starting with your first question in voir dire, you cannot ask a question and move on if the jurors are silent. Silence means they're avoiding answering and hoping to move the voir dire along. If it's an important question, you must pick on one of your jurors and ask "Mrs. Smith, how do you feel about that?"

There's a subconscious peer pressure that influences jurors during voir dire. When no one's talking, the other jurors feel pressure to stay silent. When other jurors are expressing themselves, every juror feels much more compelled to talk. This is why it's so crucial and effective to pick on a juror and get them talking. Typically you only have to do this once or twice before your jurors warm up and start volunteering answers to all of your remaining questions.

Sometimes your questions might be the problem, the reason your jurors don't feel compelled to speak up. As I've often said, don't expect any answers to voir dire questions that incorporate the words "fair and impartial," except for jurors who simply want to get dismissed. Few jurors will admit that they can't be fair, and most of your jurors with concerns won't speak up.

Often the problem is asking specific, closed-ended questions, like "who has a problem with awarding money for pain and suffering?" too early. I often recommend asking targeted, closed-ended, bias-specific voir dire questions, but those questions don't give jurors as much freedom to start talking as open-ended questions that can't be answered with a "no" or with silence. Unless you're dealing with severe voir dire time constraints, start your jurors off with broad, open-ended questions, like "how do you feel about awarding money for pain and suffering?" or "how safe do you think companies have to make their products?" This way, your jurors are given the floor, you haven't put words in their mouth, and they can't stay silent with such an open-ended question.

Once your jurors have begun talking and the ice has been broken, getting jurors to answer the tougher questions is much easier. Once you have broken the ice with open-ended questions and picked on a few jurors to get the ball rolling, you can start to ask questions that elicit specific, biased points-of-view, like "who has the feeling that it's unfair or unnecessary to award money for pain and suffering?" But even then, you should never accept silence from your jury panel, or even just a few responses. Always expect and demand answers to every voir dire question. Always keep in mind that jurors have opinions (usually strong ones), so silence usually means opinions are being hidden. And never forget that as uncomfortable as it may be, it's your responsibility to constantly break the ice with your jurors, on each and every voir dire question if you must.

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