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March 2012 Jury Tip: "Keeping bad jurors isn't always bad"

It's often been said that the term "jury selection" is a misnomer; that the process should actually be called jury DE-selection, because you are choosing which to strike, not which to keep. And as I've often written, you should be focusing on de-selection during voir dire. Spend your time and your effort in voir dire identifying unreceptive jurors to strike, not receptive jurors to keep. Don't go too far to expose your best jurors, and don't do the other side's voir dire work for them.

All that is true, yet the "de-selection" way of thinking isn't entirely accurate. Your focus in voir dire should be on de-selection, but your focus in jury selection itself should be equal parts selection and de-selection. Let me explain.

Voir dire is separate from jury selection. Voir dire is the process by which you gather information about your jurors. You get to choose what to learn about them, and you get to choose what not to learn about them by leaving some questions intentionally unasked. However, once voir dire and information collection is done, the process of actually selecting your jury does involve some indirect ways to select who remains on your jury, beyond just who you don't strike. In most (but not all) courtrooms in the country, lawyers have the option to strategically "pass" during jury selection, without necessarily losing their strike. If the other side keeps striking, the jury selection continues. But if the other side passes, the jury has been selected and all remaining strikes waived. If you practice in a venue that does this, you know this already; if you don't, my apologies, this jury tip may never apply to you.

Jury selection involves complex strategy and game theory, and here's the point: when you are choosing whether or not to strike another juror or strategically pass, there will be times when you may want to consider passing, even when there are remaining "bad," unreceptive jurors on your panel, because of the good, receptive jurors also left on the panel. Many lawyers would NEVER agree to leave a juror they consider an "F" on their panel. But what if there are two or three "A" jurors on the panel that would remain if the other side accepted the panel? If you strike the "F," the other side will probably strike another A, and if the strikes continue, the other side might end up striking the other A's. Would you be better off with two A's and an F, or with a panel of C's?

These are the situations in which you should be selecting as much as you are de-selecting. When does keeping one or more good jurors outweigh the benefit of striking one or more bad jurors? Any time I am selecting a jury in a venue with rules that allow passing, I am always considering the possibility of passing; sometimes to bluff (because I believe the other side will keep striking, thus giving my side an extra strike that we saved), and sometimes because the panel as currently constituted is likely better than what we'll end up with if all the strikes are used.

Passing with one or more bad jurors on the panel is admittedly a calculated risk, and I understand how nerve-wracking it can be. Understand too, that if you seat a jury without using all of your strikes, you do waive the right to appeal based on your judge denying a cause challenge. Most lawyers' instinct is to use all of your strikes, to immediately strike unreceptive jurors until you are either out of bullets or out of bad jurors. But there are times when that is impossible, when there are more bad jurors than you have strikes. There are times when the jury is only going to get worse, because the jurors on-deck are worse than the makeup of your current panel. And there are times when you are better off keeping some bad jurors if doing so allows you to keep some great jurors.

Every jury panel is obviously unique, and every opportunity to pass needs to be carefully weighed. I don't want to oversimplify any advice, but here are some general factors to consider when you are weighing the possibility of passing on a strike and potentially keeping some bad jurors on your panel:

Are the bad jurors you might leave on the panel persuasive and passionate, or are they relatively harmless? Even if you are 100% sure that a juror will vote against you (on a jury that doesn't require a unanimous verdict), that juror isn't necessarily dangerous. Bad jurors who are vocal, have strong views, and are persuasive leaders are dangerous; not only will they dig in their heels, they'll persuade other jurors who are on the fence. But if you're faced with an unreceptive juror who is soft-spoken, isn't a know-it-all, and doesn't have particularly strong opinions, leaving them on the jury is far less of a risk.

Are your good jurors more vocal and persuasive and outspoken than your bad jurors? Sometimes it only takes a single vocal, persuasive juror on your side to win over the skeptics and the undecideds on your panel. Sometimes it takes two, or even three. But remember that when both sides know what they're doing in jury selection, all of your "A" jurors and "F" jurors will usually be struck, and you'll be left with a group of C's. When you have a juror on your panel that you are convinced would not only be on your side, but also be a strong leader, you should probably assume that the other side will strike them. You know that the other side can't and won't live with that juror on the panel, so take the opportunity to pass. Worst case, the other side strikes them and you've retained a strike. Best case, they make a mistake and accept the panel. Or perhaps they strike someone else, and you can pass again.

Any time you pass, you have to be ready and willing to live with the panel if the other side accepts, so decide whether your strong juror is stronger than any bad jurors on the panel. When there are A's and F's on the panel, ask yourself: which of the jurors are well-spoken and sound knowledgeable and reasonable enough that other jurors will likely listen to and trust them? Are your good jurors know-it-alls whom the other jurors will look to for guidance and perceived expertise, or might the bad jurors be thought of as experts? Beyond being well-spoken, which of the jurors are out-spoken? Are your good jurors more or less passionate and emotionally involved in the issues than the bad jurors? Who will probably care more about the issues in trial?

Do you have a juror who is vocal, persuasive, outspoken, a know-it-all, and who scares you to death even though you can't tell for sure which way they'll swing? Most lawyers would play it safe and strike a "wildcard" juror like this, but keep in mind that this kind of juror usually scares both sides. If you wait, the other side could easily strike them. And even if they don't, there are times when you shouldn't play it safe. When you love the makeup of your jury-- the majority are receptive, and maybe you already have a strong leader or two-- play it safe and strike the wildcard. When your jury is lousy and largely unreceptive, you may be better off living with the risk of the wildcard being against you and taking the 50% chance that your wildcard juror will be with you and persuade the others.

The next time you select a jury, don't think only about which jurors you want; think also about which jurors you would love to keep, and how you might be able to keep them on the panel. Never assume that you have to use all your strikes; sometimes the first 12 really are the best. Twice in the last year, I have used zero strikes in jury selection; both times, my side won a unanimous verdict. Most importantly, don't focus entirely on "short-term" jury selection thinking: what your jury panel looks like at that moment, and what it will look like after your next strike. Instead, think about whether it's likely to get better or get worse if both sides keep striking. Don't think about the IDEAL jury panel, it's rarely going to happen. Instead, think about getting the best REALISTIC jury panel that might involve living with some bad jurors and waiving some strikes, if it means keeping some great jurors the other side would otherwise strike.

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