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March 2017 Jury Tip: “The danger of first impressions in jury selection”

Most of us are well aware that first impressions matter... and linger. To me, the most interesting thing about first impressions is that they are STICKY: they linger even when new information you learn contradicts your first impression. But first impressions do more than just linger; while they're lingering, they impair your judgment and bend the way that you interpret the new information you're learning. So if you are familiar with the principle of cognitive dissonance—the idea that people absorb information that fits what they already believe, but ignore evidence that doesn't fit their beliefs—you can imagine WHY first impressions are so sticky.

Once you form a first impression of someone, your mind subconsciously tries to fit new information you learn about them into that theory of them... even when that information should be making you question whether your first impression was right. Stuff they do or say that fits confirms your impression; things they do or say that contradicts your impression is more likely to get ignored or explained away or interpreted the wrong way.

Now when it comes to jurors and first impressions, a lot of attention has been paid to how jurors form first impressions when they make decisions. But today, I want to focus on the other side of the bar: how first impressions blind lawyers when you're assessing your jurors during jury selection.

Despite how some jurors may feel, lawyers are human beings, too; when you're selecting a jury, you're forming first impressions of jurors. Sometimes on purpose—I can't count the number of times I've been asked by a lawyer “what do you think of our jurors so far?” after almost zero voir dire—but always subconsciously. And when lawyers form first impressions of jurors, those impressions get sticky... even when that first impression is based on information that isn't particularly insightful or reliable. The first thing you notice about a juror that seems like a clue about whether they'll be a good or bad juror for you gets sticky. You notice a juror smiling, or frowning, and you create a mental theory about that juror. You notice a juror wearing a suit and tie, or with a tattoo or piercing, and you create a mental theory. You notice a juror holding a copy of Ayn Rand's *The Fountainhead*, or an ACLU totebag, and you create a mental theory. The first thing you hear about a juror (usually their city or residence and their job) gets sticky. And that's a big problem, not just because first impressions stick, but also because the first clues you get from your jurors are the least important, far less important than the attitudes and opinions and values that they'll express just minutes away during voir dire.

But even the first opinion they express in voir dire gets sticky. And while it's important to interpret the clues we get about jurors in voir dire, the stickiness is a bad thing. The stickiness is a bias that blinds us to viewing everything else our jurors say and do in voir dire objectively. You create a first impression based on their first answer, so you give it

more weight than the things they tell you later... and you naturally try to fit their later answers into your first impression, even if they don't fit so well.

Now being intelligent, logical lawyers, I have no doubt you are able to change your mind about your jurors. Someone seems wonderful at first, but then tells you they hate lawsuits or corporations with a passion, and you throw your first impression out. The problem is that when the conflict between your first impression and new information is subtle, you may inadvertently never realize that your first impression should be tossed. The more information you inadvertently fit into your first impression, the more evidence you think you have that supports that impression. And pretty soon you convince yourself that a bad juror actually said receptive things.

So other than trying your best to recognize the psychological effect of primacy and trying your best to assess everything your jurors say objectively, how can you stop yourselves from being misled by a first impression? The easiest way: don't form them. Stop the mental practice of asking yourselves how you feel about a juror too early. Do what your judge instructs your jurors to do: try to hear all the evidence before making a decision. Now that's never entirely possible, but what you can do is this: force yourself to be skeptical of every juror until voir dire is done. Think about how you feel about each juror in the middle of voir dire, and whenever you sense that you have a "good feeling" about a juror, tell yourself that you're wrong. Sometimes you'll be amazed at how different your jurors' answers sound when you've wiped those "good feelings" out of your mind.

The good news is that jury selection happens on an even playing field; your opposing counsel is just as susceptible to primacy and first impressions as you are. And there are ways to use them to your advantage... at least when you're on the plaintiff's side and get to go first in voir dire. If you identify a juror who you're pretty certain (from their job, perhaps) will be unreceptive to your case, it never hurts to start by asking them a (meaningless) question that they're likely to agree with... just to create a sticky, misleading first impression for opposing counsel. Let's say you're a plaintiff-side employment lawyer and there's an HR staffer on your jury. You could take a straight-forward approach, ask them "have you seen some bogus accusations of discrimination by employees?" and immediately figure out that they're bad for you... but defense counsel would immediately realize they're good for the defense. Or you could strategically ask a question like "how do you feel about companies that fail to follow a company policy?" It may seem silly, but you'd be surprised at how blinding first impressions can be, so make sure you're more careful than the other side when you're picking your next jury.