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August 2010 Jury Tip: “The danger of identifying your best jurors”

It’s often said that “jury selection” is a misleading term, since you’re essentially de-selecting a jury. Every lawyer knows that you’re powerless to select the jurors that you keep on the jury panel. But as obvious as this concept is, one of the most elementary mistakes that I see being made time and again in jury selections across the country is that too many attorneys are asking questions in jury selection that identify their best jurors. Said another way, too many lawyers are identifying their most receptive jurors—to their opposing counsel.

Identifying your best, most receptive jurors during your own voir dire time is even more dangerous than you might think. Not only are you helping the other side prioritize their strikes and sweep your best jurors off the panel, you’re also wasting the limited time you should be using to identify your worst jurors, to begin subtly persuading the jury, and to learn your jurors’ values and beliefs so that you can better persuade them during trial. You have a long list of things to accomplish in jury selection, and doing the other sides’ work for them should not be on your list.

For some lawyers, I understand that the idea of asking mostly “negative” questions during jury selection can be frightening. For the record, I don’t advocate asking only negative questions during jury selection, but I’ll explain how to handle the “positive” questions later. Let’s talk about your concerns about focusing on negative questions and your worst jurors.

How do you know that the jurors who don’t express negative opinions are receptive, good jurors? Selecting a jury without hearing “good” answers from the jurors left on the panel might feel a lot like blind faith, but in reality it’s a fairly safe, calculated bet. When you carefully remove the jurors who most strongly disagree with your case from the pool, you’re left with the jurors who disagree the least, and perhaps some jurors who kept quiet. Think of voir dire as touching your case’s most sensitive nerves; the jurors who react negatively to your most sensitive issues will be the least receptive to your case, and the jurors who don’t react at all are either receptive or aren’t particularly bothered by your greatest concerns. More likely than not, any jurors who have concerns that they keep quiet about during voir dire tend to be far less opinionated, outspoken, vocal, and forceful anyway, so they’re far less dangerous than those jurors who spoke up. There’s no guarantee that a hostile, outspoken juror might have declined to talk, but most outspoken jurors will speak up when you hit a nerve that bothers them.

A common concern that I hear from lawyers is the fear that you might alienate the good, receptive jurors if you don’t ask them questions and interact with them. There are other ways to talk and interact with the rest of your jurors without identifying them as receptive, but you should never give them the opportunity to give “good” answers for the sake of letting them talk. If you have lenient voir dire time, talk to your jurors about their

jobs or about similar experiences, without probing too far into judgmental opinions. Talk to them about their values and their beliefs without asking them to express sympathy, skepticism, or suspicions about the case or about lawsuits in general. Shining a light on your best jurors will only get them off the panel, while keeping your best jurors in the dark forces your opposing counsel to make uneducated guesses with their strikes.

Perhaps the most common fear among lawyers is that too many negative questions might present your case in a bad light, or that too many negative answers from the bad jurors might taint the rest of the jury panel. I've talked about this topic in several jury tips, most recently in February 2008, and you've probably heard similar views elsewhere. What one outspoken juror says will never change what another juror believes. Using the wonderfully-polarizing topic of politics to make my point, if you're a liberal, listening to a conservative radio host won't transform you into a conservative; in fact, it will probably reinforce your own opposing beliefs. Don't worry about negative questions or negative answers tainting your jurors, as long as you're using them to identify your worst jurors.

In reality, you should be more worried about the exact opposite—persuading your jurors too early during jury selection. The goal of any trial is obviously to win over your jurors, and the goal of any jury selection is to leave the remaining jurors receptive to your case, but winning over your jurors TOO early is a recipe for disaster. Too often I've seen lawyers present such a persuasive, slam-dunk view of their case early on—especially in courtrooms that allow the lawyers to give brief “mini-opening” statements before voir dire begins. Persuading the jurors too early only encourages them to be outspoken and supportive, to the point of talking their way off the jury. I've seen mini-openings done so well that dozens of receptive jurors had to be excused for cause when they expressed views so supportive of one side and criticized the other side so harshly that it was clear they had already begun drawing conclusions about the case and could no longer be impartial. Even without a mini-opening, I've seen lawyers focus so heavily on convincing jurors of the strengths of their case during jury selection that the same thing happens; convinced jurors talk their way off for cause, and the least receptive jurors are the only jurors left. Case lost.

So when should you persuade the jurors during voir dire, and how? There is one form of persuasion that you can never start too early or go overboard with—building your own credibility with the jurors by being personable, listening to their questions, showing them that you understand their concerns, and most importantly showing them that you can listen to and understand the viewpoints of jurors who disagree with you. But when it comes to persuading jurors about your case itself, there are a few dangers to avoid. You cannot persuade the jurors too overtly, or you'll get a tongue-lashing from your judge. You cannot persuade the jurors too early, or you'll lose your best jurors to cause challenges. And you cannot persuade the jurors with individual questioning, or you'll identify your most receptive jurors to the other side.

The technique that I advocate is to ask persuasive questions that build group consensus, not individual consensus. Once you get an individual juror to agree strongly with your themes, you might as well put a target on their back and say goodbye. But if you get an entire panel to raise their hands in agreement (without getting into an in-depth discussion with individual jurors), you can build group consensus without letting the other side pick out individuals to strike. Toward the end of your voir dire, once you've identified the worst jurors, start asking questions that foreshadow and communicate your themes to your jurors, and make sure you're certain that most of your panel will agree with these questions.

Convince your jurors that the opposing litigant made inexcusable mistakes that your jurors would never have made by asking them questions about their own approach to similar situations. Help your jurors criticize a careless plaintiff or defendant by asking them what safety precautions they take when driving, handling their finances, or using products. Convince your jurors that they might have made some of the same mistakes they might be tempted to criticize your client for by asking questions that force them to honestly confront some of their own shortcomings. When you ask "how many of you have ever driven faster than the speed limit?" or "how many of you have ever signed a long, complicated contract without reading all the fine print or without understanding all the complex legal wording," jurors are much more likely to forgive your client for similar mistakes. Convince your jurors that they agree with your trial themes by asking group questions about opinions and beliefs that you're certain most of them share. When you ask your jury "by a show of hands, how many of you believe that companies or business people who sign their name to a contract should follow the contract to the letter, no matter what," and 90% of the jurors raise their hands, leave it at that. You will have communicated a critical trial theme, the other side will realize how much consensus you have, and (perhaps most importantly) the other side won't be able to strike 90% of the panel or know which jurors agreed most strongly. And that's what jury selection is all about—giving your client an advantage in trial without helping out the other side.

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