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### **January 2014 Jury Tip: "Camouflaging Stealth Jurors"**

I can't think of many jury selections of mine in which I wouldn't have wanted an extra strike or two, even when we've done a great job of getting extra jurors off the panel with cause challenges. And I can think of dozens of trials where my wish list of jurors to strike was a lot longer than the number of strikes available. So how would you feel about getting more peremptory strikes during jury selection than the other side has, and more than the judge has given you? There is a way, without violating any rules of ethics.

First off, talking your worst jurors off the panel by encouraging them to admit bias should be your first option, but it's becoming more difficult these days, for two reasons. Cause challenges aren't available in every courtroom in America, because there are many judges who simply won't grant cause challenges. And many judges who do in theory are incredibly stingy about granting cause challenges, even when the jurors express obvious bias. I've seen judges refuse to excuse jurors who have said things like "I can't see how you could ever convince me, given [some fact]," or "I'm biased against you [with a genuine explanation]," or "the other side is starting way ahead of you." Some judges have their own "magic words" that they won't share with you, and if a juror doesn't say those words, they won't be excused. And even when you have a receptive judge, cause challenges are expensive in terms of voir dire time. If your voir dire time is limited to 15 minutes or 30 minutes or less than an hour, you may not have enough time to slowly encourage a handful of jurors to admit bias. If you're in a federal courtroom with a judge who doesn't allow attorney voir dire, forget about cause challenges.

There's only one way to get more strikes: to convince the other side to fear and strike a juror you don't want. To spend a little voir dire time getting a juror whom you've already decided will be unreceptive to your case to seem like a receptive juror. By getting your bad jurors to talk about some experiences they've had that may make them seem receptive, or seem like they might identify with your client, or by getting them to agree with some of your premises.

I've often preached about the mistake of doing the other side's work for them, and how a savvy lawyer should never spend voir dire time identifying who their best jurors are. This is the opposite. There are far too many ways to camouflage your worst jurors than I could mention, and I'm sure you're capable of developing ways that I haven't thought of, but I'll mention a few easy examples.

The "same thing happened to me" juror. In my experience, many or most lawyers believe that a juror who has had a negative experience similar to what happened to the plaintiff will "identify with" the plaintiff and be sympathetic. Not necessarily true, and more often a misconception. In reality, most jurors who have "suffered" what the plaintiff has gone through tend to be low-damage, because they've been through it and don't view the trauma as "unimaginable." They've dealt with it and still lead happy lives. And many of

these jurors don't even view their experiences as "suffering" at all. I've seen jurors who have lost loved ones to wrongful deaths or medical malpractice shrug it off, emotionally-speaking. I've seen many jurors who were mistreated at work or wrongfully fired or who work through pain shrug it off, deal with it, and move on without complaint. So if you're a plaintiff lawyer, get these jurors talking about their experiences but not how they felt about it; most defense lawyers will worry and strike these jurors.

The "low expectations" or "high expectations" juror. Another misconception: that jurors who have experienced lousy service from a doctor or professional, or who have seen nothing but lousy driving from truck drivers, will be more likely to blame a doctor or truck driver. In reality, bad experiences often set lower expectations. And when a juror assesses the negligence of a defendant, they will usually compare the defendant's conduct with what they're used to seeing. Lower expectations mean less shock and outrage from the juror. Same goes with jurors who have seen nothing but terrific work; their expectations and standards of conduct tend to be much higher, so they often hold defendants to higher standards. So if you're a defense lawyer, get this juror talking about their great experiences with doctors or whatever your client happens to be; many plaintiff lawyers will worry and strike these jurors.

Just a couple more. Almost every juror will agree to rule any way you ask as long as you qualify your question with the phrase "if proven." Their answers mean nothing; in fact, the more skeptical the juror is, the more they usually bend over backward to tell you "if you prove it, I certainly could" award millions, or award nothing. But it's easy to scare the other side by getting a juror to say "if proven and supported by the evidence, I could award \$100 million for a strained neck" or to say "if the law says it's legal, I could find Bernie Madoff not liable for all the fraud he committed."

Last one. Almost every juror will say they hate frivolous lawsuits, but that means nothing. And yet when a defense lawyer gets a juror who would probably be receptive to the plaintiff's case talking about how there are too many lawsuits, most plaintiff lawyers get scared. Few jurors actually like insurance companies or multinational corporations, but that doesn't make them anti-defense. And yet it's easy for a plaintiff lawyer to scare the defense counsel by getting a juror to talk about their general dislikes or to say they prefer the "little guy" to big companies.

So whenever you're trying to convince the other side to strike a juror you would otherwise strike, remember my advice from years ago: most lawyers develop an irrational fear toward jurors who seem loud and opinionated and fall in love with jurors who come across as friendly, open-minded, and who lack strong opinions. And if it hasn't occurred to you yet, the same can be done to disguise your best jurors as jurors who might appeal to the other side, and to convince the other side that your best jurors are good for them.

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