

5055 Oakwood Avenue  
La Canada, CA 91011  
Los Angeles and Nationwide

# HARRY PLOTKIN

## JURY CONSULTANT

(626) 975-4457  
YourNextJury.com  
harry@yournextjury.com

### **July 2017 Jury Tip: “Good voir dire should feel uncomfortable”**

Skilled trial lawyers believe in the power of building credibility with the jury. The best lawyers excel at building rapport with jurors from the first minute of trial, showing your jurors that you’re reasonable and honest, approachable and human. But unfortunately, rapport and credibility aren’t enough to win consistently in trial. Jurors who are philosophically opposed to your case won’t be swayed by your credibility. Rapport won’t save you from a bad jury... or even one or two strong jurors against you. To win consistently in trial, you have to be brave enough to ask the tough, uncomfortable questions during jury selection that identify bad jurors.

Just like you can’t make an omelet without breaking a few eggs, a good lawyer can’t pick a good jury without ruffling a few feathers and making some jurors uncomfortable. Ruffling feathers is a necessary evil. That doesn’t mean upsetting your entire jury and falling behind in trial; the trick is to ask the questions that ruffle your bad jurors’ feathers and don’t bother your good jurors. Skilled lawyers aren’t afraid to provoke bad jurors; provoking arguments is one of the best ways to get them upset enough to complain about your case and get excused for cause.

Over my years of selecting juries, I have seen every style of voir dire. I have seen plenty of lawyers try to walk on eggshells by asking the “tough” questions in lazy ways that don’t probe for brutally honest answers. It never works. There’s no “nice” or “polite” way to ask the tough questions, so don’t bother trying to sugarcoat them. Good voir dire questions encourage bad jurors to say awful things about your case. Bad voir dire questions discourage bad answers.

“Is anyone going to award the plaintiff less money just because there are too many frivolous lawsuits?” “Is anyone going to assume my client is guilty just because it’s a big corporation?” No juror will volunteer an answer, even if they agree deep-down. If your question makes the juror feel stupid for admitting it, you’re discouraging honest answers. Instead, ask questions that make your jurors’ biases seem reasonable. If you had asked “who feels like too many people exaggerate their damages to ask for more than they really deserve these days?” or “who feels like too many corporations are doing unethical things these days?” you would have heard a lot of awful opinions... but flushed out your truly bad jurors. And the unbiased jurors won’t be swayed by what other jurors say.

“Would anyone here be unable to treat a corporation the same way you’d treat an individual?” “Does anyone here have any concerns about awarding damages against a city or county or state?” Only the most vocal, outspoken jurors raise their hands and voluntarily admit biases to “yes or no” questions. 95% of your jurors won’t raise their hands... so you’ve learned nothing about how 95% of your jurors feel about an important issue. Don’t assume that jurors who don’t raise their hands to “yes or no” questions aren’t biased; all you’ve learned is that they haven’t admitted bias.

Establishing credibility with your jury is incredibly valuable... until the moment that you argue a message or ask your jurors for something a juror or two is against. No matter how reasonable and credible and friendly you seem to a juror, no amount of rapport will ever get a union member to be okay with an employer firing an employee without progressive discipline, or a tort reformer to be okay with multi-million damages for pain and suffering. So don't be shy about talking about the warts in your case in jury selection. I know some terrific plaintiff lawyers who tell the jury (in venues where it's allowed) up-front that they'll be asking for big, specific damages, as in "I'm not asking you to decide anything right now, but at the end of this trial, I'm going to ask the jury for \$50 million for my client's pain and suffering, so I need to ask you right now: who feels like that amount of compensation would always be unreasonable or excessive, no matter what an injured person has gone through?" You probably wouldn't be surprised at how angry some jurors get when they hear \$50 million, but you might be surprised to see how much easier it is to get jurors off for cause when they get angry.

To me, the more toxic the issue, the easier it can be to select a good jury, because toxic issues make it much easier to get bad jurors talking and complaining. I have consulted on (and won verdicts in) trials where the plaintiff spilled hot coffee on their lap... because the infamous McDonald's verdict makes it so much easier to get bad jurors complaining. But if your next trial doesn't have a well-publicized, toxic issue stirring the jurors up for you, you'll have to do the stirring.

Very few of your biased jurors will make your job easy by standing up and admitting that they're biased. With most bad jurors, you have to dig and pry for their biases... and because they're often unaware they're biased, they won't simply volunteer it. You have to ask open-ended questions about how they feel, and diagnose the biases yourself. Pick on the jurors who haven't raised their hands and ask a simple question: "how do you feel about how corporations conduct themselves these days?" or "how do you feel about lawsuits against cities?" forces the jurors to explain themselves. Ask questions that don't have clear, safe answers. Don't be shy about stirring the pot. The main purpose of a good voir dire is to uncover your jurors' venom, so remember that poisonous snakes only release their venom when they're angry and feeling attacked. Now I'm not suggesting that jurors are like poisonous snakes—or that you should ever "attack" or cross-examine jurors during voir dire. But I am suggesting that jurors tend to remain quiet until they realize that your case may rub them the wrong way or offend their values... so don't make the mistake of letting politeness or building rapport get in the way of asking questions that rub the bad ones the wrong way.