

September 2008 Jury Tip: “Jurors who scare both sides”

Whether or not you’re relying on a jury consultant, every attorney should go into jury selection with an understanding of juror profiles that will be receptive to your case.

Your first order of business in voir dire should be to weed out obvious bias by encouraging jurors to voice their immediate suspicions and concerns about your case. Next, highlight facts about your case that some jurors might find troubling, and encourage these jurors to admit difficulty staying fair and following the jury instructions. Spend some time rehabilitating those jurors who will likely be receptive to your case, encouraging them to be fair so that opposing counsel won’t be able to successfully challenge them for cause. If you have some issues that may be particularly troubling, ask some voir dire questions designed to convince jurors that they would have handled a similar situation closer to your client than they might otherwise admit (a psychological process called “normalization” that will be the topic of next month’s jury tip).

At this point, jury selection would be relatively simple—you’ve uncovered your worst nightmares, identified your most obviously receptive jurors, and hopefully made your panel more receptive to your case. But you shouldn’t be done yet, not until you’ve asked some voir dire questions designed to clue you into your jurors’ subtler predispositions. This is where jury selection becomes much more challenging.

Past jury tips have covered a wide range of fertile voir dire ground designed to help you make educated peremptory challenges in jury selection. During this time, you should be uncovering those experiences, attitudes, and values that the jurors themselves are cognitively unaware will ultimately shape how receptive they will be to your case.

Because the jurors don’t yet know the facts, the strengths, and the weaknesses of your case, most are completely unaware of which side their values make them more likely to favor. For example, an incredibly diligent, pro-active juror who goes to the doctor for health checkups every three months, reviews her financial investments daily, and does a ten-point safety inspection on her car every morning before she drives to work doesn’t know how likely she is to dismiss a plaintiff who failed to do any due diligence. It should be your practice to know how each juror’s unique makeup may influence their ultimate verdict, based on your case’s comparative strengths and weaknesses.

My message this month, though, is not to give more advice on ways to judge your jurors. Instead, my message is to encourage you to develop sound profiles and stick to your guns during jury selection. Too often, I see attorneys scared off by the outspoken jurors on the panel, even when those loud jurors express values that make them receptive to one’s case. Loud, opinionated potential jurors scare the daylight out of attorneys—usually both sides—and intimidate lawyers into wasting peremptory strikes that might be better used on the silent killers on the panel.

Potential jurors who claim to be biased are no more biased than the other jurors on the panel, and peremptory strikes are routinely wasted on these jurors when the judge or opposing counsel rehabilitates them into promising to be fair. In reality, all jurors are biased in some way, whether they knowingly admit it or are blissfully unaware. The jurors who claim to be biased in voir dire are either trying to get off the jury or (here's the irony) are the most honest and self-aware jurors on your panel, and probably more likely to be objective than the rest.

Don't jump to conclusions; jurors aren't jury consultants, nor are they reliable when it comes to predicting their own biases or verdicts. In fact, most jurors are completely unaware of why they make decisions in trial, although they usually think they know. To rewrite a famous phrase, talking about juror bias is like dancing about architecture, which is to say that most jurors have no idea what may bias them or where their biases will lead them in a trial that they have not yet seen.

Instead of taking the bait and wasting peremptory challenges on the loud and the allegedly-biased, focus on the underlying values and attitudes that will make each juror receptive or hostile to your case, and never lose sight of the fact that, in voir dire, jurors don't know what your case is all about. Just because a juror complains loudly about the workers compensation system and lazy employees doesn't mean that juror will be unreceptive to a plaintiff's case, especially if the plaintiff comes across as honest, hard-working, and genuinely interested in trying to work through a disabling injury.

Instead of automatically striking your loudest jurors, spend more time on them in voir dire. An outspoken juror will undoubtedly be more influential to other jurors, so take the time to figure out if the juror will be your worst nightmare or your strongest advocate. If you determine that the outspoken juror may be hostile to your case after all, don't stop asking him/her questions. The more an outspoken juror says, the more likely your opposing counsel is sweating bullets and worrying about what that juror may do. More likely than not, opposing counsel will probably use a peremptory on that juror anyway.

Just the opposite are the smiling, friendly jurors and the smart, reasonable-sounding jurors on the panel. No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. Not true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

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