

October 2009 Jury Tip: “Stop relying on demographics”

If you’re still relying on demographics, even a little bit, during jury selection, stop and dig deeper. Unless your voir dire is so limited by the court that you’re forced to rely on shortcuts and assumptions—and I’ll give those of you in the voir dire Bermuda triangles of the world advice in next month’s tip—there are always better criteria to use, and better questions to ask, during jury selection than gender, ethnicity, age, or even income and education.

Even some of the best attorneys I’ve worked with and spoken to rely on demographics. I’m often asked questions like “do we want men or women on our jury?” I can’t blame them for thinking that way—even many jury consultants are guilty of putting demographics in their jury profile reports and believing that demographics can be useful indicators of predispositions and verdicts. But if you have the opportunity to ask your jury even 15 minutes of voir dire questions, or if you have the luxury of a full day of voir dire or even jury questionnaires to analyze, the truth is that demographics are NEVER the best criteria to use.

In all my years of researching juries and analyzing mock trials and focus groups, demographics have NEVER come up as significant factors. That’s not to say that demographics aren’t sometimes predictive. In some cases—although very few, in my experience—there are differences between demographic groups. Perhaps 70% of women and 25% of men are pro-plaintiff in a particular case. But each and every time, there is an underlying REASON why men and women are viewing your case differently, and that reason is totally unrelated to gender itself. If you ever find that demographics are an important variable, it means your jurors weren’t being asked the right questions. If this were a business litigation trial, you’d probably find that 90% of the men—and 90% of the women—with a working knowledge of bookkeeping and auditing might be pro-plaintiff.

In many cases, demographics are often not predictive at all. When they are, it’s because members of a certain demographic group share a common experience, value, or attitude—not because of who they are, but because of their experiences, and to a lesser extent, their culture. A commonly held stereotype about jurors and race—that minorities tend to be much more pro-defense in criminal cases, while Caucasians tend to be much more prosecution-oriented—may be true, but there are underlying reasons. Members of minority groups tend to be much more distrustful of police and law enforcement, and for a specific reason—they are much more likely to have had a negative experience with a police officer, know someone who has had a negative experience, have heard about negative experiences, and have developed negative impressions of law enforcement as a result. If you were to identify jurors who had negative experiences and impressions of police officers and their honesty, you would be doing a much better job of identifying pro-defense jurors than if you simply relied on race. You’d probably find a handful of

prosecution-oriented minorities who have positive impressions of the police and a handful of defense-oriented Caucasians with negative experiences.

The only advantage to relying on demographics is that it is very easy—you don't need to ask a single voir dire question to identify someone's ethnicity, gender, age, or visual indicators of their social class or sophistication. Keep in mind, though, that when you rely on demographics to pick your jury, you're also relying on ASSUMPTIONS. Sometimes those assumptions are wrong. Jury research has overturned the conventional wisdom, for example, that female jurors are more sympathetic toward female plaintiffs in sexual harassment cases. But even when your assumptions are right, you can do a much better job of picking your jury than relying on demographics.

The next time you feel tempted to rely on demographics, ask yourself WHY you believe males, or Hispanics, or younger or wealthier jurors might be more receptive to your case. Is it because they are more likely to have experience, familiarity, or an understanding of some of the issues in your case? Is it because they are less likely to trust the opposing litigant because of negative experiences? Is it because they are more likely to believe your story because they've probably seen similar things themselves? Instead of blindly assuming, identify what your underlying assumptions are, and ask those questions instead.

In commercial and breach of contract trials, older jurors (but not experienced corporate employees) tend to be more pro-plaintiff than others—not because they're older, but because many come from a less complicated, less cynical time when a handshake promise was commonplace and written contracts weren't always necessary. Instead of choosing jurors based on age, ask them how they feel about promises and the necessity of written contracts.

In complex patent trials, males often tend to be more pro-defense than females—not because they have a Y chromosome, but because men are more likely to be trained in engineering, science, and technology and more likely to have mechanical experience fixing cars, fixing plumbing, and understanding the mechanics of how things work. Women are no less CAPABLE of understanding these same issues, and the defense would be much better off with a female engineer—or even a female who does her own auto maintenance or electrical wiring—than a male picked at random from the jury.

Always remember that the less you rely on assumptions, and the deeper your questions delve into your jurors values and beliefs, the better your jury selection will likely be. Demographics are only the first layer, so if you're given the luxury to ask your jurors about their experiences, their values, and their beliefs, take full advantage and make sure your jury selection is as educated as it should be.

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