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July 2015 Jury Tip: “Persuasion in voir dire that actually works”

Pre-conditioning during jury selection is a controversial subject; technically forbidden, but practiced in some form or another by most trial lawyers (in my observation, at least). Don't blame me if you get admonished by a particularly strict judge for pre-conditioning, because some judges won't allow even the slightest hint of pre-conditioning. However, the reality is that most judges do allow voir dire questions that subtly persuade, as long as the questions genuinely ask jurors for information about themselves. But here's the point: not only are questions that start out “would you agree that...” and require only “yes” or “no” answers much more likely to be shut down by a judge, they're also incredibly ineffective at persuading jurors. The most effective way to being persuading jurors during jury selection involves asking perfectly appropriate voir dire questions that are the least obvious form of pre-conditioning. Win-win. The only downside? Asking voir dire questions that persuade jurors is much more challenging and requires much more creativity than simply lecturing your trial themes to your jurors.

So before we discuss how to effectively persuade jurors with voir dire questions, set aside your worries about getting objections and upsetting the court. Believe me, I've seen plenty of judges who won't stop an aggressive lawyer from basically giving their opening statement during jury selection. Realize that, technically speaking, voir dire questions that persuade aren't automatically forbidden. In most venues, voir dire is only improper if preconditioning is the “dominant purpose” of the question. If persuasion happens to be the side-effect of a legitimate question that elicits information from jurors, it's okay to pre-condition.

But for now, let's set aside the ethics and legality of pre-conditioning and focus on how and when it can be effective. Remember that in my last jury tip, I warned against the dangers of overt pre-conditioning; specifically, sharing the facts of your case in direct or barely-veiled “hypothetical” ways. But I also wrote that “a good jury selection should absolutely include some pre-conditioning, as long as it's subtle persuasion. You do need to ask questions that get jurors thinking about your case issues in ways that match the themes of your case, and there are ways to do that without sharing any facts from your case.” So how can you influence your jurors during voir dire, without even hinting at the facts of your case? There are two key ingredients to persuasive voir dire: make your questions about the themes and principles of your case, not the facts, and design your questions so that your jurors' answers are what persuades them.

Write this down, because it's important: nothing you say during jury selection will change anyone's mind; only your jurors can change their own minds. What you can do is to ask questions that help your jurors remind themselves of how they really feel about issues involved in your case. You can ask questions that force them to think about things that they wouldn't otherwise realize until they remind themselves: experiences they've had, approaches they've taken to similar situations, lessons they've learned.

This may sound obvious, but I can't stress how frequently during my jury selections I hear opposing counsel ask questions like "wouldn't you agree that teamwork and getting along with your co-workers is important?" or "don't you think it's possible for a lawyer to put his own financial interest before their client's best interest?" In a vacuum, who wouldn't agree that something is "possible" or "important?" Don't assume that just because all of your jurors nod and say they agree means you've made some progress or begun to persuade them. They certainly know what you'll be arguing, but they won't be more likely to believe it. And worst, they haven't internalized your theme: you haven't found a way for your jurors to make your points important or real or probable to them.

Instead, your voir dire questions have to remind jurors to think about what they've actually done or how they actually feel... and only when your jurors make that personal connection will they begin thinking about the case in the ways you want them to think. In a recent medical malpractice trial, I wanted jurors on-board with the thinking that "early detection is the best protection" against cancer. Without being reminded that they've heard that maxim over and over from the medical community, our jurors were vulnerable to believing that discovering cancer too late to fix can happen even with good health care. So I had my client ask our jurors if they had heard about the importance of early detection... and if anyone had put that idea into action. One by one, the jurors reminded themselves that they got preventative tests like mammograms, routine medical tests, or annual checkups. "Even without any signs or symptoms of a medical problem" we asked? "Of course, my doctor expects me to" they realized. Reminding them of what they'd heard and what they'd practiced as patients persuaded them to think differently (and along our lines) than they would have otherwise.

The best persuasion in voir dire involves lawyers tailoring questions to the unique experiences of their jurors, and showing jurors that they apply the same approaches in their jobs or lives that the lawyer hopes they apply to their client. This isn't easy to do and involves some improvisation, but can be planned if you understand the principles you're trying to demonstrate. Let's say that you're suing a professional for making a negligent mistake through lack of diligence, like a doctor failing to double-check a medical chart or an accountant missing a red flag in financial statements. Pick out a few jurors with jobs that you understand and tailor questions to their jobs that basically ask the juror "what do you do to make sure you're being extra careful and not making mistakes?" Ask a plumber "after you've fixed a pipe, do you check a second time to make sure the leak is gone, just to be careful? Why?" Ask an accountant "when do prepare a customer's tax return, do you go over anything more than once, just to be sure you didn't make any mistakes? Why?" And follow up with "now, in your job, if you make a mistake, what's the worst thing that could happen? OK, so let me ask you this: do you think it's less important for a surgeon operating on a sick patient to double-check things than someone who does your job? Why not?"

Now I realize that improvising voir dire by tailoring questions on the spot to your jurors' unique experiences can be tough, so luckily there are some short-cuts that can be effective. My war story about early prevention illustrates one easy-but-effective method:

asking your jurors if they've ever heard of a concept that is essentially a trial theme of yours, and then asking "has anyone here ever practiced that idea in your life?" The more your jurors connect the dots between your theme and their lives, the stronger your jurors will become an advocate for that theme because they'll internalize it. Never assume that your jurors will connect the dots themselves. For example, asking your jurors specific questions like "do you wear a seatbelt when you drive? Do you check your mirrors frequently? Do you slow down when you're driving in fog?" doesn't necessarily remind your jurors that they live out the concepts of defensive driving or personal responsibility; unless reminded, they may assume they do those things out of custom or the rules of the road. Instead, ask them "when you drive, what precautions do you take to make sure you're keeping yourself, and other drivers, as safe as possible?"

For many reasons, jury selection is the most important phase of trial when it comes to your ability to influence the success of your case. Once discovery ends and trial begins, you can't change the facts of your case, you can't stop the other side from hammering on your worst facts, you can't control how many bad jurors get called into your courtroom, and you can only get rid of a small handful of them with peremptory strikes. But one thing you can do is to make your entire jury pool more receptive to your case by showing them ways that they already agree with the themes and principles in your case. No matter how compelling you think your case will be, it never hurts to make sure your jurors already agree and to get them on-board. So even though the primary goal of jury selection should be to remove the most unreceptive jurors, you should always set aside some time and effort on persuasion, because unlike peremptory strikes, there is no limit on the number of jurors you can persuade and make more receptive during jury selection.