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September 2015 Jury Tip: "Don't waste voir dire on the burden of proof"

I would guess that every lawyer who regularly goes to trial is at least somewhat guilty of asking some "standard" voir dire questions in every jury selection, no matter what the unique facts of the case… or knows another lawyer who does. And that's okay; if you have a couple of unique, "pet" questions that you feel gives you insights into how your jurors think, keep on asking them. On the other hand, I suspect that many of you have a checklist of voir dire topics that you cover every time you pick a jury… and I'm guessing that the checklist has become longer and longer over the years, until the point that it's far too long for your jurors' attention spans.

Instead of trying to convince you to stop asking the same standard voir dire questions in every case—and instead, to write new questions that deal with the unique values and themes in your current trial—what I'd like to do this month is to help you whittle down that checklist by cutting one popular but pointless topic: the burden of proof.

One word of caution: if you're defending a criminal trial, disregard everything I'm about to say; this tip is specifically for civil trials that don't deal with criminal acts. If you're defending an accused criminal, you absolutely need to ask jurors how uncomfortable they would feel letting someone go if they felt he was "probably guilty, but not 100% sure." The reason that criminal lawyers should (and civil lawyers shouldn't) voir dire about the burden of proof is completely different. When jurors are convinced that someone has possibly (or even probably) committed a terrible crime, many have a strong instinct to be risk-averse and lock up the accused, just to be safe. The question actually has little to do with how jurors weigh the proof in their minds. For better or worse, jurors don't fight that same internal struggle with money in civil cases.

So if you trust my advice implicitly and are looking only for applications, it's simple this month: plaintiff lawyers, don't ask your jurors who would feel uncomfortable deciding a civil trial based only on the "more likely true than not true" standard. Defense lawyers, don't ask your jurors who would feel uncomfortable holding the plaintiff to their burden, or following the instruction that the defense need not "prove" anything to prevail. For the purposes of this tip, include both lines of questioning in my definition of "burden of proof" voir dire. That's it, with one exception I'll discuss toward the end. Read on if you're unconvinced, skeptical or curious, or are interested in understanding why.

I'll boil the reasons down to three: the impression that "burden of proof" voir dire creates in your jurors' minds, the effectiveness of those questions, and your opportunity cost.

The opportunity cost is simple: your voir dire time is precious, your jurors' attention spans and tolerance for long voir dire is limited, so don't spend time on a topic that doesn't help you select a more receptive jury or persuade your jurors. But as I'll explain, not only do "burden of proof" questions fail to identify unreceptive jurors, they actually

harm your case by making jurors think your case is weak… and in so doing, unintentionally persuade your jurors in the wrong direction.

Let's talk first about effectiveness. In theory, I'm sure you'd like to know which jurors will hold your side to a higher burden of proof than the law requires. The problem lies in the fact that your jurors are unaware and incapable of answering that question, no matter what they believe. How much proof would you need to be convinced? 51%? 74%? 81%? No juror is cognitively aware of the answer. And after a trial is over and your jurors have made up their mind, no juror can convincingly tell you how convinced they were with a percentage. Don't believe me? Here's my evidence: having mock tested hundreds of civil cases in front of thousands of mock jurors over the past 15 years, I have statistically tested the "burden of proof" question. In each of these mock tests, I have asked mock jurors to answer (among many other questions) whether they would feel uncomfortable or unable to decide a trial based on preponderance, or whether they would feel more comfortable using a higher burden of proof. The result? Jurors who believe they are uncomfortable with preponderance are actually BETTER for plaintiffs than jurors who don't have an issue with it. Jurors who express no discomfort with preponderance were slightly MORE likely to find for the defense. Why? I can't answer this definitively, but I have a theory: I believe that people who are willing to express discomfort with preponderance are simply more honest, conscientious, and idealistic—qualities that slightly favor the plaintiff side—but not more skeptical.

So "burden of proof" voir dire tends to fail at identifying jurors who won't follow the burden of proof. If that were the only problem, asking these questions would be harmless. But over the years of talking with jurors post-trial, and hearing some candid jurors express their reservations during jury selection, I'm also convinced that "burden of proof" voir dire gives jurors the impression that you think your case is somewhat weak. If you're not concerned or nervous that a group of unbiased people using their common sense will see it your way, why are you asking? And why are you stressing that your jurors HAVE to follow that instruction? In many jurors' minds, they view any attempt by lawyers to tell them about laws they HAVE to follow as confirmation of their worst suspicions about lawyers: that you're using technicalities and loopholes in the law to win, rather than having the facts, common sense, and justice on your side.

Plaintiff lawyers, never tell your jurors that "we only have to win by a feather." Telling your jurors "we expect to prove our case by a lot more than 51%, but the law says we don't have to…" doesn't fix the problem. Instead of asking "burden of proof" voir dire, you need to ask some questions about circumstantial evidence, because in many of your cases, I imagine you don't have a smoking gun that directly proves liability. Ask your jurors if anyone feels like circumstantial evidence isn't "proof," because some jurors certainly feel that way.

Defense lawyers, never tell your jurors that "we don't have to prove anything or even put on a single witness." Jurors absolutely believe you have to explain some things. Like a criminal defendant refusing to testify, it reeks of guilt and hiding something from the jury. Unless the plaintiff's entire opening statement and witness testimony are so

obviously hollow (which it never is), the burden will shift in your jurors' minds. Instead of asking "burden of proof" voir dire, try asking your jurors some questions about the difference between being perfect and being reasonable, and between failing to do something that might have helped and being negligent. You need to identify (and strike) jurors who might find a defendant to be negligent for failing to do everything it could have, instead of judging negligence based on reasonableness.

Finally, I did mention that there is one exception to my advice: when a civil plaintiff is suing over something serious that would otherwise constitute a crime (sexual assault or theft/embezzlement are two perfect examples), plaintiff's counsel should ask about the burden of proof in voir dire. The reason: when jurors hear someone being accused of a crime (even in a civil context when they're not being charged with a crime), many jurors still feel like they're finding someone "guilty" and want to be extra careful before passing such a serious judgment. But in the 99% of civil cases in which this doesn't apply, scratch the "burden of proof" topic off your list and enjoy the extra time you've saved.