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January 2013 Jury Tip: "Rethink Conventional Wisdom"

As a jury consultant who works on over 100 trials each year, I meet and work with a lot of lawyers. Just like any other profession, there are great lawyers and not-so-great lawyers. Many are fantastic. But as you might expect, there are also many I come across without enough trial experience or insight into decision-making to truly understand jurors. And inevitably, I hear a lot of clichéd, stereotypical, misguided, and downright wrong theories about jurors.

Some of the time, lawyers develop unique, personal theories about jurors, and that's okay... as long as the theories have been developed on enough observation to be valid. But more often than not, the theories are anecdotal and based on too small a handful of trials or jurors to be legitimate. If you're convinced that hairdressers are awful for defendants because a single hairdresser on your jury was awful, you need to research the term "sample size." This way of thinking may sound crazy, but I hear illogical theories based on one or two jurors all the time. Even two or three or five anecdotal experiences is not nearly enough information to draw reliable conclusions about types of jurors. Developing strong convictions about a demographic group based on a small handful of jurors isn't a theory, it's a superstition.

But pet theories about jurors are harmless compared to the bad "conventional wisdom" about jurors that I hear more often. Like all misguided conventional wisdom, it's incredibly dangerous because it's so pervasive. Because it's so pervasive, it's persuasive and has a dangerous credibility to it. I have no doubt that every litigator and trial lawyer among you has had an older colleague pass down some bad conventional wisdom about jurors to you, and I don't blame you for trusting the messenger because of their stature and experience.

Some of this conventional wisdom was once true but is now woefully outdated. If you believe in the eternal truth of conventional wisdom about jurors, you should read Clarence Darrow's 1936 writings on "How to Pick a Jury." Darrow, a terrific lawyer in his time, advises you that Catholics "love music and art, [and] must be emotional," that "Baptists are more hopeless than the Presbyterians," and that "Lutherans, especially the Scandinavians, are almost always sure to convict." Times change, cultural values change, and new generations of jurors with different values and points-of-view replace older generations. Generations X and Y now make up more than half of the jury pool.

But some conventional wisdom was never true. If you have strong convictions about demographics-- so strong that you immediately want to strike or keep a juror based solely on their gender, race, age, education, perceived intelligence, or occupation-- you're making a huge mistake. It's true that jurors within demographic groups tend to be somewhat likely to have common shared experiences, cultural values, and attitudes, but you should never assume that all nurses, Asians, senior citizens, or high school graduates share the same point-of-view. The various theories that I regularly hear about demographic groups are often misguided, sometimes valid, but always superficial. It's always wrong to be SURE that a juror will have a certain point-of-view because of their demographic.

Unfortunately I can't address every piece of bad conventional wisdom I hear, but let's discuss one of the most common, interesting, and wrong theories out there: the myth that jurors who have had a similar experience to a plaintiff or defendant will automatically identify and sympathize with that litigant. The conventional wisdom that I've heard from the mouths of literally hundreds of lawyers is that a juror who has been cheated in a business deal will immediately side with a plaintiff suing for fraud. That a juror with a disability will almost certainly give damages to a plaintiff with a disability, or even an alleged (questionable) disability. From nervous defense lawyers, that a juror with a back injury will give big damages to a plaintiff with a back injury, because the juror will identify and sympathize with the plaintiff. And just the opposite from nervous plaintiff lawyers, that a juror with a back injury will refuse to award large damages to a plaintiff with a back injury because they will think "I have a back injury, and I never got any money for it, so why should they?"

All of these ways of thinking are myths. And the reason is simple: every person deals with and learns from an experience differently. Some people get tricked into signing an unfair contract and think "I was cheated, I shouldn't have to follow an unfair contract, and neither should anyone else!" Others who have signed an unfair contract blame themselves and think "this was my fault, I should have been more careful, it's still my responsibility to honor what I signed, and the same goes for anyone who signs a contract." Some people with back injuries struggle with their pain and limitations and recognize that they have emotional distress or disabilities; as jurors, these people will trust a plaintiff claiming to have a disability or pain or emotional distress worth something. Even if they've never received compensation, these jurors will usually be receptive to a plaintiff's claims, as long as the juror doesn't perceive the plaintiff's injuries to be far less than their own. But others with back injuries tough out their injury, ignore the pain, continue working full-time without letting it slow them down, and so as jurors, they tend to expect others to do the same; these jurors will distrust claims of disability and minimize damages.

The experiences your jurors have matter very little and tell you almost nothing during jury selection. How your jurors FEEL about their experiences is what matters, and it's dangerous to guess how your jurors feel when you have the luxury of voir dire. Your job is to ask them during voir dire, not to make a bad assumption and guess. Some courts don't allow attorneys to ask any voir dire, and so I don't blame you for guessing; it's the best you can do. More and more courts these days are limiting voir dire time to minimal amounts; I've seen some lawyers being forced to voir dire 12 or 18 or even more jurors in 45 minutes or even 30 or 15, sometimes even in state court. You'll probably have to make some educated guesses about jurors in these situations. But when you do, it's even more important to understand the real reasons jurors make decisions and to figure out which conventional wisdom about jurors is outdated or just plain wrong.

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