

5055 Oakwood Avenue
La Canada, CA 91011
Los Angeles and Nationwide

HARRY PLOTKIN

JURY CONSULTANT

(626) 975-4457
YourNextJury.com
harry@yournextjury.com

January 2018 Jury Tip: “Voir dire about litmus test issues, not your facts”

On those rare moments when I get push-back on the jury selection advice I give trial lawyers, a common complaint is something along the lines of “why do you want me to ask voir dire questions about ‘X,’ there is no evidence of ‘X’ in our case?” At times I’ve been accused of making a mistake, or not understanding the case, because of the ‘X’ topic in my voir dire advice. Sometimes ‘X’ might be the topic of work disability fraud in a personal injury trial in which the plaintiff is still working. In a trial defending a corporate defendant, ‘X’ might be corporate corner cutting on safety in a trial that has nothing to do with products or safety. ‘X’ could be a discussion of whether warning signs or warning labels are important or unnecessary in a trial where a plaintiff is accused of being careless, even when warnings aren’t an issue.

Voir dire shouldn’t always be about discussing the exact fact pattern of your case. And if you’ve picked a few juries, you probably have been scolded by a judge about pre-trying your case in voir dire. But even if you’re able to get away with asking jurors how they feel about the exact issues in your case, there are times when you’ll learn a lot more about your jurors’ essential, underlying attitudes about your case by asking questions about topics that seem to have little to do with the facts of your case. Partly because you don’t want to draw objections, but also because many trials have subject matter that most of your jurors won’t have first-hand experience or developed opinions about. 90% of your jurors won’t have any experience, knowledge, or attitudes about patent rights coming into an infringement trial... but every juror has opinions about cheating and stealing. In fact, very few lawsuit topics are universal to all jurors, except perhaps driving and employment trials. And even then, most of those trials have at least some issues (driving a truck, or medical accommodations, for example) that many jurors have little experience and little thoughts about.

But just because your jurors may have little to say or think about the key issues in your case during jury selection doesn’t mean they won’t form strong opinions when they hear the evidence during trial. And those strong opinions will come from their attitudes about similar topics, once they start drawing parallels between a plaintiff claiming pain that won’t show up on a medical test and that co-worker of theirs who took a long medical leave but looked healthy. Your jurors can’t make those connections for themselves when you’re selecting the jury, so it’s up to you to identify the “litmus test” topics to voir dire about.

So how do you identify these “litmus test” topics that tell you how jurors will likely react to your case and the issues, even before your jurors realize it themselves? It takes a lot of creativity and the expertise of a jury consultant, but on your own you need to boil down your case to its philosophical essence... then figure out a universally-accessible topic that tells you everything you need to know about a juror’s world-view and philosophy. That’s easier said than done, so let’s break it down a little bit.

We'll start by boiling down your case to its philosophical essence. When I'm working on a civil case, I don't view them as a dispute about the facts; the facts are often known. To me, civil cases are disputes about what people or companies should have done. I once heard an attorney call civil trials "a morality play," and there's a lot of truth to it. So you need to figure out what your jurors will be arguing, if they all agree on what actually happened. Many personal injury trials boil down to whether people should be tough or have the right to complain about pain and suffering. I once heard a juror tell us in voir dire that her philosophy with pain is "suck it up, buttercup," and that's the kind of thing you want to hear in voir dire. Other injury trials are essentially about whether your jurors are skeptical or trusting about injuries, which is why I may voir dire about disability fraud in a non-disability trial. Jurors who have seen people fake a disability to get out of working are far more likely to suspect exaggeration or lying when a plaintiff claims to be experiencing pain or medical limitations.

Many "business cases," whether they involve patent infringement, breach of contract, or even product liability claims boil down to whether cutthroat competition or "rule bending" is okay or not... which is why I'll often ask voir dire questions about whether some litmus test example of aggressive business practice is "smart business or wrong." The voir dire example could be about "being aggressive in exaggerating deductions on tax returns" in a trial that has nothing to do with taxes. The point is that every juror has first-hand experience with that decision to be honest or fudge on their tax returns, every juror has opinions about whether it's common (and therefore acceptable) or unethical to do it, and in the right case, it tells you plenty about how each juror will view questionable business practices. So before you start your next trial, think deep and ask yourself "what is my trial really about?"

Many comparative fault trials boil down to whether a person (or company) should be allowed to trust others or be cynically-vigilant. That's why I'll sometimes ask about whether warning signs and labels are important and helpful, or unnecessary or ridiculous: to see which jurors believe consumers must be warned, and which think people should always be proactive about their own safety. Or in another case, I might ask about second-opinions and doing your own medical research; jurors who take doctor's opinions with a grain of salt will be much more critical of someone who blindly trusted a contract they didn't fully read, or a business partner they didn't fully vet.

These are just some of the most common examples, but every case you try or defend will have philosophical values competing under the surface of the facts and evidence... and understanding the essential values you need on your jury is the key to asking good voir dire questions and picking a good jury. Just remember—sometimes the most effective voir dire questions have little to do about your superficial facts, as long as they have everything to do with the values you want your jurors who judge those facts to have.