

March 2015 Jury Tip: "Don't pigeonhole your jurors in voir dire"

In your daily lives interacting with others as people (not attorneys), I have no doubt that you understand the concept that peoples' attitudes about issues are on a spectrum; some people have extreme views about a particular issue, but for most issues, most people are somewhere in the middle without strong opinions. For those who like to think in graphs, people's attitudes about issues in life usually fall in a "bell curve," and the fat middle of that bell curve represents the majority who really have no opinion at all about the issue.

Yet when lawyers walk into a courtroom for jury selection and start asking voir dire questions to jurors about their attitudes, many if not most suddenly start assuming that every issue in the case being tried is a polarizing one, and that every juror feels strongly one way or the other. If you read that sentence and are thinking "that doesn't sound like something I've done in jury selection," ask yourself this question: have you ever asked a voir dire question that sounded something like this?

"Some people feel that [describe one way of thinking], while others feel that [the opposite way of thinking]. Which way of thinking do you lean towards, even just a little?"

You've all heard this type of question before, and many of you have probably asked a version of it once, if not in every trial. "Some people feel that it's fair to compensate someone for losing a loved one because of someone else's negligence, while other people feel like it's not right, because money isn't going to bring that person back. Which do you agree with more, even just a little?" How is the juror supposed to answer, if they don't feel strongly or haven't ever given it any thought? You'd like to believe that those jurors will say "neither, I don't have an opinion," but in my years of observation, most don't: they do what you've asked them to do. They pick one. And you've intentionally encouraged them to pick one, if you've added the "even just a little?" to the question.

If you have, stop doing it immediately: you've been pigeonholing your jurors, and the primary danger of asking that kind of question is that you are gathering misleading information that harms your ability to properly assess your jurors. Here's why.

First, by forcing jurors to pick one of two choices, you are completely ignoring what matters most: strength of conviction. A juror who absolutely hates insurance companies is much worse than a juror who thinks insurance companies are a little incompetent, and is light-years worse than another juror who answers your question the same way-- "I would lean toward the first group"-- but who is much closer to neutral. Don't worry about jurors with weak attitudes in the middle; ask questions that dig deeper.

Second and even worse, keep in mind that when it comes to juror attitudes about any issue, there are three camps: jurors who feel strongly one way, jurors who feel strongly the other way, and then the camp in the middle that has no significant opinion about the

issue. Put another way, the middle camp includes jurors who are capable of PICKING a side if you force them to, but their answers mean practically nothing, because their attitudes are so weak and insignificant, they are meaningless. What's worse is that with most issues, the middle camp is by far the largest group, and so by lumping these jurors in with those who have strong, negative views, you are in reality obscuring the jurors you should be trying to identify. Said another way, forcing jurors to pick between two polar choices causes you to fail to differentiate between jurors who are terrible for you and jurors who are perfectly neutral.

I can't tell you how often in voir dire I've heard jurors weakly echo an attitude just because another juror expressed the same attitude earlier. You'll often find that the jurors who have neutral attitudes tend to be followers, and will claim to have opinions they don't really have... but only if you force them to take a position they don't really have.

Instead, you should be thinking about ways to identify your terrible jurors who have strong biases and only bothering to identify jurors who maybe, sorta' have less than perfect attitudes, if they have to really think about it. There are so many ways to phrase voir dire questions that identify the jurors with strong views; ask about particularly negative experiences, or if you have time, ask each juror "how do you feel about it?" in an open-ended way without putting words in their mouth, or be blunt and ask a direct question like "who feels like awarding money for pain and suffering seems pointless or unnecessary?" If you feel like your jurors aren't being candid, and that some jurors with strong views might be keeping quiet, call on some individuals and ask "how do you feel about it" to warm up the rest and make them feel comfortable chiming in. But if you're going to make your jurors pick between two options and keep asking the "some people feel like X, others feel like Y" type of question, at least make sure to give them the third option: "not much of an opinion about it."

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