

**February 2008 Jury Tip:  
“What impressions do you create in voir dire?”**

If you're a regular reader of my jury tips, you may have guessed that my primary focus during the voir dire process is to gather useful information about the jurors and uncover the subtle (and not so subtle) predispositions that shape juror decision-making. If only it were that easy. At the same time that you are trying your best to learn about your jurors, voir dire gives you your most important opportunity to build trust and rapport with your jurors and to begin persuading them by foreshadowing your themes and creating positive impressions of your case. So you need to be able to come across as personable and genuine, even while you're furiously taking notes, and you need to convince your jurors that you have a great case while asking them tough, personal questions. Voir dire doesn't have a reputation as the easiest phase of trial, for good reason.

For a month, let's take a break from discussing ways to learn about your jurors and instead focus on the topic of what your jurors learn about you and your case from your voir dire questions.

Let's start with a question I get asked quite often: should I spend most of my voir dire looking for my most receptive jurors or should I focus on finding the worst jurors so that I can strike them? It's not a question I plan on answering in this month's tip (perhaps in the future), but it brings up a number of concerns. For example, don't questions designed to identify receptive jurors simply signal your best jurors to your opposing counsel, causing you to lose them? But on the other hand, don't questions designed to flush out hostile jurors poison the jury pool when those jurors tell their horror stories and voice dissenting opinions? More importantly, can your voir dire questions really give jurors positive or negative impressions of your case?

Let's address each of these concerns. Do questions designed to identify your receptive jurors reveal them to your opposing counsel? They can, but it depends on how obvious or how subtle your juror profiles are, and of course how sharp (or oblivious) your opposing counsel is. While it's usually better to ask a subtle voir dire question over a transparent one, keep a few things in mind. First, it's impossible to know who your receptive jurors may be without trying to identify them; if you don't ask questions that could reveal sympathy, you may end up striking your best jurors. Second, remember that if you ask enough questions and elicit enough opinions, you will undoubtedly hear good and bad feedback from almost every juror. If you have well-defined juror profiles and a good sense of which opinions are important, you should be better able to recognize your best jurors, while opposing counsel may have too much information to make sense of. Realize that most attorneys are just as nervous about strongly opinionated jurors as they are about biased jurors. One of my favorite tactics in jury selection is to guess which jurors opposing counsel is nervous about. When I also wish to strike one of these jurors,

I will save that juror for my last strike; in more cases than not, opposing counsel will strike that juror for me.

Can you really poison your jury pool by asking questions designed to flush out hostile jurors? For many attorneys, this is a huge concern, and the answer is complex. In truth, a juror with a horror story or strongly expressed bias to share cannot change the minds of otherwise unbiased jurors. Every juror comes into court having developed their own set of strongly-held beliefs over a lifetime of experiences that are much more persuasive than any fellow juror could be. Refusing to ask questions that flush out negative viewpoints not only risks leaving hostile jurors on your panel, it also allows these jurors to share that horror story during deliberations, when that juror can put their story in context and use it much more persuasively.

But there is one danger to asking questions designed to flush out bad jurors. If you read my jury tip from September of 2006, you'll remember that your jurors are reading between the lines and learning about your case through your voir dire questions. When listening to your questions, jurors will assume that the situations your questions present are identical to those involved in the case, so make sure that you don't create the impression that your case is weaker than it is in your quest to flush out juror bias. If, for example, you try to uncover pro-plaintiff jurors in a commercial fraud trial by asking your jurors, "Is anyone here bothered or upset by dishonest or anti-competitive business behavior like stealing trade secrets or slandering the competition," your jurors may eventually get the impression that your trial will actually involve undisputed bad conduct and that your defendant may be guilty of it. Jurors won't necessarily understand that you are planning on disputing these types of claims, rather than justifying them. Don't go too far overboard in flushing out bias, and give careful thought to the messages your voir dire questions may be sending so that you don't create suspicious jurors.

An even more subtle phenomenon that takes place during voir dire is that, believe it or not, jurors can usually tell when there is a subject that you are concerned or even nervous about. They can tell when you broach a subject with kid gloves and when you spend far too much time on a troublesome issue. Plaintiff attorneys tend to spend far too much time on the topic of frivolous lawsuits, but their biggest mistake is the uneasy, apologetic way many handle the issue. Don't be afraid to tackle difficult subjects and challenging jurors with confidence and understanding. Even more, don't be afraid to admit the types of beliefs and attitudes that concern you; jurors appreciate straightforwardness for the same reason they distrust attorneys who come across as ingratiating and who try to hide their concerns. The tactic of telling your jurors the subjects that concern you the most—one of Gerry Spence's hallmarks, as I understand—reveals a refreshing dose of honesty and confidence to your jurors that helps convince jurors that you are credible, reasonable, and that you have enough confidence in your case that you can share its weakest points. If used properly admitting weakness is a persuasive tactic. Even if you don't tell your jurors what worries you, they'll figure it out anyway.

Practically speaking, there are few risks that outweigh the value of flushing out bias and removing unreceptive jurors from your panel. There's no need to be subtle. Remember that you have an unlimited number of cause challenges (or none, depending on how reasonable your judge is) and only a small handful of peremptory strikes. It is smart to think about the impressions you are creating with your voir dire questions among your jurors; voir dire questions can certainly remind jurors of forgotten experiences and beliefs they already held, and in this way can persuade them for or against you. Make sure to help your jurors remember principles they agree with, and be aware that you can stir up experiences and beliefs that work against you. But your voir dire questions—and the responses of other jurors—can never change a juror's mind and 'poison' anyone, so don't be afraid to flush out bias on your panel.

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