

October 2008 Jury Tip: “Normalizing your jury”

I am often asked to discuss the impression that voir dire questions create among jurors on the panel. Does the practice of searching for unreceptive jurors and asking the toughest questions highlight only the negative aspects of a case? If an employment defense attorney asks only voir dire questions about discrimination, bitter employment experiences, and unfair employment practices, will the jurors become convinced that the defendant in the case is guilty of wrongdoing?

If you read last February’s jury tip (on “the impressions voir dire create”), you’ll remember that my answer was mixed. While voir dire discussions can remind jurors of experiences and attitudes they may have otherwise forgotten, jurors don’t learn new things or change their minds during voir dire. Your questions, and the comments of other jurors, cannot ‘poison’ the jury pool, but you can bring latent juror attitudes to the surface. If you aren’t careful, you might even give the wrong impression of what the case is about when jurors start reading into your questions.

Let’s spend some time talking about the flip side of ‘poisoning’ the jury pool—is it possible to persuade jurors during the voir dire process? Can voir dire questions convince otherwise hostile jurors to believe in your case, almost like a mini-opening statement? The answer here is the same as the first. You cannot change your jurors’ minds during voir dire, but you can force jurors to re-examine their attitudes and perhaps even convince them to be more realistic and receptive to your case.

Let me give an example. In auto accident or product liability trials, you will usually have a large handful of jurors on your panel who are convinced that they never make mistakes when driving or when using products. Ask these jurors, and they will tell you that they ALWAYS inspect their cars and their power tools before using them, that they ALWAYS follow safety instructions to the letter, and that they NEVER take safety shortcuts and drive carelessly. When committed to these often-unrealistic positions, these jurors are incredibly critical of injured plaintiffs or accidental defendants and often blame their passivity or less-than-perfect safety precautions for failing to prevent their accidents. Ultra-diligent jurors seize on even the most minor missteps and blame the litigants—regardless of the opposing litigant’s negligence—because the juror has convinced himself/herself that “I never would have” made the same mistake.

Although some of these ultra-diligent jurors will insist that they are always cautious and never careless, you will be able to win back a large chunk of them by asking voir dire questions that convince them that they are not as perfectly careful as they believe at first. Ask your jurors if they’ve ever forgotten to signal before turning or changing lanes, if they’ve ever rolled through a stop sign on an empty street, or if they’ve ever started making a turn and then realized that there was a pedestrian in the crosswalk or a car in their blind spot that they hadn’t noticed at first. In a commercial trial, ask your jurors if

they've ever signed a long, complex contract that they didn't completely read—or didn't completely understand. In an employment trial, ask your jurors if they've ever lectured or disciplined an employee without formalizing the conversation in a letter or an email. If you have concerns that your jurors may be too critical of your client, ask questions that convince your jurors that they may make similar mistakes from time to time.

The process that I've just described is called 'normalization' in psychology. In part, it involves convincing others to change their views of the environment to conform to an accepted reality. If a juror has a certain view of the world, ask questions that incorporate their own experiences or outside examples to convince that juror that reality might be different from what they initially believe. In product liability cases, there are a number of jurors who find it hard to believe that manufacturers produce defective products. After these jurors have been asked if they have any knowledge of asbestos recalls, tobacco lawsuits, or pharmaceutical health risks, they become far more receptive to the possibility that a manufacturer might produce a dangerous product, knowingly or not. They simply needed a reminder to bring latent attitudes to the surface that might otherwise have been ignored.

The next time you go to trial, think about the unfair criticisms that jurors may have for your client, and deal with them directly in voir dire. Putting your case in its best light is also a part of this process, and there is nothing wrong with asking questions that force your jurors to internalize your client's decisions—and may convince your jurors that they may have made the same mistakes that the juror otherwise might criticize.

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