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July 2012 Jury Tip: “Listen, don't persuade, during Voir Dire”

In the last jury tip, we tackled the issue of holding back your instinct to argue and persuade the jurors during the first half of your opening statement and in your mini-opening statement. Again, I understand that for anyone who has a forceful, alpha personality, taking your foot off the pedal can be incredibly difficult. Taking a passive position seems especially difficult for trial attorneys; you are seemingly hard-wired to argue, persuade, and advocate for your client at all times. 99% of the time, that's a terrific quality to have. But in trial, there are a few specific situations in which you are far more effective when you slide over into the passenger seat, or into the back seat if you're the type who might be tempted to reach over and grab the wheel.

This month, let's discuss another situation in which it's smarter to take a passive, back-seat role than to aggressively try your case: during voir dire. The best purpose of voir dire is to differentiate between jurors who will likely be receptive to your case and those who will likely be unreceptive. You need to understand how your jurors approach similar situations, how they feel about the key issues involved in the case, what their values and what they believe. Yet many lawyers spend most of their time trying to persuade jurors, instead of trying to understand jurors.

I don't mind subtle persuasion and pre-conditioning during jury selection; it's a reality that the best lawyers figure out ways to begin persuading the jury, and it's effective. But it's most effective (and allowed by the court) when it's done subtly, through questions and not lectures. Pre-conditioning is most effective when it hits home for the jurors in ways they can internalize, not when the lawyer makes an argument in the disguised form of a question. What that means is, the most effective pre-conditioning voir dire questions are those that get jurors talking about their own experiences and beliefs and approaches that make them realize that they already agree with your case, your trial themes, and your client's actions or approach. For example, the best way to convince jurors that a plaintiff in a product liability was careless would be to ask a question about the jurors personal approach: "Who here would ever consider doing your own electrical wiring without any training? Why wouldn't you?"

So even when you're persuading the jury during voir dire, it's much more effective to do it subtly and passively, without being directly argumentative and forcefully persuasive. As I've said, some persuasion during voir dire is helpful and important, but the most important purpose of voir dire is to identify and strike unreceptive jurors. Even the most persuasive lawyers can't win every trial with the first 12 jurors in the box, simply because some jurors in every jury pool will be inherently unreceptive to your case. You need to spend your voir dire understanding your jurors.

I don't think it's counter-intuitive that understanding your jurors involves listening to your jurors. Yet most lawyers spend more than 50% of the time in voir dire talking, not listening. And one of the biggest mistakes that I often see lawyers make during voir dire is the failure to truly listen. You've probably been told that you should be asking open-ended questions in voir dire, but it's just as important to never prompt or influence your jurors' answers. Easier said than done,

because I often see well-meaning lawyers suggest answers to jurors or put words in their mouths, especially when the juror is struggling a little to give an answer. Let the juror think, and let the juror give his or her own answer in their own words.

Time and again, I've seen good lawyers ask good questions in voir dire, but then the dangerous instinct to be persuasive kicks in. "What do you do when you are given a written contract to sign?" is a great, open-ended question to ask in a breach of contract case, or in any case in which you want to understand your jurors' approaches to being diligent, to being careful, to being thorough, or their attitudes toward responsibility toward protecting themselves. Are your jurors careful, or are they passive or trusting or careless? Do they sign without reading it, without asking questions, without fully understanding the terms and legalese, or without making sure that every detail that was negotiated and promised is in the written contract? If you truly want to understand what they do and don't do, and what they think about and don't think about, let the juror answer, unprompted, in their own words.

Time and again, I've seen good lawyers taint the jurors' answers by prompting and suggesting answers: "do you read all the fine print? do you ask if you don't understand something? do you ask that the contract be changed if something seems unfair?" Understand that jurors will rarely admit to you, and even to themselves, when they do something less than perfectly. If asked, most jurors will answer "yes" to all of the above questions, even if the reality is "no." If you were to ask a juror "do you always check your blind spot and your side mirrors and signal before you change lanes?" they will almost always answer "yes." But if you were to ask a juror "what do you do when you change lanes," they will give you a more honest answer: they might say they signal and check their mirrors, but tellingly, they may leave out checking their blind spot over their shoulder. This is a perfect example of why you must let your jurors answer questions unprompted, because you need to know what they don't THINK about doing in that situation. This juror most likely doesn't THINK to check his blind spot when he's actually driving; otherwise, he would have most likely thought about it in answering the question. It may be difficult, but wait to persuade your jurors until the trial starts, especially during voir dire.

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