

February 2010 Jury Tip: “Voir dire with limits”

Last October’s jury tip, and so many jury tips in months’ past, warned against the dangers of relying on demographics and assumptions in jury selection. For many of you, that may not be fair. There are cases in which relying on stereotypes, shortcuts, assumptions and demographics are necessary. Many of my readers come from venues where the court severely limits voir dire—if attorney-led voir dire is allowed at all. Many federal courts have minimal, if any, voir dire. I’m often asked “how do you pick juries without getting to ask any voir dire questions?” or when voir dire is conducted entirely by the judge? What if all you know about each juror is the city they live in, their marital status, prior jury service, their occupation, and their appearance? Even in venues that allow voir dire, some judges may limit your voir dire to 30 or even 15 minutes for an entire panel, and some will even object to so many of your reasonable voir dire questions that you barely get to ask or learn anything useful about your jurors—even with voir dire.

When you have little to no information to work with during jury selection, develop your own educated assumptions. Think about the voir dire questions you wish you could ask, and make assumptions about which jurors would be most likely to be receptive and share certain views based on the little information you have. In these situations, I rely heavily on making educated inferences about a juror’s personality type through their occupation, attitude, and body language. Re-read my past jury tips on the six personality types—sympathetic, practical, analytical, conventional, persuasive, and creative—and the techniques I use to infer personality and likely reactions from the choice of occupation.

Pay close attention to the few visual cues you are given; for example, plaintiffs will want to avoid jurors whose attitude and comments suggest that they don’t want to serve and that their time is being wasted. Self-centered jurors who want off a jury tend to lack the empathy required to identify with a victim and award damages. Notice which jurors seem highly curious and suspicious. The jurors who keep peeking, glancing, staring, or even glaring at and scrutinize the litigants when they hear the judge read the joint statement of the case tend to be the most suspicious and receptive to plaintiff allegations. Notice which jurors seem skeptical and unmoved. The jurors who roll their eyes, shake their heads, or smirk tend to be the most skeptical of lawsuits and plaintiff’s cases.

If your judge grants you the luxury of voir dire but not the luxury of time, you’ll have to prioritize what you want to accomplish. Remember, there are four main objectives you should try to accomplish in a full voir dire: building foundations to excuse jurors for cause, identifying unreceptive jurors to use your peremptories on, convincing your jurors that they share values with your case and your client, and learning about their values so that you can tailor your case to convince them that your case shares their values. In only 15 or 30 minutes, you’ll only have time for one of these tasks. Which one you should choose depends entirely on the nuances of your case.

If you have a polarizing case and you expect some jurors to have trouble being objective—perhaps you represent a wealthy plaintiff, are suing a government agency, are defending an accused murderer, or are defending an unpopular corporation—spend your time encouraging biased jurors to talk themselves off the jury.

If your trial is complex and the case will likely be a close call decided by the jurors' expectations and values, ask questions that give you clues to your jurors' decision-making. If you're trying a difficult case and expect to meet with a lot of resistance and unwarranted jury criticism—perhaps you're representing a pedestrian who was struck outside a crosswalk or defending a driver who failed to maintain his brakes—ask persuasive questions that convince your jurors that they might do the same things that you're concerned they will criticize your client for. If you're not quite sure how best to present your case to the jury—should you focus on defending your client's passivity or focus on attacking the opposing litigant's mistakes?—spend your time learning about your jurors and how they feel about the issues and values of your case.

With limited voir dire time, it certainly helps to be the defendant and go second, having heard plaintiff's counsel ask most of the questions. But for every attorney, even those in venues with unlimited voir dire, you'll also want to weigh the risk of boring and alienating the jury with too many voir dire questions, so there are times when cutting your voir dire and making assumptions might be the smarter choice.

Some venues and judges may not allow you to ask your own voir dire questions but will allow you to submit questions for the judge to ask, which creates another set of problems. Even when they agree to ask your questions, judges don't tend to ask them in an inviting way that helps jurors feel comfortable answering and admitting biases and concerns. Any time a juror is asked a question that ends in "that would prevent you from being fair and impartial," especially when the question is asked by a figure of authority like a judge, the juror will most likely choose not to answer. Had the question been asked in a subtler way—"does anyone here have any concerns or feel uncomfortable about..."—many more jurors would speak up and express biases. But here's the catch-22; judges tend to be leery of voir dire questions that don't bluntly and obviously ask jurors to admit bias; they tend to view subtly written questions as crafty, pre-conditioning questions.

So how can you write submitted questions that get jurors talking and identify biases in such a way that the judge agrees to ask your question, as written? Obviously you have to remove any hint of pre-conditioning, but I've found that judges are receptive to questions that ask for specific experiences. Judges will almost never agree to ask questions that deal with hypotheticals, and tend not to accept questions that ask jurors to discuss feelings and opinions. When you do submit questions about your jurors' feelings on a critical issue of your case, never give in and add the dreaded "that would prevent you from being fair and impartial" phrase. Instead, try to use the "does anyone have any concerns about X that might make it difficult for you to..." phrase. Your best bet, though, is to rely on tangible experiences your jurors have had, especially experiences that clearly relate to the issues involved in the case.

Just because your voir dire has to be approved by a judge who is undoubtedly scouring your questions for pre-conditioning does NOT mean you can't get away with being persuasive with written questions. If you want to be persuasive, craft questions that communicate your trial themes through specific experiences the jurors have had. Write questions that use your jurors' specific experiences and approaches to similar issues in your case that convince them that they would do the same thing your client did, or would have done something completely differently than what the opposing litigant did. For example, you could have the judge ask "has anyone here ever taken extra safety precautions when" engaging in whatever the plaintiff or defendant might have done, if you want to argue that they weren't as safe as they should have been. You can make just as persuasive a point without getting answers by asking a question you doubt ANY juror would agree with; for example, "has anyone here ever signed an important contract worth a lot of money to you without reading it?" or "has anyone here ever merged onto a freeway without looking in your mirrors or over your shoulder to see if any cars were coming?"

Selecting a jury without a fair chance to ask voir dire questions is an unfair challenge, but not an impossible one. For those of you in venues that severely restrict or forbid voir dire, hats off to you, and I hope my advice here helps. For the rest of us, there are always situations in jury selections in which voir dire becomes surprisingly restrictive in one way or another; through opposing counsel's objections, through the judge's objections or time restraints, or in some trials simply because the jurors are too shy to talk much.

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