

December 2009 Jury Tip: “Treat voir dire like a focus group”

As important as the makeup of your jury is, you’ll rarely be lucky enough to select an ideal jury panel. Almost every jury panel will include at least a handful of imperfect jurors with skepticisms and concerns about your case. From time to time, you’ll even encounter a nightmare jury panel. Your judge will refuse to grant cause challenges of obviously biased jurors, you’ll have less peremptory challenges than hostile jurors, and you’ll be forced to try your case in front of unsupportive jurors who have fundamental differences in values with your case. The last thing you should do with an unreceptive audience is to try your case the same way you would with a friendly jury.

No matter how receptive or hostile your jury panel may be, you should always take the time to treat your voir dire like a focus group. Jury selection shouldn’t only be about identifying jurors to strike and jurors to keep, unless you’re absolutely sure you’ll be left with a panel full of jurors who will be receptive to your case and your trial themes. Instead, ask voir dire questions designed to find out how your jurors feel about the issues in your case and to learn about their values. Only by learning about their values, their beliefs, and their approaches to similar situations can you identify the trial themes to which your eventual jurors will be receptive. Just because you can’t ask them direct questions about the specific facts of your case doesn’t mean you can’t talk about the general issues and philosophical values that your case is about. Lead your jurors in a focus group-style discussion about the ethics of business competition, their approach to safe driving, personal responsibility as a consumer, how they expect contracts and agreements to be made and followed, their definitions of good faith and bad faith, or whatever your case involves.

Every jury panel is unique. For those of you who go to trial often, you’ve undoubtedly noticed that the makeup and values of your jury panels can vary widely and wildly from one panel to the next. I see it in courtrooms every week. One jury panel may be filled with jurors complaining about lawsuits and greedy plaintiffs; the next week, most jurors may complain about irresponsible companies and the need to send a message with punitive damages. Thanks to random chance, some employment trials get panels full of jurors with bitter employment experiences while others get panels dominated by happy employees and jurors in management. Never assume that your jury panel will be equally balanced; many panels have skewed points-of-view about your case that aren’t representative of the entire jury pool. As a result, you need to understand and embrace their unique point of view about business competition, the safest way to drive, manufacturing, or whatever issue your case involves.

Matching your trial themes and the values of your case to the values of your jurors is essential because of a phenomenon that psychologists call “confirmation bias.” Even if you’ve never heard the phrase itself, you’ve no doubt observed it happening around you all the time, both on juries and in everyday life. Simply speaking, it means that people decide whether to believe or disbelieve new information based on how well the information is supported by their prior beliefs, instead of how credible the new information may be. When Aunt Janet doesn’t invite Uncle Rick to Thanksgiving, the relatives who already dislike and distrust Janet will be convinced she skipped him intentionally and for spite; those who like Janet will be sure that she simply forgot or had a good reason. Few people who know Aunt Janet will be immune from developing suspicions, drawing conclusions, and pre-judging the situation, and virtually no one will remain totally objective until they hear both sides. It’s easy to see why confirmation bias is an overwhelming factor in jury decision-making and the reason that I constantly preach the message that pre-dispositions matter much more than the evidence in trial. Confirmation bias explains why jurors who believe tobacco companies lied to smokers are instantly receptive to plaintiffs’ arguments that manufacturers knowingly sold dangerous products in product liability trials, why insurance claim representatives have a hard time believing even the most genuine examples of disabilities or property damage, and why cynical union employees immediately distrust corporations accused of breaching contracts in business disputes.

Treat part of your voir dire—my apologies if your court severely limits your time—as a focus group on your jurors’ relevant values. Ask them how they approach similar situations, and find out what they consider to be foolish, dangerous, or wrong. Ask questions about their values. Where do they think the lines of right and wrong should be drawn in the competitive business world? How safe should manufacturers make their products—or are warning labels enough? Should employers be expected to PREVENT harassment in the workplace or should they only be required to CORRECT harassment when it’s responsibly reported to them? Are the spirit of a contract, the discussions that preceded it, and the expectations of both parties more important than the written terms? Should we only blame the driver who broke a driving law and caused an accident, or should we also blame the driver who failed to anticipate another driver’s mistake and failed to drive defensively enough to avoid the accident? When you’ve selected your jury, removed the least receptive jurors, and find that you’re left with a handful that have concerns, reservations, or differences in opinion, you’ll be glad that you learned about your skeptical jurors. By using some of your time to get to know their unique values, you can tailor your trial themes and the way you present your case to match the values of your actual jurors.

As I’ve stressed before, a critical ingredient in every opening statement is to assuage your jurors’ concerns that your case might be unreasonable, and the best way to build credibility is to convince your jurors that your case matches their values. Use what you’ve learned from your voir dire “focus group” to tailor your trial themes to what your jurors already believe.

Aligning your trial themes with the values of your jurors is a particularly powerful tool for appealing to otherwise-hostile jurors. For good reason, most plaintiff lawyers are fearful of leaving conservative jurors (executives, accountants, and engineers, oh my!) on their panel. For the same reasons, most defense lawyers panic when they run out of peremptory strikes and still have sympathetic jurors left. How in the world can you convince a jury with a third grade teacher and a Habitat for Humanity volunteer to award nothing to a bereaved family in a wrongful death case? The surest way to overcome concerns and persuade potentially skeptical jurors is to immediately convince them that your case fits their values and to spend your opening statement explaining to them how your case fits with concepts they already agree with.

If your jury panel has a handful of conservative jurors, rip up your opening statement that relies on emotion and sympathetic trial themes and spend your time talking about responsibility, the ways in which your tough plaintiff is trying their damndest to overcome their harms without complaining, and the irresponsible choices the defendant made that any reasonable company never would have. Conservative jurors tend to believe in personal responsibility, so champion personal responsibility in your case and explain to them how the defendant's irresponsibility made it impossible for your plaintiff to protect himself/herself.

If your jury panel is full of sympathetic, liberal jurors who are distrustful of corporate defendants, cancel your original plan to attack the plaintiff and blame him/her for their own problems. Without apologizing, acknowledge that too many corporations do the wrong thing; if your jurors believe so but sense that you don't, they'll be distrustful of everything you have to say. Make your case and your trial themes about all the responsible efforts your client took that set them apart from your jurors' stereotypical "bad corporation." It's nearly impossible to win a case with an unreceptive jury panel, but if you can't select a receptive panel in jury selection, you might be able to make your case receptive to your jury.

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