

**November 2014 Jury Tip: "Warming up your jury for voir dire"**

One of the funniest, and truest, jokes I've heard lawyers tell during jury selection is that voir dire is like interviewing for a job that no one wants. Many if not most jurors don't want to be in court, don't want to take time away from work and family to serve on a jury, and even those who don't mind serving aren't thrilled about answering questions from three strangers (the judge and two lawyers) in front of dozens more strangers while a court reporter types every word they're saying. Unless you've never picked a jury and never received a jury summons, I'm sure that you're fully aware of everything I've written so far.

So the first challenge you face as a lawyer starting a trial has nothing to do with your facts, your client, or the law: how do you quickly get 12 or 18 or 50 strangers willing and comfortable to answer personal, probing questions when it's so much easier for them to keep their opinions to themselves by staying silent or giving only the boring, "right answers" they think the court wants to hear?

There is no single right way to warm up your jury. Every lawyer has his or her own style, and what works for one lawyer may not work for another. Some lawyers are more disarming and personable than others and can get a room laughing and talking in seconds, but having a magnetic personality isn't mandatory to getting your jurors warmed up and answering candidly. But there are certain tactics that get jurors talking, and other things you may be doing that are inadvertently making your jurors clam up or give less-than-honest, guarded answers. So no matter how you like to start your voir dire and what you tell your jurors before question number one, let's talk about three must-do steps to warm up your jurors to be candid and comfortable answering questions.

First, you have to find a way to let your jurors know that there are no "wrong" answers, nothing inappropriate they could say that would upset you, the court, or any of the lawyers. Never pull out those dangerous words "fair" or "impartial" or "bias" during voir dire, unless you are trying to get a juror to promise they are fair and impartial. Never tell your jurors something like "we're trying to find jurors who are fair and impartial, so we're asking questions to see if you may have a bias." Jurors don't want to tell you they're biased, and they're shy about expressing a potential bias to the judge and other jurors. Once you've said that, your jurors will hesitate to answer honestly if they believe that the opinion they're about to express might be considered a "bias." Because if some attitudes are "biases," that means there must be "right" and "wrong" answers. And no juror wants to be wrong. Instead, give jurors the impression that you're interested in hearing "any and every point of view," so that your jurors feel that strong opinions aren't going to be judged as "wrong," but as a difference of opinion just as valid as the opposite feeling.

Second, you have to find a way to let your jurors know that you sincerely want to hear negative feelings about your case, your client, your position. That you're inviting them to tell you all the bad stuff, because you can take it. Because your number one goal in voir

dire should be to do anything and everything possible to make your worst jurors feel comfortable telling you all the bad stuff. Your jurors aren't stupid; they know which experiences and feelings and values of theirs won't be music to your ears, when you're representing a landlord or huge corporation or person suing for emotional distress. Often I advise the lawyers I'm working with to say something like "do me a huge favor: don't be polite, don't tell me what you think I want to hear, and don't tell me what you think the court wants you to say. Honestly, if you feel that [insert a few examples of biases], I want you to let me have it. Okay?"

One incredibly important, underrated way to make your jurors feel comfortable expressing negative feelings: always make sure to give a heartfelt "thank you" to the first juror who goes out on a limb and says something controversial. It's incredibly simple and easy to do, and I would recommend doing it every time. And don't stop at the first; make sure to thank each and every juror who gives you a bad answer.

The third way to make your jurors feel comfortable and candid is to give your jurors a sense of empowerment, which isn't easy to do with two aggressive lawyers asking the questions and a powerful judge looming above them. But until they're convinced that they are the ones with the power, they will feel too intimidated to speak up. One way is to stress that they're in charge, not the lawyers or the judge: tell them something like, "you're going to be the judges of the facts in this case, not me. Not the judge, and not the lawyers. Your opinions matter, and I'd love to hear how you feel." Another way is self-deprecation. By half-jokingly taking yourself down a notch, you can diffuse what many jurors probably assume about you since you're a lawyer: that you think you're the most important, powerful person in the courtroom and that you're going to try to tell them what to think. And when you make a little fun of yourself and show them that they're more important, jurors tend to like you more and feel comfortable speaking up to you... the same way that an employee would speak carefully around their boss, but would be much more frank around someone they are in charge of. Sometimes I'll tell the lawyers I'm working with to say something in voir dire like, "this is the only part of the trial where I get to hear how you really feel, so my goal is to shut up and listen to you." It's blunt, disarming, but most importantly makes the jurors feel empowered to lecture to you, not be lectured to.

Any time that you lecture to your jurors, purposely or indirectly tell them what to think, or tell them about the laws they HAVE to follow (instead of the questions they have the POWER to decide), you are doing just the opposite: making your jurors feel powerless, and stifling their willingness to talk in voir dire. Any time you cut them off to make a point or correct them, however well-intentioned, you are cooling them off, shutting them up, not warming them up. Which matters a ton, because at the end of the day, you can't pick a receptive jury and win in trial without identifying bias, and without relinquishing your case to your jurors.

*Harry Plotkin is a jury consultant in Los Angeles but practices nationwide. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements.*