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December 2010 Jury Tip: “Improvising during voir dire”

For those of you who have never hit any speed bumps, encountered any turbulence, or been thrown a curveball (or any other cliché) while you were voir diring a jury panel, consider yourself incredibly lucky. I have no doubt that most of you have found yourself, at least once or twice, in a voir dire that was much more awkward, surprising, or frustrating than you had expected. Even when you carefully script your voir dire, your jurors, judge, and opposing counsel rarely follow your script.

Sometimes you’ll get answers you never would have expected. I’ve heard jurors insist that there’s nothing wrong with breaking contracts, stealing trade secrets, and sabotaging competitors in the business world. Sometimes you’ll find yourself facing a hostile jury panel ready to argue with you. I’ve seen jurors tell plaintiff attorneys that any person who sues for emotional distress is a greedy liar, and I’ve seen jurors tell defense attorneys that any corporation who is being sued in court must have refused to settle and therefore must be unreasonable and guilty.

Sometimes you’ll ask perfectly good questions and get no answers at all because your panel is shy and uncomfortable. I’ve seen good lawyers ask jurors if any of them have any opinions about lawsuits or car crashes or business fraud and seen no hands go up. Sometimes your jurors will raise concerns that you never anticipated and that you’re not sure how to address. A juror once told my client that he didn’t trust doctors at all but doubted that a plaintiff would have enough evidence to prove malpractice because “doctors are too afraid of lawsuits, so they would probably find a way to cover up their mistakes.” And because every judge has a different opinion about what is and is not appropriate during voir dire, sometimes you’ll have to improvise when opposing counsel or the judge objects to what you’re trying to ask. Every judge has a firm opinion about what is appropriate and what is inappropriate in voir dire; the problem is that these rules and opinions vary wildly from judge to judge. I’ve seen judges veto questions about hobbies and television as “irrelevant,” and I’ve seen other judges veto questions about specific, case-related experiences as being essentially too relevant to the case at hand.

The lesson to be learned is that you’ll have to be ready to improvise and adjust your script during voir dire. If you’re a natural at conversation and improvising, you probably don’t script your voir dire anyway—but you’ll have to be ready to change your style if something isn’t working. If you like to plan out your voir dire and type out your questions beforehand, you’ll have to be ready to adjust to unexpected obstacles by changing your tone, your wording, or how you frame your questions. No matter what obstacles you encounter during voir dire, the last thing you should do is panic and yield your right to talk with your jurors. Remember that there’s almost always a way to ask any question that you planned on asking; the key is to find the ideal way to ask the question to make your jurors, judge, or opposing counsel more comfortable.

Some jury panels are naturally talkative and opinionated, but you'll no doubt encounter some cases in which breaking the ice is surprisingly challenging. If you're asking what you believe to be good general questions and getting little to no answers from your jurors, it's almost always because your jurors are feeling too shy to speak in public. And the main reason that jurors feel reluctant to talk during voir dire is that the jurors are afraid of giving answers they believe are controversial or "wrong" in your eyes or the eyes of the judge. Jurors simply won't be fully candid and honest, let alone talk much at all, when they think there's a "wrong" answer to the question. When you're faced with a wall of silence, try to be more personable and ask your questions in a softer, less formal way. Make sure you're not using words like "fair" or "impartial." Soften up your questions by adding phrases like "does anyone here have the feeling that..." Even softer would be asking the jurors "does anyone here have any thoughts or feelings about..." your topic, without even suggesting an answer. How much you soften your questions depends entirely on how shy your panel is, and calling on individual jurors only makes the rest of the jurors more reluctant to volunteer answers. Find the bravest juror, and use their answers to encourage comments and debate. Once you get one juror to express an opinion, encourage the other jurors to "tell us how you feel about that. Does anyone here have a similar feeling, or maybe a different approach?" Sometimes it's necessary to help jurors feel that they aren't alone in their beliefs. It helps to phrase your questions by saying "many people feel that..." or even personalizing it by including yourself or your own relatives in the question. Use positive peer pressure to help jurors feel comfortable expressing themselves.

On the other hand, some jury panels are anything but shy. There will be times when you'll encounter hostile jurors who have no problem disparaging your case, telling you how wrong you are, and giving the other side's opening statement during your voir dire. That's not necessarily a problem; as I've written before, jurors don't "poison" other jurors, and hostile jurors are doing you the favor of helping you identify your strikes and perhaps even talking their way off the jury for cause. Oftentimes they even help you by making similarly hostile jurors more comfortable speaking up, or at least encouraging the jurors who agree slightly to air their concerns. One or two hostile jurors aren't too tough to handle. In fact, listening closely to these jurors and showing that you understand their point-of-view is one of the best ways to show the other jurors on the panel that you're honest, credible, and reasonable. I've said it before but will say it again: jurors firmly distrust lawyers who appear to stubbornly advocate one side without showing the ability to reasonably listen to, consider, and at least understand the opposing point of view. How do you feel about political commentators on television who automatically disagree with everything the other party's commentators argue and begin shouting and debating without first listening and trying to find common ground? So without cutting your hostile jurors off and arguing with them, hear them out and show the rest of the panel that you at least understand why they might feel the way they do. Just be sure to move on to others before they monopolize your time.

Hostile jurors are actually useful, in small numbers of course. It may sound like a dream come true, but a jury panel that seems to unanimously agree with you can be much more dangerous than a hostile panel. If you're asking questions and too many jurors seem to be agreeing with you, your problem may be worse than struggling to identify which jurors to strike; you may be inadvertently asking questions in a way that encourages jurors to tell you what you want to hear. Treat a "yes man" jury the same way you'd handle a shy jury; make them feel more comfortable expressing honest concerns by changing your tone and your phrasing. Make sure the jurors know that "I'm sure all of you are going to do your best to be fair, and that you'll all follow the court's instructions, but what kind of concerns about [your topic] might you have to set aside to do that? I'm sure someone here has something about [insurance companies, or personal injury lawsuits, or emotional distress damages] that makes you a little uncomfortable or rubs you the wrong way...." Make it clear to the jury that you're not asking them to admit bias, just asking them to voice reasonable "feelings" and "concerns."

I could probably write another 100 pages on the unexpected hiccups and disasters that can and do take place during voir dire. What to do when you run out of time and you haven't covered enough, or haven't talked to all your jurors? What do you do when most of the jury panel seems to be disagreeing with you? How do you handle a long-winded juror who tries to answer every question and monopolizes your voir dire time? What do you do if opposing counsel strongly pre-conditions your jurors, creates false impressions about the case, and gets away with it? What if your judge doesn't like your questions and ends up objecting to and vetoing most of what you're trying to ask? Should you meekly yield and stop asking questions or do you keep trying to re-phrase your questions at the risk of getting lectured even more in front of the jury?

Rather than write another volume, I'd be curious to hear from you which unexpected roadbumps you encounter and struggle with the most, and which questions you have. One of the reasons that many (if not most) lawyers worry more about jury selection than any other part of the trial is that voir dire is by far the most unpredictable part of trial. There are no depositions and no discovery. Only half of the cast has a script, and you never know what the jury will say, what they're really thinking, and what they're not telling you. It's easier said than done, but you have to approach voir dire ready to improvise, expecting anything to happen, but prepared to handle every scenario appropriately. Trials may not be won and lost in voir dire, but the battle for your credibility might be.

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