

August 2009 Jury Tip: “Does a juror’s lawsuit history matter?”

If you’ve ever picked a jury, you’ve probably learned that the hardest part isn’t figuring out interesting voir dire questions to ask your jurors—it’s juggling all the answers you receive and figuring out which to pay attention to and which to ignore. If you’ve ever used a written juror questionnaire or been given extensive time to conduct voir dire during jury selection, you may have had to juggle answers to dozens of questions from each juror, and every answer will seem interesting and useful. Juror 14 was in the navy, had some medical training, and does charity work. Juror 35 is a middle-aged Hispanic female, like the plaintiff, and has been a jury foreperson in a civil trial. Juror 47 has friends and family who are in law enforcement and believes jury damage awards are “too high.” Juror 9 is an accountant for an insurance company but once filed a medical malpractice lawsuit on behalf of his mother. Do some of these answers sound familiar? Which should you pay attention to? Unless you practice in a venue with extremely limited (or no attorney-led) voir dire, you are overloaded with information on your jurors. If you’re relying on misleading and trivial information to pick your jury, you may be worse off than the lawyers in Pittsburgh, South Carolina, or elsewhere that don’t get to ask any voir dire questions.

If you’ve ever conducted jury research and profiled your jury pool, you’ve probably realized that 90% of the answers given in voir dire and questionnaires are completely irrelevant in jury selection, even answers that sound important. In every focus group, mock trial, and jury research project that I conduct, I make sure to ask the mock jurors a wide variety of voir dire-style questions beforehand to profile them and to better understand differences in their decision-making. Within these questionnaires, I always include questions that are thought by many to be useful in jury selection, but that I know will be irrelevant—demographics, prior jury service, and a host of others.

If I had the time, I would go through and debunk every jury selection myth out there. This month, I’ll share some of my jury research data with you to help debunk one myth in particular—the misguided idea that a juror’s own history with lawsuits will be relevant to your lawsuit.

For this exercise, I combined data from hundreds of mock trials, focus groups, and jury research projects I’ve conducted in civil cases. My melting pot of data included examples of every type of civil trial—personal injury, employment, commercial, malpractice, construction, land use, intellectual property, you name it. Conveniently, or perhaps tellingly, the armada of mock jurors in this master data set were split evenly on verdict—50% for the plaintiff, and 50% for the defense. But what happens when we categorize the mock jurors based on their personal experiences with lawsuits?

28% of these mock jurors had reason to relate to the plaintiff—they had either filed a lawsuit themselves or had close friends or family members who had been plaintiffs. 10% of the mock jurors had reason to relate to the defendant—either they or a close friend or family member had been sued before. 5% of the mock jurors had been on both sides, and the remaining 57% had never been, or never had a relationship with, a plaintiff or defendant.

Conventional wisdom would suggest that the ‘past defendants’ should be highly unsupportive and skeptical of lawsuits, angry at plaintiffs and frivolous lawsuits, and more likely to give defendants the benefit of the doubt and defense verdicts. But curiously, these ‘past defendants’ only rendered defense verdicts 53% of the time. 47% of the time, they were pro-plaintiff.

The same conventional wisdom would suggest that the ‘past plaintiffs’ should be supportive of the right to sue, should identify and sympathize with current plaintiffs, and should be highly pro-plaintiff, as a group. You might be surprised to hear that ‘past plaintiffs’ rendered defense verdicts 57% of the time. Mock jurors who had filed lawsuits of their own, or who had friends or family who had, were slightly more pro-defense than even the ‘past defendants.’

Other than bursting the bubble of conventional wisdom, the lesson that should be learned from these numbers is that there is NO significant difference in juror decision-making between past plaintiffs and past defendants. Plaintiff attorneys, don’t feel too comfortable with jurors who have filed lawsuits, but don’t necessarily fear jurors who have been sued before. Defense attorneys, don’t assume that a juror who has been unfairly sued will grind his axe for your client, but don’t necessarily worry that a juror who has filed a lawsuit will feel suspicious toward your client simply for being sued.

The interesting lesson from this data is that the roles your jurors have played—plaintiff and defendant—don’t matter, but their time in the courtroom does. Remember those uninitiated jurors who have never been in a lawsuit and don’t have close friends and family who have? They’re not quite as neutral as you might think—58% of them rendered plaintiff verdicts in mock trials. And what about the small group of jurors who have been on both sides of a lawsuit? You might imagine that their balanced perspectives would make them extra impartial and open-minded toward lawsuits, but this isn’t the reality—67% of them rendered defense verdicts in mock trials. Lumping together the past plaintiffs, past defendants, and the ‘both sides’ jurors into one group reveals that ‘lawsuit veterans’ were only 42% pro-plaintiff, compared to 58% of the uninitiated.

I should point out that this exercise is far from a scientific study, but it does bring up fascinating questions about jurors, trust, and self-identification. First, why don’t past plaintiffs and defendants identify with and support other plaintiffs and defendants? I would argue that the only juror attitudes that matter are their feelings about the situation your case involves. Jurors simply don’t have generalized feelings about lawsuits that carry over to all types and cases and override how they feel about a particular situation.

A juror who believes that patients should be entirely responsible for their health and medical care—doing extensive research, asking all the right questions, seeking second opinions, understanding and accepting all the risks—may just as likely believe that consumers should be allowed to trust that the products they buy are safe. The same juror who is predisposed to blame plaintiffs in medical malpractice cases may be predisposed to fault defendants in product liability cases. For the same reason, don't assume that a juror who has sued an employer for discrimination will be supportive of a plaintiff suing a large corporation for patent infringement.

I've heard the argument that past plaintiffs will be hostile to current plaintiffs if their lawsuit didn't go well; "if I didn't get what I deserved, they shouldn't either" is the thinking. I've never found this to be true—past plaintiffs who have been satisfied with their lawsuits are no more supportive than anyone else. Jurors don't identify with litigants because they are demographically similar, and they don't identify with litigants because they share the experience of suing or being sued. Jurors only relate to those who take the same approach to a specific situation as they do.

Second, what is it about experience with lawsuits—on either side of the courtroom—that makes jurors cynical about lawsuits in general? Why were the 'uninitiated' mock jurors slightly pro-plaintiff, the jurors with lawsuit experience slightly pro-defense, and the lawsuit veterans strongly pro-defense? I would certainly argue that the litigation process leaves the participants with cynical feelings by the end, and that's a big part of the phenomenon we're discussing. I would also suggest that lawsuit veterans are engaging in the same hyper-critical process of over-scrutinizing plaintiffs that I regularly see handicapped and disabled jurors do to plaintiffs in personal injury cases. Handicapped jurors are less shocked by injuries than the rest of the jury pool, less bothered by disabilities, will hyper-critically compare their condition to the plaintiff's, and will usually conclude that theirs is more serious and legitimate. In the same way, veterans of lawsuits likely aren't shocked by allegations of negligence or wrongdoing and, when they scrutinize the plaintiff's case, are much more likely to believe that plaintiff cases pale in comparison to theirs.

The next time you select a jury, make sure to focus on the few answers to voir dire questions that you believe will matter most in your jurors' decision-making. Tune everything else out, ignore the answers to the voir dire questions you've already decided were unimportant—no matter how interesting those answers might be—and don't pay attention to which side your jurors were on in their own lawsuits.

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