

212 Madeline Drive
Monrovia, CA 91016
Los Angeles and Nationwide

HARRY PLOTKIN

JURY CONSULTANT

(626) 975-4457
YourNextJury.com
harry@yournextjury.com

March 2013 Jury Tip: "Spotting the Exception to the Rule"

When was the last time that you were so happy with your jury panel after jury selection that you wouldn't have wanted an extra strike? Has it ever happened?

No matter where you practice, no matter how much voir dire time or how many peremptory strikes you get, you have one thing in common with every other trial lawyer across the country: you'll almost always have fewer peremptory strikes than you'll have potential jurors who concern you. Too many scary jurors, not enough strikes.

This is one of the most common but most difficult challenges in jury selection: which worrisome jurors should you begrudgingly keep?

Here's another universal reality of jury selection: when the lawyers on both sides know what they're doing in jury selection, many of the strikes will be fairly obvious. All the strong, obviously pro-plaintiff and pro-defense jurors will be struck. You'll strike all of the jurors you've marked with an "F" grade (and hopefully all of the D's, if your jury pool isn't a disaster). But the other side will get rid of all of the jurors you've graded "A," and most of your B's too. And so you'll be left with all of the middling "C" jurors, 6 or 8 or 12 enigmas who've said a couple of bad things and make you nervous. But from time to time, you'll be stuck with too many D's and not enough strikes to get rid of them all. Hopefully you can encourage some of them to admit to enough bias to be excused for cause, but there seem to be more and more judges these days that will do everything in their power to avoid granting cause challenges. Some judges will spend 10 minutes rehabilitating an obviously-biased juror until the juror is intimidated into admitting they'll be fair; other judges will hear a juror admit bias and simply refuse to grant the challenge.

Before I get off track, let's go back to my first question: how often have you had to keep at least one worrisome juror on a panel that you wish you could have struck? Unless you're lucky, you faced this uncomfortable dilemma in most of your jury selections.

So which seemingly lousy, unreceptive juror do you keep when you run out of strikes? Keep in mind that, usually, you'll have enough strikes to get rid of your F jurors: the jurors who openly criticize and disagree with the themes and ways of thinking that are essential to your case. Plaintiff lawyers usually have enough strikes to get rid of all the jurors who are hostile toward lawsuits and reluctant to award damages. Defense lawyers usually have enough strikes to get rid of all the jurors who admit they hate corporations or are overflowing with sympathy. So usually, the worrisome jurors left are ones that speculatively concern you; only your instincts and assumptions and stereotypes tell you to get rid of them. These are jurors who haven't expressed judgments and biases, but who fit into demographic or occupational stereotypes that concern plaintiffs (like engineers, corporate executives, and insurance agents) or concern defendants (like liberals, union employees, postal carriers, or Occupy members).

Your job will be to figure out which one (or sometimes more) of these jurors is the lesser of the evils, or maybe even better than they seem at first glance. You'll have to keep at least one of these jurors that your hunches and prior experience and legal conventional wisdom tell you will be against you. But remember my last jury tip: conventional wisdom is often wrong. Jurors aren't tainted by experiences; instead, they are influenced by what they learned from their experiences, and people react very differently to the same experience. In other words, there is good news: there is always an exception to the rule in every jury panel. Out of every ten engineers, there is at least one who will be surprisingly sympathetic and emotional and pro-plaintiff. Out of every ten postal carriers, there is at least one who will be surprisingly skeptical and cynical and pro-defendant. Being able to identify the not-so-bad worrisome juror is an incredibly advanced, valuable jury selection skill that makes good trial lawyers great. Because when the lawyers for both sides know what they're doing in jury selection, the difference between winning and losing comes down to being able to identify the one seemingly bad juror who will actually be good (or at least, not terrible) for you.

I can't keep track of the number of times I've kept a superficially-bad juror who I perceived to be the exception to the rule. Discovering the exceptions to the rule requires some careful intuition, but it mainly involves figuring out the right voir dire question to ask based on what you would expect that juror's attitude to be based on the stereotype they represent. In other words, you need to think about WHY you would expect that kind of juror to be unreceptive to your case. Ask yourself, what is it about engineers or nurses or young jurors or the fact that juror #8 is wearing a suit and tie that you would usually expect would make them biased against your case? Make sure to ask your "tough call" jurors a subtly targeted question or two that gives you a read on how they feel about that issue without telegraphing good answers to the other side.

Do you have an engineer or scientist on your panel who seems unusually friendly or caring than the usually logical, unemotional, analytical engineers? Do you have a corporate executive or employee on your panel who seems less cynical and more caring about fairness and doing "the right thing" than you might expect? Do you have a kindergarten teacher on your panel who seems much more strict and demanding than the sensitive, non-judgmental nurturer you might expect a schoolteacher to be? What about keeping a lawyer on your panel? Lawyers-as-jurors seem to scare many lawyers to death, but the truth is that they're going to be good for one side or the other. They may be more dangerous because they are so influential to other jurors, but that misses the point; it will be to one side's advantage to keep an influential juror capable of swaying all the others. If you have a lousy jury, why wouldn't you want a single juror capable of swaying the others? If you have the technical facts and law on your side, but perhaps not the case that seems "fairer" to the lay juror, why wouldn't you want a lawyer on your panel? And there are so many different lawyers with different points of view; I've sometimes kept strict, rule-following lawyers (who work with the SEC, for example) on the plaintiff's side and corporate lawyers on the defense side to great success.

Unfortunately I can't go through every stereotype with you or share my intuition with you, but hopefully I've given you the hope and the tools to figure out which juror might be better than they appear to be. And this will involve devoting more voir dire time to the toughest jurors to read. Connecting with your jurors and spending time talking with each one is a nice idea, but

you're going to have to spend more time talking with your C and D jurors so that you can truly understand the jurors that you'll be worrying about having to keep or to spend your last strike on.

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. He can be reached at 626-975-4457 and at harry@yournextjury.com.