The art of jury de-selection

Don't try to pick the best jurors; focus on identifying bias against your client

By Sonia Chopra

When heading to trial and preparing for voir dire, it's important to remember that, despite the common reference to jury selection, the process is truly one of jury *de*-selection. In reality, the process is not about finding the people who are the best for us and choosing them to be on the jury. In fact, once our best jurors become identified – whether by us or by the other side – the most likely outcome is that they will be challenged and removed.

Rather than try to find jurors sympathetic to your cause, the more effective use of voir dire time is to identify those potential jurors who have had life experiences, or hold attitudes and opinions that would make it difficult or impossible to see the case from your point of view. The only way to do this is to get the potential jurors talking. The more you are talking during voir dire, the less you are learning about who the potential jurors are.

This all sounds fairly simple, but it is not necessarily the way that lawyers are trained to conduct jury selection, neither in law school nor in practice. There are a number of barriers to effective voir dire, some of which are systemic, such as time limits, en masse questioning, and judicial discretion on cause challenges, but others are in your control and can be changed for the better. This article seeks to identify unproductive methods of voir dire, and provide tools for making the most of what is almost always too short of a time to question the potential jurors.

Three primary goals

Going into jury selection there are three primary goals: 1) gathering information, 2) eliciting bias, and 3) protecting your favorable jurors from challenge by the other side.

The most important part of jury selection is getting information about the potential jurors. It sounds very common sense, but I'm guessing that many of you have finished a voir dire and looked at your jury and thought about at least some of them, "I don't know *anything* about them." It happens, and the reason is fatigue. Jury selection can be long and tedious which can result in less effective questioning as the process goes on. After you question those first 12 or 18, the tendency is to say to the new potential jurors, "Do you have anything to add?" or "Would you have answered any of my questions differently?" instead of covering the topics in depth as you had with the first group of panelists. It is important to do your best to resist questioning fatigue and ask each and every juror at least one of your key questions.

Part of the information you are getting from the jurors is whether or not they have life experiences, attitudes or beliefs that would result in biases against your client and your case. Your job is to get jurors to express those biases by encouraging them to speak up honestly and letting them know that you value their responses. Only by getting the jurors to talk about their biases in their own words can you establish challenges for cause and make informed decisions about how to use your peremptory challenges.

At the same time as you are eliciting biases, you want to be careful not to

identify and highlight your good jurors for the other side. If time permits, you should do what you can to protect the jurors you believe are favorable from challenges for cause and, whenever possible, from peremptory challenge.

If you have the chance to use a jury questionnaire, the information can help you determine what your goal with each juror will be before you start questioning. If not, you will need to formulate your plan for each juror as you learn more about them in oral voir dire and be prepared to shift your goal as you learn more. With each juror you will need to decide: is this someone you want to try and get removed for cause, someone you like and want to protect, or someone you still need more information from?

In order to figure out your plan for any given juror, it's important to find out who each person is as an individual. We all have stereotypes and superstitions about certain types of jurors, and in the stress of time-limited jury selection, it's tempting to rely on them. The problem, of course, is that stereotypes aren't always true and making decisions based on stereotypes about demographic characteristics can not only get you in trouble with Batson challenges, but you can also end up keeping someone who is bad for your case or dismissing someone who is good. It is crucially important that you get the jurors talking and then, that you really *listen* to what they are saying as opposed to assuming someone is going to be good or bad based on their age, gender, or the color of their skin.

Group dynamics

Another thing to consider when questioning jurors is group dynamics. Through your questioning, it's helpful to try to get a sense of how the person will interact with others on the jury. This, of course, requires hearing from the juror in her own words, as opposed to just getting a show of hands or yes-or-no answers to closed-ended questions. Assessing group dynamics is really hard when time is limited. If you don't get a chance to talk to everyone, think about what the juror does for a living, whether or not they have prior jury service or other legal experience. These considerations can help you decide if the person is going to be more of a leader or a follower in the group.

You may have a pretty good idea of some of the people you don't like and don't want to keep early on, because of their profession or other responses to judicial questioning, but for the most part, you will be the one who is going to have to elicit any potential biases from the jurors.

I also know that this goes against your natural instinct as an advocate. No one likes to hear bad news or negative opinions about oneself or one's client and case but this is the one and only chance you have to talk to the jury and get the bad out in the open. Rather you hear it in the courtroom than learn later that it surfaced in the deliberation room. And, the only way you are going to get challenges for cause is if you encourage the jurors to express their biases in their own words. The more they say, the harder it is for the other side to effectively rehabilitate them.

Weeding out

During the jury selection process you're going to find jurors you like and think will be favorable to your side. If you have the time, it's not a bad idea to try to protect these good jurors from challenges. I say if you have the time, because in my opinion, getting information from everyone, and establishing your own challenges for cause are the more important goals and should be done first when there are time limits. If you think a juror is vulnerable to a cause challenge from the other side, do what you can to rehabilitate them. Get the juror to say that they could put their views aside, follow the law, wait until they hear the evidence to decide, and so on. As plaintiff's counsel you'll need to "preemptively" rehabilitate before the defense begins their questioning.

Another tactic I like to suggest is what I call "throwing off the scent" or misdirection. This works best when you have the benefit of a jury questionnaire. There may be a juror that you like, but there are one or two answers that aren't great for you. In your follow-up, focus on those "bad" answers instead of the good ones. This may lead the other side to think that you don't like this juror, which increases the chance that they will leave them on.

What are the most common mistakes attorneys make in conducting oral voir dire? There are some jury selection styles out there that are counterproductive to the goals of information gathering and eliciting bias. These include 1) trying to ingratiate yourself to the jury, 2) attempting to "educate" them as to the law or facts and 3) arguing with them over their responses. The primary problem with all of these tactics is that they waste valuable time which limits your ability to get information about the people who will be deciding your case. A secondary issue is that, we know from post-trial interviews that some jurors find it annoying when you are engaging in these practices.

Ingratiation

When I talk about ingratiation I mean spending time trying to get the jurors to like you and "bond" with you and/or your client. Now, this is not to say that you should treat jurors rudely or be a jerk, but the reality is when you try to be too chummy with jurors, or go on and on about how grateful we are for their attendance and how important they are to the system and to justice, or spend a lot of time talking about yourself and how similar you are to the jurors in an attempt to "humanize" yourself; it can backfire. Why? Some jurors tell us that they feel like it's manipulative, which fits with the preconceived notion many people have about trial attorneys. Other times you can be seen as wasting time – both the jurors' and the Court's.

Introduce yourself, briefly acknowledge that it can be difficult to talk in a group setting, and if you are nervous too, it's OK to say so. Then get started with the questioning.

If the judge has not already done so, you can tell jurors that there are no right or wrong answers, just honest ones, and let them know that if they wish, they can discuss matters in a more private setting.

Education

The desire to "educate" the panel about the law and your case themes, and to preview what you think you can prove is deeply engrained in most attorneys, but it's also the biggest time waster and something you cannot afford to do, especially if you find yourself in a situation where you have 20 or 30 minutes to talk to 18 people. Why is trying to "educate" jurors during voir dire counterproductive? The first reason is that it does nothing to further your primary goal in jury selection, which is getting information about the potential jurors so you know who you have to strike. Time constraints are the primary reason I argue against doing education in jury selection. You can spend your 30 minutes talking about the burden of proof or how to judge the credibility of an expert, or you can find out that this person doesn't believe in the concept of emotional distress damages, or that they think it's not fair to hold an employer responsible for the actions of their employees, for example.

The second reason education is not a valuable use of your time is that it doesn't really work – at least not in the context of voir dire before the jurors really know anything about the facts and evidence and when your credibility is, frankly, at its lowest. Attitude formation is complex and often illogical. People believe what they believe and with relatively few exceptions hearing from you, whom they have never met before and are probably at least somewhat suspicious of, is not going to change their opinion if they already have one. It's much more valuable for you to spend time finding out about life experiences and what people think and then consider how each person – as they sit here now – is likely to react to the issues in your case.

Arguing

Arguing goes along with "education" but is much more detrimental to the process. By arguing, I mean trying to convince a juror that his or her beliefs are wrong and providing them with all the reasons why this is so. This is the "cross-examination" style of jury selection, and it is painful to watch. When an attorney argues with a juror, they send the message that they don't want to hear what the panel members really think, especially if is detrimental to the attorney's case. Arguing has a definite "chilling" effect on responses. People who are already nervous or reluctant to speak up will now be determined to keep quiet. The juror you argued with may feel challenged and go on and on, wasting the already too short amount of time you have to talk with everyone else.

Here's an example of an ineffective exchange involving both education and arguing tactics:
Q You've told us you're generally opposed to civil lawsuits; you feel strongly that jury verdicts are too high and are concerned about frivolous lawsuits. Is that something you've derived from experiences in your past or just from what you've heard in the media?
A From the media and…
Q Wouldn't you agree that not everything that's reported in the media is true, and, in fact, it's often just plain wrong?
A Yes.
Q And, would you agree that there are also frivolous defenses? And that sometimes awards are too low and those aren't the things that necessarily get reported in the media?
A Yes.
Q You know in a real trial, it's not like what you may have seen on television. And you don't know anything about my client or this case, right? You haven't heard any evidence?
A Right.
Q So you have no reason to believe that this case is frivolous, isn't that right?

This is a paraphrase of something I've actually seen. Another version involves trying to prove to the juror that the McDonalds' verdict was justified by the evidence. What is served by this type of questioning? Do you think the juror has really changed his mind because the attorney browbeat him into a different response? What should you do with someone who holds these attitudes? Try for Cause:
Q You've told us you you're generally opposed to civil lawsuits, you feel strongly that jury verdicts are too high and are concerned about frivolous lawsuits. It sounds to me like because of your strongly held beliefs and opinions, you may have difficulty being entirely impartial on a case like this one where we are suing for substantial money damages. Is that fair to say?

The way you formulate your questions impacts the response you are likely to get. Answers to closed-ended and leading questions are less helpful than questions designed to get the jurors talking and thinking. Try to avoid the use of leading questions *unless* you are trying to establish a challenge for cause. Leading questions inhibit the goal of information gathering because they suggest the proper answer. A yes or no answer to a leading question tells you little about the individual.

Let's look at some examples of ineffective and effective questions:
Q The judge will instruct you that we don't have to prove intentional conduct on the part of the defendant. Will you promise to follow the Court's instruction?

This is a question that solicits no information whatsoever. It suggests the right answer, and does not even "educate" because there is no context and people are not yet invested in being jurors in the case. The only time I would advocate using this kind of approach is to rehabilitate a juror who is a potential cause juror for the other side. Unfortunately, on more than one occasion I've seen attorneys accidentally "rehabilitate" terrible jurors by throwing a "follow the law" type question at someone who they had already established for cause.

What's a better way to ask?

Q Who here feels like we should have to show that the defendant intended to cause harm or intentionally did something wrong before they could find negligence? Why?

Q Some people think that if the defendant didn't mean to cause harm or didn't act intentionally, they wouldn't feel right about holding them responsible. Who shares that view?

These questions get the concept across, but are seeking information about how the juror thinks about the concept and whether or not they agree with it. Incidentally, when I say that you shouldn't "educate" the jury, I don't mean that you should not introduce concepts that will be important to the case. The key is to introduce concepts and case issues you have concerns about, not to try and precondition jurors to your version of events.

Let's look at another example:

Q Do you understand that we only have to prove our case by a preponderance of the evidence, not beyond a reasonable doubt?

What does the answer to this question tell you? I suggest that 99.9 percent of people say "yes" to a question that starts with "Do you understand…" regardless of what comes after it. This one is a throwaway. How could you ask it better?

Q The judge has told you that the burden of proof in a civil case is lower than in criminal cases; that we only have to prove that something is more likely true than not true instead of proof beyond a reasonable doubt. What do you think about that?

Q Some people think that burden is too low, or that we should have to show more than that when asking for substantial money damages. Who feels the same way?

Again, introduce the concept and see what people think. If you don't get any answers, follow up with a more specific, "some people think" prompt. This type of wording suggests that the answer is common, so it's OK for the juror to share the opinion.

Another barrier to effective voir dire is poor listening skills. It can be so hard to actively listen to jurors' responses during jury selection! You might be thinking about how much time you have left; the judge is going to cut you off; and a million other things that make listening difficult. Aside from not having the brain space to listen, our own needs and agendas can get in the way which can result in talking too much, interrupting the juror to hurry her up or change the topic, and ineffective or non-existent follow-up to their responses. For example:

Q Has anyone here or anyone close to you ever felt they were treated unfairly on the job?

A My daughter was sexually harassed at work and ended up quitting as a result.

Q Anyone else?

When someone shares something that was obviously painful or difficult, even if it is someone you don't want to highlight or an experience that you think would be detrimental to your case, be a human being and acknowledge what they are telling you. An appropriate response would be, "I'm sorry to hear that. Do you feel comfortable telling us a little more about that or would you prefer to talk privately?" Or, if you are short on time and don't need or want follow-up because you already know what you plan to do with this juror a simple, "I'm sorry she went through that, thank you for sharing. Anyone else?" would be better than just acting as if the answer hadn't been given.

Because you have limited time, voir dire questions have to be carefully constructed ahead of time so you can get as much information as possible in the most efficient way. Every case has two or three issues that are going to cause some jurors to be biased. In preparing for voir dire, start by making a list of all the potentially prejudicial jury issues in the case – the jury issues and the legal issues are not necessarily the same thing. Once you've created your list, streamline the list to two types of issues:

(1) Areas where bias is common or widespread enough that at least some of the potential jurors are likely to readily acknowledge having opinions or beliefs that are prejudicial. One example in civil cases is a pro-management bias or problems with emotional distress damages.

(2) The other areas to explore are those where the biases could be so damaging to the case that even though there may be very few jurors who have had such experiences, the issues must be touched on in voir dire because having even one juror with the experience or attitude would be catastrophic for the case. For example, in an auto case someone who has been responsible for causing a similar collision or injury, or in a medical case someone who has been treated by the defendant doctor or hospital.

Once you've brainstormed that list, come up with the two or three areas that you are most concerned about and ask yourself what experiences, attitudes and beliefs about these issues are likely to be held in the jury pool.

Not all questions are created equal as previous examples have tried to demonstrate. In addition to what I've already discussed, when coming up with how to ask the questions, one of your goals should be to ask the question in a way that identifies the jurors who will be problematic for your case without exposing everyone likely to be sympathetic to your side. So how do you do that? Use what we call the 10 to 20 percent rule. This means you want to come up with a question that 10 to 20 percent of people answer one way, and 80 to 90 percent answer another way, and this is key: the small percentages are those jurors who hold views that are detrimental to your case. In other words, you want to identify a small enough group of jurors that you can focus on getting off for cause or with a peremptory challenge. Think about this concept in terms of the questions plaintiffs' attorneys like to ask about the size of damage awards and number of lawsuits:

Q Who believes that jury verdicts are too high in this country?

Q Who thinks there are too many lawsuits these days?

Are these good questions? No. These days these questions highlight the wrong group of jurors. Why? Because 80 to 90 percent of people indicate some agreement with these statements – even jurors who would be fine plaintiff's jurors in any given case. The 10 to 20 percent who disagree, however, are arguably the *most* pro-plaintiff people in the panel. If I were the defense, those would be my strikes. In fact, I've seen publications targeted to defense attorneys suggesting that they ask these traditional tort reform questions because they know they will identify pro-plaintiff people, but are not distinguishing in terms of those who are pro-defense.

A better question that taps into the same tort reform concern is:

Q Who supports legislative reforms to place caps on the amount of money juries can award?

A minority supports legislative action to cap awards, and those who do are more likely to favor the defense.

Here is another example of how the way you ask a question makes a difference in who responds:

Q Do you believe that some employees who make claims of discrimination do so as an excuse for their own shortcomings?

versus

Q Do you believe that most employees who make claims of discrimination do so as an excuse for their own shortcomings?

The way the first question is asked, most people, even those who might be pro-plaintiff would agree. To believe that not even *some* people do this would be to hold a stronger pro-plaintiff perspective in an employment case. Changing the wording from "some" to "most" ensures that you identify a more extreme pro-defense response. The question becomes distinguishing in a way that is helpful to you as plaintiff's counsel.

What else to consider when formulating questions? Effective voir dire under strict time limits means you have to ask questions of the group as a whole, and then follow up with people based on their responses to the group questions. The way you word the questions can encourage responses in the otherwise intimidating group setting. It's best to start the question with "How many of you" as opposed to "Do any of you" or "Does anyone here." Using the words "how many" suggests that many people share the view and that it is OK to say that you do, too.

You might say, "How many of you believe that if the government has approved the manufacture and sale of a product, it cannot be considered defective? While you are going to want to try and follow up with everyone who says yes, to make the most efficient use of time, start with someone who, because of their job, demeanor, or responses to other questions you think will have strong opinions about the issue. This will break the ice. Follow up with him and get him to willingly express his opinions. You might notice other jurors nodding along. Ask, "Who shares Mr. Smith's opinion?" And ask it a few times. If you don't have any takers, find someone you are worried about or need information from and call on them to see what their thoughts are.

Another tactic is to use the phrase, "Many people believe" or even, "Over the years I've heard lots of people say…" This again normalizes the attitude and encourages responses. An example would include:

I've heard a number of people say that because medical professionals never intend to harm patients, it's not fair or right to hold them legally responsible when things go wrong. Who here shares that view? Why is that?

Then use that response to find others who feel the same way.

Open-ended questions

When you are in the information-gathering phase with potential jurors, use open-ended questions to get them talking, and follow up with prompts like these which encourage the juror to expand on their answers.

- Please tell me more about that.
- Say some more about that.
- Explain what you mean for me.
- Can you give me an example?
- What was your reaction?
- Why do you think you feel that way?
- How do you think that affected you?
- What impression did that leave on you?
- Why do you think that?
- Tell me about an incident that comes to mind.
- Is there any particular reason you feel that way?
- Did something happen that helped you come to that conclusion?
- Why do you think so?
- Did you feel the same way he did?
- How do *you* feel about it?

Resist the urge to fill a silence or jump in and talk before the juror has had an opportunity to think about and formulate an answer to your questions. If you find that you are talking more than the jurors, you should probably rethink your approach.


Chopra

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JURY SELECTION:
WHAT TO ASK AND HOW TO ASK IT

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GOALS OF VOIR DIRE

- Information Gathering
- Find the Bad, Hide the Good
- Establish Challenges for Cause
- Rehabilitation

QUESTION FORMATION

- Open ended
- Normalize the negative response
- Don't invoke the law or judge
- Avoid "do you understand," "do you have a problem"
- Try "neutral" or "impartial" instead of "fair" or "bias"

QUESTION FORMATION: 10-20% RULE

- How many of you believe jury awards are too high?

  vs.

- How many of you believe that most jury awards are excessive?

QUESTION FORMATION: 10-20% RULE

- How many of you believe there are too many lawsuits today?

  vs.

- Some people believe that lawsuits and the threat of lawsuits are hurting small businesses and the economy in Los Angeles County. Who here shares that view?

QUESTION FORMATION: 10-20% RULE

- Do you believe that some employees who make claims of workplace discrimination do so as an excuse for their own shortcomings or performance issues?

  vs.

- Do you believe that most employees who make claims of workplace discrimination do so as an excuse for their own shortcomings or performance issues?

KEY TOPICS

- Workplace Experiences & Expectations
- Management Identification
- HR Experiences
- Discrimination/Harassment/Retaliation Experiences
- Discrimination/Harassment/Retaliation Attitudes
- Specific Issue Experiences & Attitudes
- Employment Lawsuit Attitudes
- Damages

WORKPLACE EXPERIENCES

- To your knowledge, has any company or business that you've worked for had any complaints or claims of discrimination made against it? What was your involvement, if any? What impact did this have on you as an employee?

- Have you ever seen or heard about someone making a claim of workplace discrimination, retaliation, wrongful termination, or other workplace mistreatment that you felt was false or not justified? How will that experience impact the way you view this case? Might you start out skeptical or leaning towards the defense?

- Have you or anyone close to you ever had a job where working conditions, managers, or coworkers were so intolerable that you (they) decided to quit rather than complain about the situation?

MANAGEMENT IDENTIFICATION

- Have you or anyone close to you ever participated in a decision to discipline, terminate or lay off an employee? What were the circumstances?
- For those of you with supervisory or management experience, has any one that you work with ever made any complaints or filed any claims about decisions you have made as a manager?
- Have you or anyone close to you ever owned your own business or operated a franchise? How many employees? Were there ever any claims or lawsuits brought against the company? Is the company still operating? If not, why not?
- Some people feel as though government rules and regulations about what employers can and cannot do with respect to their employees have made things too difficult for managers to do their jobs. What do you think about that?

HUMAN RESOURCES

- For those with management, HR, or supervisory experience, have you or anyone close to you ever received a complaint that an employee was being sexually harassed or discriminated against in some other way?

  What was the nature of the complaint?
  How was the situation investigated? How as it handled?
  Did you or the company find evidence that supported the allegation?
  What was the outcome?

- What steps are in place in your organization to prevent discrimination and harassment? Have they been effective?

- Have there been any instances where you have received a complaint about discrimination or harassment where you determined the allegations to be true?

DISCRIMINATION/HARASSMENT ATTITUDES

- Which comes closer to your views:

  _____ discrimination in the workplace is largely a thing of the past.

  OR

  _____ discrimination in the workplace is still a problem today.

- I've heard people say that employees today are just too sensitive about how they are treated at work, or that we've all become too politically correct. How many of you share that view?

- Along the same lines, I know some people believe that (women/minorities/etc) today are too quick to accuse others of discrimination or harassment when things don't go the way they want. Who here has seen an example of this or shares this point of view?

AGE

- As a younger employee, how do you feel about the idea or concept that workers over the age of 45 get special protections under the law?
- I've heard some people say that letting go of older workers to make room for younger new hires just out of school makes good business sense. Who here shares some of those views?
- In this instance, Ms. Good was 47 when she began this position. How many of you have already formed some opinions that, if a person was hired when they were already over the age of 45 they should not be allowed to claim age discrimination if they are later terminated?
- Have you or anyone close to you ever felt as though your position was impacted by rules or regulations requiring employers to keep older or more senior workers on the job?

DISABILITY

- Have you or anyone close to you ever had your workload impacted by a coworker who was on disability or who needed workplace accommodations?
- Does anyone here feel like we expect too much from employers when it comes to accommodating workers with stress or mental health related problems? Tell us why you feel that way.
- Who here feels like we as a society have gone overboard in trying to accommodate individuals with health problems and/or disabilities?
- How many of you feel like employers are being forced to follow too many rules and regulations regarding the employment of people with health problems and/or disabilities?

GENDER/SEX

- Have you ever had an experience where you felt a co-worker or employee was being overly sensitive about comments or actions by you or others in the workplace?
- What types of actions/behaviors/comments do you think about when you think about sexual harassment in employment?
- Some people believe that, if someone doesn't report sexual harassment to a supervisor or HR right away, then it probably didn't happen. How many of you feel the same way?
- If someone who claims sexual harassment still continues to go to work with the person she accused would that fact alone cause you to believe she must not be telling the truth about the harassment and impact it had on her?
- How many of you believe that there are certain jobs or occupations that are not well suited to women, or that women should not be working in? What types of occupations are you thinking of?

IMMIGRATION/NON ENGLISH SPEAKERS

- Ms. Garcia, the person bringing this lawsuit, will be testifying in Spanish through an interpreter. I know that some people feel as though if you are going to bring a lawsuit for money damages in the U.S. you should speak English. Who here feels the same way?
- Ms. Alvarado will testify in English, but Spanish is her first language. Some people tend to be bothered more than others when trying to communicate with someone who's English is difficult to understand. Who here would fall into the category of being bothered (even a little bit) by having to communicate with someone who's English is difficult to understand?
- Ms. Alvarado is originally from El Salvador. Does anyone have any feelings about immigration, Spanish speakers, or El Salvador that they think might influence them or make it difficult for them to be an entirely neutral juror in this case?

RACE/ETHNICITY

- How much social contact do you have with African American individuals?
- Have you or anyone close to you ever had a significantly negative or unfortunate experience with someone who is African American?
- Some people believe that, especially in a blue collar or industrial type job, name calling, jokes, even racial jokes, are just part of the environment, and that people who complain or make a big deal about it are being unreasonable. What do you think?
- Have you ever heard someone tell a racial joke or use a racial slur in the workplace?
- I've heard people talk about someone "using the race card" to refer to people of minority races claiming discrimination where none exists. How many of you believe you've been in a situation where you thought someone was doing this? How frequently do you think this occurs in our society?

SEXUAL ORIENTATION

- I know that many people in our country feel they just can't accept homosexuality because it seems wrong to them for moral, religious or other personal reasons. Does anyone share that view?

- Some people have opinions, feelings, or religious beliefs about gays and lesbians that might make it difficult or uncomfortable for them to serve in a case where one of the participants was gay or lesbian and that is fine, we just need your honesty. Does anyone here feel like because of your personal beliefs you may be a better juror on a different case?

- Who here is opposed to gay marriage? Why?

- In this state, gay and lesbian individuals receive special protections in employment, similar to individuals who are of a minority race or ethnicity, women, and older workers. Who here has some concerns with this or feels that this is not right? Or that homosexuality should not be considered a "protected class" or minority?

WHISTLE BLOWERS

- What are your opinions about employees who complain or threaten to complain to outside sources about workplace policies or practices?
- What does the term “whistle blower” mean to you?
- Some people hold the belief that if you don’t like the policies or procedures at your place of work you should just quit and find another job rather than complain about the situation. Who here shares that view?

EMPLOYMENT LITIGATION ATTITUDES

- How many of you hold the belief that an employer should be able to fire whomever they want, for whatever reason? Why?
- How many of you believe that lawsuits for money damages brought by employees against employers should be prevented or limited by law?
- If you believed you or a loved one was retaliated against and/or wrongfully terminated from a job, how many of you would nevertheless NOT consider filing a claim or lawsuit for money damages? Why not?

DAMAGES

- I'd like to hear from those of you who are opposed to the idea of awarding someone future lost wages in an employment lawsuit. I'm not talking about someone who has been physically injured and can't work, but someone who was terminated based on an improper reason and hasn't been able to find a similar job. Who here thinks that awarding lost wages in this kind of a situation is not something they would agree with or be comfortable doing? Why?
- Some people argue that because the future is uncertain, it is "speculative" to award damages for the future, and therefore it is not something they could do. Who shares this view?
- Mr. Johnson will be asking the jury to award monetary damages to compensate him for the emotional distress, loss of enjoyment of life, anxiety, humiliation, and mental suffering he has experienced as a result of his workplace treatment. Some people are just philosophically opposed to the idea of awarding money to compensate for something like emotional distress and mental suffering. They think, we all go through emotional distress, we all have problems at our jobs, it is just part of life, and it's not right or fair to award money damages for something like that. Who feels that way?

CAUSE CHALLENGES

- Encourage and accept negative responses
- Validate those who speak up
- Utilize outspoken opponents
- Solidify the admission

  -Mirror the response

  -Switch to leading, close ended questions
- Connect the attitude/experience to jury service
- Inoculate against rehabilitation

BATSON CHALLENGES

Step 1: Party Objecting Must Establish a Prima Facie Case

a. Name the cognizable group excluded

b. Give factual basis for "inference of discrimination"

- Can be based on a single strike
- Race/ethnicity of client irrelevant
- Note disparate questioning
- Comparative analysis to non-challenged jurors

c. If judge asks for an explanation, prima facie case is met.

BATSON CHALLENGES

Step 2: Burden Shifts to Proponent of Strike to Provide Neutral Explanation

Insufficient explanations:

- Refusal to state "I don't have to tell, it's work product!"
- Denying discriminatory intent "I'm not racist, how dare you!"
- Accusing opponent of misusing challenges "You challenged a woman too!"
- Shared race assumptions
- Proxy/surrogate explanations

BATSON CHALLENGES

Step 3: Trial Court Determines if Explanation is Credible or Pretextual

a. Factors in weighing credibility
   - Explanations unrelated to case
   - Discriminatory impact of strike
   - Demeanor based explanations
   - Explanations based on number of group seated/in venire
   - Comparative analysis
   - Explanations unsupported by the record

b. Remedies
   - Reseating
   - Sanctions
   - Quash panel
   - Additional challenges

JURY SELECTION:
WHAT TO ASK AND HOW TO ASK IT

C | K CHOPRA KOONAN
Litigation Consulting

NELA 2016 ANNUAL CONVENTION

#NELA16 1951

Jury Selection in Employment Cases #NELA16

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WHY IS JURY SELECTION SO IMPORTANT?

- **By the time of trial, there are some things you just can't control:**
  - **The facts**
  - **The law**
  - **The venue**
  - **The judge**
  - **Your adversary**
- **But you *can* impact who decides the case**

BUT ISN'T JURY SELECTION A MYSTERY?

- **It can be . . . .**
  - **Very few cases are tried.**

  SCIENCE FACT: VERY FEW EMPLOYMENT CASES ARE TRIED, GENERALLY LESS THAN 3%. FOR THE FEDERAL COURTS FOR THE *ENTIRE COUNTRY* IN 2015, ONLY 342 EMPLOYMENT CASES MADE IT TO TRIAL. (Federal Judicial Caseload Statistics, Table C-4)
  - **Consequently many lawyers (and judges) have relatively little experience selecting juries for employment cases**
- **But it doesn't have to be . . . .**
  - **Tools are available to help you avoid terrible jurors, and find good ones**
  - **Going in with a plan will put you far ahead of most of your adversaries**

KNOW YOUR SOURCES OF LAW – DIG DEEP

- **FEDERAL COURT**
  - **Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1878**
  - **Fed. R. Civ. P. 47 and 48**
  - **Jury Plan (required for every district by 28 U.S.C. § 1863)**
  - **Local rules & judicial preferences**
- **STATE COURT**
  - **Statutes**
  - **Rules**
  - **Administrative guidelines**
- **CASE AUTHORITY, INCLUDING OTHER JURISDICTIONS**

WHERE DO JURORS COME FROM?

- **Source lists: voter registration; motor vehicle lists; tax lists**
- **Federal court example**
  - **Master Wheel (tens of thousands)**
  - **Qualified Wheel (thousands)**
  - **Pool (hundreds)**
  - **Array/Panel/Venire (dozens)**
  - **Jury**

BASIC COMPOSITION OF A CIVIL JURY

- **6 to 12 jurors**
- **Alternates?**
- **Risk of going below 6**
- **Unanimous?**

ACCESS TO JUROR INFORMATION

- **Best hope is getting access to the "jury pool," the group from which your venire will be drawn**
- **In federal court, the jury plan must specify when the pool names will be shown to the parties, but the precise timing is up to the district plan**
- **In state court, varies from state to state**
  - **Why is this information available anyway?**

WHAT CAN YOU DO WITH THAT INFORMATION?

- **“Juror research” is relatively new -- 5 to 10 years on the scene**
- **Rules vary from jurisdiction to jurisdiction, but often there is no rule**
- **No uniform federal rule, so it varies judge to judge**
- **A 2014 survey by the Federal Judicial Center found most judges really don’t like juror research**
- **But the same survey also found the vast majority of judges aren’t sure if it’s occurring or not**
- **One thing for certain: Don’t contact a juror, even indirectly (e.g., “friending,” LinkedIn)**
- **If allowed, benefits of doing research in advance . . . .**

RESEARCH TOOLS

- **Paid search engines**
- **Facebook and other social media**
- **Voter registration lists**
- **Town wiki pages**
- **General internet research**
- **Paid search firms**

PREPARING FOR JURY SELECTION/JURY SELECTION FILE

- **Statutes, rules, court guidelines**
- **Case law, especially: peremptory challenges; juror bias; permissibility of juror research; Batson challenges**
- **Voir dire**
- **Jury research tools**
  - **EXCEL SPREADSHEET: GREEN, YELLOW, RED**
- **Jury diagram**
- **Map of jurisdiction**
- **Jury selection notepad**

VOIR DIRE

- **Your voir dire**
  - **General rule: find "problem" jurors AND lay groundwork for challenge for cause (save your peremptory challenges)**
  - **Class bias**
  - **Attitudes toward litigation generally, and discrimination in particular**
  - **Past history in management, HR, prior lawsuits**
  - **Employment problems (as claimant or accused)**
  - **Union membership**
  - **Don't hide from problems or potential prejudice**
    - **SPECIAL NOTE: GET YOUR IN LIMINE MOTIONS DONE *BEFORE* JURY SELECTION**
- **Their voir dire**
  - **Look for compromise (more information is better)**
  - **But render questions neutral**

GENERAL VOIR DIRE ISSUES

- **Open ended versus closed questions**
- **Written questions versus oral questions**
- **Biographical questions**
- **Use your jurisdiction's directives to get the voir dire you want**

MECHANICS OF CONDUCTING VOIR DIRE

- **Go S-L-O-W-L-Y-!**
- **Make them talk**
- **Take copious notes (can't do this alone)**
- **Remember twin goals: (a) elicit bias to eliminate "bad" jurors; (b) learn about who your jurors are, for those that remain**
- **Hardship issues: (a) handle up front? (b) potential advantage of using "hardship" to get rid of "VIP" jurors**
- **Who/how are questions asked? (a) getting to ask questions yourself; (b) advantages of side bar discussions**
- **Follow up questions – don't be afraid to ask to ask! Court must allow if "proper." Fed. R. Civ. P. 47(a).**

CHALLENGES FOR CAUSE

- ***Always*** **put it on the record**
- **Look for similar life experiences which could lead to bias**
- **Probe with follow up questions**
- **A profession of impartiality does NOT need to be taken at face value**

PEREMPTORY CHALLENGES -- MECHANICS

- **Number of challenges**
  - **Federal Court: 3 each. 28 U.S.C. § 1870**
  - **"Evening up" for multiple parties. Id.**
- **Plaintiff goes first**
- **Effect of "passing"**
- **Effect of not using all your challenges**
- **Be nice!**
- **Keeping track of challenges**

PEREMPTORY CHALLENGES -- STRATEGY

- **Ultimate goal: Eliminate “bad” jurors, NOT find “good” jurors. Therefore: leave “neutral” jurors alone!**
- **DON’T rely on bogus prejudices**
- **DO rely on your research and the voir dire**
- **Key an eye out for the juror with an agenda trying to fly under the radar**
- **Bad vibes**
- **No matter what, insure you can articulate a reason for why you excused each juror (Batson challenge)**

KEEP TRACK OF YOUR JURORS POST-SELECTION

- **Keep on top of your notes**
- **Juror note taking**
- **Juror questions**
- **Watching your jurors & non-verbal communication**

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Selecting an Ideal Jury

#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles California

Selecting a receptive jury is incredibly challenging, but the principles of how to select a receptive jury are relatively simple. Identify and remove the jurors who are the most biased (toward your case; bias for us is a plus), as well as those who are the most unknowingly unreceptive to your case. Just as important, build rapport with your jurors so that they trust you—and by extension your client and your case. No less important, learn about your jurors during voir dire so that you can tailor your presentation to fit their unique values and view of the world. Easier said than done; if it were that simple, I could stop writing now. Because jury selection is so complex and challenging, let's discuss how to select a winning jury.

Stop relying on demographics

If you're still relying on demographics, even a little bit, during jury selection, stop and dig deeper. Unless your voir dire is so limited by the court that you're forced to rely on shortcuts and assumptions, there are always better criteria to use, and better questions to ask, during jury selection than gender, ethnicity, age, or even income and education.

Even some of the best attorneys I've worked with and spoken to rely on demographics. I'm often asked questions like "do we want men or women on our jury?" I can't blame them for thinking that way—even many jury consultants are guilty of putting demographics in their jury profile reports and believing that demographics can be useful indicators of predispositions and verdicts. But if you have the opportunity to ask your jury even 15 minutes of voir dire questions, or if you have the luxury of a full day of voir dire or even jury questionnaires to analyze, the truth is that demographics are <u>never</u> the best criteria to use.

In all my years of researching juries and analyzing mock trials and focus groups, demographics have <u>never</u> come up as significant factors. That's not to say that demographics aren't sometimes predictive. In some cases—although very few, in my experience— there are differences between demographic groups. Perhaps 70% of women and 25% of men are pro-plaintiff in a particular case. But each and every time, there is an underlying <u>reason</u> why men and women are viewing your case differently, and that reason is totally unrelated to gender itself. If you ever find that demographics are an important variable, it means your jurors weren't being asked the right questions. If this were a business litigation trial, you'd probably find that 90% of the men—and 90% of the women—with a working knowledge of bookkeeping and auditing might be pro-plaintiff.

In many cases, demographics are often not predictive at all. When they are, it's because members of a certain demographic group share a common experience, value, or attitude—not because of who they are, but because of their experiences, and to a lesser extent, their culture. A commonly held stereotype about jurors and race—that minorities tend to be much more pro-defense in criminal cases, while Caucasians tend to be much more prosecution-oriented—may be true, but there are underlying reasons. Members of minority groups tend to be much more distrustful of police and law enforcement, and for a specific reason—they are much more likely to have had a negative experience with a police officer, know someone who has had a negative experience, have heard about negative experiences, and have developed negative impressions of law enforcement as a result. If you were to identify jurors who had negative experiences and impressions of police officers and their honesty, you would be doing a much better job of identifying pro-defense jurors than if you simply relied on race. You'd probably find a handful of prosecution-oriented minorities who have positive impressions of the police and a handful of defense-oriented Caucasians with negative experiences.

The only advantage to relying on demographics is that it is very easy—you don't need to ask a single voir dire question to identify someone's ethnicity, gender, age, or visual indicators of their social class or sophistication. Keep in mind, though, that when you rely on demographics to pick your jury, you're also relying on <u>assumptions</u>. Sometimes those assumptions are wrong. Jury research has overturned the conventional wisdom, for example, that female jurors are more sympathetic toward female plaintiffs in sexual harassment cases. But even when your assumptions are right, you can do a much better job of picking your jury than relying on demographics.

The next time you feel tempted to rely on demographics, ask yourself <u>why</u> you believe males, or Hispanics, or younger or wealthier jurors might be more receptive to your case. Is it because they are more likely to have experience, familiarity, or an understanding of some of the issues in your case? Is it because they are less likely to trust the opposing litigant because of negative experiences? Is it because they are more likely to believe your story because they've probably seen similar things themselves? Instead of blindly assuming, identify what your underlying assumptions are, and ask those questions instead.

In commercial and breach of contract trials, older jurors (but not experienced corporate employees) tend to be more pro-plaintiff than others—not because they're older, but because many come from a less complicated, less cynical time when a handshake promise was commonplace and written contracts weren't always necessary. Instead of choosing jurors based on age, ask them how they feel about promises and the necessity of written contracts.

In complex patent trials, males often tend to be more pro-defense than females—not because they have a Y chromosome, but because men are more likely to be trained in engineering, science, and technology and more likely to have mechanical experience fixing cars, fixing plumbing, and understanding the mechanics of how things work. Women are no less <u>capable</u> of understanding these same issues, and the defense would be much better off with a female engineer—or even a female who does her own auto maintenance or electrical wiring—than a male picked at random from the jury.

Always remember that the less you rely on assumptions, and the deeper your questions delve into your jurors values and beliefs, the better your jury selection will likely be.

Demographics are only the first layer, so if you're given the luxury to ask your jurors about their experiences, their values, and their beliefs, take full advantage and make sure your jury selection is as educated as it should be.

Don't do the other side's voir dire for them

It's often said that "jury selection" is a misleading term, since you're essentially de-selecting a jury. Every lawyer knows that you're powerless to select the jurors that you keep on the jury panel. But as obvious as this concept is, one of the most elementary mistakes that I see being made time and again in jury selections across the country is that too many attorneys are asking questions in jury selection that identify their best jurors. Said another way, too many lawyers are identifying their most receptive jurors—to their opposing counsel.

Identifying your best, most receptive jurors during your own voir dire time is even more dangerous than you might think. Not only are you helping the other side prioritize their strikes and sweep your best jurors off the panel, you're also wasting the limited time you should be using to identify your worst jurors, to begin subtly persuading the jury, and to learn your jurors' values and beliefs so that you can better persuade them during trial. You have a long list of things to accomplish in jury selection, and doing the other sides' work for them should not be on your list.

For some lawyers, I understand that the idea of asking mostly "negative" questions during jury selection can be frightening. For the record, I don't advocate asking only negative questions during jury selection, but I'll explain how to handle the "positive" questions later. Let's talk about your concerns about focusing on negative questions and your worst jurors.

How do you know that the jurors who don't express negative opinions are receptive, good jurors? Selecting a jury without hearing "good" answers from the jurors left on the panel might feel a lot like blind faith, but in reality it's a fairly safe, calculated bet. When you carefully remove the jurors who most strongly disagree with your case from the pool, you're left with the jurors who disagree the least, and perhaps some jurors who kept quiet. Think of voir dire as touching your case's most sensitive nerves; the jurors who react negatively to your most sensitive issues will be the least receptive to your case, and the jurors who don't react at all are either receptive or aren't particularly bothered by your greatest concerns. More likely than not, any jurors who have concerns that they keep quiet about during voir dire tend to be far less opinionated, outspoken, vocal, and forceful anyway, so they're far less dangerous than those jurors who spoke up. There's no guarantee that a hostile, outspoken juror might have declined to talk, but most outspoken jurors will speak up when you hit a nerve that bothers them.

A common concern that I hear from lawyers is the fear that you might alienate the good, receptive jurors if you don't ask them questions and interact with them. There are other ways to talk and interact with the rest of your jurors without identifying them as receptive, but you should never give them the opportunity to give "good" answers for the sake of letting them talk. If you have lenient voir dire time, talk to your jurors about their jobs or about similar experiences, without probing too far into judgmental opinions. Talk to them about their values and their beliefs without asking them to express sympathy, skepticism, or suspicions about the case or about lawsuits in general. Shining a light on your best jurors will only get

them off the panel, while keeping your best jurors in the dark forces your opposing counsel to make uneducated guesses with their strikes.

Perhaps the most common fear among lawyers is that too many negative questions might present your case in a bad light, or that too many negative answers from the bad jurors might taint the rest of the jury panel. I constantly write about this topic, and you've probably heard similar views elsewhere. What one outspoken juror says will never change what another juror believes. Using the wonderfully-polarizing topic of politics to make my point, if you're a liberal, listening to a conservative radio host won't transform you into a conservative; in fact, it will probably reinforce your own opposing beliefs. Don't worry about negative questions or negative answers tainting your jurors, as long as you're using them to identify your worst jurors.

In reality, you should be more worried about the exact opposite—persuading your jurors too early during jury selection. The goal of any trial is obviously to win over your jurors, and the goal of any jury selection is to leave the remaining jurors receptive to your case, but winning over your jurors too early is a recipe for disaster. Too often I've seen lawyers present such a persuasive, slam-dunk view of their case early on—especially in courtrooms that allow the lawyers to give brief "mini-opening" statements before voir dire begins. Persuading the jurors too early only encourages them to be outspoken and supportive, to the point of talking their way off the jury. I've seen mini-openings done so well that dozens of receptive jurors had to be excused for cause when they expressed views so supportive of one side and criticized the other side so harshly that it was clear they had already begun drawing conclusions about the case and could no longer be impartial. Even without a mini-opening, I've seen lawyers focus so heavily on convincing jurors of the strengths of their case during jury selection that the same thing happens; convinced jurors talk their way off for cause, and the least receptive jurors are the only jurors left. Case lost.

So when should you persuade the jurors during voir dire, and how? There is one form of persuasion that you can never start too early or go overboard with—building your own credibility with the jurors by being personable, listening to their questions, showing them that you understand their concerns, and most importantly showing them that you can listen to and understand the viewpoints of jurors who disagree with you. But when it comes to persuading jurors about your case itself, there are a few dangers to avoid. You cannot persuade the jurors too overtly, or you'll get a tongue-lashing from your judge. You cannot persuade the jurors too early, or you'll lose your best jurors to cause challenges. And you cannot persuade the jurors with individual questioning, or you'll identify your most receptive jurors to the other side.

The technique that I advocate is to ask persuasive questions that build group consensus, not individual consensus. Once you get an individual juror to agree strongly with your themes, you might as well put a target on their back and say goodbye. But if you get an entire panel to raise their hands in agreement (without getting into an in-depth discussion with individual jurors), you can build group consensus without letting the other side pick out individuals to strike. Toward the end of your voir dire, once you've identified the worst jurors, start asking questions that foreshadow and communicate your themes to your jurors, and make sure you're certain that most of your panel will agree with these questions.

Convince your jurors that the opposing litigant made inexcusable mistakes that your jurors would never have made by asking them questions about their own approach to similar situations. Help your jurors criticize a careless plaintiff or defendant by asking them what safety precautions they take when driving, handling their finances, or using products. Convince your jurors that they might have made some of the same mistakes they might be tempted to criticize your client for by asking questions that force them to honestly confront some of their own shortcomings. When you ask "how many of you have ever driven faster than the speed limit?" or "how many of you have ever signed a long, complicated contract without reading all the fine print or without understanding all the complex legal wording," jurors are much more likely to forgive your client for similar mistakes. Convince your jurors that they agree with your trial themes by asking group questions about opinions and beliefs that you're certain most of them share. When you ask your jury "by a show of hands, how many of you believe that companies or business people who sign their name to a contract should follow the contract to the letter, no matter what," and 90% of the jurors raise their hands, leave it at that. You will have communicated a critical trial theme, the other side will realize how much consensus you have, and (perhaps most importantly) the other side won't be able to strike 90% of the panel or know which jurors agreed most strongly. And that's what jury selection is all about—giving your client an advantage in trial without helping out the other side.

Pre-conditioning is important, but don't force-feed answers to jurors

I understand that for any lawyer who has a forceful, alpha personality, taking your foot off the pedal can be incredibly difficult. You have been trained and conditioned to argue and persuade your jurors whenever you can, even during voir dire and opening statements. There's a reason that judges often have to remind good lawyers that it's an opening statement, not an opening argument. 99% of the time, that's a terrific quality to have. But in trial, there are a few specific situations in which you are far more effective when you slide over into the passenger seat, or into the back seat if you're the type who might be tempted to reach over and grab the wheel.

Voir dire is one of those times. The best purpose of voir dire is to differentiate between jurors who will likely be receptive to your case and those who will likely be unreceptive. You need to understand how your jurors approach similar situations, how they feel about the key issues involved in the case, what their values and what they believe. Yet many lawyers spend most of their time trying to persuade jurors, instead of trying to understand jurors.

I don't mind subtle persuasion and pre-conditioning during jury selection; it's a reality that the best lawyers figure out ways to begin persuading the jury, and it's effective. But it's most effective (and allowed by the court) when it's done subtly, through questions and not lectures. Pre-conditioning is most effective when it hits home for the jurors in ways they can internalize, not when the lawyer makes an argument in the disguised form of a question. What that means is, the most effective pre-conditioning voir dire questions are those that get jurors talking about their own experiences and beliefs and approaches that make them realize that they already agree with your case, your trial themes, and your client's actions or approach. For example, the best way to convince jurors that a plaintiff in a product liability was careless would be to ask a question about the jurors personal approach: "Who here would ever consider doing your own electrical wiring without any training? Why wouldn't you?"

So even when you're persuading the jury during voir dire, it's much more effective to do it subtly and passively, without being directly argumentative and forcefully persuasive. As I've said, some persuasion during voir dire is helpful and important, but the most important purpose of voir dire is to identify and strike unreceptive jurors. Even the most persuasive lawyers can't win every trial with the first 12 jurors in the box, simply because some jurors in every jury pool will be inherently unreceptive to your case. You need to spend your voir dire understanding your jurors.

I don't think it's counter-intuitive that understanding your jurors involves listening to your jurors. Yet most lawyers spend more than 50% of the time in voir dire talking, not listening. And one of the biggest mistakes that I often see lawyers make during voir dire is the failure to truly listen. You've probably been told that you should be asking open-ended questions in voir dire, but it's just as important to never prompt or influence your jurors' answers. Easier said than done, because I often see well-meaning lawyers suggest answers to jurors or put words in their mouths, especially when the juror is struggling a little to give an answer. Let the juror think, and let the juror give his or her own answer in their own words.

Time and again, I've seen good lawyers ask good questions in voir dire, but then the dangerous instinct to be persuasive kicks in. "What do you do when you are given a written contract to sign?" is a great, open-ended question to ask in a breach of contract case, or in any case in which you want to understand your jurors' approaches to being diligent, to being careful, to being thorough, or their attitudes toward responsibility toward protecting themselves. Are your jurors careful, or are they passive or trusting or careless? Do they sign without reading it, without asking questions, without fully understanding the terms and legalese, or without making sure that every detail that was negotiated and promised is in the written contract? If you truly want to understand what they do and don't do, and what they think about and don't think about, let the juror answer, unprompted, in their own words.

Time and again, I've seen good lawyers taint the jurors' answers by prompting and suggesting answers: "do you read all the fine print? do you ask if you don't understand something? do you ask that the contract be changed if something seems unfair?" Understand that jurors will rarely admit to you, and even to themselves, when they do something less than perfectly. If asked, most jurors will answer "yes" to all of the above questions, even if the reality is "no." If you were to ask a juror "do you always check your blind spot and your side mirrors and signal before you change lanes?" they will almost always answer "yes." But if you were to ask a juror "what do you do when you change lanes," they will give you a more honest answer: they might say they signal and check their mirrors, but tellingly, they may leave out checking their blind spot over their shoulder. This is a perfect example of why you must let your jurors answer questions unprompted, because you need to know what they don't THINK about doing in that situation. This juror most likely doesn't THINK to check his blind spot when he's actually driving; otherwise, he would have most likely thought about it in answering the question. It may be difficult, but wait to persuade your jurors until the trial starts, especially during voir dire.

Don’t pigeonhole your jurors

In your daily lives interacting with others as people (not attorneys), I have no doubt that you understand the concept that peoples' attitudes about issues are on a spectrum; some people have extreme views about a particular issue, but for most issues, most people are somewhere

in the middle without strong opinions. For those who like to think in graphs, people's attitudes about issues in life usually fall in a "bell curve," and the fat middle of that bell curve represents the majority who really have no opinion at all about the issue.

Yet when lawyers walk into a courtroom for jury selection and start asking voir dire questions to jurors about their attitudes, many if not most suddenly start assuming that every issue in the case being tried is a polarizing one, and that every juror feels strongly one way or the other. If you read that sentence and are thinking "that doesn't sound like something I've done in jury selection," ask yourself this question: have you ever asked a voir dire question that sounded something like this?

"Some people feel that [describe one way of thinking], while others feel that [the opposite way of thinking]. Which way of thinking do you lean towards, even just a little?"

You've all heard this type of question before, and many of you have probably asked a version of it once, if not in every trial. "Some people feel that it's fair to compensate someone for losing a loved one because of someone else's negligence, while other people feel like it's not right, because money isn't going to bring that person back. Which do you agree with more, even just a little?" How is the juror supposed to answer, if they don't feel strongly or haven't ever given it any thought? You'd like to believe that those jurors will say "neither, I don't have an opinion," but in my years of observation, most don't: they do what you've asked them to do. They pick one. And you've intentionally encouraged them to pick one, if you've added the "even just a little?" to the question.

If you have, stop doing it immediately: you've been pigeonholing your jurors, and the primary danger of asking that kind of question is that you are gathering misleading information that harms your ability to properly assess your jurors. Here's why.

First, by forcing jurors to pick one of two choices, you are completely ignoring what matters most: strength of conviction. A juror who absolutely hates insurance companies is much worse than a juror who thinks insurance companies are a little incompetent, and is light-years worse than another juror who answers your question the same way-- "I would lean toward the first group"-- but who is much closer to neutral. Don't worry about jurors with weak attitudes in the middle; ask questions that dig deeper.

Second and even worse, keep in mind that when it comes to juror attitudes about any issue, there are three camps: jurors who feel strongly one way, jurors who feel strongly the other way, and then the camp in the middle that has no significant opinion about the issue. Put another way, the middle camp includes jurors who are capable of PICKING a side if you force them to, but their answers mean practically nothing, because their attitudes are so weak and insignificant, they are meaningless. What's worse is that with most issues, the middle camp is by far the largest group, and so by lumping these jurors in with those who have strong, negative views, you are in reality obscuring the jurors you should be trying to identify. Said another way, forcing jurors to pick between two polar choices causes you to fail to differentiate between jurors who are terrible for you and jurors who are perfectly neutral.

I can't tell you how often in voir dire I've heard jurors weakly echo an attitude just because another juror expressed the same attitude earlier. You'll often find that the jurors who have

neutral attitudes tend to be followers, and will claim to have opinions they don't really have... but only if you force them to take a position they don't really have.

Instead, you should be thinking about ways to identify your terrible jurors who have strong biases and only bothering to identify jurors who maybe, sorta' have less than perfect attitudes, if they have to really think about it. There are so many ways to phrase voir dire questions that identify the jurors with strong views; ask about particularly negative experiences, or if you have time, ask each juror "how do you feel about it?" in an open-ended way without putting words in their mouth, or be blunt and ask a direct question like "who feels like awarding money for pain and suffering seems pointless or unnecessary?" If you feel like your jurors aren't being candid, and that some jurors with strong views might be keeping quiet, call on some individuals and ask "how do you feel about it" to warm up the rest and make them feel comfortable chiming in. But if you're going to make your jurors pick between two options and keep asking the "some people feel like X, others feel like Y" type of question, at least make sure to give them the third option: "not much of an opinion about it."

Don't be afraid to talk about your trial's most sensitive topics

The more trials and mock jury deliberations I observe and the more actual jurors I interview after trials have ended, the more I've come to realize that winning the battle of credibility is the most essential part of winning over your jurors. When your jurors don't trust you and your case, all the facts and expert witnesses in the world won't convince them otherwise. As I've said time and again, great facts and great witnesses don't build credibility for you; you have to create that trust early on in trial, or your jurors won't trust those great facts by the time you finally present them.

Building credibility and trust, and doing it early on, is a mandatory part of winning a trial. I can't stress enough that you need to get your jurors to trust you, and especially what you'll be arguing for, by the middle of your opening statement. Building trust in jury selection is even better. There are a number of ways, large and small, to build trust during voir dire. Come across as friendly and personable. Show the jurors that you want to <u>listen</u> to them, not lecture to them. Demonstrate that you understand <u>all</u> the points of view your jurors express, not just those who agree with you and your case. When you show patience and understanding with jurors who disagree with you, the rest of the jurors get the impression that you're reasonable; when you argue with them, ignore them, or struggle to understand them, you'll lose the rest of the jurors' trust.

There are a million lessons in building credibility during jury selection or your opening statement that I could discuss, but let's focus on my favorite way of building trust and overcoming your jurors' concerns in voir dire, a technique I sometimes call "tackling the elephant in the room."

To win a trial and win over your jurors, you <u>must</u> convince the jurors that your case makes sense and fits their values. Not every case is a natural fit for most jurors' common sense, and many cases clash with your jurors' values. Unless you have a slam-dunk case or pick the perfect jury, you'll have to deal with jurors who have immediate doubts and strong concerns about your case.

When you're suing an employer for retaliation or discrimination, the "elephant in the room" is often the employer's valid-sounding reason for firing the plaintiff. How can your jurors blame the employer if it sounds like your employee deserved to be fired?

When you're defending a company accused of trade secret misappropriation, patent or trademark infringement, or intellectual property theft, the "elephant in the room" is usually the idea of "stealing." Most jurors have been raised to immediately see "stealing," "copying," and "cheating" as wrong, no matter what the law says.

In wrongful death cases, the "elephant in the room" is usually the point of awarding damages; most jurors are wondering "what good would awarding money do if it won't bring the victim back, and why does the victim's family deserve to collect?"

As soon as they hear the judge describe the basic outline of the case and listen to your voir dire questions, your jurors start to develop doubts and concerns about your case that will influence their view of your credibility and of your evidence throughout trial. Unless you deal with them directly, these elephants will sit in the courtroom throughout the trial. Few jurors will be brave or self-aware enough to tell you during voir dire that they can't imagine you proving your case. I say few, because I have encouraged clients to ask jurors that very question and have seen jurors tell us "I can't imagine a way you can win this case," and have had those jurors excused for cause. Most jurors won't say what they're thinking, but trust me—they're thinking "how in the world is this lawyer going to explain that?"

Ignoring those elephants only makes them worse. If your jurors get the sense that you're avoiding a weakness of your case or planning on arguing something they don't believe in, you've lost their trust already. Instead of avoiding the topic, use those elephants in the room to overcome your jurors' concerns and show the jurors that you understand them.

In your next trial, identify the most challenging issue in your case. Think about your case, talk about it to friends and colleagues, do a focus group, or do whatever you do to help you see the forest through the trees. When you do, choose the most glaring weak spot that jurors will likely figure out immediately. And during your voir dire, bring it up. Flush it out, and get your jurors to comfortably talk about their concerns. Trust me, this line of questioning is helpful—your jurors are already thinking about their doubts and concerns. Don't be afraid to hear it, and make sure to show the jurors that you're interested in listening, interested in understanding how they feel, and not afraid of their concerns. Just bringing the topic up, by itself, will earn you credit. Most jurors believe that (less-than-honest, stereotypical) lawyers won't talk about the problems with their case, so not only will you gain some trust, but the jurors will believe that the topic might not be so important and damaging to your case.

Then comes the important part—once you've talked about and framed their concerns, show them how your case is <u>different</u> than the cases they've been concerned and complaining about. When you show your jurors that you understand their concerns, they begin to trust you. When you tell your jurors that you <u>agree</u> with their concerns, that you would be wrong to pursue or defend a case that deserved their worries, they'll find you refreshingly honest and <u>agree</u>. The most important, persuasive point you can make in voir dire is that you AGREE with them that your case (or defense) would have no merit if it couldn't answer those concerns, but that your case is fundamentally different than the hypothetical flawed case you've been describing.

Obviously, you wouldn't be allowed to tell your jurors these things, directly. But you can communicate that you agree through your voir dire questions. You should always be allowed to ask questions like:

"Does everyone here agree that surgery is risky, and that it would be unfair to blame the doctor just because the surgery didn't work and the patient wasn't saved? I agree."

"Does everyone here agree that it seems unfair to blame a doctor who follows all the standard procedures and makes the most safe, careful decisions they can in an emergency situation, even if their decisions turn out to be the wrong ones and the surgery goes poorly for the patient? I agree."

"But what about this: Does anyone here believe that it is WRONG for a surgeon to be less careful, less cautious, and less safe than they could be, and to refuse to take extra precautions in a risky, challenging surgery?"

So now comes the hardest part—winning your jurors over by distancing your case from their concerns and by framing your argument in a way that makes sense, that fits their values, and that they'll agree with. Unfortunately, there's no one-size-fits-all solution to tailoring your case to your jurors' concerns and values that I can summarize in a paragraph, so the rest is up to you.

One way to re-frame your case for your jurors is to listen to their concerns and then ask about exceptions to their "rules." If your jurors can't imagine how a careful driver could have struck a pedestrian, ask them if they can think of any exceptions: "you should always be able to spot and stop for a pedestrian unless… they dart into the street unexpectedly? They cross in an unexpected spot, like outside of the crosswalk or on a highway? They cross on a dark road in the middle of the night without any reflective clothing?" If you're suing for fraud but your jurors have issues with plaintiffs who failed to do enough due diligence, ask them "can you think of anything that might make it more difficult or even impossible for a buyer to get information or answers to their questions?" Getting your jurors thinking and talking about exceptions to their concerns can send the message that your case might be different.

No matter what you do, you'll have to get comfortable with the fact that you cannot win a case without listening to your jurors' concerns, understanding their (not your) idea of common sense and their values, and convincing them to trust you by completely changing the way you present your case to agree with their values and common sense. You cannot afford to ignore their concerns and point of view and forge ahead with pre-planned trial themes that your jurors don't agree with. You'll have to be ready to tailor your trial themes, your opening statement, your case values, and how you present to the case on the fly, based on jury selection. But that's an entirely new topic—how to use voir dire like a focus group—that I'll discuss at the end.

Don't use the word "fair"... or let your jurors self-diagnose their biases

Jurors rarely know that they are biased. Unless they are lying or exaggerating to get out of jury duty, almost every juror believes deep down that he or she is "fair" and "reasonable," regardless of their ability to accept and follow the jury instructions.

Have you ever heard the saying, "if you want something done right, do you it yourself?" As a trial lawyer, if you want to demonstrate that a juror is biased, you need to do it yourself because you can rarely count on a judge to uncover juror bias and can never rely on a juror to recognize their own biases.

You cannot simply ask a juror "would you be able to follow the laws as instructed, even if you disagreed with them?" and expect a reliable answer, no matter how honest your jurors and no matter how well-intentioned the question. Here's the problem: 99% of your jurors have no idea what the laws that apply to your case are. And most jurors assume that the laws are fair; and by "fair," I mean that most jurors believe that they will find the laws to be fair according to the juror's own values and beliefs. So it's easy for a juror to believe that they would follow the law when the juror doesn't know what the laws are but assumes they will almost certainly agree with those laws on a personal level.

Yet once these same jurors are explained specific laws and questioned about them, many of the jurors immediately express concerns about following the laws they suddenly realize sound "unfair" to them. Almost every juror will agree with a judge that they will follow the laws as instructed... but many will feel differently when faced with a particular law they actually find disagreeable.

Not to pick on judges too much, but some (especially in federal court) won't allow the lawyers to ask any voir dire questions and won't ask any questions about the jurors' ability to follow specific laws. They will simply ask the one catch-all question ("would each of you be able to follow the laws as I instruct you, even if you disagreed with them?") and assume that the jurors' promises mean something.

Of course, there is little you can do when you are before a judge who does not permit you to voir dire the jurors. But in many federal courts and most state courts, you do have the opportunity to ask your jurors if they might have some biases. And the point of this jury tip is that, whenever your judge gives you that opportunity, be careful to <u>never</u> let your jurors self-diagnose their own biases.

Any time you ask a voir dire question that uses the words "fair" or "unbiased" or "reasonable," you are in some way allowing the juror to use their own subjective, meaningless definition of those words in their answer. Any time you ask a question like "given what you've told me, do you believe that you would be unable to be fair as a juror in this trial?", you are letting the juror self-diagnose their own bias. Now that may seem obvious, but there are less-obvious ways to accidentally make this mistake. Any time you ask a question like "would you be able to award a <u>reasonable</u> amount of damages for emotional distress, if the evidence proves it?", you are letting the juror define "reasonable." Understand that jurors have their own, subjective definitions of words like "fairness" and "reasonable," and their definition of "reasonable" may not be at all reasonable to you.

Almost every juror believes that he or she is "fair" and "reasonable." But don't be fooled when you hear these words from a juror; when a juror says he is "reasonable," the juror means that his beliefs seem incredibly "reasonable" to himself. Believe me, because I've asked jurors directly: a juror who believes it's "unreasonable" to find a defendant liable of negligence when the negligence was unintentional will absolutely tell you they will be a "fair, reasonable" juror. Every juror has their own unique definition of what "fair" and

"reasonable" are, and they have nothing to do with the laws or the jury instructions. A juror who believes that awarding more than $100,000 seems "unreasonable" in any situation will, if asked, tell you that she can absolutely give a "fair and reasonable verdict." A juror who believes awarding money based on sympathy, regardless of liability, is the right thing to do will usually agree that he can be "fair and reasonable." Even the most unfair, biased, unreasonable jurors who would never follow the law believe that they are "fair" and "reasonable," in their own minds.

The next time you pick a jury, keep in mind that your jurors don't see "fair" and "reasonable" and "unbiased" the same way you do, or the same way the court does. Remember that even the most honest, self-aware jurors don't know when they're biased, because they probably don't understand what laws they'll be asked to follow and can't gauge their ability to follow the law until they find themselves face-to-face with a law they disagree with. Make a note of the key laws you'll need your jurors to follow, and make sure to explain those laws to your jurors before you ask them if they believe they can follow them. And, perhaps most importantly, only use words like "fair" and "reasonable" one way: "do you have the feeling that following that kind of law seems a little unfair or unreasonable to you?"

Show your jurors that you're reasonable

I have no doubt that each one of you takes great pains to present your case as perfectly as you can to a jury. You probably even make every effort to present yourself perfectly to the jury. Keep in mind when you're preparing for trial and thinking about all the strategies that go into presenting yourself, your client, and your case that the most challenging thing about a perfect presentation is that you are not the judge that matters. A case presented perfectly to you, a judge, or any lawyer is probably not a perfect case to a jury. So if you're taking a case to a jury trial, remember that only their opinions matter. And while you're at it, realize that your jurors' opinions about you and your case aren't always logical or fair.

I'm going to discuss your jurors' perceptions of you, the lawyer. Not their perceptions of your client or your case, but of you. Even though you didn't have anything to do with the events surrounding the facts and parties at trial, you are the most important figure the jurors have to trust in order to trust your client and your case. If the jurors trust you, they'll trust what you have to say. If the jurors don't trust the messenger, they won't trust the message.

To make matters worse, jurors seem to distrust lawyers more these days. They each come into the courtroom with an idea of the stereotypical dishonest lawyer seared into their brains, and for many jurors, you are guilty of being that stereotypical lawyer until proven innocent. So let's discuss how jurors go about figuring out if you're one of the cliché, dishonest lawyers they distrust.

Jurors expect the stereotypical lawyer to force their own point-of-view down the jurors' throats in trial, and too often lawyers do just that at the worst possible time—in voir dire, when you should be letting the jurors express themselves. Few things offend the jurors more than a lawyer who asks them questions but then cuts them off, tells them what to think, and doesn't let them be entitled to their own opinions. Voir dire is not the time to tell your jurors how they should think, but many lawyers are unknowingly guilty of doing just that. Anytime you ask the jurors "wouldn't you agree that…" you are forcing your point-of-view on them. Even when they claim to agree, many really don't, so it's a waste of your time. Your jurors

have opinions, some very strong ones, and many do not agree with you, no matter what you lecture to them in voir dire. So never ask a juror a question like "wouldn't you agree that…" or "can you all promise me you'll follow the court's instruction that…" If a juror doesn't agree, or doesn't really think the jury instruction is fair, they won't be persuaded, no matter what they say, and they'll resent you for asking.

Jurors trust you when you listen to them. Voir dire is your only opportunity to show them that you want to listen to them. And even though there are ways to subtly persuade jurors in voir dire, a large part of voir dire should involve shutting up and letting the jurors tell you how they feel. You can kill two birds with one stone during jury selection—by asking open-ended questions and asking lots of "how do you feel about that?" questions, you'll not only identify hostile jurors to de-select and learn how your remaining jurors feel about the issues of your case, but just as importantly you'll show your jurors that you care enough to listen. Jurors trust lawyers who listen, and voir dire is your best and only chance to show your jurors that you accept and understand every point-of-view. Invite disagreements, listen carefully and understandingly to jurors who are completely hostile to your case issues, and show even the craziest jurors that you understand what they're saying and how they feel.

Jurors expect the stereotypical, dishonest lawyer to avoid talking about the most glaring weaknesses in their case. Jurors don't just expect dishonest lawyers to object when it comes up; they also expect you to actively ignore the topic in hopes that the jurors won't notice. The jurors may be right. Too many lawyers don't know what to do with the most worrisome issues in their case and become paralyzed in their ability to talk about it to the jury. But unless the other side does you a favor and doesn't mention the issue, it's going to come up, and the jurors will notice if you avoid it. Even worse, your jurors will get the impression that you're hiding the issue from them, even when you're only ignoring or avoiding it because you can't figure out what to say about it.

Believe it or not, jurors trust you when you talk about your worst issues and make honest admissions that seem to be detrimental to your case. Jurors are always surprised when lawyers openly admit concerns in voir dire, and they find it refreshingly honest. You'd be amazed at how much credibility you build simply by asking the question. And as I've written many times, jurors get the impression that if you're not worried about talking about a challenging issue, then it must not be that damaging an issue for you. Take great pains to identify the elephant in the room and talk about it, especially if the other side is going to bring it up.

Jurors expect the stereotypical lawyer to be biased and subjective toward their side of the case, which brings up a strange phenomenon. You and I know that subjectivity and advocacy is how the system is supposed to work, but jurors miss this point. Jurors believe that honest lawyers are objective and honest—even to their own client's detriment, perhaps—and that subjective, biased lawyers are dishonest. In a recent case I was involved in, we asked jurors if they believed a lawyer representing his or her spouse would be more or less objective than any other lawyer. The judge was incredulous—"why are you asking such a ridiculous question? Lawyers aren't supposed to be objective!" But when the jurors returned their questionnaires, their responses told a different story—some felt that lawyers representing spouses could be "objective," while others believe they couldn't be trusted if they were "subjective." So your jurors' trust depends largely on a concept that isn't part of our system of justice—impressions of your honesty and objectivity.

Not to give you nightmares, but jurors have many more subtle, unfair reasons and cues to distrust you and shoehorn you into their definition of the cliché, dishonest lawyer—more than I could ever list out and many more that even I can't imagine. The point of telling you this isn't to scare you into a state of paralysis or make you self-conscious, but rather to make you comfortably aware of the things, big and little, that lawyers sometimes do (inadvertently) to offend and alienate jurors. The irony of course is that none of the offending signals you might be sending the jury are fair or logical; they're all normal, reasonable parts of representing your clients and dealing with the challenges of litigating a jury trial. But no matter how unfair, your jurors' perceptions and criticisms of you shape how they trust you, your client, and your case, and once you've done something seemingly harmless to turn a juror off, you may have lost them (and your case) in the process. So as foolish as it may sound to worry about how you're dressed, how you talk to the jurors, and the style with which you try your case, everything that matters to the jury should matter to you.

Don't be influenced by your jurors' demeanors

Never strike a juror because they seem unfriendly or opinionated. These jurors typically scare both sides, but that doesn't mean they'll be unreceptive to your case. Too often, I see attorneys scared off by the outspoken jurors on the panel, even when those loud jurors express values that make them receptive to one's case. Loud, opinionated potential jurors scare the daylights out of attorneys—usually both sides—and intimidate lawyers into wasting peremptory strikes that might be better used on the silent killers on the panel.

Potential jurors who claim to be biased are no more biased than the other jurors on the panel, and peremptory strikes are routinely wasted on these jurors when the judge or opposing counsel rehabilitates them into promising to be fair. In reality, all jurors are biased in some way, whether they knowingly admit it or are blissfully unaware. The jurors who claim to be biased in voir dire are either trying to get off the jury or (here's the irony) are the most honest and self-aware jurors on your panel, and probably more likely to be objective than the rest.

Don't jump to conclusions; jurors aren't jury consultants, nor are they reliable when it comes to predicting their own biases or verdicts. In fact, most jurors are completely unaware of why they make decisions in trial, although they usually think they know. To rewrite a famous phrase, talking about juror bias is like dancing about architecture, which is to say that most jurors have no idea what may bias them or where their biases will lead them in a trial that they have not yet seen.

Instead of taking the bait and wasting peremptory challenges on the loud and the allegedly-biased, focus on the underlying values and attitudes that will make each juror receptive or hostile to your case, and never lose sight of the fact that, in voir dire, jurors don't know what your case is all about. Just because a juror complains loudly about the workers compensation system and lazy employees doesn't mean that juror will be unreceptive to a plaintiff's case, especially if the plaintiff comes across as honest, hard-working, and genuinely interested in trying to work through a disabling injury.

Instead of automatically striking your loudest jurors, spend more time on them in voir dire. An outspoken juror will undoubtedly be more influential to other jurors, so take the time to figure out if the juror will be your worst nightmare or your strongest advocate. If you determine that the outspoken juror may be hostile to your case after all, don't stop asking

him/her questions. The more an outspoken juror says, the more likely your opposing counsel is sweating bullets and worrying about what that juror may do. More likely than not, opposing counsel will probably use a peremptory on that juror anyway.

Just the opposite are the smiling, friendly jurors and the smart, reasonable-sounding jurors on the panel. No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. Not true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

For the same reasons, never keep a juror because they seem friendly or intelligent. Too often, I see lawyers making the mistake of automatically trusting the smiling, friendly jurors and the smart, reasonable-sounding jurors on the panel.

No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. Not true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

Don't fall into the trap that smiling, friendly, courteous jurors will be receptive to you and your case. Yes, you seem to have rapport with them. Yes, they seem to be open-minded and willing to listen. But are they equally friendly during opposing counsel's voir dire? Are they equally willing to listen to the other side of the case? The truth is, friendly jurors have biases too, and a friendly demeanor doesn't tell you much about what a juror may be receptive to during trial.

Likewise, don't fall into the trap that intelligent, perceptive, reasonable jurors will be receptive to you and your case. Yes, they seem to understand you. Yes, they seem to grasp the issues in the case, and you get the feeling during voir dire that they'll 'get-it' and be smart enough to see right through the opposing case. But here's a fact that you may not have considered—both sides are usually convinced that their case is stronger, that the opposing case is full of holes and deceptions, and that any smart, 'gets-it' juror will be on their side without having the wool pulled over their eyes. Convincing yourself that 'gets-it' jurors will see things your way is one of the most common examples of attorney bias.

Also, don't fall into the trap that jurors who should relate to your client will relate. Just because a juror is a middle-aged construction worker like your plaintiff doesn't mean that juror will identify with and relate to your client's case and decision to file a lawsuit. When the plaintiff is a hard-working, blue-collar, never-complains employee, his or her peers are often unreceptive to the plaintiff's case. Too often I see attorneys rely on their client's input in jury selection when the client is merely looking for those jurors that he/she identifies with and fearing those jurors who seem different. Identifying with the case and with the litigant are often very different processes.

Remember, you are looking for jurors whose values align with the values of your liability and damage arguments. Values are segregated across demographic lines much more rarely than you might believe, so make sure to stay focused on your jurors' values, expectations, and understanding of how the world works. The next time you select a jury, don't be afraid to ignore their education and personality quirks.

Remind your jurors of their own beliefs to persuade them

Pre-conditioning during jury selection is a controversial subject; technically forbidden, but practiced in some form or another by most trial lawyers (in my observation, at least). Don't blame me if you get admonished by a particularly strict judge for pre-conditioning, because some judges won't allow even the slightest hint of pre-conditioning. However, the reality is that most judges do allow voir dire questions that subtly persuade, as long as the questions genuinely ask jurors for information about themselves. But here's the point: not only are questions that start out "would you agree that…" and require only "yes" or "no" answers much more likely to be shut down by a judge, they're also incredibly ineffective at persuading jurors. The most effective way to being persuading jurors during jury selection involves asking perfectly appropriate voir dire questions that are the least obvious form of pre-conditioning. Win-win. The only downside? Asking voir dire questions that persuade jurors is much more challenging and requires much more creativity than simply lecturing your trial themes to your jurors.

So before we discuss how to effectively persuade jurors with voir dire questions, set aside your worries about getting objections and upsetting the court. Believe me, I've seen plenty of judges who won't stop an aggressive lawyer from basically giving their opening statement during jury selection. Realize that, technically speaking, voir dire questions that persuade aren't automatically forbidden. In most venues, voir dire is only improper if preconditioning is the "dominant purpose" of the question. If persuasion happens to be the side-effect of a legitimate question that elicits information from jurors, it's okay to pre-condition.

But for now, let's set aside the ethics and legality of pre-conditioning and focus on how and when it can be effective. Remember that in my last jury tip, I warned against the dangers of overt pre-conditioning; specifically, sharing the facts of your case in direct or barely-veiled "hypothetical" ways. But I also wrote that "a good jury selection should absolutely include some pre-conditioning, as long as it's subtle persuasion. You do need to ask questions that get jurors thinking about your case issues in ways that match the themes of your case, and there are ways to do that without sharing any facts from your case." So how can you influence your jurors during voir dire, without even hinting at the facts of your case? There are two key ingredients to persuasive voir dire: make your questions about the themes and principles of your case, not the facts, and design your questions so that your jurors' answers are what persuades them.

Write this down, because it's important: nothing you say during jury selection will change anyone's mind; only your jurors can change their own minds. What you can do is to ask questions that help your jurors remind themselves of how they really feel about issues involved in your case. You can ask questions that force them to think about things that they wouldn't otherwise realize until they remind themselves: experiences they've had, approaches they've taken to similar situations, lessons they've learned.

This may sound obvious, but I can't stress how frequently during my jury selections I hear opposing counsel ask questions like "wouldn't you agree that teamwork and getting along with your co-workers is important?" or "don't you think it's possible for a lawyer to put his own financial interest before their client's best interest?" In a vacuum, who wouldn't agree that something is "possible" or "important?" Don't assume that just because all of your jurors nod and say they agree means you've made some progress or begun to persuade them. They certainly know what you'll be arguing, but they won't be more likely to believe it. And worst, they haven't internalized your theme: you haven't found a way for your jurors to make your points important or real or probable to them.

Instead, your voir dire questions have to remind jurors to think about what they've actually done or how they actually feel… and only when your jurors make that personal connection will they begin thinking about the case in the ways you want them to think. In a recent medical malpractice trial, I wanted jurors on-board with the thinking that "early detection is the best protection" against cancer. Without being reminded that they've heard that maxim over and over from the medical community, our jurors were vulnerable to believing that discovering cancer too late to fix can happen even with good health care. So I had my client ask our jurors if they had heard about the importance of early detection… and if anyone had put that idea into action. One by one, the jurors reminded themselves that they got preventative tests like mammograms, routine medical tests, or annual checkups. "Even without any signs or symptoms of a medical problem" we asked? "Of course, my doctor expects me to" they realized. Reminding them of what they'd heard and what they'd practiced as patients persuaded them to think differently (and along our lines) than they would have otherwise.

The best persuasion in voir dire involves lawyers tailoring questions to the unique experiences of their jurors, and showing jurors that they apply the same approaches in their jobs or lives that the lawyer hopes they apply to their client. This isn't easy to do and involves some improvisation, but can be planned if you understand the principles you're trying to demonstrate. Let's say that you're suing a professional for making a negligent mistake through lack of diligence, like a doctor failing to double-check a medical chart or an accountant missing a red flag in financial statements. Pick out a few jurors with jobs that you understand and tailor questions to their jobs that basically ask the juror "what do you do to make sure you're being extra careful and not making mistakes?" Ask a plumber "after you've fixed a pipe, do you check a second time to make sure the leak is gone, just to be careful? Why?" Ask an accountant "when do prepare a customer's tax return, do you go over anything more than once, just to be sure you didn't make any mistakes? Why?" And follow up with "now, in your job, if you make a mistake, what's the worst thing that could happen? OK, so let me ask you this: do you think it's less important for a surgeon operating on a sick patient to double-check things than someone who does your job? Why not?"

Now I realize that improvising voir dire by tailoring questions on the spot to your jurors' unique experiences can be tough, so luckily there are some short-cuts that can be effective. My war story about early prevention illustrates one easy-but-effective method: asking your jurors if they've ever heard of a concept that is essentially a trial theme of yours, and then asking "has anyone here ever practiced that idea in your life?" The more your jurors connect the dots between your theme and their lives, the stronger your jurors will become an advocate for that theme because they'll internalize it. Never assume that your jurors will connect the dots themselves. For example, asking your jurors specific questions like "do you wear a

seatbelt when you drive? Do you check your mirrors frequently? Do you slow down when you're driving in fog?" doesn't necessarily remind your jurors that they live out the concepts of defensive driving or personal responsibility; unless reminded, they may assume they do those things out of custom or the rules of the road. Instead, ask them "when you drive, what precautions do you take to make sure you're keeping yourself, and other drivers, as safe as possible?"

For many reasons, jury selection is the most important phase of trial when it comes to your ability to influence the success of your case. Once discovery ends and trial begins, you can't change the facts of your case, you can't stop the other side from hammering on your worst facts, you can't control how many bad jurors get called into your courtroom, and you can only get rid of a small handful of them with peremptory strikes. But one thing you can do is to make your entire jury pool more receptive to your case by showing them ways that they already agree with the themes and principles in your case. No matter how compelling you think your case will be, it never hurts to make sure your jurors already agree and to get them on-board. So even though the primary goal of jury selection should be to remove the most unreceptive jurors, you should always set aside some time and effort on persuasion, because unlike peremptory strikes, there is no limit on the number of jurors you can persuade and make more receptive during jury selection.

Pay more attention to your jurors' expectations than their experiences

You represent a wrongfully terminated employee, and prospective juror #7 has been mistreated by a former employer. Great juror for you? Not necessarily.

I've often said that your jurors' experiences don't matter much: the lessons and attitudes they've developed from those experiences matter. Assuming that a juror's experiences have predisposed them a certain way is a dangerous assumption. Not only might a juror have formed an attitude 180 degrees from what you've assumed, jurors with important experiences tend to have formed stronger attitudes than jurors without case-relevant experiences. If you have the voir dire time, dig deeper and find out for sure.

But attitudes and opinions aren't the only impressions jurors form from their experiences. Experiences create and change a person's expectations and standards. So for the same reasons that you should focus on attitudes (not experiences) in jury selection, you should focus on the expectations your jurors' experiences have shaped. Don't get distracted by the experiences themselves. So let's talk about the ways your jurors' expectations matter.

Jurors have a tendency to decide cases by comparing their own (highly-subjective) expectations to the facts in the case. In other words, they'll usually find a defendant blameless if its conduct "is no worse than what most companies or people do these days" but liable if the conduct "crosses the line." Jurors usually don't consciously disregard the law, but that line has little to do with the law and more to do with your jurors' perceptions of the real world. And within each juror's mind, that line is in a different place.

Jurors decide all kinds of civil lawsuits this way, not just professional liability and malpractice cases in which the jury is directly asked to think about a standard of care. Whether or not the jury instructions mention a standard, your jurors will always decide your case based on an unspoken standard of care as defined by their own expectations.

When jurors deliberate, they spend less time debating the facts ("what actually happened") and more time debating right and wrong. And when they debate right and wrong, they're really debating their own personal standards of care for whatever the case involves: a driver, a company in the business world, the limits of intellectual property, the role of government in an eminent domain case, etc. No matter what the experts say, your jurors' impression of what is normal and expected (according to their own experience) sets the standard of care against which they measure the conduct of the defendant.

And when it comes to jury selection, keep in mind a counter-intuitive phenomenon: your jurors' experiences usually create and change their expectations in the opposite direction. In other words, when a juror has had a negative experience, it most often reduces their expectations and makes them prone to judge defendants more gently. The worse your jurors are used to, the lower their expectations of what a defendant should have done.
Jurors who have had overwhelmingly positive experiences sometimes develop amplified expectations. Raised standards actually make jurors judge defendants much more strictly: the better they've seen, the higher their standards and expectations of what a defendant should have done. Sometimes to the point of being unfair or unrealistic.

So the next time you hear a juror raving about how fair and responsible her employers have been, don't expect that juror to automatically trust the defendant in an employment case. She's just as likely to be shocked and disappointed by an employer who didn't treat an employee with the perfect fairness she's come to expect. High expectations don't translate into high levels of trust.

The same goes for jurors with low expectations. The next time you hear a juror describe a negative experience with an entity similar to the defendant, don't assume that the juror has a distaste for those kind of entities or even bad conduct. Jurors who have experienced lousy service from a doctor or professional, or who have seen nothing but lousy driving from truck drivers, or have seen unethical business practices from corporations, are often less likely to blame a doctor, truck driver, or company. Bad experiences often set lower expectations, and jurors compare a defendant's conduct with what they're used to seeing. Lower expectations, less shock and outrage from the juror.

Keep in mind a couple of exceptions. You represent a hospital, and prospective juror #4 has had a loved one's surgery botched at the same hospital. Lousy juror for you? Almost certainly; one exception to the rule of diminished expectations is when a juror's negative experiences involve your client specifically, not just similar entities like hospitals or employers or patent holders in general.

Here's another: you represent a plaintiff in a breach of contract suit, and prospective juror #2 complains about how often he's had promises broken and contract terms violated. Good idea to strike this juror because his expectations have been lowered? Not in this case, because this juror complained. Jurors who are upset instead of being resigned aren't cynical. When a juror's negative experiences have caused them to become angrier than jaded, their expectations haven't changed. These jurors are usually still idealistic and continue to expect better. Only when a juror has become resigned to the reality of reduced expectations and adopts the impression that "that's how the world is" will a juror be receptive to dismissing seemingly bad conduct.

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Harry Plotkin is a nationally-renowned jury consultant and leading voice in the field of juror decision-making, psychology, and persuasion. Harry has helped shape the outcome of over one thousand civil trials across the country by selecting juries, mock testing cases, and shaping the way his clients present their case to the jury. He devotes a large part of his consulting practice to employment trials, primarily on behalf of plaintiff employees, and is proud to have helped dozens of CELA members win multi-million dollar verdicts in retaliation, discrimination, defamation, harassment, and whistleblower trials in state and federal courts in California in the past few years.

Each month, he shares his expertise and understanding of juror decision-making, psychology, and strategy with trial attorneys across the country with his acclaimed Jury Tips. To read additional articles and learn more about jury selection and juror decision-making, please visit www.yournextjury.com. He can be reached at 626-975-4457 and harry@yournextjury.com.