

Understanding De-selection Questions for Voir Dire: Identifying Bad Jurors without Drawing Attention to Good Jurors

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Picking a jury is a de-selection process that should be guided by de-selection questions. Put another way, the goal of voir dire is to identify jurors to strike, not jurors to keep. By asking de-selection questions it is possible to identify jurors who will not be receptive to your arguments without drawing attention to your good jurors. More times than not, attorneys ask questions completely backwards because they are sold on the idea of arguing their case during voir dire. Conventional wisdom, influenced mostly by research on the Primacy Effect, has lead attorneys to believe that priming jurors before open statements will increase the probability of a favorable verdict. However, we now know that arguing your case during voir dire typically causes unfavorable jurors to stop volunteering information. They stop talking because their opinions are contrary to yours. Meanwhile, your good jurors start talking too much, which makes them easily identifiable to the other side. To identify unfavorable jurors it is necessary to discuss your problem areas and that usually means asking questions that you would probably expect from the other side.

I recently heard a criminal prosecutor say, “Raise your hand if you believe police officers usually do their job properly and do not arrest people unless there is a good reason to do so.” He was trying to demonstrate that most people believe that police – including the arresting officer in that particular case – do not just go around harassing people. A better approach would have been to say, “Raise your hand if you know of a situation in which a person was arrested without a good reason.” That way the prosecutor would have drawn attention to his bad jurors, not his good jurors. He could have then followed-up by asking the jurors who raised their hands about the outcome of those cases. Chances are the defendants in those cases either plead guilty (which suggests the arrests were warranted) or the cases were dismissed (in which case the legal system worked in the end).

In the civil arena, one of the biggest obstacles for a plaintiff attorney is the issue of frivolous lawsuits. Most plaintiff attorneys simply avoid the issue altogether as if not talking about it will make the problem go away. A more effective approach is to deal with the problem head-on, and that requires asking jurors how they feel about frivolous lawsuits. Inevitably one of the jurors will mention the McDonalds coffee case. At that point you should ask what it was about that case that makes it stick out in the juror’s mind. The juror will say something to the effect of, “That lady sued for millions of dollars when really it was her fault and she didn’t even get hurt that much.” At that point your *least* effective option is to try to convince the juror that there was more to the case than most people realize, and if he or she knew all the details then the case would not seem as frivolous. However, trying to change his or her opinion is not a good use of your time because you are not likely to succeed. A better approach is to thank the juror for his or her candor and then use that information to your advantage. You now know which juror(s) is going to be hesitant to award damages in any case without serious injuries.

When dealing with issues that are not favorable to your case you should always find a way to put yourself on the same side of the issue as the jurors. For example, when a juror voices a concern about all the frivolous lawsuits, simply agree and reply, “My client has had to wait almost three years for his day in court because of all the frivolous lawsuits.” The key is to put yourself on the same side of the issue, as oppose to trying to convince jurors you are right and they are wrong.

While plaintiff attorneys should be addressing issues like frivolous lawsuits, defense attorneys should be addressing issues such as negative experiences with doctors. It is not uncommon for a defense attorney to say, “Raise your hand if you believe health insurance in America is too expensive because of frivolous lawsuits.” The purpose of the statement, of course, is to drop the hint that the current case is without merit. However, the plaintiff attorney will make note of every juror who raises his or her hand. Therefore, the statement does more harm than good for the defense. Meanwhile, the defense attorney learned nothing from the show of hands. A much more informative question would have been, “Who here has switched doctors because of a negative experience?” Or, “Please raise your hand if you do not have a primary care doctor because you prefer alternative forms of medical care.” Jurors who respond to those issues may not have a favorable view of your client. You will benefit more by talking to those jurors about their mistrust of doctors than by dropping hints about frivolous lawsuits.

It is possible to incorporate themes during voir dire without arguing your case and without drawing attention to your good jurors. That will be the topic of a future article. In the meantime, just understand that you should always be asking questions in a way that will enable you to identify jurors you want to strike, not jurors you want to keep. By asking de-selection questions you will have much more information available when exercising your peremptory challenges.

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