

### **July 2008 Jury Tip: “Uncovering pre-trial suspicions and unofficial evidence”**

Having been called into jury duty myself this past month—and able to watch the jury selection process both in the courtroom and backstage (where the jurors talked with one another about the case, the lawyers, and the questioning)—I was once again reminded of how wildly variable juror predispositions are, and how persuasive these pre-trial predispositions are in each juror’s decision-making. Anyone who has had an opportunity to listen to jurors discuss a case before voir dire has even begun probably knows that, in some jurors’ minds, the case may be over before jury selection.

The comments I heard from my fellow jurors—after the judge had read the neutral description of the case but before attorney-led voir dire—were loaded with pre-judgments and suspicions based entirely on subjective interpretations of ambiguous evidence. This was a criminal trial, and several jurors insisted that the defendant **MUST** be guilty simply because the judge had mentioned that there was a witness at the scene of the crime. At the same time, another of the jurors confided in me that this witness was proof that the defendant was being framed by the victim of the crime (a home invasion and burglary/robbery). His thinking was that, if the witness was actually credible, the defendant would surely have pled guilty or taken a plea bargain. Each of these jurors were fairly certain of the guilt or innocence of the defendant before hearing a shred of evidence, but only one discussed their suspicions aloud in voir dire, and this one juror reluctantly agreed to be fair after a long lecture from the judge.

The jurors’ suspicions—and the wildly different ways each juror used them to support wildly different conclusions about the guilt or innocence of the defendant—are the same type of comments I regularly hear from mock jurors during focus groups and from actual jurors when I encourage attorneys to probe concerns and suspicions during voir dire. If a plaintiff is suing a doctor instead of a hospital or the HR director instead of the employer, jurors will often complain that it is unfair for a plaintiff to target the little guy. If a plaintiff is suing the hospital or the company instead of the driver of the company van that was involved in the car accident, jurors will often complain that the plaintiff must be greedy and is suing the entity with the ‘deep pockets.’ Before every trial begins, your jury panel will undoubtedly be filled with suspicions about why the plaintiff ‘really’ filed the lawsuit, why the defendant hasn’t settled the case, why the judge allowed the case to proceed to a jury, and suspicions about insurance, motives, guilt and innocence—all based on the barest of information.

The lesson to be learned here is that jurors jump to strong, sometimes unshakeable conclusions after the first minute of trial. Let’s call these suspicions-turned-conclusions “unofficial evidence,” because to your jurors, their assumptions become just as compelling as any evidence you can produce. In every trial, a handful of jurors will create ‘unofficial evidence’ in their minds that will overwhelm their decision-making before trial begins, and the best method of dealing with the concerns and suspicions that

your jurors develop is to discuss these suspicions openly in voir dire. Invite your jurors to tell you what concerns them about your case and what questions are already in their minds that may make them skeptical or suspicious of one side or the other. Never discourage your jurors from expressing themselves openly and honestly by telling them that these views may prevent them from being “fair” or by letting jurors know that these pre-judgments are improper. Save the jury instructions for the end of voir dire.

In a criminal trial, a defense attorney should ask jurors if anyone has the feeling that a defendant **MUST** have done something wrong—or probably did, at least—if they have been investigated, questioned, and arrested by the police department and charged with a crime by the district attorney. In an employment trial, a plaintiff attorney should ask jurors if anyone has the feeling that an employer would probably only fire an employee if it had a good reason, or that an employer would have no reason to fire a truly productive employee. In a patent infringement trial, the attorney representing the lesser-known litigant should ask jurors if they have the feeling that the larger, more well-known company is more likely to have developed a product first, especially if the better-known company has a good reputation or has developed other well-known products. In patent cases, jurors often have an underlying feeling that a large, wealthy corporation would never infringe on a patent idea if they have the resources to acquire or purchase the idea from the inventor. No matter what the evidence suggests, this feeling may often overwhelm your jurors before the trial begins.

Once you’ve had an open discussion with your jurors about their concerns, their suspicions, and how their beliefs and values may clash with your case (and, without telling them yet, the jury instructions), the next step is to commit your jurors to their statements. Convince your jurors—and the court—that they can’t help but be skeptical of a supposedly injured and disabled plaintiff because they appear to be in good health in the courtroom, no matter what a medical expert might tell them. If you make them feel comfortable enough, many jurors will admit that they believe a plaintiff who can walk into a courtroom on their own power can surely find a job that they can physically do full-time, no matter what the evidence says. Convince them that there is **NOTHING** wrong with having beliefs and opinions, but once they commit, demonstrate how their beliefs may make it difficult for them to follow the jury instructions.

When a juror expresses a doubt or a suspicion about your case—for example, a juror who tells you they find it hard to believe that a manufacturer wouldn’t know that a product was unsafe long before the FDA or CPSC did—encourage them to admit that they will keep that suspicion in mind throughout trial. Encourage them to admit that it is hard for them to imagine your case being believable now, and that even if you produced evidence—for example, witnesses who testified that the product passed safety testing—they would **STILL** have that suspicion in the back of their mind and might still have a hard time believing your defenses.

Getting jurors to admit to unshakable bias is not as difficult as it sounds. In nearly every medical malpractice jury I've selected, I have been able to get a handful of jurors to admit that they believe that doctors are so well-trained and so careful that they would find it highly unlikely, if not impossible, to imagine a doctor making a serious mistake, no matter what the plaintiff's evidence says. I've given you just a couple of examples of common juror suspicions here; for a full list, contact your local jury consultant or put together a focus group if your case is large and challenging enough to warrant it.

Because most judges—or opposing counsel, if they have voir dire time remaining after yours—will usually try to rehabilitate jurors who admit that their biases may impair their ability to follow jury instructions, be sure to rehab-proof these jurors. Tell them that both sides know that they can TRY to set beliefs aside and TRY to be fair and impartial, but ask them if they can be SURE that they can abandon their beliefs or ignore their concerns throughout trial. You may even ask jurors “even if the judge requires you to follow the jury instructions, and you promise the judge or [opposing counsel] to follow them and try your best, will you still be SURE that you can ignore the beliefs you shared with us today?”

Unless your judge is dead-set against granting challenges for cause and believes in rehabilitating even the most biased juror—and in many judges' courtrooms, uncovering bias and pursuing cause challenges are a waste of breath—your chances for success at trial have a lot to do with how well you pursue uncovering juror bias and removing jurors for cause. And even if you aren't successful in persuading the court to grant challenges for cause, you will have uncovered some of the most unshakeable biases against your case and the jurors who need to be removed with peremptory strikes. Never assume that you can overcome your jurors' suspicions and the ‘unofficial evidence’ they create, even with the strongest evidence. Jurors who make up their minds early don't rethink their positions; instead, jurors who are skeptical of your case become so entrenched that they will search for any reason to dismiss your evidence and, even worse, will interpret your best evidence to support the conclusions they have already drawn. The message, as always, is that it is much easier to select a receptive audience than to win over a skeptical jury, so don't be afraid to spend voir dire time asking your jurors what they already find troubling or wrong with your case from the get-go.

*Harry Plotkin is a jury consultant in Los Angeles. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements. He can be reached at 626-975-4457 and at [harry@yournextjury.com](mailto:harry@yournextjury.com).*