



LACBA Small Firm and Sole Practitioners Section and
LACBA President's Advisory Committee on Women in the Legal Profession
(PAC-Women) Promoting Women to Lead Subcommittee

Presents

The Plotkins on Jury Selection in the Post COVID-Era, with a Focus on How Women Lawyers Can Maximize Their Full Potential in Voir Dire

Featured Speakers

Claire and Harry Plotkin, Trial Consultants and Founders of Your Next Jury

Moderator:

Patricia Egan Daehnke, Past LACBA President and Co-Chair of PAC-Women

Tuesday, July 20, 2021

Program - 12:00 p.m. - 1:30 p.m.

Los Angeles County Bar Association

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SPEAKER BIOGRAPHIES

HARRY PLOTKIN (panelist) is a nationally renowned jury consultant and leading voice in the field of juror decision-making, psychology, and persuasion. When the best trial lawyers in California go to trial, they call Harry. He has helped trial lawyers win some of the biggest and most difficult verdicts in over a thousand civil trials by selecting juries in court, focus grouping cases, and shaping the trial themes and opening statements that persuade jurors to deliver justice for his partners in trial. In the past 7 six years alone, he has selected the jury in 43 different eight-figure verdicts, which include trials involving claims of product defect, defamation, auto negligence, failure to prevent child abuse, medical malpractice, wrongful death, wrongful termination, trip-and-fall, dangerous condition of public property, wrongful arrest, insurance bad faith, and traumatic brain injury, among many others.

CLAIRE PLOTKIN (panelist) is a jury consultant known for her competitiveness and tenacity. A former collegiate athlete, Claire never backs down from a challenge, and has helped win many 7 or 8 figure verdicts in well-known conservative venues. Doing everything from witness prep, focus grouping, and crafting voir dire and attending jury selection, Claire worked on over 150+ trials throughout the country. Claire is also passionate about education and training in the profession and works with area groups to help lawyers gain confidence and learn useful trial skills.

Patricia Egan Daehnke (moderator) heads up the medical malpractice team at Collinson, Daehnke, Inlow & Greco. Her practice includes the defense of complex, high damage, high risk cases in California and Nevada. In addition to defending physicians and surgeons, plastic surgeons, pharmacists, midwives, dentists, nurses, chiropractors and physician assistants, she has successfully defended legal malpractice, products liability and general liability cases. She has obtained defense verdicts in cases involving catastrophic injuries including quadriplegia, traumatic brain injury and wrongful death. Tricia also handles mass tort litigation, including opioid litigation and cases claiming injury from contaminated endoscopes. She has significant and successful experience defending physicians, dentists and nurses before state licensing boards. Tricia is a member of the American Board of Trial Advocates (ABOTA) and is recognized as a prominent attorney in both California and Nevada. Tricia is board-certified as a Civil Trial Specialist and Civil Practice Advocate and is a Fellow of the American College of Board Certified Attorneys. She is a Senior Fellow of the Litigation Counsel of America, a highly selective trial attorney honor society comprised of less than one-half of one percent of all American lawyers.

LACBA 2021: Empaneling an Ideal Jury

Harry Plotkin/Jury Consultant

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 never the best criteria to use.

In all my years of researching juries and analyzing mock trials and focus groups, demographics have never 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 reason 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 assumptions. 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 why 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 capable 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.

You should sound like opposing counsel in voir dire

Jury selection is not the right time to sell your case; it’s the time to identify and weed out those jurors who will never buy what you’re going to be selling. Because no matter how hard you try, and no matter how much of a “slam dunk” case you think you have, there will always be jurors who are completely unreceptive. The time for “building a tribe” and winning over your tougher jurors is in opening statement—when you can build credibility by incorporating their beliefs and values into your case—not jury selection.

Instead, your main goal during jury selection should be to identify jurors who think like the other side. Whose beliefs and values and expectations will make them receptive to what your opposing counsel will argue. In other words, jurors who speak the other side’s language, not yours. So how can you get them comfortable answering questions and freely admitting how they feel unless they feel like you’re speaking their language?

Imagine for a moment that you’re a juror with strong biases. Perhaps you believe that it’s disgusting that so many people in today’s society file lawsuits, that people who sue ask for way more money than they deserve, and that greedy lawsuits always seem to target big corporations just because they have “deep pockets.” You firmly believe that you’re right, that plaintiffs and plaintiff lawyers are wrong... and if you’re that person, you don’t think you’re “biased” or unreasonable at all. In your mind, YOU are the fair and reasonable one in the courtroom.

But imagine if a lawyer who seemed to agree with your beliefs asked you questions. You would feel comfortable agreeing with them... if they used the right words that made you feel like your beliefs were fair and right, not biased and forbidden. Imagine if the corporate defense lawyer asked you (the anti-corporate juror) “do you feel like too many companies these days are unethical, greedy, or irresponsible?” You would feel much more comfortable talking about how you feel... because your views haven’t been framed in a negative way by the question.

The question is judgmental toward the defendant, not the pro-plaintiff juror... which is exactly why the question is a good one. Look at those three adjectives for a moment.

Those are all words the plaintiff lawyer would probably use, in opening and closing. Using them in voir dire encourages jurors who AGREE to talk, which is exactly why the best way to identify bad jurors is to talk like the opposing counsel in voir dire. If you're a defense lawyer, use "plaintiff" words.

And if you're a plaintiff lawyer, use defense words. Instead of asking jurors if they believe in "tort reform" or have a "cap" on damages (few defense jurors think about these things) or would be "unable" to do something, use defense words to see which jurors perk up. When you talk about damages, use words like "unnecessary," "ridiculous," "excessive", and "unreasonable." Your questions should imply that the JUROR is reasonable, and that big damages are unreasonable. Questions like "would anyone here have a PROBLEM with awarding money for pain and suffering" don't work, because they discourage bad jurors from talking. First off, they don't think they have a problem. They think they're fully capable of awarding "reasonable" damages. And second, the question makes their values and beliefs seem wrong. They know how you feel about their beliefs, so they won't talk to you.

Now when I say "talk like opposing counsel," I don't mean you should express opinions to the jury. I'm not suggesting that defense lawyers should argue that lots of corporations are unethical, or that plaintiff lawyers should agree that big verdicts are excessive. What I am saying is that, during voir dire, you shouldn't take a position. Be neutral and non-judgmental. And when you're trying to encourage jurors to admit beliefs and judgments that the court knows are biases, don't call them biases (at first)... instead, use the words that bad jurors would agree with; that's what I mean when I say talk like opposing counsel."

Only once you've gotten your bad jurors to express their biases and how they really feel can you get them off for cause. But the tricky part is that, at some point, you're going to have to get them to admit that the beliefs they think are reasonable and fair and objective are in fact biases and prejudices. Don't expect them to agree with you that they are biases simply because you say so, or because they are at odds with the law and jury instructions. Most biased jurors are convinced they're fair, so they'll quickly retreat to saying "I can follow the law" once they get the sense their beliefs are being critiqued. You have to phrase your questions in a way that continues to imply that their beliefs are right, and maybe the law is wrong. Convince them to agree that any law that conflicts with their beliefs seems "unfair." Ask them if they think they might have a hard time "going against what you believe is right, and enforcing a law like that?"

The point being: you can't help but be an advocate for your side, and your goal is to persuade jurors. But once you've started persuading, you've taken a position and lost your ability to convince jurors you want to hear every opinion. If you believe in persuasion during voir dire, that's fine; so do I. But save it until the end of voir dire. Save your persuasion for the end, and for opening... and before you do, spend a little time talking like opposing counsel to see which jurors jump up to agree with you.

Good voir dire should feel uncomfortable

Skilled trial lawyers believe in the power of building credibility with the jury. The best lawyers excel at building rapport with jurors from the first minute of trial, showing your jurors that you're reasonable and honest, approachable and human. But unfortunately, rapport and credibility aren't enough to win consistently in trial. Jurors who are philosophically opposed to your case won't be swayed by your credibility. Rapport won't save you from a bad jury... or even one or two strong jurors against you. To win consistently in trial, you have to be brave enough to ask the tough, uncomfortable questions during jury selection that identify bad jurors.

Just like you can't make an omelet without breaking a few eggs, a good lawyer can't pick a good jury without ruffling a few feathers and making some jurors uncomfortable. Ruffling feathers is a necessary evil. That doesn't mean upsetting your entire jury and falling behind in trial; the trick is to ask the questions that ruffle your bad jurors' feathers and don't bother your good jurors. Skilled lawyers aren't afraid to provoke bad jurors; provoking arguments is one of the best ways to get them upset enough to complain about your case and get excused for cause.

Over my years of selecting juries, I have seen every style of voir dire. I have seen plenty of lawyers try to walk on eggshells by asking the "tough" questions in lazy ways that don't probe for brutally honest answers. It never works. There's no "nice" or "polite" way to ask the tough questions, so don't bother trying to sugarcoat them. Good voir dire questions encourage bad jurors to say awful things about your case. Bad voir dire questions discourage bad answers.

"Is anyone going to award the plaintiff less money just because there are too many frivolous lawsuits?" "Is anyone going to assume my client is guilty just because it's a big corporation?" No juror will volunteer an answer, even if they agree deep-down. If your question makes the juror feel stupid for admitting it, you're discouraging honest answers. Instead, ask questions that make your jurors' biases seem reasonable. If you had asked "who feels like too many people exaggerate their damages to ask for more than they really deserve these days?" or "who feels like too many corporations are doing unethical things these days?" you would have heard a lot of awful opinions... but flushed out your truly bad jurors. And the unbiased jurors won't be swayed by what other jurors say.

"Would anyone here be unable to treat a corporation the same way you'd treat an individual?" "Does anyone here have any concerns about awarding damages against a city or county or state?" Only the most vocal, outspoken jurors raise their hands and voluntarily admit biases to "yes or no" questions. 95% of your jurors won't raise their hands... so you've learned nothing about how 95% of your jurors feel about an important issue. Don't assume that jurors who don't raise their hands to "yes or no" questions aren't biased; all you've learned is that they haven't admitted bias.

Establishing credibility with your jury is incredibly valuable... until the moment that you argue a message or ask your jurors for something a juror or two is against. No matter how reasonable and credible and friendly you seem to a juror, no amount of rapport will ever get a union member to be okay with an employer firing an employee without

progressive discipline, or a tort reformer to be okay with multi-million damages for pain and suffering. So don't be shy about talking about the warts in your case in jury selection. I know some terrific plaintiff lawyers who tell the jury (in venues where it's allowed) up-front that they'll be asking for big, specific damages, as in "I'm not asking you to decide anything right now, but at the end of this trial, I'm going to ask the jury for \$50 million for my client's pain and suffering, so I need to ask you right now: who feels like that amount of compensation would always be unreasonable or excessive, no matter what an injured person has gone through?" You probably wouldn't be surprised at how angry some jurors get when they hear \$50 million, but you might be surprised to see how much easier it is to get jurors off for cause when they get angry.

To me, the more toxic the issue, the easier it can be to select a good jury, because toxic issues make it much easier to get bad jurors talking and complaining. I have consulted on (and won verdicts in) trials where the plaintiff spilled hot coffee on their lap... because the infamous McDonald's verdict makes it so much easier to get bad jurors complaining. But if your next trial doesn't have a well-publicized, toxic issue stirring the jurors up for you, you'll have to do the stirring.

Very few of your biased jurors will make your job easy by standing up and admitting that they're biased. With most bad jurors, you have to dig and pry for their biases... and because they're often unaware they're biased, they won't simply volunteer it. You have to ask open-ended questions about how they feel, and diagnose the biases yourself. Pick on the jurors who haven't raised their hands and ask a simple question: "how do you feel about how corporations conduct themselves these days?" or "how do you feel about lawsuits against cities?" forces the jurors to explain themselves. Ask questions that don't have clear, safe answers. Don't be shy about stirring the pot. The main purpose of a good voir dire is to uncover your jurors' venom, so remember that poisonous snakes only release their venom when they're angry and feeling attacked. Now I'm not suggesting that jurors are like poisonous snakes—or that you should ever "attack" or cross-examine jurors during voir dire. But I am suggesting that jurors tend to remain quiet until they realize that your case may rub them the wrong way or offend their values... so don't make the mistake of letting politeness or building rapport get in the way of asking questions that rub the bad ones the wrong way.

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 listen to them, not lecture to them. Demonstrate that you understand all 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 must 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 different 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 agree 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 agree. 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 never 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 reasonable 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?"

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.

Don't expect your jurors to enforce the laws

Imagine for a moment that you've been called to jury duty and are seated in the jury box as a juror, not a lawyer. The judge asks you and your fellow jurors a seemingly straightforward question that I see judges ask all the time: "will you follow the law and my instructions, even if you disagree with them?" Your answer, like 99% of your fellow jurors, is probably "yes, of course." As long as a juror is taking their job seriously and isn't trying to say anything to get excused, they tend to say yes... and mean it.

But imagine that one of the lawyers stands up to voir dire you, and because she is a smart lawyer, she explains to you that "this is a legal malpractice trial. And one of the laws that you'll be asked to follow as a juror in this trial is a new law. That law says that any attorney who took a vacation within 60 days of an upcoming trial, or any attorney who took a weekend day off within 21 days of an upcoming trial, has committed malpractice and is strictly liable for a bad result in trial for their client." And then she asks you, "now that's what the law says, but I need to know how you really feel: who feels like that law seems unfair or wrong to you... or that you might have a hard time enforcing it?"

I'm guessing that, as a practicing lawyer, you might have a different answer than the blanket "yes" you just gave to the judge about automatically following the law, even one you disagree with. You probably meant the first "yes"... but things change when the idea of following the law is no longer in a vacuum, and you're confronted with a law that seems horribly unjust to you. Now obviously I invented a fake, unrealistic law as an example. But the reality is that jurors face the same dilemma in nearly every trial, because a large chunk of the jury pool finds many of our existing laws incredibly unfair and incomprehensible. So do you truly believe that jurors are somehow better able to ignore their disgust, abandon their personal sense of right and wrong, and blindly enforce the law than you (a sworn officer of the court) could enforce my made-up legal malpractice law?

So why do jurors promise judges and lawyers they'll follow the law no matter what—and mean it!—when in practice, they often don't? The reason is that jurors assume the laws are fair. I've seen judges and lawyers ask jurors to give an example of a law they find unfair countless times... and most jurors can't think of a single example. Realize that most jurors know very little about our civil laws, and almost every juror knows absolutely nothing about how those civil laws apply to lawsuits. Other than vague notions and wrong assumptions, most jurors don't know much about non-economic damages, or that patent infringement need not be willful, or the exceptions to legal terminations for at-will employees, or vicarious liability or ostensible agency. Until you explain the law to them, they'll mean it when they tell you they can follow any law.

So the first, but not last, lesson is that you need to voir dire on the law as much as your judge allows you to. Stop assuming that jurors will follow the law. Or that certain kinds of jurors (businessmen and "responsible-looking" people, as opposed to the less-educated

or disenfranchised) will at least follow the law. Don't put any stock in promises by jurors to follow the law, even if they disagree with it, unless the specific law is explained. In a vacuum, their promises mean nothing. Don't get me wrong—some jurors can do it, but not many. And there are really no “profiles” of jurors who you can safely bet on to enforce a law they can't stomach. The only jurors who will consistently follow and enforce the law are those jurors who already agree with the law. That's it.

Some judges don't like lawyers explaining the law, but you need to push the envelope and do whatever you can to explain the laws that you worry some jurors might not like. Ask your judge to read the law in voir dire when the issue comes up. Paraphrase as best you can. Or at least explain the gist, like “I can't tell you exactly what the law says, but you'll be asked to enforce a law that restricts a company's right to fire employees and says they can't fire an employee for certain reasons. So who feels like any law that restricts companies from firing any employee they want for any reason seems unfair to you... or that you might have a hard time enforcing it?”

And you have to make the jurors feel comfortable admitting that they can't enforce a law, because most jurors worry that they'll get in trouble with the judge for saying they won't follow a law. You might laugh, but it's no joke; jurors' fears about giving a “wrong answer” can keep them silent about their biases, so always make sure to tell them there's nothing wrong with admitting an inability to enforce a law. Make it crystal clear that you're not being judgmental. One phrase I like to use is “now that's what the law says, but I want to know how you REALLY feel...” You also need to anticipate that your judge or opposing counsel may try to “rehabilitate” your jurors, sometimes by intimidating them into promising that they'll “try their best” to follow the law. Make it clear during jury selection that “trying” might not be enough. Tell them “I have no doubt that you're going to try your best to set your feelings aside and follow that law. But even if you try your best, do you think you still might have a hard time? What might interfere with your ability to enforce a law like that, even if you try your best?”

Now even if you do your best to uncover bias during jury selection and strike those jurors who won't enforce the laws you'll be asking your jurors to enforce, you still can't assume you got rid of every bad juror. Assume that you've got plenty of jurors on your panel who, at the very least, might find those laws a little unfair. To me, it's always a mistake to frame your case around convincing jurors that the evidence fits the law. The best way to win over jurors is to convince them that the law you're asking them to enforce is fair. In other words, you have to sell your jurors on your case being FAIR, not on your case being on the right side of the law. The reality is that even when jurors try their best to follow the law, their interpretation of the law itself is influenced by their sense of fairness. When jurors encounter a law that seems unfair, they are less likely to say, “that's not fair, let's break that law” and more likely to say, “that's not fair, it must mean something else.” So make sure that you never take the law for granted. Frame your case around trial themes designed to persuade jurors that what you're asking for is fair.

Pay more attention to your jurors' attitudes 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.