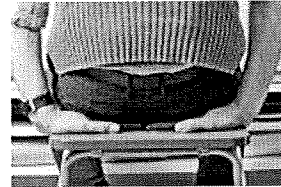


GETTING THE ANSWERS YOU NEED IN JURY SELECTION: HOW MANY vs. DO ANY?

The way you ask the question signals to the prospective jurors what you are expecting to get for an answer. That signal can either encourage jurors to volunteer a response or encourage them to sit on their hands through your voir dire. When you ask jurors “how many of you...?” you are signaling that the belief, attitude or experience you are asking about is so common that it you would expect it to apply to one or more of them. When you ask jurors “do any of you...?” you are signaling that whatever you are asking about is not the norm, and thus you are not necessarily expecting anyone to raise a hand in response. As we all know from interactions with clients, co-workers, and even our children, signaling expectations has an influence on the response and that principal applies to jury selection as well. Since jury selection involves interacting with a group of people who would generally rather remain silent, sending the right signal about your expectations can make a critical difference in getting the information you need to assess juror bias. For many of our clients, dropping “do any of you...?” as the default framing for their voir dire questions was half the battle. Knowing when and why to use “how many” vs. “do any” will help you accomplish your goals in jury selection.



When you are trying to get at a belief or attitude that jurors might be reluctant to share, you should always use the “how many” format. As indicated above, this makes it easier for jurors to respond because you have signaled that it would be the norm. You can make that signal more explicit by prefacing the “how many” question with a short sentence acknowledging that either “some” or “many” people share the belief, attitude or experience you are asking about. Whether you use “some” or “many” in the preface depends on the topic of your question. For example, if your ultimate goal is to sort out those who are the strongest adherents of a widely shared bias you would want to start out by encouraging the broadest possible response: “Many people believe that government regulations on XYZ have not been effective in solving or reducing the problem of XYZ. How many of you feel that way?” Stating that this is a belief shared by “many” sets up agreement as the socially desirable response which then encourages more jurors to raise their hands. To then sort out those who believe government regulation could never be effective from those who have the opposite view, you can shift to the “some” format: “Some

people think X while others think Y. How many of you are closer to the X side of the scale? (Chose one juror with hand up.) Tell me about that.” If you are primarily interested in identifying those who think “X,” then that belief or attitude should be very specifically described, e.g., “Some people believe regulation is simply not the answer – regardless of how it is written or how it is enforced they believe it just doesn’t work. Others think there may be ways to improve regulatory efforts to make them more effective.” What “others” think is intentionally stated in broader terms encompassing a variety of opinions when your goal is to identify those who really believe “X” without necessarily identifying those at the other end of the spectrum.

You send another important signal when you state what “some” believe and what “others” believe and ask how many subscribe to each view: differences of opinion among members of the jury panel is also the norm. More importantly, you reinforce what should be the central message of your introduction to the voir dire, which is that hearing about the different ways jurors look at the issues involved in the case is the main purpose of jury selection. Even when that purpose has been clearly stated at the outset, without being clouded by qualifications that send a mixed message (e.g., “We are just looking for people who can be fair and impartial”), we often hear jurors preface their response by saying, *“Do you want to know what I really think?”* While we all know that overcoming fear of speaking in public is a hurdle for many of the jurors, we often forget that publicly stating a position about which there may be strong disagreement is a much higher hurdle. Being taught that it isn’t “polite” to discuss topics where there may be fundamental differences – politics, money or religion – is one reason why most jurors have little or no prior experience in publicly expressing their opinions.

When and why would the “do any of you...?” format be the better choice for a voir dire question? In cases where you want to frame one or more of your opponent’s contentions as being “outside the norm,” using that format will help you find out whether that view is likely to be accepted or rejected by your jury. The basic principal that jury persuasion is determined by matching your arguments to the jurors’ preexisting attitudes and beliefs tells you that this type of “audience testing” on key issues can be an essential element of voir dire. When you ask “do any of you...?” you are not endorsing the attitude or belief you are asking about, and you are not signaling an expectation that any of the jurors will have an affirmative response. But what if they do? Depending on the situation, you may need to probe for details to be able to distinguish the juror’s opinion or experience from your

opponent's contention, you may need to probe for details to develop a challenge for cause, or you may simply thank the juror for that response and move on. If you have been able to conduct jury research before trial, this question will have been tested and you will be in a better position to anticipate how jurors are likely to respond. However, if you have not been able to conduct any jury research, it may happen that a "do any of you...?" question gets many affirmative responses. If so, you can use this feedback just as you would after getting the same finding in jury research: reassess your strategy and redesign your message or rule out your plan to frame that contention as being outside the norm.

There are also some other less sensitive situations where using the "do any of you...?" format makes sense, such as after reading a witness list, or when you are short on jurors and trying to discourage those who remain from asking to be excused due to the length of the trial. At the outset of jury selection, there are a number of these standard qualifying questions for which the "do any of you" format is certainly appropriate. The problem occurs when that format becomes the default that is used for all the questions that follow. Having a topic list of issues to cover in voir dire often leads to this unintentional use of the "do any of you" format. Writing out full questions in advance, or reading out loud the questions written by your jury consultant, will force you to think through which signal you want to send and will help to extinguish the often detrimental "do any of you" default.