



Politics in Civil Jury Selection

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A recent analysis of mock trial data determined that in assessing damages, factors other than political leaning are more useful in predicting if a juror will award large or small damage amounts. Read what social-political attitudes are more predictive of juror behavior than is party affiliation.

When lawyers undertake the civil-jury selection process, they often look for clues that, they hope, will provide insight into a potential juror's political outlook. To many lawyers, a juror's political perspective is so important that litigation teams nationwide spend time and resources determining whether a prospective juror has donated to or is affiliated with a political party. If such an inquiry is fruitless, even more time may be spent trying to deduce party identification. Does a certain juror have on his car an Obama sticker, a McCain sticker, or any sticker indicating candidate preference? When summoned on the first day of trial, is a particular juror reading about the virtues of Reaganomics or is she more interested in learning about how left-leaning approaches to economic stewardship are a recipe for financial success? Does a juror appear to be pro-choice, pro-death penalty, anti-tax, anti-government, or pro-environment?

These inquiries assume that when a person's political compass is revealed, a host of other litigation-related attitudes, beliefs, and opinions become evident and will reveal how a juror will render a verdict. Especially for attorneys who are involved in politics, the most imperative task for providing insight into how jurors will assess damages is to determine jurors' political points of view.

Specifically, the thinking goes, the more left-leaning or liberal someone is, the more likely it is that the person will be receptive to rendering large damage amounts and assigning punitive damages and the less likely that he or she will place limits on the amount of money juries can award. Conversely, many



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attorneys believe that if someone tilts right, or is more conservative, the person is less likely to award money and to support punitive damages and is more interested in “tort reform.” During voir dire, and through written questionnaires, many attorneys go to great lengths to discern where potential jurors fall on the political spectrum so the attorneys can use that information to make inferences about how each juror will determine appropriate damage awards.

Mock Trial Data

Given the recent elections and the nation’s attention on the political process, Zagnoli McEvoy Foley (Zagnoli), a litigation consulting firm in Chicago that conducts mock trials throughout the country, analyzed recent mock trial data in an attempt to determine if political leaning and damage assessments are intertwined. A total of 476 mock jurors who identified themselves as either Democrats or Republicans were studied. These jurors were participants in mock trials for cases involving a personal injury, product liability, or medical malpractice claim. Cases in which a corporation sued another corporation were not used as part of this analysis. Jurors of all ages, ethnicities, and educational backgrounds and from throughout the United States participated. Every one of these mock trials involved the prospect of rendering damages; jurors would deliberate and subsequently have a chance to award money.

The purpose of a mock trial is to discover jurors’ reactions to key facts, strategies, themes, arguments, and damages. Mock trials are not designed to accurately predict what the actual verdict will be but instead to provide insights, in a simulated, condensed setting, that help attorneys prepare for trial. However, with a large enough number of participants in a variety of venues, generalizations about damage assessments can be made with a high degree of confidence.

When mock jurors show up for a focus group, before hearing any case-specific information, they fill out a lengthy questionnaire that asks basic demographic and opinion questions, simulating what would be asked of them during voir dire. One area probed deals with attitudes toward lawsuits and jury awards in general. These questions measure how jurors feel about awarding damages, including punitive damages, and whether they are interested in restricting the amount of money juries can award.

Jurors also are asked about a range of socio-political attitudes. These attitudes range from the obvious (for example, do they identify themselves as liberal, moderate, or conservative) to the more direct (how they planned to vote in the November election) to the more subtle (do they feel the government should provide free health care for all citizens). All of these variables are looked at in conjunction with attitudinal variables on damages, and the actual rendering of damage awards, to learn more about the interplay between political attitudes and a propensity to award money. The ZMF study found that while political leaning tends to correlate with what jurors say about damages in civil cases, it does not predict whether or how much they actually award. In other words, political leaning is related to what a juror says but not necessarily to what a juror does; thus, political party allegiance should not be too heavily relied on during jury selection. The key lesson learned is that other factors prove more useful in predicting whether a juror will award large or small damage amounts.

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Juror Attitudes about Damages

For purposes of this analysis, jurors were divided according to four basic categories of damages, which were determined based on how much they actually awarded during a mock trial: no damages, low damages, medium damages, and high damages. The first test compared the number of Republicans and Democrats in each category, and the results showed no significant differences regarding damage awards. In other words, being a Republican or being a Democrat did not predict how much was awarded for damages. In fact, 22.3 percent of self-described Democrats awarded no money damages, while 20.8 percent of self-described Republicans awarded no money. This small difference of 1.5 percent is insignificant both in the formal statistical sense and from a loosely subjective interpretation of the data. Also, 53.2 percent of Democrats were in the medium and high categories of damage assessments, while 50.4 percent of Republicans were medium- and high-damages jurors – this also was not significant. A lawyer using political outlook as a central guide in jury selection is leaving more up to chance than she would hope.

Even though there were no differences in the sums Republicans and Democrats actually awarded mock plaintiffs, jurors' responses to certain questionnaire items were more revealing. In other words, there is something significant about what jurors have to say about awarding damages even if there is nothing significant about what they do. Jurors were asked whether they agree or disagree with the idea of placing limits on the amount of money juries can award. As might be expected, nearly three-quarters (74 percent) of Republicans agreed with that statement. A significantly smaller percentage of Democrats, 54 percent, agreed with that statement. For a plaintiff's attorney thinking he wants as many Democrats on the panel as possible, the results show roughly 6 in 12 Democrats agree with damage caps (although that is lower than the percentage of Republicans in favor of caps). But the bottom line is that political party affiliation does not predict the size of actual damage awards. The actual question, regardless of political party, is what is significant and useful during jury selection. Importantly, jurors who agreed with damage caps tended to be no- or low-damages jurors while those opposed to caps rendered higher amounts for damages.

This finding shows the importance of targeted follow-up in voir dire. Once you learn that a sizeable number of prospective jurors, both Republican and Democrat, are in favor of caps on damages, the all-important "please tell me why you think that" question will reveal crucial information that will enable you to make more intelligent use of your allotted strikes. For example, a reticent and follower type of juror who is merely parroting another person's opinion about limiting damage awards will likely have a vastly different influence on the jury compared to a leader who can clearly articulate a firm belief that the entire legal system is broken because of juries that get carried away with excessive damage awards. As a plaintiff's attorney, you might be significantly better off leaving on the panel a Republican with mild and case-specific views on tort reform instead of a Democrat who sees tort reform as necessary in all civil cases. Some lawyers may think that discussing tort reform in voir dire with one or more jurors will poison the rest of the panel, but it is better for a lawyer to hear this information during voir dire than during a post-trial interview following a disastrous result at trial.

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Another item asked of jurors was whether they would consider making a defendant pay a plaintiff for various components of damages. The mock jurors, when filling out the questionnaire, had a list of different damage components for which they could respond “yes” or “no.” There were no Republican-Democrat differences for the damage categories of pain and suffering, loss of enjoyment of life, and loss of consortium (loss of marital relations). There were significant differences for fear of future injuries: 44 percent of Democrats would consider making a defendant pay a plaintiff for this category compared to only 28 percent of Republicans. Also, Democrats were significantly more likely to consider awarding money for emotional distress: 79 percent of Democrats compared to 65 percent of Republicans said they would consider awarding money for emotional distress. Defense attorneys in medical malpractice cases who are afraid of Democrats and comfortable keeping Republicans should be cautious, however, because Republicans were more likely than were Democrats to consider making a defendant pay damage awards for future medical expenses. A closer look shows that a high proportion of Democrats (86 percent), but an even higher proportion of Republicans (92 percent), would consider awarding money for future medical expenses. The message is that defense counsel in these cases should not look to party identification when picking a jury but instead should figure out a better way to impanel low-damages jurors.

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Attitudes about Social-political Issues

As mentioned at the outset, jurors were asked a series of social-political questions in addition to ones about party identification. These findings are summarized below.

Regarding voter participation, 99 percent of Democrats and 98 percent of Republicans in the survey planned on voting in the fall presidential election. This is an exceptionally high percentage and not likely to mirror the number of jurors who actually voted. What jurors say generally is not necessarily fully consistent with what they do in a specific situation.

When asked whether they plan to vote for a Democrat or Republican for president, 90 percent of Republicans said they would vote for a Republican while 95 percent of Democrats said they would vote for a Democrat. If anything, this was a good indicator that when a juror says he is a Democrat or a Republican he means it.

In other results, Democrats were significantly more likely to believe that the government should provide free health care for all citizens. This was a major distinction, with 83 percent of Democrats compared to 46 percent of Republicans agreeing.

In addition, 26 percent more Democrats than Republicans (87 percent compared to 61 percent, respectively) were in favor of requiring companies to provide health benefits to employees. This last finding shows that some markers of political leaning that tend to be associated with a certain party (for example, broader and better access to health care is more of a Democrat than a Republican priority) are more useful in jury selection than is actual political party affiliation. When political party is disregarded and this question is viewed by itself, the result shows that people who favor mandating that companies provide free health care tend to fall into the higher damages categories. Conversely, people who oppose the idea tend to be lower on the damages spectrum. In this case, political party interacts with a more fundamental attitude that is predictive of damage awards, but it is the attitude, not the party affiliation, that is crucial to understand in voir dire. In fact, getting bogged down by

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political party affiliation could cause an attorney to overlook the importance of key attitudes that are more critical in terms of how a juror will make decisions in the case.

Jurors also were asked if they agree or disagree with the idea of awarding punitive damages. The questionnaire explained that punitive damages are meant to punish a company for its mistakes or to send a message to similar companies. More than 92 percent of Democrats agreed with the idea of awarding punitive damages while 80 percent of Republicans agreed with this concept. This is a significant difference, but because four-fifths of Republicans agree with punitive damages awards, a defense attorney should not feel overly confident simply because she has many Republicans on her jury. This is another example of how political party is predictive of a certain attitude (toward punitives) but is not predictive of the actual rendering of damages. This question alone is a good one to ask because, regardless of political party, jurors who tend to be in favor of punitive damages award higher amounts and jurors who tend to be against punitives are from the low- and no-damages categories.

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