

August 2008 Jury Tip: “Leveraging your jurors’ self-interest”

Jurors are not selfless. Even when they try their best and promise to be impartial, jurors cannot divorce their values and interests from the outcome of your case. Sometimes subconsciously (but sometimes knowingly), jurors bend, misinterpret, and ignore the jury instructions to fit the verdict decision they would LIKE to render. More often than not, jury verdicts are expressions of the jury’s own sense of common sense and personal justice.

As I’ve written time and again, jurors are far less likely to let the evidence speak for itself than to judge the credibility of the evidence based on the predispositions they bring into the courtroom. A juror who comes into trial believing that corporate HR departments are risk-averse and fully knowledgeable about employment laws will rarely accept even the most obvious evidence of employment discrimination or retaliation, believing it to be impossible that a company’s human resource manager would ever make a careless mistake and fail to protect a company from liability. In just the same way, jurors are virtually paralyzed from making decisions based upon the evidence, the jury instructions, and the law. Instead, they rely largely on their own ideas of how they would LIKE the world to work.

When the law conflicts with how a juror would like the world to work, their personal values, and their idea of fairness, jurors use subconscious, cognitive processes to align the law with their values. Even when they try to be fair and insist they are following the court’s instructions, jurors have psychological incentives to make the evidence fit their view of the world, rather than tailor their view of the world to fit the evidence.

For example, safety-conscious jurors who hope that manufacturers are careful and that products are safe have psychological incentives to overlook evidence that a product may be unsafe. More often than not, anxious jurors convince themselves that products are safe and search for reasons why injured plaintiffs must have made a careless mistake. Believing that the plaintiff and not the product was at fault insulates anxious jurors from feelings of vulnerability, so it’s easy to understand why jurors search for verdicts that make them feel the world works the way they’d prefer it to.

Every juror tries to reconcile the evidence with their view of how they believe the world works and shapes their verdicts to fit their view of how they want the world to be. Jurors who want businesses to succeed and maximize profits—whether they are active stockholders, business executives, or believers in unfettered business competition—often have a difficult time finding against corporate defendants. Jurors who wish that society would take care of the sick and disabled—perhaps because the juror is a “sympathetic” personality, has a close friend or relative who is disabled, or is a physical therapist who relies on the workers compensation system for their income—often have a difficult time turning an injured plaintiff away empty-handed, even in cases where plaintiff’s liability

case is weak. Jurors who are nervous and fearful about crime, are prior victims of crime, and are risk-averse, law-and-order types feel safer and more secure when they choose to convict and feel incredibly nervous when they grudgingly acquit accused criminals.

In prior tips, I have stressed how important it is to ask your jurors questions that help you understand how they believe the world works, and thus what they are likely and unlikely to believe. This month, I must stress how important it is to ask your jurors questions that reveal how your jurors believe the world SHOULD work.

In employment cases, ask your jurors if jobs should be stable and if employers should show some loyalty to productive employees, even at-will ones, or if employers should be allowed to make business decisions that make profits (and not fairness) the top priority. In business cases, ask your jurors if they believe corporations should be single-mindedly devoted to profits and stockholders or should have competing priorities like fairness, cooperation, safety, customer service, etc. In criminal cases, ask your jurors which they value more: individual freedoms or community safety?

Once you have identified—and hopefully de-selected—those jurors whose values clash with the verdict you’re requesting, take an honest look at your jury and tailor your case to their values. If your jurors respect and revere doctors, a plaintiff’s lawyer in a medical malpractice case must convince the jury that a plaintiff’s verdict is a good thing for careful doctors and the medical community; perhaps it will weed out careless doctors, or be a visible lesson that educates other doctors on proper treatment options. If your jurors worry about the financial impact of a damage award, convince the jury that an award will actually help corporations, government agencies, or similar entities to become more careful and responsible. Unless you align your trial themes with your jurors’ values and give them reasons why your verdict will make the world a better place (in their minds), jurors will seek reasons to disagree with you.

At the risk of raining on your parade, it is nearly impossible to seat a perfectly receptive jury. Accept it, take a deep breath, and realize how incredibly important it is to align your trial themes and your requested verdict and damages with your jurors’ self-interest, especially those jurors whose views might clash with your case at first glance. Spend time thinking about potential concerns jurors might have about your case—not concerns about how strong your evidence and case is, but concerns about the impact of awarding you a verdict. When you ask the jury to make the world a fairer and better place in your opening statement and closing argument, make sure you know what your jurors’ ideas are about what that fairer, better world looks like.

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