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November 2011 Jury Tip: “Are *ethical* and *legal* the same to your jurors?”

Anyone who has ever worked in a competitive industry in the business world (or any lawyer who has ever tried a case involving the competitive business world) understands that there is a huge difference between conduct that is “unfair” and “unethical” and conduct that is “illegal.” In the strict eyes of the law, ethical and legal are completely separate concepts. But in the eyes of your jury, ethical and legal aren’t necessarily distinct. Some jurors blend the two together, and how your individual jurors do or do not distinguish between ethical and legal can be as influential to their verdicts as the facts of the trial themselves.

The difference between ethical and legal is always a huge issue in your jurors’ minds, because they’re often asked in trial to decide whether something unfair or unethical or “not so nice” a defendant did was actually negligent or illegal. Sometimes jurors take it upon themselves to decide whether they should hold a defendant at-fault for doing something that was technically negligent or illegal, when the jurors aren’t sure whether the defendant did something unfair or unethical or wrong. For many jurors, it is difficult or impossible for them to decide what is legal or illegal without weighing ethics and morality and fairness.

It shouldn’t matter, but it always does. I cannot count how many times I’ve seen mock jurors resist finding a clearly negligent civil defendant at fault simply because, in their words, “it was an honest mistake.” I cannot count how many real jurors I’ve encouraged to admit (in voir dire) that they don’t believe that an “honest mistake” is negligent, and that they would have a hard time finding a defendant at fault for an “accident.” It’s the same reason that I’ve often seen real and mock jurors struggle to find a criminal defendant not guilty of an overcharged crime when the defendant is clearly a bad person who has obviously committed a lesser crime. It’s the same reason that I’ve often seen outraged jurors find corporate defendants liable for legal business practices (“stealing” trade secrets that are publicly available, for example) simply because the jurors were upset at business practices they felt were unethical and shocking.

Nearly every species of trial involves the dueling issues of fairness, ethics, and legality, not just business trials. In personal injury or product liability trials, some jurors will weigh how much a defendant seemed to “care” about safety into account. Some jurors believe that an airbag manufacturer whose products barely meet the minimum government safety standards should never be held liable, and some believe that manufacturers should be liable unless their products are made “as safe as possible,” way beyond the minimum standards. In employment trials, how your jurors feel about what is fair and justifiable for a company to do with personnel decisions matters just as much as what the facts and employment decisions actually are. In real estate trials, some jurors are influenced by ethics and believe that “staging” a house is fraud. Even in criminal

trials, your jurors will often judge the moral character of the defendant and let it influence the letter of the law.

Finding out how your jurors feel about whether or not there is a difference between ethical and legal should be an essential part of your voir dire in many cases. Fortunately, the difference between ethical and legal isn't a controversial issue, so jurors will usually feel comfortable discussing their definitions of ethical and legal candidly in voir dire. In general, jurors who believe that what is fair and ethical has nothing to do with what is legal tend to be receptive jurors to civil defendants, especially corporations who are defending unpopular conduct like aggressive business competition, terminating employees, manufacturing products that harmed someone, or operating a less-than-perfectly-safe road or walkway. The same can be said for corporate litigants who are trying to enforce contracts that, to your jurors, might come across as "unfair." These jurors are often the Cynical Jurors I've often discussed, meaning they expect people and companies to be unethical and sometimes even excuse clearly unlawful conduct.

On the other hand, many of your jurors have feelings about unethical conduct that isn't so black-and-white. Many jurors believe that unfair, unethical, or cutthroat conduct is always wrong. To non-cynical, idealistic jurors, anything unethical is by definition unlawful. And in general, jurors who intertwine ethics and legality tend to be receptive to civil plaintiffs and tend to err on the side of finding "bad" conduct and unlikeable defendants at-fault.

As always, the lesson to be learned here has applications in jury selection and in how you present your case to your jury. Depending on the facts of your case—and which side you're representing—you'll want to identify and strike jurors who fit into one of these categories. And based on the makeup of your jury, you'll need to make sure your themes and message conform to what your jurors already believe. The more cynical your jurors, the less a plaintiff's lawyer should focus on trying to get the jury outraged and the more the lawyer will have to convince the jurors that the defendant did something actually and technically unlawful. These are the jurors who need to be convinced that specific rules were broken, specific policies weren't followed, and specific laws were violated. They don't particularly care if companies put profits before safety, if an employer heartlessly fires a productive employee, or if a doctor or lawyer being sued for malpractice did less for a patient or client than one might hope.

The more idealistic your jurors, the less a defense lawyer can get away with explaining away unseemly conduct as technically legal and the more the lawyer will have to convince the jury that the conduct wasn't unethical. These are the jurors who get upset at cutthroat, self-interested, unfair behavior. They don't particularly care what a signed contract says or doesn't say in writing; they'll condemn a defendant for failing to do the "right thing" even if the contract never made that promise. They don't particularly care if an unsafe product was approved by the FDA or passed safety testing; if it harmed someone, the design and manufacturing process must have been negligent.

The concept itself is simple: ask your jurors if they believe there's a difference between unethical and illegal. The complexity lies in taking the time to accurately take the pulse of your jury and adjusting your approach to the case accordingly. As always, your jurors' points-of-view are all that matter.

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