

September 2009 Jury Tip: “Dealing with juror hypocrisy”

I’ve often said that the best predictor of a juror’s verdict is whether or not that juror would have made the same decisions (and taken the same actions) as the litigants did. Whichever litigant a juror agrees with will almost always win the case. And although you will rarely be permitted to ask your jurors, directly in voir dire, what they would have done in the same situation, I’ve often stressed the importance of asking voir dire questions about similar situations to get a sense of what your jurors would likely have done.

Unfortunately, jury selection is not always as easy as figuring out what your jurors would have done. In many cases, what your jurors would have done is NOT the same as what your jurors BELIEVE they would have done. And in many cases, what your jurors would have done is NOT the same as what your jurors would expect and demand that OTHERS do in the same situation.

As I’ve discussed in previous jury tips, jurors are not always honest with themselves. I wrote that “you cannot change your jurors’ minds during voir dire, but you can force jurors to re-examine their attitudes and perhaps even convince them to be more realistic and receptive to your case.” In many cases, you may need to use voir dire time to remind your jurors that they would have made the same mistakes, or the same decisions, as your client. Unless you force them to think, jurors usually assume that they are more careful and diligent than they really are. Believe it or not, most jurors instinctively believe that they always drive defensively and always read the fine print. Unless you remind them with voir dire questions, jurors will forget that they drive faster than 65 mph, don’t always signal their turns when they believe the street is empty, and don’t read the warnings and side effects in the often-ignored information packet when they take medications.

This month, let’s focus on how jurors judge others differently than they judge themselves. It may be illogical, but jurors rarely judge themselves by the same standards by which they judge others. A florist who prefers to give customers a single price and doesn’t believe she should have to itemize her labor and expenses might expect and demand her mechanic to disclose the costs of each auto part and bill his labor by the minute. The florist, like most jurors, thinks about responsibilities differently depending on her point of view. Most jurors don’t reconcile or even recognize the inconsistent standards by which they judge others.

Unfortunately, this means that even a juror who you’re SURE would have done the exact, same thing your client did won’t necessarily identify with your client and your case. If that juror shares the opposing litigant’s expectations of—and disappointment in—your client, the juror will be more likely hostile than receptive to your case.

Let's say you're defending a company accused of fraud, related to an admitted failure to disclose. It may not matter that juror #8 admits that he never discloses potential plumbing problems and other defects and expects the buyer to do their own due diligence whenever he sells a home if that same juror expects and demands that sellers disclose everything to him when he's looking to buy. This juror will more than likely impose his expectations of sellers onto your client, ignoring his expectations of himself as a seller. If you think this juror seems illogical, you're right. If you think it's unrealistic for jurors to think this way, you're wrong.

This isn't to say that jurors will always decide cases based on their expectations of others; in many cases, the jurors will give like-minded litigants the benefit of the doubt. But it depends entirely on the jurors' perspectives—through which side's eyes will each juror view the case?

Your jurors' likely perspective matters a great deal. This is why non-management employees often take the side of employee-plaintiffs and business owners, executives, and management tend to take the side of employer-defendants. Employees who have never made managerial decisions will identify with the plaintiff and base their verdicts on how much they agree with what the plaintiff did and how well the defendant conformed to their expectations of what a company SHOULD do. Jurors with management experience, on the other hand, are much more likely to compare their own employment practices to the defendant's, and to strictly impose their expectations of their own employees onto the plaintiff. In every case, consider whose perspective each juror is more likely to relate to. And you'll often find jurors who could potentially view the case from either perspective, so consider which side the juror will more LIKELY relate to.

In every trial, most jurors judge others far more critically than they would ever judge themselves. A juror's own home may be a pig-sty, but the same juror will likely expect a retail store's aisles and floor to be perfectly clean; too bad if you're defending a slip-and-fall case. Another juror who regularly drives on icy roads with balding car tires that haven't been changed in years might blame slip-and-fall plaintiffs for wearing flip-flops and not being careful enough on a slippery supermarket floor. A professional money manager who feels entitled to make unilateral investment decisions without client permission might be outraged by doctors who make surgical decisions on behalf of patients.

During jury selection, make sure to ask your jurors questions designed to give you insights into what they would have done in the same situation, but don't stop there. Never assume that your jurors will judge your client based on what the jurors themselves would have done, because they'll often be judging your clients by harsher standards. Make sure to discover the expectations, demands, and feelings your jurors would impose on your client if they were in the shoes of the opposing litigant.

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