

July 2010 Jury Tip: “What your witnesses should learn from psychology”

The most fascinating issues in psychology deal with trying to explain why rational human beings make decisions and reactions that seem at-odds with logical, rational thought. I doubt if most lawyers would disagree if I said that jurors are often guilty of making decisions and reacting to trial situations that, on the surface, don't seem to make much rational sense. I could discuss 1,001 ways in which jurors' reactions and decisions diverge from what the law demands or what most lawyers would expect, and tell you WHY the jurors do what they do. This month, I'm going to discuss some of the unusual, unexpected ways jurors react to witnesses and the seemingly illogical ways in which jurors judge the honesty of witnesses.

Logic might tell you that jurors should judge witnesses on the truthfulness of what they say during their testimony, and specifically on the CONTENT of what they say. If a witness contradicts what they've said earlier in court or in a prior deposition, the jury should probably trust the witness less. If a witness holds their ground in cross-examination and disagrees vehemently with the opposing counsel's position, the jury should understand why. If an expert witness presents a much more accurate, scientifically-sound analysis than the other side's expert, the jurors should be persuaded. If the plaintiff or defendant admits to making a mistake or concedes a point to opposing counsel, the jurors should trust that litigant's case less. But in reality, that's not what happens.

Jurors often trust witnesses who contradict themselves, and distrust witnesses who hold their ground. Jurors routinely ignore the content of what witnesses say and focus on seemingly trivial minutiae like the witness's body language, appearance, personality, communication style, demeanor, and rapport during cross-examination. Jurors regularly ignore and dismiss the testimony of the “smarter” expert witness and listen to the expert with sloppy science and wrong conclusions. Jurors routinely fail to penalize litigants who make startling admissions that should cripple their case while routinely hating litigants who stand their ground during cross. It may surprise the lawyers or even seem irrational, but there is a reason that jurors base their assessment of witnesses more on demeanor than on the content of their testimony, and it has to do with a psychological phenomenon called “fundamental attribution error.”

Translating psychology into English, fundamental attribution error is the tendency for people to attribute the behavior of others (specifically strangers) to their perceived personality, rather than on situational explanations. In other words, people judge strangers based on how they're acting instead of letting the situation explain how they're acting. On the other hand, people tend to judge themselves (and people they know well) based on the situations we're in. If your spouse or best friend was in a horrible mood, you'd wonder why—what happened to them? If you met a stranger who was in a horrible mood, you'd probably assume they were an angry, rude person. You probably

wouldn't even consider if they had a bad day or just got out of 90 minutes of gridlock traffic. Unfortunately, your witnesses aren't familiar to your jurors, and they won't get any benefit of the doubt.

Jurors are the same way with unfamiliar witnesses—they assume that the witness's demeanor, behavior, and reactions are indicative of the witness' personality, honesty, and guilt. This is why jurors decide whether to trust or disbelieve a witness (especially your client) largely on HOW that witness testifies, not on WHAT they say. This is why jurors never trust a witness who seems angry, argumentative, defensive, or nervous, even if they're telling the truth or if they have a valid reason for being upset. And this is why jurors always trust a witness who seems friendly, confident, honest, who doesn't seem fazed by tough questions or admitting mistakes, and who seems as polite and comfortable during their cross-examination as they are during direct—even when they make admissions that should be detrimental to their case!

Jurors pay incredible attention to how your witness acts during their testimony, even at the expense of what their message is. On a subconscious level, jurors believe they can figure out if a witness is lying, hiding something, or feels guilty simply by scrutinizing their body language, communication style, and emotional reactions to the questioning. Jurors are very interested in figuring out if your client is honest and knows it, or if they're dishonest and worried, simply by reading between the lines and scrutinizing their demeanor.

So when a witness seems angry during their testimony, especially during cross-examination, jurors assume that the witness is an angry person. If a witness is an angry person, perhaps their anger clouds their judgment and prevents the witness from being honest and reasonable. Perhaps the witness's anger explains why they filed a lawsuit or why they won't admit responsibility when they've been sued. Or maybe the witness is angry and upset because they realize opposing counsel is hitting a nerve and successfully poking holes in their case. There might be a more logical explanation for your witness's anger, but jurors rarely consider situational explanations. The jurors won't understand that your witness may be angry because a doctor's negligence caused a family member's death. The jurors won't assume that the witness may be angry because opposing counsel is intentionally pushing their buttons, being misleading, or asking inflammatory and unfair questions. You'll need to explain to your witness that they'll often have GOOD REASON to be angry during cross, but that showing that anger can be devastating to their case. In a recent case of mine, the jurors described a brilliant expert as "snotty and egotistical" because his communication style—content aside—was condescending and arrogant.

The jurors interpret a witness's defensiveness and nervousness even worse than they do anger. Your witness might have good reason to be defensive and nervous, but jurors have a hard time understanding what it's like to be in a litigant's shoes. When a witness seems bothered by a question, even for good reason, the jurors always assume it's because the witness knows there's something to be worried and defensive about. When a

witness dodges a question or tries to divert a question and give their own answer, the jurors always assume it's because the witness wants to hide the truth.

Explain to your witnesses that they have a second choice: being as friendly and helpful to opposing counsel as they were to you during their direct examination. When a witness survives cross-examination without getting angry or defensive, without seeming worried or troubled, and seems unfazed and confident throughout, the jury gets an unmistakable message—the witness knows he or she has a winning case, is perfectly honest, and has nothing to worry about. Time and again, I've seen witnesses calmly and happily make admissions that factually may be damaging to their case, but the jurors NEVER interpret the admissions negatively if the witness seems unfazed.

Next time you prepare a witness to testify—and it's inexcusable not to prepare your client to testify, at the minimum—spend as much time training them HOW to testify as you spend practicing WHAT they'll say. What they say is important, but it's far less important than you might think. Explore the issues and the questions they're worried or sensitive about, and with or without a jury consultant, help them to overcome their worries so that they can go into cross-examination ready to answer any question comfortably, confidently, and credibly.

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