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January 2016 Jury Tip: “Be careful with the words you choose in trial”

If you’ve been reading my jury tips for years, you know how strongly I feel that facts don’t win trials by themselves and don’t speak for themselves. How a good lawyer presents those facts, builds credibility, and explains why a verdict in their favor is fair and helpful (not just technically proper) is what truly persuades jurors.

Powerful trial themes that your jurors can relate to their own lives and beliefs are crucial to helping jurors get behind a verdict emotionally; the facts are what jurors use to support whatever verdict they’d like to give. But jurors are persuaded by the little things too, not just the big trial themes. How your client dresses and reacts (with facial expressions) matters to jurors. How polite you are with the witnesses during cross—and how polite the witnesses are with you during cross—matter to jurors. I could go on for pages listing little things that matter, but this month I’m going to talk about something small and subtle but important: your choice of words.

Using the right or wrong word when you’re trying to convey an important message to jurors can make a huge difference. And while I certainly can’t cover every important word choice that you could make during your trials, I can focus on some sensitive words that have meaning to jurors that you might not be aware of—because these words and phrases mean something very different to lawyers than they do to regular people.

The first and most obvious set of “no-no” words are “fair” and “impartial” in voir dire, when you’re trying to get a juror excused for cause. I’m sure I’ve written about those words before, but the subject is worth tackling again because I see these words misused so often in jury selection. Most jurors are clueless about their biases; most of the biased jurors on any panel are convinced that they are “fair” and that their hatred of insurance companies, refusal to award money for non-economic damages, or belief that there’s nothing wrong with companies firing older employees still allow them to be “impartial.” In these jurors’ minds, awarding \$0 for pain and suffering is “fair,” awarding millions is always “unfair,” and so they are more than capable of being fair. Just last month, I heard a juror explain that she could never award money for emotional distress, but that she could be “fair” and could “definitely follow the law... but not in a way that the plaintiff would like.” Use the words “fair and impartial” carefully—when I’m consulting in trial, I advise my clients to only use those words when they want to rehabilitate a juror who has expressed biases, because they’re likely to say “of course I can be fair.” But when you’re trying to get someone off for cause, you’re better off using concepts like “would it be tough for you to follow that instruction?” or “hard to set aside those feelings.”

Another phrase that is a mistake to use in jury selection—but that I hear spoken constantly—is “do you have a problem...?” Jurors don’t think they have problems. Telling someone they have a “problem” sounds insulting. So when a lawyer asks them “would you have a problem deciding this case fairly given your experiences?” or “would

you have a problem awarding punitive damages?” their strong impulse is to feel insulted and insist that they don’t have a problem. They’re fair and reasonable in their own minds, so it’s you (the lawyer) who has a “problem” if you ask them to follow a law they don’t believe is fair. The solution is an easy fix; instead of using “problem,” say something like “would you have a difficult time...” or “do you feel like it seems unfair or unnecessary to...” follow whatever jury instruction you’re concerned they won’t follow.

The key to recognizing which words to use and which to avoid have to do with negative connotations that jurors read into phrases, especially words with legal meaning that lawyers don’t view as negative. Trial lawyers see all kinds of good, honest people who can’t be fair and impartial in certain cases, but jurors feel insulted when they’re told they can’t be “fair.” Here’s another phrase that seems harmless to lawyers but has a negative meaning to regular people: “emotional distress.” Sometime over the past 10-20 years, that phrase has come to mean “bullshit” or “oversensitivity” to jurors. When jurors hear “emotional distress,” they immediately think of someone faking depression to get more money than they deserve. So whether you’re representing a plaintiff or defendant in trial, make sure to only use the phrase “emotional distress” when you want to encourage jurors to say they won’t award it. For plaintiff lawyers who plan on asking for non-economic damages, use the phrase in voir dire to identify your stingy jurors, and put it away once the jury has been selected. When you want to convince jurors that it’s fair to award money for mental suffering, use the real human words that have a connection to something: “worrying” (about money, or losing your job, or never walking again), “sadness,” “embarrassment” or “humiliation.” And when you want to convince jurors to reject or minimize general damages, keep using the phrase “emotional distress.”

Sometimes a single, carefully-chosen word can give positive or negative meaning to everyday legal phrases. Most jurors don’t have issues with expert witnesses, but they generally distrust “paid expert witnesses.” Adding the word “paid” when you talk about an expert on the other side can be persuasive, for the exact same reason that jurors love “independent medical examiners.” The word “independent” (even though that doctor isn’t usually truly neutral) is convincing to jurors.

Defense lawyers often fret over the pro’s and con’s of conceding liability in trial; will the jurors appreciate the honesty and be more forgiving to a defendant who admits liability? Sometimes the answer depends on the words used to explain what’s going on to jurors. I have often seen jurors react appreciatively when defense lawyers explain that their client “took responsibility,” even when the defendant is still fighting over the amount of damages or even disputing causation. Jurors love it when they feel like a party is taking responsibility. If I’m the defense side, I would always use that phrase and never say “conceding fault.” But if I’m on the plaintiff side, I would make sure to tell jurors that the defendant is not taking any responsibility, that all they’ve done is to “admit that they were negligent and careless” but won’t take full financial responsibility... or any at all, if they’re still fighting causation.

In the world of public polling and surveys, it's fascinating how influential an innocent word choice or way a question is framed can significantly skew how people respond to survey questions. In recent Pew Research surveys, significantly more people said they favored "making it legal for doctors to give terminally ill patients the means to end their lives" than favored "making it legal for doctors to assist terminally ill patients in committing suicide." Same concept, but the word "suicide" is loaded. Another example, for those of you who find this stuff interesting: significantly more people favored giving "financial assistance to the poor" than favored giving "welfare assistance to the poor." Words and phrasing in trial are no different. Next time you're heading to trial, give some thought to your choice of words, and more importantly how you're subtly employing those words.