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November 2016 Jury Tip: “Take your choir for granted; preach to the skeptics”

When you’re in trial as often as I am, everything you read and hear makes you think of how it applies to jurors and trials. The other day, I read a political article about how Democrats and the HRC campaign take minority voters “for granted” because they’ll still get their votes, without having to tailor their platforms or causes to those voters. Whether that’s true or not isn’t for me to decide, but the article naturally made me think of jurors, not voters... and how the same concept applies so accurately to how lawyers should be trying their cases.

Just like in political elections, some in your jury pool will always be receptive to you, some of your audience will always be against you, and some jurors will be on the fence... so every lawyer who tries cases has to choose which jurors to cater their arguments toward. In politics, candidates often have to make the same choice: do I focus on energizing my “base” of loyal voters, or do I try to win over the moderate, undecided voters in the middle and risk alienating my “base?” In politics, the choice (as I understand it) is a tough, complicated one. But in jury trials, the choice is an easy one: you should never preach to your choir, you should always take your receptive jurors for granted, and you should always tailor your themes and arguments to your skeptics. Let’s discuss why.

Unlike politics, it’s practically impossible to “alienate” your best jurors. No matter how you frame your case, jurors who hate corporations and want to punish unethical business conduct will be on-board with a big verdict for a plaintiff... and jurors who support unrestrained capitalism and hate regulations on businesses will be on-board with a defense verdict. Anti-corporate jurors will be with the plaintiff lawyer no matter what, whether you preach to the choir (by arguing that “corporations are evil and need to be stopped”) or not (perhaps by arguing that “most corporations are honest and responsible, but this defendant is the exception”). A savvy medical malpractice defense lawyer isn’t going to lose the vote of a loyal doctor’s spouse by arguing that “some doctors are lazy and careless, but not this one.” Knowing that it’s safe to take your “choir” for granted, you need to accept the reality that most trials are won and lost in the minds of skeptical jurors who aren’t immediately receptive to the facts of your case... and who need some extra persuasion to convince.

In theory, if you have a perfect jury that is naturally receptive to your case’s point-of-view, preaching to the choir won’t harm you. But selected juries are almost never perfect; unlike politics, the lawyers get to select the voters by striking the most obviously biased. More often than not, opposing counsel will strike your loyal “choir.” And even if they miss a few—or if you absolutely love your jury panel—you should always assume that there are a few lurking skeptics on that panel. No matter how much I love the juries I select, I always recommend trying the case to any skeptics or on-the-fence jurors that may be on the panel, whether they’re real or imaginary, just to be extra cautious.

So far this concept may seem obvious to you, but here's a reality check: most lawyers I've worked with have a natural inclination to get tunnel vision about their case and preach to their choir. Most lawyers assume the facts and arguments and cross-examinations they've developed are so compelling that any juror who is at least open-minded and impartial will be on-board. But the reality is that most juries are filled with hidden bias that wasn't disclosed during jury selection, so you should assume (because it's usually true) that there are always a few jurors on your panel who perceive your case to be against their values. Like jurors who feel doctors are too often unfairly criticized and blamed, or jurors who feel contracts should only be followed when they're "fair," no matter what they actually say. Always assume that your trial will be won and lost on how well you appeal to your unreceptive, skeptical jurors by giving them creative, counter-intuitive reasons why your version of events actually fits into their beliefs and the verdict you're asking for actually fits into their values. The goal of jury selection may be to select an ideal jury and make your job easy, but once the jury is picked, you need to shift gears and present your case to your toughest audience. A truly great lawyer is someone who can persuade people who think differently than their ideal juror, and they do that by building credibility and tailoring their case to their critics.

How? When you're deciding how to frame your case and developing trial themes, think about possible objections to your case, what the other side will be arguing, and why some jurors may be receptive to the other side's arguments. Imagine that you're trying your case to only one hostile juror, who normally wouldn't like a case like yours. Whenever I'm developing ideas and advice for trial themes and opening statements, I am primarily focused on finding persuasive ways to address and refute what the other side is saying... or likely objections from skeptical jurors. It's not that hard to figure out what your skeptical jurors' objections might be; even if you haven't focus grouped a case in advance, you can use jury selection to gauge your jurors' values and beliefs.

When you're writing out your opening statement or closing argument, take a quick step back and ask yourself: are these arguments geared toward changing the minds of people who don't automatically believe what I'm saying, or are they merely firing up people who already agree with what I'm saying?

Find a way to incorporate your hostile jurors' beliefs and values into your case. I'll give you an example: when I'm working on the plaintiff's side of a personal injury trial in which the defendant (as always) is trying to blame the injury on the plaintiff's own carelessness, I always assume we'll have some jurors on our panel that think too many consumers are stupid and careless and should only blame themselves for not following directions. So I develop trial themes that focus them on what they already believe: that every careful, responsible person pays attention to warnings and follows safety rules and instructions, that anyone who ignores warnings or safety instructions is careless and irresponsible and should only blame themselves if they get hurt... but for those reasons, it's horribly irresponsible for a company to fail to give warnings or safety instructions on products or workplaces or roads (or whatever). Instead of defending careless consumers, my themes agree with the values of these jurors, and use the importance of warnings and safety rules against a defendant who hasn't done enough.

Another free example: when I'm working on the plaintiff's side of a failure to accommodate employment trial, I always assume we'll have some jurors on our panel that hate the word "disability" and get angry at any employee who they perceive to be lazy or entitled or trying to get special treatment. Knowing that we can't afford to lose a single juror, I develop trial themes to bring them into our camp. I give them the chance to complain in voir dire about people who are "capable of working," but get disability pay and don't work... and I have the lawyer agree: "How many of you know someone like that? Upsetting, right?" And then I subtly frame our case to bring them in, by having the lawyer clarify that "when we use the word "disability" in this trial, does everyone here understand the difference between an employee with a disability that can still keep working with a little help called an "accommodation" and an employee who says they're "disabled" and can't work? Does everyone here understand that plaintiff is not saying she's disabled, just that she has a disability that requires a little help because she wants to keep working?"

Finding ways to make your case appeal to otherwise hostile or skeptical juror isn't easy, but it's the most crucial challenge once your jury is selected. I can't give you a cookie-cutter method for developing persuasive trial themes, but I can point you in the right direction by encouraging you to audit yourself before and during every trial, to make absolutely sure that you're focusing your case on the jurors who matter—the skeptics—and not wasting your time preaching to the choir.