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November 2015 Jury Tip: "Jurors love objectivity… but what is it?"

Having listened to hundreds of mock juries deliberate, I tend to hear the same arguments, concerns, and points-of-view out of the mouths of jurors again and again. The facts of each case may be unique, but how jurors react to cases is predictable once you've heard from enough jurors and seen enough deliberations. And one of the jury phenomena that comes up the most is the idea that jurors desperately want to hear "objective" evidence and "neutral" witnesses… and tend to ignore and reject witnesses that they don't believe are objective enough.

For many lawyers and judges, this sounds backwards. You and I both know that expert witnesses are always hired and paid by one side, selected to testify only if their opinion helps the side that hired them, and are more advocate than "neutral." That's the way the system works. Yet some jurors instantly dismiss the testimony of experts simply because they're hired by one side… and I'm constantly hearing from mock jurors that they wish the court would hire "independent, neutral" experts to give expert opinions. The truth is that unless a verdict seems like a slam dunk, jurors feel uncomfortable assessing credibility and are desperately searching for something concrete or for someone reliable to trust. And so jurors are acutely persuaded by proof and witnesses that seem "objective" to them.

So what do jurors think is truly "objective"… and what do they view as untrustworthy? The quick answer: jurors trust inanimate objects, not people. They trust documents, photographs, videotape, and physical evidence. They want "proof," but when jurors say "proof," they mean tangible evidence that speaks for itself, not something that has to be interpreted. They don't trust witnesses telling them what happened, they want to see documented evidence that it happened. Second, jurors trust witnesses who have no allegiances whatsoever to one side or the other. Jurors rarely trust anything the parties say unless it's been proven by something objective already. Jurors barely trust friends and family and employees or even business partners of the parties. Anyone with a friendly or financial connection to one side isn't "objective" enough. Experts certainly aren't objective enough. Jurors want to hear from some complete stranger who witnessed a car crash, or some notary who happened to be there when a contract was signed, or a police officer who conducted an impartial investigation without being hired and paid by one side.

I understand that most trials, if not every trial, rely on some degree of circumstantial evidence and witness testimony. I'm certainly not telling you to give up on a case that relies heavily on things that jurors don't find "objective." But it is essential to recognize the limits of your jurors' trust and to adjust how you put on your case accordingly, to maximize your chances of persuading your jurors without having to ask them to blindly believe you and your evidence.

The first lesson: jurors hate "he-said, she-said" testimony. You will rarely win a case in which you have the burden without some kind of corroborating evidence. All but the most trusting, idealistic, and naïve of jurors will reject anything one of the parties says happened, unless it's documented in writing. It's not that jurors will automatically believe that your client is lying; in fact, many jurors will feel that your client is "probably" telling the truth. But here's the problem: even when they might guess that your client is being honest, jurors will still reject their testimony as meaningless and unpersuasive… because to them, it's "unproven." I'm not suggesting that you should drop a case if your client's testimony is your only evidence… but you should lower your expectations of winning the case, and adjust accordingly. Put your client on the stand last. Jurors won't buy their testimony until they have strong reasons to trust your case. If you have any other witnesses who might corroborate your client, put them on before your client. In your opening, build credibility by asking your jurors not to take your client's word for it… and highlight any circumstantial or corroborating evidence that you do have. Jurors will trust you much more if you show them that you understand their reluctance to blindly trust a party in a lawsuit… and distrust you if they sense that you're expecting them to automatically believe a stranger without backup proof.

The second lesson: jurors rarely believe "hearsay" evidence… but their definition of hearsay is not the accurate, legal definition that you use. To many jurors, any verbal testimony from a fact witness that isn't supported by concrete proof (like a document, photo, or videotape) is "hearsay." In other words, whenever a juror has only the word of a witness to support something they've seen or heard, jurors call it "hearsay" and sometimes reject the testimony entirely. Does this mean every juror rejects every piece of unsubstantiated witness testimony? Of course not. But jurors who are already looking for an excuse to disbelieve your case will often reject your supporting witnesses as "hearsay," even when the witness is (relatively) objective… but much more often when the perceive a witness to be less than neutral.

The solution to dealing with your jurors' harsh definition of "hearsay" isn't to spend more time demanding that jurors follow the jury instructions… that simply doesn't work. A solution that works involves two steps: when you have a case that relies heavily on circumstantial evidence and witness accounts (and is light on concrete proof your jurors can see), you need to identify jurors who are skeptical of "hearsay" evidence in voir dire and strike them, ideally for cause. If you have a fair judge who grants legitimate cause challenges, you should have no problem getting any juror excused for cause who admits that they could not accept as fact something a witness SAYS they heard or saw without proof. And if your judge won't grant a cause challenge, strike those jurors. During trial, always assume that your remaining jurors do have milder but similar skepticisms about "hearsay" evidence; build your case around as much direct evidence as you can, and get in your most important facts through the witnesses your jurors will perceive as the most "neutral." If you can get a key fact into evidence through a stranger instead of your client, or your client's co-worker instead of your client's relative, put those witnesses on first. And take the time to explain to your jurors—in opening and with the witness—why the witness is truly neutral. Long story short, you can never under-emphasize a piece of evidence or a witness that seems completely objective. Build your case around it.