

**May 2008 Jury Tip: “Why jurors routinely ignore experts witnesses”**

The most amusing part of watching mock jurors deliberate or discuss a case is the disconnect between jury decision-making and what the attorneys expect jurors to focus on. Jurors approach cases in ways that truly surprise—and, in some cases, frustrate—attorneys. In my experience, the jury phenomenon that most surprises attorneys is a juror’s tendency to misunderstand and circumvent the jury instructions. Attorneys who expect jurors to conform their feelings to the jury instructions are often stunned when jurors deliver a surprising verdict. The reality is that jurors rarely conform to the jury instructions and usually twist the jury instructions (usually without meaning to) to match their feelings about justice and fairness.

But I digress. In my experience, a close second jury phenomenon that would surprise most attorneys is the jurors’ distaste for, and dismissal, of expert witnesses. Too often, I see attorneys relying on experts to establish their arguments and persuade jurors. But in reality, jurors rarely view the opinions of expert witnesses as credible facts.

This is not to say that experts are useless. Far from it, experts are necessary to meet your legal, evidentiary burdens in the eyes of the court. Omitting an expert’s opinion, while not necessarily fatal to the jury’s verdict, may destroy your case on a directed verdict. But keep in mind that jurors don’t view experts the same way that the court does. For many jurors, expert opinions are unnecessary and often not persuasive.

Once a juror has framed a case in their terms and decided which side’s story seems more likely, revelations from an expert witness aren’t going to change a juror’s mind, even if that expert convincingly refutes what that juror believes to be true. When an expert’s opinion is in conflict with a juror’s beliefs—no matter how uninformed or without basis—a juror will likely reject that expert’s opinion and find a way to justify dismissing the expert. When an expert’s opinion matches what a juror already believed, the juror will use that expert to reinforce their beliefs and bolster their arguments in deliberation. Because this decision-making process is in direct violation of the way jurors are required to view evidence, attorneys are understandably shocked when jurors seem to disregard brilliant experts. Oftentimes, jurors don’t need opposing experts to dismiss an expert’s opinion; in case after case, I have seen jurors manufacture “evidence” that neither side presented, based entirely on assumptions that the jurors believe to be likely.

You and I know that experts are bright and highly-trained, often professional and honest, and have spent vast amounts of time and detail studying the subject matter of a case. And yet jurors, who are far less knowledgeable than experts and spend only a few hours studying the subject matter, have two valid reasons for dismissing the opinions of experts: experts often don’t seem credible, and experts aren’t often understandable. No matter how brilliant or thorough, an expert is only as valuable as he/she is believable, and jurors don’t believe experts who rub them the wrong way. Attitude and demeanor

are just as important as an expert's methods and opinion. Experts are often condescending or arrogant, defensive, evasive, or hostile during cross-examination, and often refuse to answer questions or seem to have an agenda during cross; jurors interpret these demeanors as evidence that the expert is being dishonest. Make sure that your experts' attitudes are just as unimpeachable as their testimony, and spend time working with them to ensure that they come across as friendly and cooperative during cross-examination. Jurors like transparency and want questions answered, not evaded. Tell your experts that their job is not to frustrate opposing counsel by curtly, smugly giving non-answers like "I couldn't answer that question," but rather to convince the jury that they are trying their best to seek the truth.

Just as destructive are experts who confuse or bore the jury. Never expect that jurors will accept an expert's opinion if they don't understand (and listen attentively to) his/her reasoning. If a juror doesn't understand what an expert is saying, the juror will tune the expert out and base his/her verdict on the evidence that he/she understood. Jurors don't have to disagree with an expert's opinion to render a verdict that directly contradicts it; jurors merely dismiss or ignore confusing experts they don't understand. OJ Simpson's criminal trial was the perfect illustration. The jurors were utterly confused (and skeptical of) the prosecution's DNA evidence, so rather than disagree with it, the jurors merely ignored it.

No matter how much time, effort, and money you have already spent on an expert, don't be reluctant to keep an expert on the sidelines in trial if the jurors are sick with boredom and seem to be fed up with day after day of expert testimony and techno-babble. Once your jurors become confused, they will probably lose focus and begin tuning out your experts, and you need to tune them back into your case or risk losing their attention and support.

Jurors respond well to common sense and principles they can understand and relate to, so make sure to put everything your experts say in the context of common sense. Force your experts to step down from the pedestal and use simple terms, analogies, and explanations your jurors can relate to. Jurors chafe when attorneys expect jurors to side with their case just because the experts say so; I find it helpful to put your experts in context in opening statements by telling your jurors "you don't have to be an expert to know that..." Present your experts as authorities who you've brought in to reinforce the obvious, not to spoon feed the jury.

Never make your arguments depend on what your experts have to say, because jurors can disregard and disagree with experts for reasons that you will never understand. Your experts will only persuade the jury if their opinions appeal to your jurors' common sense and what your jurors already believe to be likely and true.

With all that said, experts are persuasive to jurors in other, indirect ways. Although an expert will rarely change a juror's mind, they are often in the best position to arm jurors with useful information that can be used to persuade other jurors in deliberations. While a hostile juror will likely dismiss an opposing expert, that same juror can be persuaded by another juror who uses that expert's arguments. The group decision-making that goes on in jury deliberations is wildly different from the individual decision-making processes that go on in the minds of each juror. As I've mentioned in past jury tips, jury research seems to suggest that 85-90% of jurors will not change their minds between the end of opening statements—before the introduction of evidence—and the end of closing statements. Yet these same jurors can and do change their minds during deliberations, so be sure that your experts arm your receptive jurors with clear, persuasive arguments to use in deliberations.

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