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May 2018 Jury Tip: “Unfair (but true) reasons jurors will hate your client”

People have natural reactions to being involved in lawsuits, and they’re never positive reactions. Plaintiffs have suffered harm and (almost always) truly believe they’ve been wronged. Defendants (almost always) truly believe they’ve done nothing wrong and are being falsely accused... or are being asked to pay much more than they should. These reactions don’t improve when the parties are on the hot seat: having their depositions taken, being questioned, criticized, and attacked in cross-examination, and even having to sit in trial with their credibility questioned every minute of every day. Every party has lingering feelings of anger and resentment... and also, as humans, react naturally to other things during a trial, when a jury is watching them closely. A plaintiff suffering from depression or emotional distress might smile or laugh in court in response to something. Get upset about something they’ve heard.

But just because a party’s response is a natural, reasonable one doesn’t mean that jurors will judge them fairly for it. And in fact, jurors will often criticize or dislike your client for many natural, reasonable actions they’ve taken or reactions they have to something that has happened in the course of litigation or in the course of a trial. And because the jurors are the sole judges of your case, and only their opinions matter, it’s no consolation that your client did nothing wrong when it cost you a lawsuit. This is why it’s so critical to understand how jurors judge (often unfairly) the parties, the little things about your client that jurors hate (or like), and to prepare your client to testify and react in ways that the jurors will appreciate.

The most common response I see when I prep party witnesses is anger. They’re angry at being (in their minds) wronged or being unfairly blamed, and they have every right to be. But when jurors see an angry plaintiff, they see an unreasonable plaintiff with clouded judgment. Jurors trust and like plaintiffs who take the high road, who seem polite and passive. Jurors want to help plaintiffs who seem helpless, not bitter.

So to get jurors to trust and advocate for a plaintiff, you need to prep your client to be in a state-of-mind during cross that helps them react in a cooperative, calm way to tough questioning. If opposing counsel gets loud, train your client to stay calm and never match their tone of voice. Help them to respond firmly in a calm, quiet way. I’ve worked with witnesses who were ready for a battle and cherishing the opportunity to “win” a debate during cross... and that’s a recipe for disaster. Educate your client to avoid arguments with opposing counsel, because when a party responds to aggressive cross calmly, the jury will feel sympathy for your client at being bullied. When I prepare witnesses, most parties have no idea that their own attorney gets to re-direct and let them explain any misleading questions and answers during cross. Explain that it’s not their job to point out misleading questions and answers or to “win” the cross.

Now when jurors see a defendant who’s angry to be there, they see unreasonable

indignation... and guilt. Defendants who feel unfairly accused certainly have a right to be upset, but jurors interpret anger at defiance. When I prep party witnesses to testify, my most valuable piece of advice is to be as polite and helpful during cross-examination as they were to their own lawyer. And an analogy I often share is to imagine themselves being questioned by a police officer as a potential suspect in a crime. What impression would the police have if you were angry, combative, argued, and objected to some questions? Those are hallmarks of guilt. What impression would the police have if you were eager and happy to answer any questions, inviting the officer to search your home or car, totally cooperative? The officer would at least FEEL like you had nothing to hide.

Jurors, like police officers, hate defiance. They like and trust defendants who are polite, who are eager to defend themselves, and who seem to exude calm even when being attacked or presented with the worst evidence. When I prep party witnesses to testify, my primary goal is to get them to seem eager and happy to answer even the toughest questions during cross, and to flush out any guilt or worries that could make them get angry, block the tough questions by arguing or diverting, and seem defensive to the jurors. Assure them that there aren't any true answers that can harm them, as long as they come across as honest and eager to share all the facts. Research into jury decision-making has repeatedly shown what I've noticed for years: that jurors are more persuaded by how a witness testifies than the content of what they say. Jurors trust people who appear to be honest, and their short-cut method of judging honesty is to scrutinize a party's demeanor during the toughest questions in cross-examination.

For the same reasons, jurors scrutinize parties off the stand to see if they can spot clues to someone's innocence or guilt through the mirror of demeanor. Aside from the obvious mistakes that a party can make—bad behavior in the courtroom or hallway in view of the jurors—a common way a party can damage the jury's view of their credibility is to get too involved (publicly) in how the case is being tried. It's not a fair judgment; a truly objective person should understand that someone with everything on the line in a trial would want to be involved. But when jurors see a party whispering too much to their lawyers, pulling their sleeves to interject, or even taking too many notes, they think they see a nervous witness who is manipulating their own lawyer. It's a strange phenomenon, but jurors believe that lawyers are more objective than their clients, and that lawyers who are given directions by their clients are somehow less objective and less worthy of trust. Letting your client jot down an important note every now and then (as discretely as possible) is okay, but make sure your client doesn't sit through trial furiously taking notes... and don't ever let them pass you a note during trial or whisper into your ear. Everyone who's been in grade school knows that note passing is suspicious.

All of these behaviors have two things in common: first, they give the appearance that a party is worried too much about the outcome of the case. Unlike lawyers, jurors don't understand how often the "right side" can lose in trial... jurors truly believe that the side that is honest shouldn't have to worry. And second, these behaviors are perfectly human natural reactions, which is why so many plaintiffs and defendants seem "guilty" to jurors for no good reason. The lesson? Under the scrutinizing watch of a jury, your clients can't just be themselves; they have to be prepared to act and behave differently in trial.