

December 2008 Jury Tip: “Interpreting body language, yours and your jurors”

You may have heard the theory that what you say isn't as persuasive as how you say it. In trial, this concept is absolutely true. The content of what an attorney says—and even more so, what a witness says under cross-examination—is far less important and influential than the tone and demeanor with which it's said.

By the same token, voir dire is an exhibition of juror demeanor and body language. Should you take your juror's personalities, tone, and body language as seriously as they take yours?

In my experience, reading and interpreting juror body language is an exercise in restraint. If you insist on trying, make sure to separate the informative from the misinformative, because most of what you see will tell you little about a juror's predispositions. When a juror looks bored or nods off during the third hour of voir dire, he's more likely bored or exhausted than disinterested in the case or unable to focus on the evidence. When a juror seems a little angry or hostile during questioning, she is more likely annoyed at missing work or upset at being asked probing questions than hostile to your case and unreceptive to you as an attorney.

Should you pay attention to how your jurors are dressed? More times than I can count, I've seen sophisticated, professional jurors show up to jury duty in ripped jeans and t-shirts. Are your jurors' clothing insightful clues to their verdicts, or are they just trying to be comfortable? I remember chuckling when a liberal-minded client's enthusiasm for a potential juror (both the lawyer and the juror were males with ponytails) turned into shock when the first words out of the juror's mouth were complaints about plaintiffs and a diatribe about the importance of personal responsibility. Don't go overboard judging your jurors by their covers.

The most commonly misinformative body language exhibited by jurors is annoyance and disinterest. Let's face it—even as an attorney, you are likely bored and annoyed when you are called to jury duty, so imagine how the average juror must feel. Most jurors are annoyed to be missing work, family time, or whatever they're doing, and most don't feel the need to be particularly polite about it. This doesn't mean that they hate lawsuits, plaintiffs, or defendants, and most are happy to focus on the case once they are empaneled. Most jurors are also bored by the jury selection process. Listening to confusing questions and a room of strangers tell stories isn't the most exciting exercise unless you're emotionally and financially invested in the case, and most jurors have no idea how long the questions will last or what is happening. Forgive them for acting disinterested. Once they are empaneled, most jurors find trials fascinating. Most of the trial, at least.

Instead of overanalyzing, interpret your jurors' body language, tone, and appearance carefully and conservatively. Annoyance, boredom, and sarcasm during voir dire aren't usually informative clues into a juror's mind, but they do mean something if a juror's attitude is markedly different during your voir dire and your opposing counsel's. The most informative, meaningful clue during voir dire is hesitation and signs of an internal struggle during an answer. Take note when a juror pauses or struggles to answer a relatively simple question—or more notably, a controversial question. Learn to tell the difference between what a juror looks like when thinking about the right answer (thoughtful face, furrowed brow, eyes pointed up or down) and when thinking about how to answer, or whether or not to be truthful (slight smile, eye contact with you, biting the lip, verbal stammering or hesitation). When you ask the toughest questions—like asking jurors to be honest about a potential bias or to express negative concerns about your case—be especially attuned to signs of hesitation and conflicted responses.

Now let's re-examine the other side of the coin: how do jurors interpret your body language and demeanor, and the tone of your witnesses? Last October's series of presidential debates—no matter what you thought of each candidate—provided us the best example in years of how overwhelming critical tone and demeanor are to a judgmental audience.

During the three debates, John McCain was often aggressive and accusatory and showed flashes of anger, annoyance, and sarcasm on camera while his opponent was speaking. In sharp contrast, Barack Obama appeared comfortable and optimistic throughout, often smiling during McCain's sharpest criticism. In a few key moments, McCain visually took offense to Obama's accusations by grimacing, shaking his head, tensing angrily, and even interjecting verbally at times. In contrast, Obama weathered McCain's sharpest accusations without reacting angrily or negatively.

No matter whether they agreed or disagreed with the content of the candidates' arguments, the typical viewer was left with the indelible impression that McCain was angry and defensive, Obama optimistic and confident. Based on the post-debate polling, undecided voters—like unsure jurors—didn't respond well to the anger and combativeness. Even if McCain had perfectly good reasons to be upset with Obama, the audience got the impression that he was worried and defensive.

The same principles hold true when jurors watch you and your witnesses during trial. Anger is interpreted as volatility and emotional recklessness; few situations actually warrant anger and outrage for jurors, probably less than you might think. Combativeness is interpreted by jurors as an inability to think objectively; jurors get the impression that attorneys and witnesses who refuse to agree with the other side are automatically rejecting their points without thought, which will shred your credibility. The most damaging characteristic is defensiveness, and unfortunately it is probably the most common trait that most witnesses exhibit. When a witness refuses to answer cross-examination directly, dodges questions, gives self-serving answers that don't answer the questions, or chafes at a question, the jury is left with the impression that the witness is worried about the answer and has something to hide.

Do yourself a favor, and teach your witnesses, too. NEVER react to a question or an argument by opposing counsel with visual anger or a negative tone. When an attorney or a witness doesn't seem fazed or worried by a question, piece of evidence, or opposing counsel's tactic, the jury gets the impression that whatever it is must not be damaging at all. When a witness conducts herself as graciously, politely, and helpfully during cross-examination as she does during direct exam, the jury gets the impression that the witness has nothing to hide and is incredibly honest and confident. You may know that the content and the evidence presented at trial matter the most, but your jurors don't. And because they're the final judges of your trial, they can afford to make the mistake of reading too much into body language. You can't, so pay more attention to your body language than to theirs.

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