

March 2010 Jury Tip: “Juror perceptions of YOU”

I have no doubt that each one of you takes great pains to present your case as perfectly as you can to a jury. You probably even make every effort to present YOURSELF perfectly to the jury. Keep in mind when you’re preparing for trial and thinking about all the strategies that go into presenting yourself, your client, and your case that the most challenging thing about a perfect presentation is that YOU are not the judge that matters. A case presented perfectly to you, a judge, or any lawyer is probably NOT a perfect case to a jury. So if you’re taking a case to a jury trial, remember that only their opinions matter. And while you’re at it, realize that your jurors’ opinions about you and your case aren’t always logical or fair.

This month, I’m going to discuss your jurors’ perceptions of you, the lawyer. Not their perceptions of your client or your case, but of you. Even though you didn’t have anything to do with the events surrounding the facts and parties at trial, you are the most important figure the jurors have to trust in order to trust your client and your case. If the jurors trust you, they’ll trust what you have to say. If the jurors don’t trust the messenger, they won’t trust the message. To make matters worse, jurors seem to distrust lawyers more these days. They each come into the courtroom with an idea of the stereotypical dishonest lawyer seared into their brains, and for many jurors, you are guilty of being that stereotypical lawyer until proven innocent. So this month, let’s discuss how jurors go about figuring out if you’re one of the cliché, dishonest lawyers they distrust.

Let’s start with a simple one. Jurors expect that a stereotypical lawyer will dress to impress, in a suit with a Rolex. Jurors trust you when you dress to look more approachable. “Approachable” means something different depending on your personality and where you practice, but it may mean wearing less expensive, less formal attire. Perhaps a lighter suit, or a blouse or sport coat instead of a two- or three-piece. Dressing to be more approachable is especially important on those days in which you’re making your first impression and interacting with the jury: jury selection, opening statements, and closing arguments.

Jurors expect the stereotypical lawyer to force their own point-of-view down the jurors’ throats in trial, and too often lawyers do just that at the worst possible time—in voir dire, when you should be letting the jurors express themselves. Few things offend the jurors more than a lawyer who asks them questions but then cuts them off, tells them what to think, and doesn’t let them be entitled to their own opinions. Voir dire is NOT the time to tell your jurors how they should think, but many lawyers are unknowingly guilty of doing just that. Anytime you ask the jurors “wouldn’t you agree that…” you are forcing your point-of-view on them. Even when they claim to agree, many really don’t, so it’s a waste of your time. Your jurors have opinions, some very strong ones, and many do NOT agree with you, no matter what you lecture to them in voir dire. So never ask a juror a question like “wouldn’t you agree that…” or “can you all promise me you’ll

follow the court's instruction that..." If a juror doesn't agree, or doesn't really think the jury instruction is fair, they won't be persuaded, no matter what they say, and they'll resent you for asking.

Jurors trust you when you listen to them. Voir dire is your only opportunity to show them that you want to listen to them. And even though there are ways to subtly persuade jurors in voir dire, a large part of voir dire should involve shutting up and letting the jurors tell you how they feel. You can kill two birds with one stone during jury selection—by asking open-ended questions and asking lots of "how do you feel about that?" questions, you'll not only identify hostile jurors to de-select and learn how your remaining jurors feel about the issues of your case, but just as importantly you'll show your jurors that you care enough to listen. Jurors trust lawyers who listen, and voir dire is your best and only chance to show your jurors that you accept and understand every point-of-view. Invite disagreements, listen carefully and understandingly to jurors who are completely hostile to your case issues, and show even the craziest jurors that you understand what they're saying and how they feel.

During trial, jurors expect the stereotypically dishonest, defensive lawyer to OBJECT a lot. They expect you to object every time the other side says something damaging to your case that worries you. In fact, most jurors believe that every time a lawyer objects, it's BECAUSE they are nervous, guilty, or worried about what the other side is going to share with the jury. Jurors ALWAYS want to know the whole story, so they don't like it when they feel that you're trying to hide interesting information from them. When a lawyer objects early and often in trial, the jurors do NOT get the impression that the other side is crossing a line, even if the judge sustains the objections. Having talked with jurors after trials, with shadow jurors during trials, and having overheard actual jurors during trials, believe me—the jurors usually believe that objections are lawyers' ways of hiding the whole story and the truth from the jury.

As painful as it may be to hold back an objection when the other side says something inappropriate, weigh the benefits of objecting with the risk of making your jurors' suspicious. Usually their imaginations conjure up much more damaging assumptions than what the other side would have said. In most situations, it may be better to hold your objection and remain calm. Jurors trust you when you appear calm and unfazed by everything the other side says. And if you have to object, as much as judges hate this, explain your objection out loud in terms the jury can understand. Instead of "objection, calls for speculation!" you might say "objection, the witness is guessing, not giving facts!"

Jurors expect the stereotypical, dishonest lawyer to avoid talking about the most glaring weaknesses in their case. Jurors don't just expect dishonest lawyers to object when it comes up; they also expect you to actively ignore the topic in hopes that the jurors won't notice. The jurors may be right. Too many lawyers don't know what to do with the most worrisome issues in their case and become paralyzed in their ability to talk about it to the jury. But unless the other side does you a favor and doesn't mention the issue, it's going to come up, and the jurors WILL notice if you avoid it. Even worse, your jurors will get

the impression that you're HIDING the issue from them, even when you're only ignoring or avoiding it because you can't figure out what to say about it.

Believe it or not, jurors trust you when you talk about your worst issues and make honest admissions that seem to be detrimental to your case. Jurors are always surprised when lawyers openly admit concerns in voir dire, and they find it refreshingly honest. You'd be amazed at how much credibility you build simply by asking the question. And as I've said in past jury tips, jurors get the impression that if you're not worried about talking about a challenging issue, then it must not be that damaging an issue for you. Take great pains to identify the elephant in the room and talk about it, especially if the other side is going to bring it up.

Jurors expect the stereotypical lawyer to be biased and subjective toward their side of the case, which brings up a strange phenomenon. You and I know that subjectivity and advocacy is how the system is SUPPOSED to work, but jurors miss this point. Jurors believe that honest lawyers are objective and honest—even to their own client's detriment, perhaps—and that subjective, biased lawyers are dishonest. In a recent case I was involved in, we asked jurors if they believed a lawyer representing his or her spouse would be more or less objective than any other lawyer. The judge was incredulous—"why are you asking such a ridiculous question? Lawyers aren't supposed to be objective!" But when the jurors returned their questionnaires, their responses told a different story—some felt that lawyers representing spouses could be "objective," while others believe they couldn't be trusted if they were "subjective." So your jurors' trust depends largely on a concept that isn't part of our system of justice—impressions of your honesty and objectivity.

When you start your opening statement on the attack, aggressively advocating a position before your jurors have had a chance to make their minds up about what happened, your jurors get the impression that you're the stereotypical, SUBJECTIVE lawyer. Your jurors don't really think about the fact that you've studied the case for months or years and are ready to make critical judgments. To them, taking a position too early in your opening shows that you jump to conclusions too quickly, that you'll argue for your client no matter what the evidence shows, and that you're once again going to force your point-of-view on the jurors instead of letting them make up their own minds.

Jurors trust you when you tell them what happened in your opening statement before you start taking a position and pressuring them with arguments. When you tell the story of what happened objectively and stay off your soap box for the first half of your opening statement, the impression the jurors get is that YOU are being careful about making up your mind and that YOU needed to know the whole story before drawing reasonable conclusions.

Not to give you nightmares, but jurors have many more subtle, unfair reasons and cues to distrust you and shoehorn you into their definition of the cliché, dishonest lawyer—more than I could ever list out and many more that even I can't imagine. The point of telling you this isn't to scare you into a state of paralysis or make you self-conscious, but rather to make you comfortably aware of the things, big and little, that lawyers sometimes do (inadvertently) to offend and alienate jurors. The irony of course is that none of the offending signals you might be sending the jury are fair or logical; they're all normal, reasonable parts of representing your clients and dealing with the challenges of litigating a jury trial. But no matter how unfair, your jurors' perceptions and criticisms of you shape how they trust you, your client, and your case, and once you've done something seemingly harmless to turn a juror off, you may have lost them (and your case) in the process. So as foolish as it may sound to worry about how you're dressed, how you talk to the jurors, and the style with which you try your case, everything that matters to the jury should matter to you.

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