

March 2011 Jury Tip: “Why your jurors’ intelligence means nothing”

Leo Tolstoy might not have been a trial lawyer or jury consultant, but he understood how jurors think when he wrote that “the most difficult subjects can be explained to the most slow-witted man if he has not formed any idea of them already; but the simplest thing cannot be made clear to the most intelligent man if he is firmly persuaded that he knows already, without a shadow of doubt, what is laid before him.”

Turns out I’ve been incorporating Tolstoy’s principles into my jury practice for years, even though I came across his quote just a month ago. I don’t categorize potential jurors as “slow-witted” or “intelligent,” or even pretend to guess at their intelligence levels too much during the selection of a jury. But I do pay close attention to what jurors understand about the key issues of the case, just as close attention to what jurors think they understand, and the most attention to the jurors’ likely expectations about the issues. In other words, your jury pool will usually contain some jurors who will easily understand what your case is all about, some jurors who think they know what the case is about, and some jurors who know they know nothing and have to learn from you. You might have names for these types of jurors; I sometimes call them experts, insiders, and blank slates.

As Tolstoy pointed out, how intelligent a juror may be has almost nothing to do with how easily they can grasp your arguments, let alone how willing they might be to accept them. I’ve found this to be entirely true. How well-educated, well-spoken, careful and intelligent a juror is has no predictive value about their predispositions and ultimate verdicts.

Believe it or not, in the hundreds of mock trial and focus groups that I’ve analyzed, I have consistently found that a juror’s level of education, intelligence level, and understanding of the case (measured by objective comprehension of the facts) has no significant impact on individual verdicts. I have never once found educational attainment to be a statistically significant factor in predicting verdict. There is virtually no such thing as a case in which “intelligent” jurors will feel one way and “ignorant” jurors another, as much as it might feel that way when a jury has seemingly botched your verdict. As I’ve said many times over, jurors largely decide cases based on their own beliefs and values, and not all “intelligent” jurors share the same values and beliefs. Something entirely different is going on, and that something has to do with where a juror’s assumptions are coming from. How knowledgeable a juror may be about the key issues of the case can matter, but that’s completely independent from intelligence.

And yet I’ve found that many lawyers don’t view jurors this way. Many lawyers are convinced that “smart” jurors will be much more likely to understand their case and that “dumb” jurors will be much more likely to make mistakes and get fooled by the other side’s case. And so many lawyers make the mistake of overvaluing “smart” jurors and undervaluing less-educated, less-intuitive, less-bright jurors in jury selection.

The know-how in your jurors' brains that actually matters involves what they know about the key issues of your case and what they've been exposed to in their work and personal histories. The jurors that I call "experts" really do have an accurate, advanced understanding of your core issues—engineers in product design lawsuits, HR managers in employment trials, or commercial real estate agents or appraisers in eminent domain cases. Expert jurors are obviously wonderful to keep if you need your jurors to understand complex concepts that aren't clear or intuitive, but it's incredibly important for you to know what they know, in case they disagree with your experts.

The big differences are among the jurors I call "insiders" and "blank slates." Your insiders are those jurors who have been exposed to the issues or industries involved in the case; expert or not, insiders are know-it-alls who think they know how everything works. Jurors who have worked for corporations believe they know exactly how the business world works, just as mortgage brokers know how the home selling and buying process works. Whatever your case involves, anyone who knows how that environment "really works" is an insider juror, and they'll apply their definitions of right and wrong based on what they've seen to your case.

On the other hand, your jurors who have little to no experience or understanding with the issues or industries involved in your case are "blank slates." You'll usually have a fair number of college students, young wide-eyed jurors who have only worked in entry-level jobs, homemakers, or even blue-collar jurors who have never signed a contract, never seen the inner workings of a corporation, never had to do due diligence, and even who have never driven a car. That doesn't make them bad jurors; a juror can only be "bad" for one side, not both. "Blank slates" might be "slow-witted" at times, but they don't come in with preconceived notions, other than their own "common sense." Blank slates are naturally less jaded and cynical than insiders, and they'll usually apply their own higher standard of "right and wrong" to the case than any insider would.

How much a juror "knows" about the issues your case involves is an important factor in shaping how receptive they may be to your case, so use it as a criteria in jury selection. Who would find the allegations more believable and appalling—an insider, or someone who knows nothing about the business world or the health care system or whatever environment your case involves? Think about what standards you would like your jurors to apply—their own personal definitions of fair and unfair, right and wrong, and common sense, or the insular rules and expectations within the industry?

Just as important is the issue of how best to explain and argue your case to your jury, because the reality is that no juror is truly open-minded. You simply cannot expect an expert or insider juror to be open-minded, because they truly are know-it-alls when it comes to the facts of your case. Just like a judge trying a bench trial, it's difficult for someone who has seen many similar situations to avoid assuming that the case before them is just like the rest. And these jurors will instinctively impose their own ideas, expectations, and values onto your case.

Yet the jurors who don't know it all, the blank slates, aren't truly more open-minded. They might not know anything about your case, but they will still impose their own values and ideas about right and wrong or fair and unfair on your case. Never expect blank slate jurors to accept a different definition of right and wrong simply because an unsavory practice is "common and accepted in this industry." If you're defending conduct that seems unfair or unethical but isn't illegal and is accepted within an industry, you really need to convince blank slate jurors that it's not only legal but also that it's fair, and overcome their conviction that your defendant must have done something wrong.

Right or wrong, jurors impose their own expectations and common sense on unfamiliar situations. And other than cases that involve commonly-experienced situations like driving and employment, most trials involve situations that are completely unfamiliar to most jurors. Most jurors have never dealt with a patent, or product design and safety testing, or even complex business contracts. No matter how carefully you try to educate your jurors, they will instinctively impose their own approaches and judgments on how an investment manager should have managed risk, or what a commercial real estate broker should have disclosed to buyers, or how meticulously an airline should inspect planes in between flights. Fairly or not, your jurors are more likely to judge these situations more by how they manage their 401K, and how they sold their own house, or how they inspect and maintain their minivan than by industry standards. This is why blank slates aren't any more open-minded than know-it-alls.

No matter who your jurors are, you need to expect that every juror will have a blind spot that will make explaining some of your most basic concepts an uphill battle against their preconceived ideas. By identifying whether a juror is an expert or insider or blank slate, you can not only strike those jurors who will be least receptive to your case, but you can also determine the best way to persuade your jurors. With a jury dominated by blank slates, the case will be much more about "right and wrong," the insular rules that govern how your clients act don't matter much to the jury, and you need to focus on fairness rather than on the letter of the law. With a jury dominated by insiders and experts, the case will be much more about industry standards and expectations and whether conduct was illegal, regardless of whether it was fair or nice or ethical. Always remember that the knowledge and understanding (or lack thereof) that your jurors bring to court cannot help but cloud their vision, so be prepared to tailor your case—as always—to their point of view.

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