

January 2011 Jury Tip: “When jurors discriminate”

You know by now that jurors get distracted. They don't always decide cases based on the evidence alone, if ever. They fixate on details that the law says are irrelevant, and they are persuaded by their interpretations of those ambiguous details. If you've ever watched a mock jury deliberate or talked to your jurors after a trial, you know that jurors are just as likely to be persuaded by a witness' perspiration as by that witness' testimony. Jurors are just as likely to notice your tie or your earrings as they are to remember what you promised to prove two weeks ago in your opening statement. They often invent scenarios of “what really happened” while forgetting what each side actually presented.

One of the most frustrating and challenging distractions that you'll deal with is when there is a disconnect between how jurors feel about your case and how they feel about your client. No matter how strong your case may be, your jurors will always be distracted by a plaintiff or defendant they simply don't like. The jurors' reasons for disliking your client aren't usually complicated—racism, prejudice, dislike of corporations, dislike of people who sue—but getting these jurors to admit their prejudices during voir dire is difficult if not impossible.

Discrimination probably happens more often in jury deliberation rooms than in boardrooms these days, and your jurors don't have to give explanations for their decisions. When your jurors decide that they don't want your plaintiff to receive damages, or when they decide that they do want your defendant to pay up, they'll figure out creative pretexts to deny or invent damages. I've seen real and mock jurors refuse to find defendants liable in wrongful death cases because “the victims' family doesn't deserve to get rich.” I've seen jurors award huge damages against corporate defendants because “they can afford it, and I'm sure they've done worse things before.” Any time you represent a bank or insurance company, or a Middle Eastern client, or a seemingly-healthy plaintiff with a permanent disability, you face a real risk of jury discrimination, no matter how objectively compelling your facts are.

In a perfect world, your prejudiced jurors would confess in voir dire, be removed for cause, and your objective jurors would decide your case on the merits alone. Representing a hedge fund in a recession or an African American client in an unfriendly venue or an out-of-state company against a large local employer wouldn't be a disadvantage, if getting a fair and impartial jury was easy. Unfortunately, getting jurors to admit prejudices they know are politically incorrect is almost impossible. Not only because people are reluctant to admit their prejudices out loud, in public, but because people are usually as unwilling to admit their prejudices to themselves. So even when your jurors believe they can be fair, they cannot always be. Even when jurors don't knowingly discriminate against a litigant, they still can. When jurors have an abstract, unrecognized distrust of a plaintiff or defendant, they subconsciously let it color how they view everything in a case.

So the next time you find yourself representing a potentially unpopular litigant, you should probably expect some of your jurors to be inclined to overlook your case and discriminate against your client. Recognize potential sources of discrimination, do your best to politely encourage your jurors to admit “concerns” about clients like yours, but don’t expect that you will have identified and removed all of the jurors who feel that way.

Instead, you’ll have to find a way around their prejudices and force your jurors to overlook your client. The best and only way to shift your jurors’ focus away from your client and onto your case is to make your case, from opening statement to closing, about the jurors themselves, not your individual client. Only by persuading your jurors that this could have happened to anyone—even the jurors themselves—will you convince them to ignore how they feel about your client. Your jurors may not want to give your client justice, but no juror wants to deny themselves justice, even by proxy.

As subtly as you can, remove your individual client from your story. De-personalize them by focusing almost exclusively on their thinking, their decisions, and their actions. Don’t try to get your jurors to sympathize with a client they dislike. Instead, get your jurors to agree that what your client thought and did was what the jurors themselves (or any “reasonable” person) would have done. The goal is to get your jurors imagining that “this could have been you!”

The trial themes that you highlight in your opening statement, echo in your witness examinations, and bluntly argue in your closing should overtly have less to do with your individual client and more to do with the principle of what is best and fairest for the rest of us. In auto crash trials, craft your message to focus more about protecting good drivers than about protecting your particular driver. In business trials, shape your message to focus on reinforcing the fair rules of the business world than on being fair to your lovable, billion-dollar client. Subtly send your jurors the message that you’re not representing a particular individual or company—you’re representing “any safe driver” or “any responsible business” or “any hard-working employee” who was “unlucky enough” to have crossed paths with an unreasonable plaintiff or an irresponsible defendant and have been unfairly treated or unfairly accused. Encourage your jurors to feel that this time it was your client, but that it could have been any honest inventor, medical patient, responsible landlord, or conscientious product manufacturer... and next time it just might be.

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