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### **September 2017 Jury Tip: “Don’t expect jurors to follow or enforce the laws”**

Imagine for a moment that you’ve been called to jury duty and are seated in the jury box as a juror, not a lawyer. The judge asks you and your fellow jurors a seemingly straightforward question that I see judges ask all the time: “will you follow the law and my instructions, even if you disagree with them?” Your answer, like 99% of your fellow jurors, is probably “yes, of course.” As long as a juror is taking their job seriously and isn’t trying to say anything to get excused, they tend to say yes... and mean it.

But imagine that one of the lawyers stands up to voir dire you, and because she is a smart lawyer, she explains to you that “this is a legal malpractice trial. And one of the laws that you’ll be asked to follow as a juror in this trial is a new law. That law says that any attorney who took a vacation within 60 days of an upcoming trial, or any attorney who took a weekend day off within 21 days of an upcoming trial, has committed malpractice and is strictly liable for a bad result in trial for their client.” And then she asks you, “now that’s what the law says, but I need to know how you really feel: who feels like that law seems unfair or wrong to you... or that you might have a hard time enforcing it?”

I’m guessing that, as a practicing lawyer, you might have a different answer than the blanket “yes” you just gave to the judge about automatically following the law, even one you disagree with. You probably meant the first “yes”... but things change when the idea of following the law is no longer in a vacuum, and you’re confronted with a law that seems horribly unjust to you. Now obviously I invented a fake, unrealistic law as an example. But the reality is that jurors face the same dilemma in nearly every trial, because a large chunk of the jury pool finds many of our existing laws incredibly unfair and incomprehensible. So do you truly believe that jurors are somehow better able to ignore their disgust, abandon their personal sense of right and wrong, and blindly enforce the law than you (a sworn officer of the court) could enforce my made-up legal malpractice law?

So why do jurors promise judges and lawyers they’ll follow the law no matter what—and mean it!—when in practice, they often don’t? The reason is that jurors assume the laws are fair. I’ve seen judges and lawyers ask jurors to give an example of a law they find unfair countless times... and most jurors can’t think of a single example. Realize that most jurors know very little about our civil laws, and almost every juror knows absolutely nothing about how those civil laws apply to lawsuits. Other than vague notions and wrong assumptions, most jurors don’t know much about non-economic damages, or that patent infringement need not be willful, or the exceptions to legal terminations for at-will employees, or vicarious liability or ostensible agency. Until you explain the law to them, they’ll mean it when they tell you they can follow any law.

So the first, but not last, lesson is that you need to voir dire on the law as much as your judge allows you to. Stop assuming that jurors will follow the law. Or that certain kinds of jurors (businessmen and “responsible-looking” people, as opposed to the less-educated or disenfranchised) will at least follow the law. Don’t put any stock in promises by jurors to follow the law, even if they disagree with it, unless the specific law is explained. In a vacuum, their promises mean nothing. Don’t get me wrong—some jurors can do it, but not many. And there are really no “profiles” of jurors who you can safely bet on to enforce a law they can’t stomach. The only jurors who will consistently follow and enforce the law are those jurors who already agree with the law. That’s it.

Some judges don’t like lawyers explaining the law, but you need to push the envelope and do whatever you can to explain the laws that you worry some jurors might not like. Ask your judge to read the law in voir dire when the issue comes up. Paraphrase as best you can. Or at least explain the gist, like “I can’t tell you exactly what the law says, but you’ll be asked to enforce a law that restricts a company’s right to fire employees and says they can’t fire an employee for certain reasons. So who feels like any law that restricts companies from firing any employee they want for any reason seems unfair to you... or that you might have a hard time enforcing it?”

And you have to make the jurors feel comfortable admitting that they can’t enforce a law, because most jurors worry that they’ll get in trouble with the judge for saying they won’t follow a law. You might laugh, but it’s no joke; jurors’ fears about giving a “wrong answer” can keep them silent about their biases, so always make sure to tell them there’s nothing wrong with admitting an inability to enforce a law. Make it crystal clear that you’re not being judgmental. One phrase I like to use is “now that’s what the law says, but I want to know how you REALLY feel...” You also need to anticipate that your judge or opposing counsel may try to “rehabilitate” your jurors, sometimes by intimidating them into promising that they’ll “try their best” to follow the law. Make it clear during jury selection that “trying” might not be enough. Tell them “I have no doubt that you’re going to try your best to set your feelings aside and follow that law. But even if you try your best, do you think you still might have a hard time? What might interfere with your ability to enforce a law like that, even if you try your best?”

Now even if you do your best to uncover bias during jury selection and strike those jurors who won’t enforce the laws you’ll be asking your jurors to enforce, you still can’t assume you got rid of every bad juror. Assume that you’ve got plenty of jurors on your panel who, at the very least, might find those laws a little unfair. To me, it’s always a mistake to frame your case around convincing jurors that the evidence fits the law. The best way to win over jurors is to convince them that the law you’re asking them to enforce is fair. In other words, you have to sell your jurors on your case being FAIR, not on your case being on the right side of the law. The reality is that even when jurors try their best to follow the law, their interpretation of the law itself is influenced by their sense of fairness. When jurors encounter a law that seems unfair, they are less likely to say, “that’s not fair, let’s break that law” and more likely to say, “that’s not fair, it must mean something else.” So make sure that you never take the law for granted. Frame your case around trial themes designed to persuade jurors that what you’re asking for is fair.