

November 2010 Jury Tip: “Confess, and you shall be believed”

This month, I’m going to give away one of my most valuable secrets. The more cases I see, the more I am convinced that the key to winning over jurors lies in finding ways to gain their trust and build credibility. Not in ways to outsmart the other side, change people’s minds, or build the strongest case. Jurors are stubborn, and seem to be getting more stubborn. And no matter how strong your case, you will only win if you can convince your stubborn jurors to listen to you. Don’t take their willingness to listen for granted. In fact, getting your jurors to truly listen to your case might be the most challenging task in trial.

When I say “listen,” I’m not talking about paying attention. I’m talking about open-minded listening. Getting your jurors to actually consider whether what you’re saying, and the objective evidence you’re presenting, could possibly be true. Jurors are supposed to give you the courtesy of open-minded listening without question, but they rarely do. If your jurors already distrust you or your case, their skepticism and distrust will completely blind them to even your strongest evidence. There are thousands of ways to encourage your jurors to trust you, to trust your case, and to listen with a truly open mind. This month, I’m going to talk about one of the simplest yet most effective: admitting your weaknesses, and apologizing for your mistakes.

Your stubborn, cynical jurors start trial expecting you to be stubborn and unreasonable. They expect to hear excuses, exaggerations, and self-serving half-truths. Ask anyone (especially if they don’t know you’re a lawyer), and they’ll probably admit it to you. Even jurors who like lawyers are somewhat cynical about how accurate and reasonable they expect you to be in trial. Most jurors believe that being misleading and self-serving is an inevitable part of your job, something every lawyer does for their clients, right or wrong. Some jurors hate lawyers for it, but many don’t hold it against lawyers at all. Either way, no juror expects both sides to be perfectly honest, reasonable, and objective. And so by the time you start your opening statement, most jurors are actively searching for reasons to distrust and dismiss you and your case. It’s tough to persuade jurors when they’re actively skeptical. Even when you’re presenting undisputed evidence in an honest, straightforward way, skeptical jurors won’t necessarily accept it.

You need to find ways to immediately gain the jurors’ trust. The best way to do that is to tell them the one thing they least expect: that your case isn’t perfect, or that your client made some mistakes. Confessing isn’t fatal to your case, unless you’re admitting fault completely. In fact, jurors respond positively when they hear confessions, admissions, acknowledgments, and apologies. I’ll share an example with you that boldly put that theory into action.

For those of you familiar with Domino’s Pizza’s ad campaign in the past year, it’s one of the most instructive, translatable lessons for trial lawyers that I’ve come across in years.

For those of you who have no idea what I'm talking about, I'll summarize it. Domino's recognized that a large segment of the consumer market hated their pizza. A clueless pizza company might never have noticed. A stubborn pizza company might have tried to change the minds of customers through advertising, by trying to convince people that what they believed about Domino's Pizza was wrong. For those of you who have tried cases in front of hostile jurors, you know how difficult or next-to-impossible that can be. A concerned pizza company might have changed their recipe and touted the new recipe in advertisements, which might have worked.

What Domino's did was slightly different, but the slight difference was anything but slight in its effectiveness. Domino's did change their recipe and tout their new recipe in commercials. But at the beginning of each commercial, before they touted their new recipe, Domino's confessed. The commercials bluntly admitted that most customers hated Domino's pizzas. Domino's bluntly ripped into themselves and their product. One media report called the ad campaign "self-flogging." In the first quarter after the ad campaign, same-store sales increased 14.3%, one of the largest recorded jumps by a fast-food chain, and in the same quarter that competing pizza-delivery companies' sales dropped 3%.

The confession was completely necessary and hugely persuasive. Without the confession, Domino's would be giving the message that "our old pizza was good, but our new pizza is even better!" But that's not what consumers believed; many consumers really did hate Domino's old pizza. Without the confession, why should customers believe Domino's any more than they did before?

By confessing, Domino's regained credibility in the eyes of every consumer who held the belief that Domino's pizza was terrible. Frankly, it was the only way to make those consumers listen. Jurors choose whether to listen to or dismiss your case for the same reasons. You have the same opportunity that Domino's had to gain your jurors' trust, and the same danger of losing your jurors' trust if you don't show them that you and your case agrees with what they already believe.

Next time you're in front of a jury, admit something immediately in your opening statement. Admit to the jury that your client wasn't perfect. That they made some mistakes. That they were foolish or naïve. That they probably could have handled something better. That they panicked, or that they trusted someone too much, or that they overreacted. In some cases, the best and perhaps only way to win is to admit some comparative fault. I'm not sure that plaintiffs in tobacco trials, for example, can maintain much jury credibility without admitting some fault. Identify whatever it is that concerns you most about your case, or that bothers the lay people most when you explain your case to them, or that upsets the mock jurors when you test your case, and find a way to frankly and immediately acknowledge and admit it to your actual jury. If it's on your jurors' minds and bothering them at the start of trial, you need to address it head-on.

Just as powerful as admissions are apologies. Jurors almost always react positively to litigants who say they're sorry about something, especially in tragic cases. And when I say "positively," I'm not talking about jurors being happy that your defendant confessed and awarding a verdict against them. I mean that jurors are usually more likely to trust litigants who express sadness and regret, without admitting guilt or fault. That increased trust leads these jurors to be more open-minded about hearing your explanations and your side of the case.

In most cases in which an avoidable tragedy has taken place, the jurors are sure that everyone has made mistakes. They'll be suspicious, and they'll be fully expecting both parties to unreasonably refuse to admit any responsibility. Expressing sadness or regret is disarming for jurors. It's a fresh, unexpected dose of honesty for jurors who were probably looking for reasons to distrust you.

Once you've made your confession or your apology, you have a window of opportunity in which you have won some measure of trust with the jury but haven't lost the case, at least not yet. Your jurors will need to hear an explanation, but they'll at least be receptive to hearing one. And the basic theme that you'll need to present to your jurors is that there is an important difference between someone who COULD have done something differently and someone who SHOULD have done something differently. There's an important difference between acting perfectly and acting reasonably. Looking back, your client certainly regrets what they did and wishes they could have done something differently. But why did they? Why did it make sense at the time? Tell your jurors what else your client wishes—that they wish they had been told or given more information, or accurate information. That they had more time or more understanding of how serious a situation would be. If your client had known, they would have done something completely different.

Whatever your explanation happens to be, getting the opportunity to explain is your best and perhaps only chance to win over your jury. Don't be afraid to make honest but "damaging" admissions to your jury if you have a chance to explain them. Honesty is the only currency for acquiring trust, and trust is your best asset in trial. Trying to hide your bad facts is like throwing a blanket over the elephant in the room—it won't work, and it will only make you appear more guilty and dishonest. Jurors won't stop focusing on a bad fact, even if you avoid talking about it, as long as it's in their minds. The only way to take the focus off of a challenging issue in your case is to address it until your jurors feel satisfied that it's been addressed. Only then will they ignore it, and focus on what you want them to focus on.

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