

**November 2009 Jury Tip: “Tackle the elephant in the room”**

The more trials and mock jury deliberations I observe and the more actual jurors I interview after trials have ended, the more I’ve come to realize that winning the battle of credibility is the most essential part of winning over your jurors. When your jurors don’t trust you and your case, all the facts and expert witnesses in the world won’t convince them otherwise. As I’ve said time and again, great facts and great witnesses don’t build credibility for you; you have to create that trust early on in trial, or your jurors won’t trust those great facts by the time you finally present them.

Building credibility and trust, and doing it early on, is a mandatory part of winning a trial. I can’t stress enough that you need to get your jurors to trust you, and especially what you’ll be arguing for, by the middle of your opening statement. Building trust in jury selection is even better. There are a number of ways, large and small, to build trust during voir dire. Come across as friendly and personable. Show the jurors that you want to LISTEN to them, not lecture to them. Demonstrate that you understand ALL the points of view your jurors express, not just those who agree with you and your case. When you show patience and understanding with jurors who disagree with you, the rest of the jurors get the impression that you’re reasonable; when you argue with them, ignore them, or struggle to understand them, you’ll lose the rest of the jurors’ trust.

There are a million lessons in building credibility during jury selection or your opening statement that I could discuss, but this month I’m going to focus on my favorite way of building trust and overcoming your jurors’ concerns in voir dire, a technique I sometimes call “tackling the elephant in the room.”

To win a trial and win over your jurors, you **MUST** convince the jurors that your case makes sense and fits their values. Not every case is a natural fit for most jurors’ common sense, and many cases clash with your jurors’ values. Unless you have a slam-dunk case or pick the perfect jury, you’ll have to deal with jurors who have immediate doubts and strong concerns about your case.

When you’re suing an employer for retaliation or discrimination, the “elephant in the room” is often the employer’s valid-sounding reason for firing the plaintiff. How can your jurors blame the employer if it sounds like your employee deserved to be fired?

When you’re defending a company accused of trade secret misappropriation, patent or trademark infringement, or intellectual property theft, the “elephant in the room” is usually the idea of “stealing.” Most jurors have been raised to immediately see “stealing,” “copying,” and “cheating” as wrong, no matter what the law says.

In wrongful death cases, the “elephant in the room” is usually the point of awarding damages; most jurors are wondering “what good would awarding money do if it won’t bring the victim back, and why does the victim’s family deserve to collect?”

As soon as they hear the judge describe the basic outline of the case and listen to your voir dire questions, your jurors start to develop doubts and concerns about your case that will influence their view of your credibility and of your evidence throughout trial. Unless you deal with them directly, these elephants will sit in the courtroom throughout the trial. Few jurors will be brave or self-aware enough to tell you during voir dire that they can’t imagine you proving your case. I say few, because I have encouraged clients to ask jurors that very question and have seen jurors tell us “I can’t imagine a way you can win this case,” and have had those jurors excused for cause. Most jurors won’t say what they’re thinking, but trust me—they’re thinking “how in the world is this lawyer going to explain that?”

Ignoring those elephants only makes them worse. If your jurors get the sense that you’re avoiding a weakness of your case or planning on arguing something they don’t believe in, you’ve lost their trust already. Instead of avoiding the topic, use those elephants in the room to overcome your jurors’ concerns and show the jurors that you understand them.

In your next trial, identify the most challenging issue in your case. Think about your case, talk about it to friends and colleagues, do a focus group, or do whatever you do to help you see the forest through the trees. When you do, choose the most glaring weak spot that jurors will likely figure out immediately. And during your voir dire, bring it up. Flush it out, and get your jurors to comfortably talk about their concerns. Trust me, this line of questioning is helpful—your jurors are already thinking about their doubts and concerns. Don’t be afraid to hear it, and make sure to show the jurors that you’re interested in listening, interested in understanding how they feel, and not afraid of their concerns. Just bringing the topic up, by itself, will earn you credit. Most jurors believe that (less-than-honest, stereotypical) lawyers won’t talk about the problems with their case, so not only will you gain some trust, but the jurors will believe that the topic might not be so important and damaging to your case.

Then comes the important part—once you’ve talked about and framed their concerns, show them how your case is DIFFERENT than the cases they’ve been concerned and complaining about. When you show your jurors that you understand their concerns, they begin to trust you. When you tell your jurors that you AGREE with their concerns, that you would be wrong to pursue or defend a case that deserved their worries, they’ll find you refreshingly honest and reasonable. The most important, persuasive point you can make in voir dire is that you AGREE with them that your case (or defense) would have no merit if it couldn’t answer those concerns, but that your case is fundamentally different than the hypothetical flawed case you’ve been describing.

Obviously, you wouldn’t be allowed to TELL your jurors these things, directly. But you can communicate that you agree through your voir dire questions. You should always be allowed to ask questions like:

“Does everyone here agree that surgery is risky, and that it would be unfair to blame the doctor just because the surgery didn’t work and the patient wasn’t saved? I agree.”

“Does everyone here agree that it seems unfair to blame a doctor who follows all the standard procedures and makes the most safe, careful decisions they can in an emergency situation, even if their decisions turn out to be the wrong ones and the surgery goes poorly for the patient? I agree.”

“But what about this: Does anyone here believe that it is WRONG for a surgeon to be less careful, less cautious, and less safe than they could be, and to refuse to take extra precautions in a risky, challenging surgery?”

So now comes the hardest part—winning your jurors over by distancing your case from their concerns and by framing your argument in a way that makes sense, that fits their values, and that they’ll agree with. Unfortunately, there’s no one-size-fits-all solution to tailoring your case to your jurors’ concerns and values that I can summarize in a paragraph, so the rest is up to you.

One way to re-frame your case for your jurors is to listen to their concerns and then ask about exceptions to their “rules.” If your jurors can’t imagine how a careful driver could have struck a pedestrian, ask them if they can think of any exceptions: “you should ALWAYS be able to spot and stop for a pedestrian unless... they dart into the street unexpectedly? They cross in an unexpected spot, like outside of the crosswalk or on a highway? They cross on a dark road in the middle of the night without any reflective clothing?” If you’re suing for fraud but your jurors have issues with plaintiffs who failed to do enough due diligence, ask them “can you think of anything that might make it more difficult or even impossible for a buyer to get information or answers to their questions?” Getting your jurors thinking and talking about exceptions to their concerns can send the message that your case might be different.

No matter what you do, you’ll have to get comfortable with the fact that you cannot win a case without listening to your jurors’ concerns, understanding their (not your) idea of common sense and their values, and convincing them to trust you by completely changing the way you present your case to agree with their values and common sense. You cannot afford to ignore their concerns and point of view and forge ahead with pre-planned trial themes that your jurors don’t agree with. You’ll have to be ready to tailor your trial themes, your opening statement, your case values, and how you present to the case on the fly, based on jury selection. But that’s an entirely new topic—how to use voir dire like a focus group—that I’ll discuss in next month’s jury tip.

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