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February 2009 Jury Tip: “Jurors who charm both sides”

A few months ago, I received a call from a *Wall Street Journal* writer doing a story on jury service. She wanted to know whether or not the jury system would be better off with professional volunteer jurors, instead of forcing every American from every walk of life to serve. In particular, she wondered whether or not losing the most professional, educated, and intelligent jurors would have an impact on verdicts. I answered her questions, but this month I'll give you a better answer to an important question: does a juror's education, intelligence, and understanding matter?

The answer, for better or worse, is no. I have never seen a juror's education, measured intelligence, or even income surface as a significant factor in a jury profile, as long as questions about the jurors' values, experiences, and opinions are considered. Highly educated and intelligent jurors are just as likely to make 'mistakes' and be blinded by pre-judgments and predispositions as any other juror. Whether this reality destroys or restores your faith in the jury system is up to you.

Before you argue with me and cite an example, keep in mind that education and understanding are sometimes correlated with the traits that actually do determine predispositions. Don't confuse the two. A group of highly-educated engineers who understand the issues in a product liability case may be highly pro-defense, but it's probably not their education and understanding that distinguishes them from the plaintiff group of construction workers and administrative assistants. More likely, their engineering backgrounds, analytical way of looking at the world, and trust toward corporate manufacturers explains why they see the case differently from other jurors.

The majority of cases are not so cut and dry. In most cases, a well-educated juror is no more likely to agree with another well-educated juror in deliberations than with an unsophisticated juror. Biases rarely fall among demographic lines. So unless you know that education is correlated with some other value or belief that will make a juror more receptive to your case, don't pay much attention to how smart your jurors seem or the degrees they hold.

A few months ago, I argued that every attorney should go into jury selection with an understanding of juror profiles that will be receptive to your case and to not necessarily be scared off by loud, opinionated jurors. This month, let's discuss another common mistake I see made in jury selection—the mistake of automatically trusting the smiling, friendly jurors and the smart, reasonable-sounding jurors on the panel.

No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. Not true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

Don't fall into the trap that smiling, friendly, courteous jurors will be receptive to you and your case. Yes, you seem to have rapport with them. Yes, they seem to be open-minded and willing to listen. But are they equally friendly during opposing counsel's voir dire? Are they equally willing to listen to the other side of the case? The truth is, friendly jurors have biases too, and a friendly demeanor doesn't tell you much about what a juror may be receptive to during trial.

Likewise, don't fall into the trap that intelligent, perceptive, reasonable jurors will be receptive to you and your case. Yes, they seem to understand you. Yes, they seem to grasp the issues in the case, and you get the feeling during voir dire that they'll 'get-it' and be smart enough to see right through the opposing case. But here's a fact that you may not have considered—both sides are usually convinced that their case is stronger, that the opposing case is full of holes and deceptions, and that any smart, 'gets-it' juror will be on their side without having the wool pulled over their eyes. Convincing yourself that 'gets-it' jurors will see things your way is one of the most common examples of attorney bias.

Finally, don't fall into the trap that jurors who should relate to your client will relate. Just because a juror is a middle-aged construction worker like your plaintiff doesn't mean that juror will identify with and relate to your client's case and decision to file a lawsuit. When the plaintiff is a hard-working, blue-collar, never-complains employee, his or her peers are often unreceptive to the plaintiff's case. Too often I see attorneys rely on their client's input in jury selection when the client is merely looking for those jurors that he/she identifies with and fearing those jurors who seem different. Identifying with the case and with the litigant are often very different processes.

Remember, you are looking for jurors whose values align with the values of your liability and damage arguments. Values are segregated across demographic lines much more rarely than you might believe, so make sure to stay focused on your jurors' values, expectations, and understanding of how the world works. The next time you select a jury, don't be afraid to ignore their education and personality quirks.

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