

April 2009 Jury Tip: “Dealing with juror anarchy”

At a recent legal conference at which I was speaking, I was asked a particularly thought-provoking question: “how good (or bad) a job do you think juries do at getting verdicts RIGHT?” The answer is understandably complex, and I invite you to weigh in and share your feelings on the subject, especially if you disagree with me.

At the risk of running too far into left field and turning my jury tip into a philosophical discussion, I will argue that juries do a wonderful job of re-interpreting (and thereby changing) our laws by injecting common sense and evolving societal values into their verdicts. A jury’s verdict can change the law with more expediency and freedom than any judicial or legislative body could. Jurors may at times fail to fully understand the issues presented at trial and will usually judge cases more on credibility and predisposition than on the evidence presented, and these phenomena are admittedly less than ideal. However, I would argue that when jurors ignore or reinterpret the jury instructions and the law, as they often do, their verdicts are the purest expressions of democracy in action.

But no matter whether jurors get it right or wrong, you as the attorney have no choice but to deal with the reality that jurors bring their own set of ‘jury instructions’ into the courtroom that often override the actual instructions.

As a jury consultant, I am an expert in jury misconduct. While the law will tell you what your jurors SHOULD do, only a jury consultant can tell you what your jurors WILL do, because jurors NEVER fully understand or follow the instructions and decide cases on the evidence and the law. Abandon the hope that jurors will follow the jury instructions, enforce a contract, or obey any rule simply because the law demands them to. If a jury instruction, contract, policy, or law seems unfair to a juror, they will have a difficult (if not impossible) time enforcing it during an anonymous deliberation process. Instead, jurors base verdicts on their common sense and their personal values of justice and fairness, no matter what the law demands.

Some jurors believe it’s unfair for a company to fire an employee without giving a compelling reason, no matter what the at-will employment laws say. “If they had a good reason to fire her, they would have told her why,” they’ll argue in deliberations. Other jurors believe it’s unfair to prevent companies from firing employees for any reason, even retaliatory or discriminatory ones. “He deserved to be fired, and he would have been fired anyway,” they’ll convince themselves. Demanding that your jurors follow the law and jury instructions because they are required to is not persuasive. To be sure of winning over these jurors, you’ll have to convince them that your case is FAIR and not just the law.

Jurors don't disregard the law and ignore the jury instructions on purpose, at least not most of the time. But when they find contracts, rules, or jury instructions confusing—and they always do—jurors subconsciously re-interpret those rules to match their own sense of justice and fairness. Jurors allow their values to shape the rules, subconsciously. For example, jurors never fully understand the concept of fiduciary duty, so they'll always re-interpret the definition and disregard obligations that don't seem fair. In particular, jurors will carve up and re-write the meaning of contracts based on their own common sense and ideas of fairness. I have seen mock jurors re-interpret contracts in mock trial deliberations to suit their own logic—once, a juror said “there's no way the contract could mean what the defendant says it does, if it did the plaintiff would never have signed it.” That type of thinking speaks for itself and is indicative of how most jurors reconcile rules and contracts with their own perceptions.

I realize how scary this sounds. But instead of tearing your hair out and losing faith in contracts, the law, and the jury instructions, understand that there is a better way of persuading your jury than simply forcing the law down their throats. Accept that jurors view trials much differently than judges and lawyers. And instead of stubbornly assuming that your jurors will adhere to the jury instructions simply because they are told to, you must focus on giving your jurors common sense reasons why your case is fair. Supplement the law with practical arguments to help jurors follow those instructions. Every law, jury instruction, policy, and contract stipulation was put there for a reason, so take the time to explain those reasons and why they are fair to your jurors.

There are far too many reasons why a law or contract might appear confusing or unfair to a juror for me to explain how to merge fairness with the rules, but I'll offer a few examples anyway.

When contracts are too confusing or complex for jurors to understand—almost always the case in commercial, breach of contract trials—make a convincing argument to the jury that your client never would have signed if the contract meant what the opposing counsel now says it means. Jurors aren't experts at interpreting contracts, and if two expert lawyers can't agree, the jurors know they won't be able to figure it out on their own. Show your jurors that your client would have been crazy to agree to the terms your opposing counsel insists are enforceable; if you represent a sophisticated individual or a large-enough company, your jurors will doubt that your client was naïve or foolish enough to sign an unfair contract.

When you're trying to enforce a contract that jurors may view as unfair, you'll need to explain to your jurors why it's unfair for your client to be denied the benefit of the contract. It's never enough to show the jury the opposing litigant's signature on a contract.

Treat potentially “unfair” jury instructions the same way; if your jurors don’t believe the law is fair, they’ll find a way to divert the instructions. One jury instruction that jurors often struggle with involves the vicarious liability of employers; most jurors have a difficult time blaming a company for the actions of a single employee. Even when the law defines an employee’s negligence as “foreseeable”—perhaps a truck driver causing a collision—the jurors struggle to see how a company could have “foreseen” such an unpredictable accident. Rather than assuming the jury will follow the instruction, a savvy plaintiff’s attorney should focus on demonstrating how the employer could have done a better job of minimizing risks and ensuring that their employees were safer and more careful. Explain how unfair it would be to the injured plaintiff for the company to avoid blame when the injury would have been far less severe if the truck driver were driving his Honda Civic off duty instead of the defendant’s slow-braking truck, heavily loaded with freight.

Before your next trial, take a closer look at the rules you’ll be asking your jurors to follow, and think about how confusing or unfair they may appear to your jury. Make sure never to take your jury’s obedience for granted or assume that they’ll “have to” follow the rules. Just to be safe, give your jurors reasons to follow the law, the jury instructions, or the terms of a contract based on common sense and fairness. Your jurors don’t mean to be anarchists, but they’ll inadvertently choose justice over the law when given the choice, and they’ll rely on their own sense of justice and fairness, not necessarily yours.

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