

January 2012 Jury Tip: “Connecting and disconnecting your jurors”

I have always found it amusing that trial lawyers spend so much time focusing on (or worrying about, if you’re representing a defendant) the influence of sympathy on jurors. For those of you who think sympathy matters to jurors, let me make a correction that may seem trivial, but matters quite a lot when it comes to jury decision-making.

As any vocabulary stickler would tell you, sympathy and empathy are not the same, and the word “sympathy” is often misused. Sympathy is a passive process that involves pity: feeling sorry for someone without understanding how they’re feeling. Empathy is an active process that involves understanding someone else’s feelings by identifying with them, putting oneself in the other person’s shoes.

The word “sympathy” gets thrown around quite a bit in all kinds of trials, often by judges and civil defense counsel and either side in a criminal trial. Will the jurors promise not to allow sympathy to influence or cloud their judgment? Jurors are constantly asked this question. Civil defendants often worry about jurors sympathizing with the plaintiff in wrongful death trials, personal injury trials, employment trials, and even business trials, especially when the plaintiff is an individual facing a corporation. Criminal defendants often worry about jurors sympathizing with the alleged victims of serious or violent crimes. Even criminal prosecutors sometimes worry about jurors sympathizing with accused defendants when they appear remorseful or seem to be a good person or are facing serious consequences and jail time.

Jurors are often asked about sympathy, but sympathy isn’t the real problem: empathy is. In the courtroom, sympathy would involve a juror feeling sorry for a litigant without putting themselves in the litigant’s shoes, and that does not happen much. Probably because our society has become so judgmental, especially when we are being asked as jurors to judge the conduct of others, few jurors are influenced by sympathy. But to jurors, empathy can be incredibly influential. Empathy involves jurors feeling sorry for a litigant when the juror imagines “that could have been me.”

Jurors rarely support litigants who have suffered tragedies. In fact, jurors have a natural instinct to insulate themselves from feelings of danger and vulnerability. Sympathetic or not, jurors are motivated to distance themselves from empathizing with victims by convincing themselves that the same thing could never happen to them. Realistic or not, it helps jurors sleep at night. But jurors do support litigants who they can identify with and feel empathy towards, when the juror cannot help but imagine the same thing happening to them.

I'm not suggesting that judges stop talking about "sympathy" and start using "empathy" instead. When jurors talk about sympathy, they're usually talking about empathy. But as lawyers who worry about your jurors being influenced by their feelings, you need to understand the distinction. Worry less about your jurors being influenced by pity, and worry more about your jurors' capacity to identify with the opposing litigant and their decisions. And most importantly, you need to focus on preventing your jurors from identifying with the opposing litigant.

Preventing your jurors from identifying with the opposing litigant is incredibly important, and cannot be done by asking your jurors to "promise not to let sympathy influence" their decisions. Instead, you need to "disconnect" your jurors from the seemingly-similar opposing litigant by pointing out key differences in voir dire. The key to disconnecting your jurors from the other side is to craft your questions so that they subtly reinforce the idea that the juror made the "right" decision, the subtle and subconscious conclusion being that the litigant made the "wrong" one. You won't have to talk about "right" or "wrong" directly; your jurors are already wired to believe that they're always right. And your jurors will do the talking for you; simply ask them "why?" they made the decisions that they have.

You can apply my "disconnecting" methods to almost any kind of trial. In one trial, we were concerned that the jurors would identify with an individual defendant employee who breached a non-compete agreement. It's easy to understand why; most working jurors have no trouble empathizing with fellow employees and protecting the principle of employee freedom in an unstable job market. So we asked a few voir dire questions to subtly convince our jurors that THEY were smart to be at-will employees and that the defendant should blame himself for signing a non-compete contract.

"How many of you are working right now as "at-will" employees, without a contract? How many of you have NEVER signed a restrictive employment contract and have always been an at-will employee? How many of you would NEVER sign a non-compete agreement that restricted your freedom to leave your job and go work for a competing company? Why wouldn't you?"

I have no doubt that our jurors would have been very likely to identify and empathize with the individual defendant had we not forced them to think about this distinction. Forcing our jurors to recognize the difference between themselves and the defendant helped. The real key was taking the question a step further by asking the jurors to explain why they would never do the same thing the opposing litigant did. The next time you worry that your jurors will identify with someone injured in a car crash, an inventor claiming their intellectual property was misappropriated, an employee claiming to have been mistreated, a homeowner claiming to have been cheated, or a business person claiming to have been defrauded, focus on disconnecting your jurors from feeling empathy and forget about creating sympathy.

For those of you representing the victim or the individual, you need to do just the opposite: establish a connection between your jurors and your client. Forget about fostering sympathy; sympathy is worthless if your jurors can't imagine the same thing happening to them. Recognize that most jurors are not motivated to feel empathy and are instead motivated to insulate themselves from feeling vulnerable. In other words, your jurors' first instinct is usually to convince themselves they are different than the plaintiff, not the same.

So you need to ask voir dire questions that force your jurors to confront the key similarities between themselves and your client. There's a reason I used the word "force." Many jurors have unrealistic views about how careful and logical and perfect they are in most situations. Very few jurors admit in voir dire, even to themselves, that they aren't perfect drivers. That they don't always take extra safety precautions. That they aren't usually diligent about double-checking important things. That they usually don't read every word of the contracts they sign, the warning labels of products they buy, or the user manuals of the machines they use.

In voir dire you will often have to force your jurors to realize that they are not always as perfect as they would like to believe. You'll have to craft your questions to be detailed and specific, because jurors will usually believe that they are "always" careful and safe and diligent, in general. Don't ask your jurors "how many of you sometimes don't check your side-view mirrors before you change lanes?" They'll usually claim that they do. Ask them specific questions that they'll more easily remember, like "has anyone here ever been changing lanes and successfully prevented an accident with a car you didn't see in the lane? Why weren't you able to see the car at first...?"

In every case you take to a jury, spend some time thinking about the admitted mistakes or unfair criticisms your client will have to face, and deal with them directly in voir dire. Only by getting your jurors to internalize your client's questionable decisions can you deactivate your jurors' instinct to blame and activate their ability to empathize. Luckily for you, you get to ask the voir dire questions first, before the defense has the chance to get jurors thinking about the differences.

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