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March 2014 Jury Tip: “Expectations (not experiences) shape juror biases”

You represent a wrongfully terminated employee, and prospective juror #7 has been mistreated by a former employer. Great juror for you? Not necessarily.

You represent an insurance company, and prospective juror #11 has routinely had insurance claims denied. Lousy juror for you? Not necessarily, and perhaps not probably either.

I've often said that your jurors' experiences don't matter much: the lessons and attitudes they've developed from those experiences matter. Assuming that a juror's experiences have predisposed them a certain way is a dangerous assumption. Not only might a juror have formed an attitude 180 degrees from what you've assumed, jurors with important experiences tend to have formed stronger attitudes than jurors without case-relevant experiences. If you have the voir dire time, dig deeper and find out for sure.

But attitudes and opinions aren't the only impressions jurors form from their experiences. Experiences create and change a person's expectations and standards. So for the same reasons that you should focus on attitudes (not experiences) in jury selection, you should focus on the expectations your jurors' experiences have shaped. Don't get distracted by the experiences themselves. So let's talk about the ways your jurors' expectations matter.

Jurors have a tendency to decide cases by comparing their own (highly-subjective) expectations to the facts in the case. In other words, they'll usually find a defendant blameless if its conduct "is no worse than what most companies or people do these days" but liable if the conduct "crosses the line." Jurors usually don't consciously disregard the law, but that line has little to do with the law and more to do with your jurors' perceptions of the real world. And within each juror's mind, that line is in a different place.

Jurors decide all kinds of civil lawsuits this way, not just professional liability and malpractice cases in which the jury is directly asked to think about a standard of care. Whether or not the jury instructions mention a standard, your jurors will always decide your case based on an unspoken standard of care as defined by their own expectations.

When jurors deliberate, they spend less time debating the facts ("what actually happened") and more time debating right and wrong. And when they debate right and wrong, they're really debating their own personal standards of care for whatever the case involves: a driver, a company in the business world, the limits of intellectual property, the role of government in an eminent domain case, etc. No matter what the experts say, your jurors' impression of what is normal and expected (according to their own experience) sets the standard of care against which they measure the conduct of the defendant.

And when it comes to jury selection, keep in mind a counter-intuitive phenomenon: your jurors' experiences usually create and change their expectations in the opposite direction. In other words, when a juror has had a negative experience, it most often reduces their expectations and makes them prone to judge defendants more gently. The worse your jurors are used to, the lower their expectations of what a defendant should have done. Jurors who have had overwhelmingly positive experiences sometimes develop amplified expectations. Raised standards actually make jurors judge defendants much more strictly: the better they've seen, the higher their standards and expectations of what a defendant should have done. Sometimes to the point of being unfair or unrealistic.

So the next time you hear a juror raving about how fair and responsible her employers have been, don't expect that juror to automatically trust the defendant in an employment case. She's just as likely to be shocked and disappointed by an employer who didn't treat an employee with the perfect fairness she's come to expect. High expectations don't translate into high levels of trust.

The same goes for jurors with low expectations. The next time you hear a juror describe a negative experience with an entity similar to the defendant, don't assume that the juror has a distaste for those kind of entities or even bad conduct. Jurors who have experienced lousy service from a doctor or professional, or who have seen nothing but lousy driving from truck drivers, or have seen unethical business practices from corporations, are often less likely to blame a doctor, truck driver, or company. Bad experiences often set lower expectations, and jurors compare a defendant's conduct with what they're used to seeing. Lower expectations, less shock and outrage from the juror.

Keep in mind a couple of exceptions. You represent a hospital, and prospective juror #4 has had a loved one's surgery botched at the same hospital. Lousy juror for you? Almost certainly; one exception to the rule of diminished expectations is when a juror's negative experiences involve your client specifically, not just similar entities like hospitals or employers or patent holders in general.

Here's another: you represent a plaintiff in a breach of contract suit, and prospective juror #2 complains about how often he's had promises broken and contract terms violated. Good idea to strike this juror because his expectations have been lowered? Not in this case, because this juror complained. Jurors who are upset instead of being resigned aren't cynical. When a juror's negative experiences have caused them to become more angry than jaded, their expectations haven't changed. These jurors are usually still idealistic and continue to expect better. Only when a juror has become resigned to the reality of reduced expectations and adopts the impression that "that's how the world is" will a juror be receptive to dismissing seemingly bad conduct.

Harry Plotkin is a jury consultant in Los Angeles but practices nationwide. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements.