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October 2010 Jury Tip: "Understanding the other side's appeal"

I often talk about the most common mistakes I see lawyers make, purely as constructive criticism of course. But what I haven't yet done is to dig a little deeper and discuss WHY lawyers make those mistakes. So this month, instead of talking about what you might be doing wrong, let's talk about why you might be making mistakes and what fundamental changes you could make to your approach that will help you better understand your jurors, and better persuade them.

The first fundamental mistake that most lawyers make is the failure to understand their jurors' points of view. Frustrated lawyers often criticize jurors for making the "wrong" decision, but the reality is that the jury (like the customer) is always right. This is a lesson that has run through every jury tip I've written for several years, and understanding and accepting this reality is the main difference between a lawyer and a persuasive lawyer. A lawyer focuses their case on the law, the jury instructions, and the evidence. A lawyer expects that jurors will be persuaded by the evidence, the jury instructions, and the law. But a persuasive lawyer has learned that jurors reinterpret the law, the jury instructions, and the evidence based on their own values, sense of fairness, and common sense. And so a persuasive lawyer tries to understand the jurors' point of view, presents their case to appeal to the jurors, and reframes the evidence and the law to conform to their jurors' beliefs.

I understand that understanding your jurors' points of view and recasting your case to appeal to their beliefs is easier said than done. And in fact, I have worked with plenty of lawyers who make every effort to think about the jurors' point of view, but who still make fundamental mistakes understanding their jurors. That brings us to the second fundamental mistake that lawyers make in presenting cases to juries. It's incredibly simple, but incredibly important: the failure to understand what might make the other side's case compelling to your jurors.

Far too often, I see lawyers who overestimate the appeal of their case because they dismiss, ignore, or underestimate the appeal of the other side's case. When in the hands of a jury, there is no such thing as a slam-dunk case. There is always something about the other side's case that will appeal to a jury, no matter how dumb or irrelevant or unsupported it may seem to you. It's natural to want to believe in your case. And for those trials that you don't mind taking to a jury, it's probably inevitable that the deeper you get into discovery and the better you get to know your client, the more you believe in your case. Unfortunately, believing in your case doesn't help you win your case and can become a handicap, or more accurately, a blind spot.

Your case is NOT perfect, and jurors will have strong concerns. The other side probably believes in their case as much as you believe in yours. That's why it's going to trial. Surprisingly, many lawyers don't spend time considering the other side's strengths. Even worse, most lawyers seriously underestimate the other side's case and don't spend any time UNDERSTANDING why the other side's case might appeal to jurors. Believe it or not, I've seen good lawyers refuse to rebut persuasive arguments from the other side simply because they thought the arguments weren't worth addressing. But when those arguments are persuasive, and you've underestimated their appeal, the jurors react negatively.

Believe me when I say that focusing exclusively on your strong points while ignoring the other side's points can be incredibly dangerous. Time after time, I've seen real and mock jurors believe that you're conceding any arguments that you don't rebut or address. And when you address the other sides' arguments dismissively, the jurors start to believe that you're out of touch and unreasonable—and they may be right. Failing to show the jurors that you have considered both sides of the argument leaves the impression that you haven't been as fair and objective as jurors expect, and you'll lose credibility quickly.

I've seen jurors in intellectual property trials lose faith in defense lawyers who spent all their time focusing on the differences between the competing products, but no time on any of the similarities that the plaintiff's lawyer focused on during opening. I've seen jurors in employment trials wonder if the plaintiff's lawyer was in touch with reality when the lawyer focused exclusively on the evidence supporting retaliation or discrimination but completely ignored the plaintiff's questionable job performance. I've seen criminal jurors refuse to believe defense lawyers who immediately and aggressively criticize the prosecution for charging the defendant, without addressing the reality that the prosecution (and the jurors) believe that the defendant probably deserved to be a suspect, and might have deserved to be investigated and arrested in the first place.

I know it sounds simple, but you cannot properly try your case to a jury without stepping into the other side's shoes, imagining what you would feel confident arguing if you were the other side, and thinking about how those arguments might appeal to your jurors. Get to know what the jurors are inclined to believe, even if it's not as supported by the evidence and the law as you think.

Whenever I help lawyers prepare for trial by testing our case in front of mock jurors, I stress the importance of losing the mock trial, at least with some jurors. Winning a mock trial is virtually worthless. The only lesson learned is that you don't need to strike anyone in jury selection and that the case is perfect as-is. It's more likely that a unanimous verdict in a mock trial is a false positive, created by presenting our case too strongly and the opposing side too weakly. It's far more helpful to present our case too weakly, the other side too strongly, and to learn from the failures. Losing a mock trial is the only way to see which jurors jump ship the quickest, what they find concerning or hard to believe or even hate about your case, and why they feel that way.

Mock trials may make it easier to understand which of the other side's arguments will appeal to your jurors, but you don't have to mock try your case to understand the other side's strengths. You don't have to put any mock jurors in a room. Spend a few hours writing an opening statement for the other side. Imagine what you would say to the jury, what you would focus on, and how you would disparage your own client's case. How would you poke holes in your own side's arguments? How would you explain to a jury that your own side's evidence isn't relevant? What themes and evidence would you hammer on to divert the jury's attention away from your own side? Now deliver that opening to yourself, and think about it. Only by forcing yourself to step into the other side's shoes can you write your own opening statement in a way that gives jurors the impression that you understand both sides, understand what they must be thinking, and that your arguments are reasonable.

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