

How Jurors Use Emotional Information to Decide Cases

By Richard Gabriel
Columnist

Published: February 16, 2009 - Lawyers USA.com



A mother sobs gently in her deposition, describing the last moments of life her teenage daughter experienced after a head-on collision. She cries as she talks about the plans her daughter had to go to medical school and how she will never hear the sound of her daughter practicing piano again.

Many cases have been settled for high dollar amounts based on such emotional testimony. However, when this video deposition testimony was played for a mock jury, what were the comments?

"She knows that if the jury feels bad for her, we will want to award more money. I kind of resented that," said one mock juror.

"I feel bad for her but if it were my daughter, there is no amount of money that would be enough. I have a problem with parents asking for money for the death of a child," said another.

Whether it is a personal injury, death penalty or patent infringement case, how emotions affect a trial is one of the least understood phenomena in the legal system.

There are a number of misconceptions about the impact, including:

- Sympathetic witnesses automatically create an emotional connection with jurors and make them emotional.
- Jurors can set aside their emotions.
- Attorneys who are able to evoke strong emotions usually prevail.
- Emotions are only measured by negative extremes, i.e. sad, angry, tragic, etc.
- Intellectual property, complex commercial and securities cases do not have emotional components.

- Witnesses, except the plaintiff or a victim, should never display their emotions.

Because the judicial system operates on the concept of rational, linear and intellectual decision-making, the courts have been reluctant to accept, and even hostile to, the role of emotion. But it's actually impossible to separate emotion from a juror's (or judge's) decision process.

Here are some ways that trial attorneys can control the emotional temperature of a case:

Understand the complexity of jurors' emotions.

Most psychological theory considers emotions to be a combination of physical sensations, thoughts and behaviors.

Within this framework, boredom, confusion and even doubt are emotions, and may be some of the primary ones jurors most commonly experience – even when there is seemingly no "emotional" testimony.

Also, a juror's life experiences and personality determine his reaction to evidence and witnesses.

It is important to consider potential reactions that will affect the way jurors listen to cases. Would a juror who had recently lost his job at a failed bank be able to set aside his feelings in a wrongful termination case involving a retaliation claim?

The current economy can create an immense amount of stress on jurors, affecting both their emotional state as well as their ability to concentrate on a trial. Other life events to explore include recent medical problems, divorce or the loss of a loved one.

Understanding juror emotions will also help you make better choices in jury selection.

Do you want an angry jury? A coldly calculating jury? A jury with a sense of humor? Each jury has a group "personality" and these different personalities will have very specific reactions to your case.

Plan the emotional story of the case.

Every case contains a story and every story contains emotions.

Yet we are remarkably unsophisticated when it comes to presenting emotional evidence.

Don't be afraid to present jurors with a full picture of your clients, even if it exposes some of their vulnerabilities. While care must be taken to avoid admissions that lead to liability or guilt, it is beneficial to describe the client's struggles.

For example, a mother in a medical malpractice case involving the delivery of her baby should explain the challenges she faced in her prenatal care.

Your clients' struggles are credible because jurors inherently understand that the world is comprised of human beings struggling to overcome adversity.

Also, remember that anger is much easier for a juror to experience than sympathy. As a result, both plaintiffs and defendants usually focus on the misconduct of the opposing party.

But witnesses also gain credibility when their testimony creates a balance of positive and negative emotions. A paraplegic who tells the jury how she is struggling to use the tragic accident to move ahead in her life, for instance, will often garner more sympathy than a plaintiff who mourns her inability to function.

The emotional story is even important in seemingly dry, technical cases like intellectual property, commercial or securities actions.

Since jurors are always searching for a story to explain the case, it is helpful to portray the human emotion of say, a commercial breach of contract case, such as: Why were the defendants so disappointed when they discovered the plaintiff's misrepresentations of value?

This allows you to anthropomorphize a company culture, as well as supply the human motivations that jurors require in every case.

Communicate the emotional tone of the case.

Jurors don't like to be overtly told how to feel about the evidence, and react

negatively to outsized emotion that does not match the evidence: rage, excessive weeping or gimmicks like throwing books.

But they do look at the attorneys' body language and tone of voice for cues on how to feel about the case.

Attorneys can telegraph doubt in a witness' testimony by how they communicate, using an upward inflection in their voice, a pause after the response, a slight furrow of the brow or a tilt of the head.

These behaviors should never be planned, but rather come out of the attorney's reactions to the testimony.

Talk about the emotions in the case.

Jurors are suspicious of strong emotions displayed by witnesses or attorneys.

Attorneys can sidestep some of this suspicion in voir dire by stating clearly that they will be presenting emotional testimony solely as evidence of the client's loss.

Jurors who have an immediate negative reaction to such testimony can be challenged for cause or struck with a peremptory challenge, depending on the nature of the evidence and the composition of the jury pool.

We experience a vast variety of emotions in our everyday lives, small and sublime as well as tumultuous and tragic. The more we can understand and use the rich complexity of human emotion, the better we can represent the stories of our clients.

Richard Gabriel is President of Decision Analysis, a national trial consulting firm that specializes in complex litigation. He is co-author of Jury Selection: Strategy and Science, published by Thomson-West and is a regular columnist on trial strategy for Lawyers USA.