

LAWYER CREDIBILITY

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2013

Introduction

My first article on Lawyer Credibility appeared in the July 1985 issue of *Trial Magazine*. Since that time I have conducted mock jury experiments designed to determine how jurors judged the credibility of arguments; I have interviewed jurors who had decided civil injury claims in an effort to determine why they considered certain lawyers more credible than others; and I have continued to follow the literature in the communication and psychology fields on the subject of "credibility." The following article on Lawyer Credibility is an integration of these various studies.

Jurors' assessments of the credibility of lawyers, litigants and witnesses are crucial elements in any jury trial. Most trials involve cases where the facts are in disputes. As a rule, the jurors selected to hear a case are unfamiliar with the lawyers, litigants, facts, and law involved. Each side of the case presents a conflicting "view" of the reality or the facts of the case, and the jury decides which is the "correct" reality. In so doing, the jury must decide which lawyers, litigants, and arguments are the most credible. Thus, an understanding of how jurors form credibility assessments is an invaluable tool for trial lawyers.

Credibility assessments are one aspect of the process by which people form impressions of others. As humans we construct or create the world in which we live. Our understanding of others is always in terms of images and impressions that we form about them. Since we cannot directly perceive another person's intentions, inner qualities, or attitudes, we construct an impression about them by interpreting the other's appearance and behavior. Said another way, meaning does not

reside in people and things, but rather, we, as humans, form impressions about what other people or things mean. People create impressions of what other people and things mean.

For example, different people will construct different impressions of a cigar. To one person the cigar produces aromatic odors; to another person, foul pollutants. As another example, one person forms the impression that George Bush, Jr. is the most capable candidate to lead the country while another person forms the impression that Al Gore is the most capable candidate. The cigar and the political candidates do not change, but different people construct different impressions about them.

In the same way, credibility, as an aspect of meaning, does not reside in people, but rather, we as humans, form credibility judgments about people. In the same manner, jurors construct credibility impressions of lawyers, litigants, and witnesses.

Psychological studies have identified general dimensions of credibility assessment that individuals use to form their credibility assessments. Based on these studies, we can predict that jurors, hearing and deciding cases can be expected to form credibility assessments about lawyers, litigants, and witnesses based on the extent to which they appear to exhibit the dimensions of expertness, trustworthiness, and dynamism.

EXPERTNESS

Expertness is the extent to which the lawyer appears to be competent, intelligent, authoritative, trained, experienced, skilled, informed, professional, and a source of valid information. Therefore, to establish expertness, lawyers must demonstrate general intelligence and ability; training, experience, and qualifications with respect to law; and accuracy and validity as sources of information.

Lawyers can demonstrate intelligence and ability by appearing knowledgeable about all aspects of each case. Over the course of a trial, the lawyer who is knowledgeable about courtroom procedure will

be judged more credible than the lawyer who is continually interrupted or corrected by the Judge for improper courtroom etiquette. Thus, the first step to being viewed as credible by jurors is to have a good grasp of courtroom procedure and practice. This may be developed by diligence on the part of the lawyer by studying and learning courtroom procedure.

The next step is to develop an understanding of civil procedure and the laws of evidence. The lawyer who knows when to object and whose objections are sustained will be judged more credible than the lawyer who makes objections at the wrong time and whose objections are continuously overruled. The lawyer who is able to skillfully lay a foundation for a piece of evidence will be judged as more credible than the lawyer who stumbles around until the judge tells him or her what they need to do to get their exhibits into evidence.

The final step is to become knowledgeable about the law and substance of the case being tried. In order to be able to successfully try a medical negligence case, the attorney must be willing to thoroughly learn the medicine of the case. If you do not understand the medical theories on both sides of your medical negligence case, you won't be able to have a meaning exchange with the jurors during voir dire or in opening statement when you are trying to discuss the issues of the case. The lawyer who is knowledgeable about the substance of the case will demonstrate his or her intelligence, skill, and authoritativeness, and will be viewed as credible. In an injury case, lawyers may demonstrate expertness by being able to explain the plaintiff's medical condition to the jury and by conversing knowledgeably with doctors on direct and cross-examination. Conversely, a lawyer's inability to explain concepts or to pronounce technical words correctly will result in low judgments of expertness.

Typically, in injury cases, and particularly in medical negligence or product liability cases, expert witnesses try to speak over the lawyers attempting to cross-examine them. These experts love to respond to questions on cross-examination by telling the lawyer that they just don't understand the subject matter, or that they are confused. The

lawyer who is willing to develop a thorough understanding of the substance of the case will be able to converse comfortably with the experts and will be viewed as highly credible.

Lawyers who demonstrate that they have thought out all aspects of the case and that they are prepared for any contingencies will be perceived as expert. Lawyers who appear to know what they are talking about, will be viewed as accurate and valid sources of information. This is accomplished by doing the necessary homework involved in each and every case so that you are prepared for whatever arguments or tactics the other side of the case uses during the trial.

Lawyers may establish or destroy witnesses' credibility using the standard of expertness. The credibility of experts can be established by showing that they did the necessary groundwork and took into account all relevant factors in arriving at their opinions. Conversely, the credibility of expert witnesses may be damaged by demonstrating that they did not do their homework and did not take all relevant factors in account before arriving at their conclusions. For example, an expert's credibility may be destroyed if you can show that the expert reached an opinion before conducting tests or viewing important medical records, or without taking into account necessary information.

Competency will also be based on the lawyer's ability to deal with both positive and negative aspects of the case. In a study in which jurors were interviewed about their perceptions of lawyer credibility, the plaintiff's lawyer in an automobile collision case continually failed or refused to acknowledge weaknesses in his case during opening statement and in direct examination of witnesses. The defense lawyer brought out these weaknesses in his opening statement and cross-examinations and destroyed the credibility of the lawyer, the plaintiff and the case. For example, the plaintiff's lawyer did not acknowledge in his opening statement that the plaintiff told the police officer at the accident scene that he was not hurt, and that after the collision, he went to a party and did not seek medical attention until the next day. All of these developments are common after automobile collisions and could have been explained. The plaintiff's lawyer

ignored these facts, however, and allowed the defendant to present the "real" story. When debriefed after the case, several jurors alluded to the fact that the plaintiff's lawyer was either not very competent or was unprepared in that he failed to deal with and to explain these inconsistencies before the defendant's lawyer brought them up. Several jurors acknowledged that these facts were not unusual and could have been explained and that, by failing to do so, the plaintiff's lawyer hurt his case.

Thus, in order to be seen as credible the lawyer must be able to acknowledge and discuss the negative aspects of each case. If there is a negative aspect to my case, I want to talk about it before the other side so that I can put it into the proper perspective. The plaintiff's lawyer who acknowledges the negative aspects of his case to the jury will be judged as more credible than the lawyer who does not.

Lawyers, witnesses, and litigants will be judged competent and expert to the extent that they fulfill the jurors' expectations of their roles in the trial. Just as theatergoers have expectations of actors and actresses in a play, jurors have role expectations of participants in a trial. Jurors have expectations about what a lawyer should look like and how a lawyer should behave. They judge a lawyer who looks the part and who appears knowledgeable about courtroom etiquette and practice as competent; they judge one who violates their role expectations as low in credibility.

Jurors have expectations about the proper role of plaintiffs and defendants. They expect plaintiffs to behave consistently with what they are asking for. For example, in a medical malpractice case against a specialist, the plaintiff was judged low in credibility when she was shown not to have followed her family doctor's orders and not to have done everything she could to protect her own health. After the verdict for the defendant, the several jurors remarked, "How can she criticize the defendant doctor when she won't follow the directions of her own family doctor. In a hunting injury case where the plaintiff was suing a gun manufacturer for negligence in the design of a rifle safety catch, jurors perceived the plaintiff as low in credibility because he did not

follow accepted safety rules for hunters. A plaintiff claiming damages for pain and suffering was judged low in credibility because he took "passes out" from the hospital during the time period that he claimed to be suffering from pain. Jurors will expect plaintiffs in dental negligence cases to have had good dental hygiene when they came to dentist in question. It will be seen as hypocritical for a plaintiff who won't take care of his or her own teeth to criticize a dentist for not properly handling their dental care. In order to be viewed as credible, you and your client must be aware of what your roles are and what the jurors will expect from you during the trial.

TRUSTWORTHINESS

The dimension of trustworthiness is the extent to which lawyers appear to be honest, just, open-minded, friendly, well-mannered, warm, fair, loyal to listeners, and reliable sources of information. Lawyers may appear warm, friendly, and well-mannered by being polite and by recognizing the rights and feelings of others. At all stages of the trial, lawyers should treat jurors, witnesses, and opposing litigants with respect. During voir dire, lawyers should be polite and friendly to all the jurors regardless of their predispositions. All jurors should be treated as equally important.

Lawyers should not abuse witnesses on the witness stand. They should remember that people have feelings, and whenever possible, take these feelings into consideration. This is not to say that lawyers should hide anger or contempt for a witness or litigant who has lied or attempted to subvert justice. In fact, such a display, when justified, adds to the lawyer's credibility by demonstrating the lawyer's commitment to the client and the pursuit of justice. Lawyers, however, should avoid going to the extreme of browbeating witnesses who are captives on the stand.

Lawyers can demonstrate open-mindedness and fairness by being evenhanded in voir dire questioning. Jurors had more respect for lawyers who treated favorable and unfavorable prospective jurors equally during voir dire than for those who did not. Typically, if a

prospective juror acknowledges a connection with the opposing litigant or attorney, this juror is questioned thoroughly about the connection and possible prejudice. Jurors gave higher credibility assessments to lawyers who asked the same probing questions to favorable and unfavorable jurors alike than to those who summarily questioned and accepted the fairness of favorable jurors.

Lawyers will be judged trustworthy if they are perceived to be reliable sources of information. This means that lawyers, litigants, or witnesses must present evidence honestly. Those lawyers who try to skew or misstate evidence that is against their position will be perceived by the jury as just another "used car salesman" and will generally be held low in credibility. However, those who present the evidence in a straightforward and fair manner will be viewed as honest, trustworthy and credible. This brings us back to the negative aspects of your case. If you ignore the negative aspects of your case you will be judged as low in trustworthiness. You will be judged higher in credibility if you acknowledge the negative aspects of your case and deal with them head on. One well known attorney suggests that with enough thought you can take the negative aspects of your case and turn them into positives. In the *Silkwood* case Gerry Spence discussed the negative aspects of his case in voir dire and opening statement. He acknowledged that his client had a different type of lifestyle, but put that in the context of fairness by getting the jurors during voir dire to agree that she was entitled to the same fairness in her trial as if she was "the virgin mother." In the automobile case mentioned above where the plaintiff did not go to the emergency room after the collision, but went on to a party, the jury could be told that the plaintiff was hurting, but did not want to believe that she was hurting. That she was not thinking about a lawsuit, but went on about her business hoping that she would wake up the next day and be fine. But she was not fine. She woke up the next day and could hardly get out of bed, and thus, decided that she had better go to the hospital. You could ask the jurors during voir dire if they had ever had a situation where they or any of their friends or family members were in a car wreck or some other type of accident, and were stiff or sore immediately afterwards,

but didn't seek medical attention right after the accident, but then, after a day or two, realized that they really were hurt, and only then decided to seek medical attention. If any jurors acknowledge that the same thing happened to them or their relative, you have validation from the jurors themselves that these types of things happen. Acknowledging weakness will cause jurors to perceive you as being honest and trustworthy, and hence more credible.

The most important aspect of trustworthiness is loyalty to the listeners, or a lawyer's desire not only to further his client's interest, but to do good for the sake of the jury. Usually, in opening the case and in the jury instructions, the judge will tell jurors that their function is to reach a fair and impartial verdict. Jurors want to do that. Thus, they will feel deceived if they perceive that a lawyer is trying to keep evidence from them in order to obtain an unjust decision. Ideally, the trial lawyer should try to be perceived as the attorney trying to get all the evidence before the jurors so that they can reach a just and fair decision. If a party is perceived as attempting to withhold or misstate evidence, the jury will perceive them as making conscious choices to subvert justice. In opening statement, I always tell the jurors that "I am going to try to get all of the evidence before you so that you can reach a fair and just decision." Jurors may view continuous objections to the admission of evidence as a lawyer's attempt to keep evidence from them. Therefore, lawyers should use motions in limine, when possible, to obtain rulings on the admission of evidence out of the hearing of the jury.

Choices that lawyers and litigants make are crucial determinants of credibility assessments. Jurors will note during the course of a trial that the lawyers and litigants have made and are making various choices relative to the trial. Jurors will view these choices as intentional and will take the choices made into consideration when assessing credibility. If jurors see an attorney continually attempting keep evidence from the jury, they may view the lawyer as untrustworthy. If jurors find out, that prior to or during the litigation, a party did something in an effort to suppress or hide evidence, they will view that choice as willful and will conclude that the party is not

trustworthy. Again, you want to be perceived as doing your best to get all the evidence to the jury. You want to be viewed as an active participant in the pursuit of justice. If you can demonstrate that the opposing attorney or litigant has or is making choices to withhold evidence or to subvert justice, their credibility will be damaged.

DYNAMISM

The dimension of dynamism includes such characteristics as being aggressive rather than meek, emphatic rather than hesitant, bold rather than timid, active rather than passive, and energetic rather than tired. Dynamism is an intensifier, so if the lawyer, litigant, or witness is perceived as expert or trustworthy, these perceptions will be intensified if the jury also sees them as dynamic.

While some people seem to be more naturally dynamic than others, there are several ways that you may enhance your dynamism. First, if you take cases you believe in and use themes you feel strongly about, you will tend to be more dynamic. Lawyers who become protectors of the little guy or watchdogs against big business will tend to be more dynamic than those who are trying just another case. Second, the more experience that you have in the courtroom, the more dynamic you will be as a trial lawyer. Lawyers can develop and hone their trial skills until trying jury cases becomes almost second nature.

INDIVIDUAL DIMENSIONS

Jurors will also have individual dimensions for assessing credibility. Because jurors have different educational and social backgrounds, they will have different perceptions of reality, and they can be expected to have different dimensions or constructs for assessing credibility.

How can lawyers discover these dimensions? As a rule, the individual dimensions will be consistent with the individual backgrounds of the jurors. Psychological studies demonstrate that people are attracted to people they perceive as similar to themselves, and therefore, it can be predicted that they will assess credibility to those they perceive as

similar to themselves. Credibility studies support this prediction. Minorities assessed politicians who espoused minority rights as more credible than those who did not. Gays assessed gay therapists as more credible than heterosexual therapists. Drug counselors experienced with drugs were rated as more credible by addicts than counselors with no drug experience, and speakers who presented messages listeners disagreed with were rated lower in credibility than those who presented messages listeners agreed with.

Predictably, jurors will tend to assess credibility to those lawyers, litigants, and witnesses who are perceived as sharing similar philosophies backgrounds, or goals. Thus, lawyers should use voir dire to find out as much as possible about the jurors' educations, socioeconomic backgrounds, attitudes, and beliefs, and then highlight those aspects of the clients' personal profile that are most similar to the jurors'. In opening statement for example, a lawyer might tell the jury, "The evidence will demonstrate that the plaintiff is just like most of us here in the courtroom. He grew up in this area, is married, has a family, and has worked for a living all his life." In trying a case, the lawyer should select themes consistent with the backgrounds of jurors.

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