

Anger Management

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By all accounts, the plaintiff lawyer had managed to alienate everyone in the courtroom. We weren't involved with the case, but we heard that the plaintiff lawyer was up to his usual tricks. When he wasn't clumsily belligerent, he exuded smarminess. He persistently violated court orders. His antics invited incessant sidebars and stretched what should have been a three week trial into nine weeks. Outside the jury's presence, and even sometimes with the jury present, the judge vented judicial wrath. We know that the defense lawyers were appalled by their opponent's mendacity. From facial expressions, it looked like the jurors found the guy annoying. The court staff smirked. Surely, this had to turn out well for the defense, right?

Wrong. At the beginning of closing argument, the plaintiff lawyer profusely thanked the jury for their service, with the same ham-handed analogy to military service he makes in every case. And then he apologized. He said that he knew the jury probably disliked him for a lot of his tactics. But those tactics were animated by a passion for his client who had been grievously wronged and had suffered terribly. The plaintiff lawyer acknowledged that the jury had plenty of reason to be angry with him, but he begged them not to take such anger out on his innocent client.

Oh-oh. This sounded like it might actually work. An eight-digit verdict later, it was clear that it had.

The following week, we had lunch with an in-house lawyer. She was from a different company and, like us, had nothing to do with the case alluded to above. But she had followed it with interest. Moreover, she once had a case against the same plaintiff lawyer, who had operated from the selfsame playbook. Everything was the same: same disregard for the judge's orders, same rearguments on points lost, same palpable insincerity, and same guy you couldn't trust as far as you can throw a Sumo wrestler. But that case settled after closing arguments. And the jury was happy to talk with the lawyers. It turned out that they really did think the plaintiff lawyer was a buffoon. He ticked them off big time. But they were also thinking about giving him a big time verdict. So did that jury anger toward the plaintiff lawyer mean anything? Or do plaintiff lawyers get a free pass?

The easy answer is that plaintiff lawyers get a free pass if they have a sympathetic client. Just as the plaintiff lawyer insists, jurors are loath to take out their anger on an individual who has sustained a terrible injury. But the in-house lawyer went a step further, and offered a fascinating theory: an angry jury -- no matter the source of the injury -- is bad for the defense. If the case has become a nightmare for the jury, lasting way longer than expected and filled with mind-numbing sidebars and recesses (occasioned by the plaintiff lawyer's latest outrage), the jury grows furious. If the atmosphere of the courtroom reeks of hostility, the jury marinates in that atmosphere. When it comes time for that verdict, the jury's anger is a heckuva lot more likely to be visited upon a Fortune 100 company than someone who has spent a couple of weeks in an ICU and will never go to a junior prom.

There have been some articles written about jury anger. Most of it pertains to criminal cases. It's hardly surprising to learn that angry jurors in capital cases are more likely to convict. That's a pretty good reason to exclude gruesome photographs. As for civil cases, some jury consultants believe that, while it is possible for defendants to counter sympathy for plaintiffs (indeed, there was a very good presentation on exactly that at DRI-Chicago a couple of weeks ago), juror anger toward the defendant is devastating because jurors might simply stop listening to the defendant.

If you click on the Wikipedia entry for Anger, you'll find that religious scholars, philosophers, and psychologists have been discussing anger for centuries. They don't always agree, but this much seems clear: anger is a powerful, irrational force. Expressions of anger, including blame and desire to punish, can land on people who didn't really provoke the initial anger. All of the action in *The Iliad* stems from the anger of Achilles. In the courtroom, anger is like the cartoon Tasmanian devil, spinning out of control.

To mimic Lenin's angry question, what is to be done? Starting with the obvious, so much depends on jury selection. Look for jurors who are less prone to indignation, and who seem to feel more in control of their lives. Second, pray you get a judge who exerts control over the courtroom, who sorts things out in advance, and keeps things moving swiftly and smoothly. Third, make sure your defense shows that the company didn't simply comply with government rules and regulations (anger is often, after all, directed at the government), but also was proactive. The sad truth is that jurors tend to hold companies to a higher standard. Why not embrace that, and show that the defendant even exceeded that standard? Fourth, the

company witness must come across as competent, caring, and credible. It's hard to think of too many mass tort defense verdicts that didn't involve highly likeable company witnesses. If you're lucky enough to work with a company that already has a witness who fits the bill, congratulations. More often, developing such a witness takes a lot of work. Get started sooner rather than later. Finally, the defense lawyer needs to do everything possible to set the right tone. The defense lawyer certainly cannot engage in stand-up humor; most courtroom attempts to be funny fall flat. And you don't want the other side to suggest that you're not taking the plaintiff's injuries seriously. (By the way, if you're facing a case without an injured plaintiff, such as a third-party payor case or a government case, all bets are off. As a recent tobacco case shows, it is possible to go after those plaintiffs with hammers and tongs, and ridicule can be a powerful force.) But a professional, respectful approach that keeps things calm and cool can reduce the jury's temperature and maybe even model the correct way to analyze the evidence.

We wanted to run these suggestions past the Drug and Device Daughter, who says she will major in Psychology. But for some reason she's mad at us right now.