

## Persuasion and emotion

By: F. Dennis Saylor IV and Daniel I. Small ◉ December 10, 2015



Jurors are instructed to put aside their sympathies and decide the case on the evidence and the law, according to their good judgment and common sense. But as we all know, jurors are human beings, and they are not purely rational decision-makers. Emotions can play a role — sometimes a strong role — in their decisions.

Sometimes, those emotions are so powerful that they can substantially distort the decision-making process. Very few jurors, for example, faced with a child in a wheelchair in a products liability case, could decide the issues purely based on cold rationality. Even in a fair trial, such a thing may be difficult to overcome.

Most trials, though, don't produce an overwhelming emotional response. Nonetheless, emotions play a role in almost all trials, even if the role is relatively small. The challenge for trial counsel is how to control, counter and direct that emotional response to persuade effectively, within the confines of the facts and the law.

Trial lawyers are usually aware that this is an issue, but often overreact or underreact to it. They may overreact by assuming that nothing really matters but emotion, and don't properly develop the facts. Or they may underreact by assuming that they are powerless to understand or shape the jury's emotions, and don't give the issue the attention it deserves.

Obviously, you cannot know what is going on inside jurors' minds. To some extent, the jury is a black box. But people usually react and respond to things in reasonably predictable ways. While you can't control, or even affect, everything that happens in a trial, you do have considerable ability to affect the way that the facts are presented.

Try to use the facts to shape the jurors' emotions. A story that may move them deeply if presented in a certain way, could leave them cold if presented another way.

Dan Small uses what he calls the "Five P's" to frame the challenges of this issue: place, power, position, phoniness and pandering.

**Place:** Although in many respects we are increasingly homogenized as a nation, some strong regional differences remain. The level of emotional appeal that is acceptable in the South and Southwest may be quite different from what is appropriate in buttoned-down New England. One challenge is to understand local norms.

**Power:** The power of emotions requires a solid foundation in the facts. It may be hard to shed a tear over the facts of your case, no matter how important they may be to your client. If the facts don't lend themselves to a powerful response, don't risk offending the jury by overstating the issue.

**Position:** The level of emotion in the case may depend in large part on the position of the parties. For example, can the plaintiff honestly be portrayed as a sympathetic victim? Is there a danger that the defendant could be viewed as a bully, or as callous? Are there stereotypes, based on the position of the parties, that you will need to overcome?

**Phoniness:** Jurors can be good at spotting phonies, and they don't like it when they see it. If the jury doesn't view the response you're trying to evoke as real, the result may be devastatingly negative. As the trial lawyer, are you truly emotional about something, or just wishing you were? Will the personalities of the witnesses and the evidence support their emotion as genuine, or do you need to work harder to keep them honest?

**Pandering:** Of course, you hope that genuine emotion will help persuade the jury that your cause is just. But be careful not to overdo it. Treat emotion carefully; don't flaunt it. You do not want the jurors thinking that you are deliberately pandering to their emotions. A light touch here can be more persuasive than a heavy hand.

Jurors are not either totally irrational or totally rational. They're human beings, almost always decent ones, trying to do the right thing. They're affected by their emotions, but they're also trying to sort through the facts and render the right decision. It's the job of the trial lawyer to show them how to get there.

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