
When Superman Loses His Cape: The Lawyer As Defendant

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Jurors are very likely to hold lawyers to extremely high standards, and judge them harshly when they don't seem to measure up. The challenge for the defense litigator is to humanize the defendant and give the jurors realistic perceptions and expectations.

For many lawyers, the courtroom is familiar territory. There they ply their trade on a regular basis before juries. But what happens when a lawyer becomes a litigant? Do juries view the lawyer-defendant in the same light as they view other defendants? Is a jury truly predisposed to find against a lawyer-defendant? If this predisposition exists, is it cast in stone or can it be altered?

The answers to these questions have increasing financial significance for the legal profession. It has been estimated that lawyers face a one-in-five chance of becoming involved in a legal malpractice action in any given year. Total compensatory and punitive damages in legal malpractice cases exceed \$5 billion yearly (cited in Douglas L. Christian and Michael Christian, "Twice Bitten: Violations of Ethical

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Rules as Evidence of Legal Malpractice," *The Brief* 62 (Spring 1999)). Here, we discuss the image jurors hold of lawyers, using case examples, and suggest how jury research can assist defense counsel as they prepare for trial. The bar association survey cited in this article is based on Ross Laguzza and Robert D. Minick, "The Lawyer Image Study, A Report Submitted to the Texas Bar Association" (November 1990).

Juror Perceptions of Lawyers

Where do jurors get their perceptions of lawyers? Sometimes from the media. Fictional depictions of lawyers in best-selling novels, television dramas, and films have certainly played a role in creating cultural stereotypes. In recent years, however, news coverage of high-profile trials (and the endless commentary on them) has played an increasing role in shaping public perceptions of lawyers and the trial system. The O.J. Simpson criminal trial and the tobacco litigation are just two examples.

Jurors also get their perceptions based on personal acquaintance. Jurors may be socially familiar with lawyers through family membership or friendship. They may be former or current clients of lawyers. Or, they may have former or current work experience with lawyers (in these settings, they do not tend to see lawyers' legal acumen on display, but rather their office or employer conduct toward colleagues and subordinates).

Jury service is another source for juror perceptions of lawyers. Jurors develop definite perceptions of lawyers through direct observation of their voir dire, opening and closing statements, and their direct and cross-examinations of witnesses.

What Are Juror Perceptions of Lawyers?

Typical impressions of lawyers are reflected in the findings of a telephone survey commissioned by a state bar association (Laguzza & Minick, 1990). The bar association was interested in determining whether lawyer advertising was causing negative effects on the legal profession. In a statewide sample, 2,100 residents were asked questions designed to elicit their opinions of lawyers. The telephone survey

revealed an antipodal view of lawyers: People hold both strongly negative and strongly positive images of lawyers. Few survey respondents professed to be neutral about lawyers or claimed to have no opinion about them.

The Strong Negative

When people think of lawyers in general and are not in need of legal services, they give an unguarded, off-the-cuff opinion of lawyers, and that impression is usually negative. When survey respondents were asked to identify the first word that came to mind to describe lawyers, they used negative adjectives 75 percent of the time. These words pertained predominantly to lawyers' greed or lack of ethics. Thus, to answer the bar association's original question, lawyer advertising did not engender negative opinions of lawyers; people's opinions of lawyers were already negative.

The Strong Positive

However, when people are in need of legal services, they switch over to a very idealized, positive view of lawyers as all-knowing and even all-powerful. Lawyers are perceived as superbeings. People in need of legal services perceive lawyers as professional advisors, who always have the solutions to all kinds of problems, not just legal matters. They will assume lawyers are knowledgeable about organizational/management issues and about all aspects of their clients' business and financial affairs. (How else would lawyers be able to advise their clients?) Among the perceptions:

- Lawyers are perceived as having all information about their work on behalf of their clients at their fingertips. People assume that all of a lawyer's work will be documented in detail. After all, everybody knows that lawyers leave good paper trails, that lawyers always get everything in writing;
- Lawyers are perceived as all-powerful. They command vast resources and a large army of assistants that can be marshaled at a moment's notice on behalf of their clients. Lawyers enjoy lavish lifestyles from their client billings. The

implication is that they are financially successful because they achieved successful outcomes for their clients.

People in Trouble Need Rescuers

People who need lawyers imbue them with heroic qualities because these people need omniscient, omnipotent rescuers. They hold high expectations for lawyers with every confidence that lawyers can meet those high expectations. And the public persona that lawyers project in the courtroom feeds popular expectations. Perceptions from all sources undergird the impressions of attorneys' high standard of care, record-keeping ability, and total recall of events. And these are things that people hope for and expect when they turn to lawyers for help.

The Lawyer as Defendant

The antipodal image of lawyers poses a severe challenge for the lawyer who is a defendant. Jurors will first hear the plaintiff's story. Typically, the plaintiff will be a former client of the lawyer. If the plaintiff tells his or her story well, the jurors will identify with the plaintiff. The jurors will see the plaintiff as a person in need of legal services, triggering their image of the lawyer-as-hero. But they will have heard how the lawyer failed the plaintiff, triggering the very negative image of lawyers. This will lead to a sense of betrayal of their own high expectations of the lawyer, and a corresponding desire to punish the lawyer for their disillusionment. Since the expectations were so high, the lawyer falls precipitously in the eyes of the jurors. The hero will have failed miserably.

In the case examples that follow, we illustrate how jurors' antipodal attitude toward lawyers affects their case perceptions.

The Lawyer as Defendant-Practitioner: Negligent Representation

In this case, the plaintiff portrayal of a client who suffered a bad outcome was successful in first evoking jurors' desire for and expectation of the lawyer-as-hero and then eliciting jurors' negative image of

lawyers when they heard of the defendants' apparent failure of their client. The jury research revealed that the surrogate jurors lacked knowledge of what conduct is considered below the standard of care or what constituted negligent representation. Falling back on their own expectations of lawyers' work performance, they held the lawyers to an absolute, airtight standard in the wording of the agreements. The case involved the interpretation of an employment contract drawn up by the defendants. Unintentional ambiguity in wording of the contract was interpreted by the jurors as professional negligence, though intentional ambiguity (a loophole) would have been considered good lawyering.

Case Strengths And Recommended Defense Strategy

Jury research findings suggest possible avenues for doing three things:

- Neutralizing the negative lawyer image;
- Replacing it with a negative image of the plaintiff-client; and
- Reshaping juror perceptions of the client's outcome (i.e., converting the "bad" outcome to a "correct" outcome).

The jury research also revealed that surrogate jurors can perceive employer plaintiffs very unfavorably. (Surrogate jurors who had been terminated from employment in the past view employer plaintiffs with particular disfavor.) The surrogate jurors also held corporate executives to high standards; they believed corporate executives had a responsibility to review and understand the agreements they signed.

Highlighting Negative Perceptions Of the Plaintiff

Based on these research findings, a defense strategy was proposed that focused on the plaintiff as an ungrateful employer rather than allowing jurors to apply standards of professional behavior that they either misunderstood or misconstrued based on lay perceptions of "good lawyering." This revised defense strategy was intended to provide the jurors with a different framework for viewing the lawyer's

task, and to adjust their expectations for the lawyer's conduct to a more realistic level.

A Real-World Analogy

Specifically, the jurors were asked to consider an analogy of an accountant hired to do a client's tax returns: It would be unreasonable for the client to expect an accountant to arrange \$0 taxes to be paid. What the client should expect is that the accountant calculate the minimum legal amount of taxes owed by the client. Similarly, in the plaintiff-client's arrangement with his senior employee, he had agreed to reward his employee for his efforts in making the company financially successful, and the employee had done so. The role of the lawyers had been to draft an agreement that expressed the objectives of the client at the time. The lawyers could not be held responsible just because the client later came to regret his agreement with his employee and wanted to renege on his promise. The employee had fulfilled his part of the bargain – so should the employer. It would have been unethical for the attorneys to draw up a contract that did not embody the original intent of the parties.

The Law Firm as Defendant-Employer

Jurors may also project their perceptions of lawyers onto law firms. The case of a female associate terminated by her firm illustrates the point. In this case, the jurors had very high expectations of the law firm as a professional entity. The jurors would view any professional failings on the firm's part with intensified harshness. But the firm was also an employer. Identification with the associate as an employee triggered jurors' negative lawyer image for the firm. This had two unfavorable implications for the firm:

- First, since the surrogate jurors had no knowledge of the internal operations of a law firm or the stages in an attorney's career, they would be more likely to accept any portrayal of the firm that the plaintiff or the plaintiff's experts could muster. Even without such expert

testimony, the surrogate jurors readily fell back on their stereotypes about lawyers and law firms. Most surrogate jurors imagined law firms to be bastions of older, white male power; the plaintiff's strategy played strongly to this image. Lack of corroboration of the plaintiff's story by her colleagues was interpreted and forgiven by jurors as indicating other associates' fear of speaking out lest they too be terminated;

- Second, in any wrongful-termination case, jurors hold high expectations for how employers should treat employees. Jurors want to see that the employer exhausted every alternative before deciding to terminate an employee. They want to see evidence of due process. They expect to see proof that the employer gave the employee a fair warning, made some inquiry into family or financial problems that might be interfering with job performance, and made some attempt to accommodate temporary difficulties the employee was experiencing by offering counseling or training. These standards for employer conduct are even higher when the employer is a law firm.

Law Firm as Unfair Employer

In this case, surrogate jurors perceived the law firm as falling short in the due process accorded to the plaintiff. They latched onto the abrupt change in the tone of the performance reviews of the plaintiff following statements she had made about how the firm treated female lawyers; they also considered the apparent lack of warning and the absence of some sort of "appeal" procedure to be significant. The surrogate jurors were also struck by the inconsistency between the firm's opinion of the plaintiff's work performance, and the firm's clients' opinions of her work.

Additionally, some surrogate jurors were particularly sympathetic toward the plaintiff. Jurors who had themselves experienced gender-related problems with their employers were more sympathetic, as were jurors who had been terminated from employment or who had worked for their current employer for less than two years

(the plaintiff had been terminated after about two years with the law firm).

Case Strengths And Recommended Defense Strategy

A defense strategy was recommended to change jurors' perception of the plaintiff's termination from a bad outcome to a correct outcome, and to correct jurors' perception of the law firm's evaluation of the plaintiff's work.

The research revealed that surrogate jurors did recognize that the plaintiff lacked important interpersonal skills. Most surrogate jurors agreed that being a team player and getting along with others at work was an important and legitimate issue in promotion decisions. Surrogate jurors who worked in companies with 50 or more employees were more likely to be defense-oriented. These jurors were more likely in their own jobs to encounter complex work assignments that required the combined expertise of many different employees for completion; they understood that a disruptive or abusive employee made task completion difficult for everyone else involved.

These findings suggested that the defense should stress that associates needed both legal and team/managerial skills to succeed in large law firms. This defense story explained to jurors that, while good performance at lower associate levels was based primarily on the associate's legal skills, good performance at senior associate levels had to be based on the associate's legal and supervisory/management skills. In addition, the jurors had to be educated to view young lawyers as free agents who had options in selecting their preferred work milieu (law firm or solo practice). In this case, the termination decision was also the correct outcome for the plaintiff: Her work habits and interpersonal style were more conducive to a small law firm or individual practice where she could exercise sole autonomy over casework. After several years it had become clear that her work niche was not in a large law firm, a setting that required managing a large work team or negotiating her way through a bureaucratic environment.

The Lawyer as Criminal Defendant

The tendency of jurors to start off with unrealistically high expectations of lawyers, and then fall back on harshly negative stereotypes, can be especially dangerous when the lawyer is a criminal defendant. An illustrative case involves a lawyer prosecuted for defrauding clients. In this case, the lawyer's contingency-fee clientele was largely poor and uneducated. The surrogate jurors perceived these clients as easy victims, arousing the jurors' protective instincts. This was especially true of jurors who had themselves been plaintiffs in lawsuits. The law firm's accounting practices admittedly looked messy and were difficult to explain to people outside the legal profession. Surrogate jurors with prior jury service on criminal trials were especially prosecution-oriented. Extremely religious surrogate jurors were offended by the practice of charging what they perceived to be entertainment expenses to client accounts. These jurors perceived the lawyer as maintaining a lavish, if not sinful, lifestyle at the expense of his clients.

Case Strengths And Recommended Defense Strategy

Here, the prosecution strategy called for focusing jurors' attention on the processing of the defendant's work for his clients (i.e., sloppy bookkeeping), eliciting the negative image of a lawyer who was more interested in making money than in taking care of his clients. The defense took advantage of favorable research findings and focused jurors' attention on the good outcomes the lawyer had attained for his clients. Surrogate jurors' personal acquaintance with lawyers was associated with a defense orientation; these jurors were willing to consider lawyers as fallible human beings. Surrogate jurors who agreed with the statement that "Lawyers are fixers who find ways to make something shady look legal" were also found to be defense-oriented. In the eyes of these jurors, there was nothing wrong with lawyers as "fixers" as long as they were fixing matters for the benefit of their clients. Such jurors seemed to be more pragmatic, less offended by case details such as the liquor purchases by the firm charged to client

accounts, and more bottom-line oriented. They did not lose sight of the fact that the law firm had been responsible for winning for its clients favorable settlements from insurance companies. Nor were defense jurors bothered by the practice of charging higher contingency fees for higher-risk cases. They appreciated the significance of the defense argument that the law firm depended on repeat business and word-of-mouth endorsements from its former clients and hence it would not have been in its business interests to mistreat clients.

Defense: The Clients Always Got A Square Deal

The above findings suggested a defense strategy that placed in the forefront the fact that the clients always received their fair share of the settlements. If there was an adverse outcome, the law firm ate the costs. If there was a settlement, the client always received the amount required to cover damages even if this meant the law firm took less than the agreed-upon contingency fee. The law firm may have had unorthodox bookkeeping but if it did not matter to the Internal Revenue Service, then why should it matter to the jurors? As for those unforgiving highly religious, former plaintiffs – they had to go (the purpose of voir dire assistance and jury selection).

Conclusion

In these examples, we have shown how jurors' antipodal attitude toward lawyers – superhero or jackal – affects their perceptions in cases of alleged attorney malpractice.

The jury research conducted in each case example suggested possible strategies to neutralize these activated juror images of lawyers by:

- Changing the jurors' cynical and client-oriented views of attorneys and providing examples that led them to apply appropriate standards;
- Shifting the focus from the negative image of the defendant-lawyer to a negative image of the ungrateful plaintiff-client; and
- Revising juror perceptions of the plaintiff's outcome (a correct or good outcome versus a bad outcome).

In summary, understanding juror perceptions of lawyers can be as important a factor in case preparation as understanding the case against your client. This understanding can direct strategy and help to present a winning case, or it can help to identify cases that should be settled. Not all cases are significant enough to warrant the time and expense of jury research. However, when the likelihood of hefty damages is high, such assistance can help to guide trial preparation.

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