

TRIER BEWARE: JURORS SAY THE DARNDDEST THINGS

Who do you want deciding your fate? In litigation you have three choices: you, a Judge, or a jury. The first choice-you-is what makes mediation so appealing. You decide the terms and conditions by which your dispute is resolved. The last two choices involve the risk that a judge or a jury, with only a few days or weeks worth of information about your case, will not share your point of view. Can you afford to take that risk? The uncertainty of trial is what makes the benefit of mediation so clear. After all, trials involve many conflicting interests: your client's rights that are at stake; your desire to prevail at trial; your opponent's determination to prevent that from happening; the court's desire for judicial economy given the pressures of an over-crowded docket; and the jurors' desire to fulfill their duties and return to their jobs and families.

While there are obvious things to consider when evaluating the risk of trial, it is very difficult to know how the unique facts of your case and the manner in which you present the evidence will be received by the jury. They are strangers. You cannot be sure how they will react to you or your client. The Honorable Jacqueline Connor, Judge of the Los Angeles County Superior Court, recently wrote an article in which she shared the post-trial views of jurors who served in her courtroom.¹ Many of them expressed frustration about spending their time in jury service on cases they believed could have been resolved without them.

" I disliked that the whiny plaintiff thought his problem was worth the court's and 14 jurors' time."

" The defendant was arrogant and should have worked this out in arbitration."

" Too many attorneys take too many cases to court. This was exactly one of those that should never have been brought.

" This was such an obvious chase of the deep pocket. It should have been handled in arbitration."

" The trial should have been sent to mediation or arbitration. It seemed to me really frivolous, keeping 12 to 14 jurors away from their jobs. It was not professional. The other jurors told me they felt the same way."

Other post-trial juror responses show that jurors are influenced by things trial attorneys ordinarily do not consider when performing a pre-trial risk analysis.

" The defense attorney was popping TUMS. What's wrong?"

" Plaintiff's counsel had a shaking foot when he was seated as the defense lawyer was speaking, a nervous gesture."

" Skilled and articulate but his hair was a little long to be compatible with his high quality dress without suggesting shiftiness."

" His yellow Mustang license plate is _____. He seemed cartoonish, shirt collar flipped up, some first grade overacting and sometimes confused looking. At times his stories did not make sense."

" She was good, logical, kind of dull, though. And needs to update her wardrobe (button hanging off.) Stuff like that is distracting."

These juror responses reflect a sobering fact: after closing argument, you cede responsibility for the outcome of your case to strangers. Before giving up that control, be sure you have carefully considered all of the facts and variables associated with your case. If you conclude there is no risk of an adverse outcome, you are fortunate indeed. Maybe your opponent will reach the same conclusion, and invite you to mediate your dispute. If, on the other hand, you conclude that the risks of trial outweigh the concessions that may be necessary to settle your case, you must make every effort to resolve the litigation. No one is in a better position to do so.

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¹ Hon. Jacqueline Connor, *The Jurors Are Paying Attention-What Messages Are You Sending?*, Advocate, June 2008, at p.22.