

## Keep Survivors On Your Next Jury Panel

by Kevin Bouilly, Ph.D.

*Can tales of survival in extreme conditions inform your next jury trial?*

What might survivor personalities have that you desperately need in your next jury panel? As a defendant, perhaps something more important than you might imagine. For example, consider jury decision-making in employment litigation. Employment jurors are unique in that each brings a level of expertise to jury service that jurors in many other case types typically cannot: personal experiences (as employees) that they directly apply to the facts of the dispute. Some experiences (e.g. supervisory experience, past terminations, education level) are more influential than others. For instance, results from Persuasion Strategies' 2009 National Juror Survey demonstrate that people with supervisory experience are less likely (47%) to favor an employee in an employment termination dispute than are those with no supervisory experience (61%). So how do these and other experiences influence jurors' views of your case?

Cognitive psychology shows us that past experiences help jurors create mental models of how interactions ought to occur – essentially generalized expectations for what should transpire in a given set of circumstances. Jurors are consistently displeased if a litigant's behavior violates their mental models of typical interactions. A recent employee termination mock

juror argued firmly against a defendant company whose conduct in the process of an employee termination failed to follow the steps of the process she had in mind. Her model, based on her own experience, was her template for ideal conduct and the standard by which she judged the defendant. A defendant's failure to match jurors' mental models immediately creates a burden for that party to prove to jurors its conduct was reasonable, appropriate, and fair.

None of this is surprising, but when I recently finished reading a handful of books on survival and surviving extreme conditions, I got to thinking about how survival psychology applies to juror decision-making.

The survival psychology literature is replete with examples and psychological jargon describing the characteristics of people who have survived extreme and extraordinary situations and physical and mental improbabilities – the lore of hikers lost and found, fallen mountain climbers returned to their base camps, and airline passengers thrust into catastrophe. The clear message? Survivors adapt and persevere by remaining flexible and being willing to revise their mental models as circumstances change. This allows them to avoid becoming stuck in a world of irrelevant expectations and perceptions that fail to match reality. In short, when reality fails to match the model, survivors alter the model and adjust rather than becoming frustrated and ineffectual actors in a counterfeit reality.

Jurors have mounds of mental models influencing their views of litigants in disputes. Some are more capable of adjusting their models and accepting that their expectations cannot be appropriately applied to all situations. These jurors will be more open to hearing your side of the story, and more likely to think flexibly and openly about the context that influences

difficult employment decisions.

Identify inflexible jurors by considering a few characteristics in voir dire:

- Inflexible preferences for managing work-related tasks. When a project at work or a deadline is suddenly changed, how do you typically react? How many of you are frustrated by sudden shifts in your work?
- Low tolerance for spontaneity. Do you get a kick out of last minute vacations out of town? Why or why not?
- Preference for long-term goal-setting. When you think about your career, how far into the future do you like to plan?
- Low tolerance for ambiguity. How did it make you feel to come here this morning and not know how your day would end up? How does it feel if you go to work and aren't clear what is expected of you that day?
- A work history of only a few long-term employers.

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