



Emotion in the courtroom: Persuasion or poison

*Harnessing your emotions in the courtroom
can lead to a favorable outcome for your client.*

*“One cannot see well except with the heart,
the essential is invisible to the eyes.”*

—The Little Prince, written by An-
toine de Saint-Exupéry

J. JUDE BASILE

This article will show you how to use emotion when you present your client’s story to the jury and explain how doing this will positively affect the outcome in trial.

Why even lawyers need to express emotion

Emotions are what make us human. Can you imagine a world without feeling?

It would be like subsisting on a bland diet of white bread and water. Yet oftentimes we do not allow ourselves to truly experience the feelings swirling around inside us. As lawyers, we are trained to be analytical thinkers. We become objective, unfeeling human beings that simply apply the law to the facts and reach a particular result.

If we stop for a moment and think about our feelings, we will come to some very interesting insights. Our feelings are the messengers of our emotions. How we feel about something creates an emotional state inside us. For example:

- Feeling hurt often leads us to experience the emotional state of being angry.

- Feeling scared causes us to be in fear, which we respond to by “fight” or “flight.”

- Feeling good about a person causes us to feel caring and concern for that person.

In short, when we feel good, our emotional state may be one of joy, happiness or contentment. When we feel bad, our emotional state may be one of fear, anger or resentment. Our emotions send us messages that are the key to our survival. Experiencing emotions enables us to figure out what to do in a particular situation, i.e., when to fight and when to run. Our feelings will guide us because feelings create the



desire for more or less of the particular emotion that we are experiencing.

Some key points to consider:

- Emotions are the basis of most decisions. There are numerous studies that demonstrate that decisions are mostly based on emotion and then justified by rationalization. (See, www.sciencedaily.com/releases/2006/08/060803171138.htm.)
- Understanding the impact of emotions is critical. Simply knowing about how emotions affect decisions and being aware of our own emotions will enable us to better understand how to use our emotions more effectively.
- Balance is the key. If our emotions are too muted, the feelings they create will be dull and distant. If our emotions are out of control, too extreme or persistent, our feelings can become pathological, such as debilitating depression, overwhelming anxiety, raging anger or manic agitation.

Using our emotions to obtain justice

In order to obtain justice for our clients, it is imperative that we use emotion when we explain our client's story to the jury. However, if we overuse emotions, it will be perilous. Today's jurors have been polluted with propaganda and bullshit from various sources. Jurors believe that lawyers are emotional and dynamic simply to manipulate them to win. Jurors are especially suspicious of plaintiffs' lawyers from the start. Even if jurors find us believable, many think that the ability to fake credibility is something we learned in law school.

Credibility is critical

One point you must always keep in mind is that our reputation is all we have. If we lie, omit information or misstate a fact during trial, our reputation for credibility with the jury [and the judge] will be destroyed. Therefore, we must never express emotion that is contrived or made up. Everyone will see through this act to our detriment.

So, where do we begin? We begin with ourselves. One of the first steps we can take is to slow down, reflect on our lives and examine our feelings. If you have never done this before, it is helpful to locate and use some of the many hard copy and CD ROM materials that teach how to do this. If we regularly reflect on our life events, we will eventually learn how to be able to express emotion openly and honestly.

During trial, we must discuss emotion with the jury panel. It is best to tell the potential jurors that there are emotional aspects to the case that they might be hearing. A good way to follow that up is with a question I frequently ask: "I sometimes feel emotions are used to influence an outcome. Who feels that way?" This question allows me to introduce myself to the panel as a real person, not a "lawyer," and lets them know that I am willing to talk about emotions.

Discuss only positive emotions

When you discuss emotions with the jury, the emotions should be positive. After all, you do not want the jury to see you as bearer of bad feelings. For example, if you have a case that involves a spine surgery, you should NOT discuss damages by asking, "What is the price of going through this horrible surgery? Having rods and screws drilled into your neck bones...imagine that and the pain!" This approach is negative. Who wants to imagine that? Instead, you should present your client's damages in this way: "This case is about the price of a healthy spine and all the good things a healthy back and neck allow us to do, as well as the cost we incur when our health and our enjoyment of life are taken away."

Why do you change the focus of your questions? Everybody wants to be healthy. Nobody wants to go through painful surgeries that leave ugly scars. Using a more positive approach does several things. First, it causes the jury to feel good because you are presenting something from a more positive point of view, which creates good feelings. As a

result, you should always frame the case and what happened to the client in a favorable light. Second, putting forth a positive point of view makes you appear less like a whining lawyer crying about all of the horrors your client experienced. Third, focusing on the positive allows the jury to feel what it is like to have a healthy neck and spine and to recall all of the wonderful things that you can do if you are healthy. Then, when you do discuss the difficult surgery, horrible pain and permanent disability, you will be able to more easily associate these bad feelings or emotions with the defendant.

Show facts leading to the emotion first

Another critical rule that I can almost never find an exception to break is to NOT show emotion in your case until you have shown the jury the facts that lead to the emotion. For example, do not say this evil corporation ignored public safety and injured the public. Instead, present the facts that lead the jury to conclude that the corporation is evil and ignored public safety.

One way to achieve this goal is to tell the jury not just the facts, but how we discovered the facts. You should explain how you contacted the witnesses (doctors, police officers, family members, coworkers, neighbors, etc.) and first learned about the facts you are now presenting to the jury. Let the jury know that what happened is real and that you are not making things up to just manipulate their emotions.

Expressing emotions in the courtroom: do's and don'ts

Here is a list, by no means exhaustive of what to do and not do when you express emotion in the courtroom:

- DO NOT present conclusions. Instead, show the facts that lead to the feeling or emotion.
- DO NOT present highly emotional exhibits without first explaining their purpose.



- *DO NOT* do things that will make any of the jurors cry in the courtroom.
- *DO NOT* tell the jury how they should feel unless you are doing it in an empathetic way during voir dire.
- *DO NOT* use witnesses simply for their emotional appeal.
- *DO* be professional with opposing counsel at all times, especially when you do not want to.
- *DO* present the factual story that leads up to the emotion.
- *DO* spend time discovering your client's story and understand what scenes and themes will evoke emotion.
- *DO* reflect on your own life experiences so that you can truly

experience your own emotions and feelings.

- *DO* look at the hearts, minds and eyes of the OTHER person. Practice this every day by using role reversal and empathetic listening techniques. If you do not know how to do this, you can take a class or purchase books or audio CDs that will teach you how to use these tools.

Conclusion

Finally, always remember that we are human because of our feelings and our ability to be empathetic. If you work on this, it will be your greatest tool, not just in the courtroom but also in your life.

J. Jude Basile, with offices in San Luis Obispo and San Diego, specializes in cases of personal injury, accident, product defect, insurance, elder abuse as well as civil rights discrimination. He serves on the staff of the Trial Lawyer's College, founded by Gerry Spence, and in 2004 was named Trial Lawyer of the Year by the Consumer Attorneys of San Diego. He recently won an \$11.5 million dollar verdict against the City of San Diego in a civil rights (police misconduct) case.



Basile

