

The Path to Justice:

Winning Trial Strategies When Representing Undocumented Immigrants

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Representing undocumented immigrants in civil jury trials strikes fear in the heart of trial lawyers. I know it because I have felt it myself and the shame that comes with it. What are we afraid of? We are afraid that justice will be elusive because of anti-immigrant prejudice.

The same prejudices, but in different forms, will be present for any vulnerable person or group, which, when you make a list, ends up being quite a lot of people. And how can we forget the lesson of bitter experience: our opponents will amplify every prejudice if it gives them advantage in their pursuit of an ill-defined trial “victory.” So, fear tells us, “This is a case for settlement for what we can get rather than trial for what we deserve.”

Behind the curtain of fear is the most powerful truth in our case: racism and prejudice against undocumented immigrants is morally unjustifiable and poisonous. While our fear may cause us to reject or devalue cases and, with time, cause us shame, when we begin walking the path to a just verdict with courage, we can transform ourselves and become worthy of the justice we seek. We can take action that brings pride rather than shame.

Our willingness to stand with the vulnerable is a demonstration of moral power that leads directly to full justice jury verdicts. Properly understood, trial cases involving undocumented immigrants and others vulnerable

to prejudice contain within them a strong ingredient required to successfully walk the path to justice and achieve a full justice jury verdict.

To achieve justice for an undocumented immigrant during a civil jury trial, consider the following:

Voir Dire

At trial, you must first show the jury that prejudice, despite being invisible, is real. Anti-immigrant prejudice is in the courtroom at that very moment, threatening injustice. While you may know this fact, many of your jurors (and judges) are blissfully unaware or pretending to be so. During voir dire, I would say the following:

In the spirit of brutal honesty, my client, the Plaintiff, is an undocumented or illegal immigrant, whichever word you want to use. I, myself, have been told by family and friends I shouldn’t represent immigrants because jurors won’t like them and, shamefully, I wrestled with it for a long time, for years. Over the years, I even turned down some cases I should have taken because of my own prejudice and fear. Still, we are here today for a jury trial for an immigrant, they will testify with an interpreter, and we are looking for fair and neutral jurors.

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How do you feel about that?

It will take tact to get jurors to open up, but in focus groups people will be very open. Jurors, if they are being brutally honest, will express fear that racism and prejudice will result in injustice. Decent jurors will swallow deeply at the challenge before them after hearing the racism and prejudice of others on the venire panel. In this moment, we must fight our instinct to run from these comments and, instead, allow for all the prejudice to be aired, completely and thoroughly. We must encourage and thank jurors expressing ugly racism in open court. We must thank our venire panel for their brutal honesty and for the integrity and courage it takes to reveal their fear or admitted prejudice.

Our own fear, as trial lawyers, leads us to think these statements will spread anti-immigrant prejudice like contagion amongst the jurors. We might even leave the venire panel thinking, “Oh man, I don’t have a chance.” But, has anyone who loves an immigrant changed their mind after listening to a racist rant? Instead, how many have been furious and shocked?

When a full airing of anti-immigrant prejudice happens, the jurors who are repulsed by racism and prejudice realize the challenge the undocumented immigrant plaintiff faces. These jurors naturally and instantly see the courage it takes to bring their case to jury. Often, one or more justice-minded jurors will resolve to give the immigrant plaintiff a fair trial, volunteer to be the foreperson and otherwise work against anti-immigrant prejudice within the jury. Some jurors will give credibility to the plaintiff lawyer, who they perceive has taken a tough case based on principle (rather than being seen as greedy and in it for the money). The lawyer who stands against racial prejudice and on the side of justice during voir dire will gain credibility and allies by addressing this difficult issue head on and early. For all the reasons listed above, addressing anti-immigrant bias during voir dire is an essential action on the path to a full justice civil jury verdict.

The Strength of Vulnerability and Brutal Honesty in Opening and Evidence

During the rest of trial, the anti-immigrant prejudice the trial lawyer once perceived as a weakness, now becomes a source of strength. When controlled by our fear the failure to candidly address the “elephant in the room” during voir dire leaves a plaintiff lawyer withholding information due to fear it will give away the secret they are hiding. This strategic error saps credibility and drains power just when the trial lawyer needs it most. On the other side of fear, after having confronted anti-immigrant prejudice during voir dire, the Plaintiff lawyer enjoys the power that brutal honesty about undisputed facts unlocks

Now you can address your client’s anxiety about being in court – will the police arrest them? Can their boss come to court to say they had a job? The jurors can understand gaps in treatment were related to social status and lack of access to medical care. You can talk with brutal honesty about the suffering of a roofer who can’t climb a ladder, a meatpacker who can’t stand on the line, a day laborer with no labor to sell. The jurors will believe you because they know how harsh the world can be, they just heard it during voir dire.

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In every trial, there is a tort reformed juror who searches for clues to confirm their pre-existing belief that plaintiffs are masterminds manipulating the entire system to get money. These jurors are deflated when they imagine an immigrant, who speaks a foreign language and has limited education being the mastermind of a fraud.

Slowly, during the opening statement and evidence, jurors will conclude, all on their own, that the Defendant knows about anti-immigrant prejudice too. They will conclude the Defendant was counting on prejudice to avoid accountability, to gain impunity and to commit injustice. The moment these realizations happen, jurors will despise your opponent.

From opening statement to the close of evidence, your jurors have felt the cloud of prejudice you showed them during voir dire. If they have held true to their conviction to deliver justice, they have made many reasonable and favorable conclusions about the Plaintiff lawyer, your client, and your case. Because the jurors heard the poison during voir dire, they know it took courage for the immigrant plaintiff to come to court and pray for justice. Your client's vulnerability and brutal honesty about who they are will become their greatest strength.

Completing the Journey from Shame to Pride by Delivering a Full Justice Verdict

In closing statement, you make your prayer for justice directly to the jurors. Most judges and lawyers, and certainly cynical insurance defense lawyers, will likely not believe you when you talk of justice. But this reflects their heart, not yours. If you have made it this far, you have a strong heart. Now is when you show it to the jurors and ask them for true, full justice. When you speak of justice in this position, it will ring full in their ears and jurors will believe what you say.

First, you remind the jurors that the court rules are made to guide them to justice. The jury instructions direct them to set aside prejudice. So does the blindfolded image of Lady Justice buried in their subconscious and displayed in court before them – sometimes in murals, statues on judges' desks, or simply in an image supplied by you, the lawyer. Everything inside the jurors knows that prejudice and justice do not go together. The jurors know they can only achieve justice if they follow the law and reject prejudice as well.

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In a civil justice case over money damages, the jurors know they must balance the scales of justice. If they are appraising the suffering of a vulnerable person, doesn't their vulnerability make their suffering worse? Almost unbearable to witness? But it is their duty to bear witness and accurately appraise physical pain and mental suffering. If the undocumented immigrant plaintiff had an elementary education and speaks no English in Omaha, Nebraska then isn't their physical health extremely valuable? Brutal honesty about undisputed facts can help the jurors weigh damage and balance the scales of justice.

Lady Justice is not only blindfolded and holding scales – she wields the Sword of Justice. This is an invitation to the jury to take decisive action for justice. Justice always has an opponent, injustice. Injustice in this case is clearly defined as racial prejudice against the plaintiff that, by closing statement, is clearly unmasked as aligned with your opponent. Did someone, somewhere think the worst of the jurors in this community? That this community would not deliver justice to an undocumented immigrant? Did they think it would never come this far? Anyone who thinks this way needs a clear, unmistakable statement of justice – one delivered by the Sword of Justice. This is when the jurors are invited to cut down injustice by delivering a full justice verdict. The jurors will be proud of their actions, they will be proud to deliver a just verdict and a repudiation of anti-immigrant prejudice.

From here, you will have the opportunity to ask for full and complete justice in the form of a money damage verdict that matches the physical pain and mental suffering of the case. Jurors will be proud to deliver equality before the law by balancing the scales with a swift blow of the Sword of Justice. The jurors will have completed the same journey from shame to pride as the lawyer who guided them on the Path to Justice.



EQUALITY BEFORE THE LAW