INSIGHT

Winning over the Jury: Tips From the Mouths of Jurors

Today, litigators are increasingly turning to jurors themselves to learn what jurors are receptive to during trial. In big cases, this may mean using trial simulations before mock juries or shadow juries before trial. In addition, attorneys continue to learn about their presentations from post-trial interviews with real jurors where the judge hearing the case allows such questioning. The following article offers practical advice that comes from the mouths of the jurors themselves about what works and what doesn't, from opening statements to closing arguments.

By Dr. Jeffery R. Boyll

Trial attorneys have the privilege of acting out the real life drama that has long been the focus of books, movies and multiple television drama series. Whether the case be civil or criminal, big or small, the trial attorney becomes the orchestrator of the most exciting of modern day human dramas. Simply step into a jury trial at any courtroom across the country and you are likely to find a group of jurors... with eyes drooping and glazed over, enjoying the third hour of a deposition reading, or jurors slipping hopelessly into slumber at the fifth month of an eight month trial as a biomechanical engineer discusses page 14 of his impressive vitae... and so it goes, one gripping day after the next.

Should a jury trial be exciting or interesting? Not necessarily. First and foremost, it is a legal proceeding with formal rules, procedures and significant ramifications for the parties involved. This aside, most trial attorneys seek methods to enhance the impact of their message. Logically, in communication and persuasion, the party that can best engage the hearts and minds--or at least the attention--of the audience will be the most effective.

Opening Statements

It is generally accepted that opening statements carry a disproportionate significance in relation to the entire trial.In past studies, authors have reported that as many as 80% of jurors have made up their minds regarding the case at the conclusion of opening statements.[1] Although subsequent research suggests this number is *somewhat inflated*, unquestionably openings are of critical importance. Despite instructions to the contrary, most people simply cannot "withhold judgement." Jurors make quick judgements and usually with limited information. More important than this, however, is the truly human characteristic to stick with our original attitude and defend against anyone or anything that runs in contrast to this belief.[2]

Because trial simulations are "artificial," and post-trial interviews may be misleading ("Sure, I waited until the end to decide"), the "shadow jury" may represent the closest approximation to getting "inside the black box." Experience with shadow juries is supportive of the following contention: The vast majority of jurors do begin to formulate a very definite verdict at some point before deliberations. Additionally, once this verdict is formulated, the selective perception of information is nothing short of amazing. Witness testimony and information presented that is contrary to a juror's decision is selectively ignored, misperceived, or down-played. Information that supports a juror's initial leaning tends to be highlighted. Consequently, at a certain point in the trial, many jurors will begin to only see what they want to see and only hear what they want to hear. At this point, even the most riveting closing arguments will likely fall upon "deaf ears."[3]

How to Get the Most Out of Opening

In most cases, a strong opening will necessarily be based on the key themes identified as representing the focus of the case. In special cases, pretrial jury research and simulations may be useful in determining what jurors will see as most important.

As in any audience presentation, the opening should be well organized and flow coherently. The following model, based on professional keynote speakers' guidelines,[4] may be helpful:

1. OPEN: Begin with the entire crux of your case stated in one or two sentences. This tells the jury at a time when they are fresh and attentive: "This is precisely our position." For example: "Good morning ladies and gentlemen, as you know,.I represent XYZ Corporation. We are confident the evidence will prove very clearly to you that XYZ's product did not injure the plaintiff and, in fact, her injuries were caused by..."

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2. FOCUS: Lay some groundwork as to the path to be taken, e.g., the witnesses and evidence that will prove what is necessary to require that they find in your favor. Further, the judge will instruct you that these, indeed, are the critical elements the law requires that you follow.

3. ANCHORS 1-2-3: These are the three core themes of the case and should be made clear and explicit to the jury. Explain and support each with witness statements, physical or demonstrative evidence.

4. INOCULATE: Numerous studies have documented the effectiveness of inoculating an audience to the opposition's attempts to persuade. In simpler terms, take the "sting" out of opposing counsel's case. If you have bad facts that you know will come out, face them head on.

5. CLOSE: Ask for a commitment from the jury, that if each of the elements mentioned are met, they must find in your favor.

The steps noted above may be noted to contain some elements of argument. In this respect, the attorney walks a fine line. Although the case is not meant to be tried at opening, the importance of the opening necessarily dictates an aggressive approach. In fact, in some recent high stakes cases, this author has witnessed extraordinary shows of "high tech" persuasive technology in opening statements. For example, in the major securities litigation involving the bondholders vs. now defunct ACC/Lincoln Savings, Charlie Keating and a host of co-defendants, jurors were treated to openings interlaced with clips of videotaped depositions shown on a huge big screen TV. One innovative lawyer augmented his openings with a 12-minute movie production depicting the core themes and issues of his case. It is estimated that more than half of the numerous parties in this case conducted pretrial jury research panels in order to test, among other things, the persuasive impact of their openings. Indeed, in such a case, a powerful opening may be worth millions.

In summary, the opening statements are far too critical to put off preparation until the last minute. A well presented opening may mean the difference between winning and losing.[5]

Attorney Characteristics

How important are attorney characteristics such as likability, personality, and so forth, in affecting juror decisions? Although this may come as a surprise to some, considerable research suggests these factors usually make very little difference.[6] In some instances, jurors have reported they even "hated" an attorney, but had to find in his or her favor because the case facts dictated so. Most importantly, jurors see their job as discovering the truth and delivering a just verdict. Keep in mind, no matter how ridiculous or "off-the-wall" a jury's verdict seems to you, to them it is based upon truth, justice and facts.

Gerry Spence, perhaps one of the best known and "feared" of the modern-day litigators, recently wrote in his article "How to be a Trial Lawyer:"

> "I think of the people I have feared most in the courtroom, and they have always been either some young man struggling to get his honest feelings out to the jury or some neophyte, self-conscious women who wishes, for God's sake, that she could be anywhere else.... The most successful trial lawyers I know are those who have not only acquired the requisite technical skills, but who have also mastered the highest art of all--the art of truly being themselves in a courtroom."[7]

Considerable research suggests that factors such as an attorney's likability and personality usually make very little difference.

As with witnesses, the primary factor with which jurors judge the attorney is credibility--defined by: 1) Competence; 2) Trustworthiness; and 3) Dynamism/Strength of Conviction. Consequently, attorneys in multiple jury studies have received higher ratings from jurors on measures of persuasiveness and competence when jurors find in their favor. Jurors generally have to believe one side or the other. Consequently, they often determine that the "losing" attorney was less trustworthy after they choose not to accept his or her position. Thus, how "competent" an attorney is perceived to be is often dictated by the strength of the case.

In short, an attorney is best advised to concentrate on developing persuasive themes, strategies and arguments based on the merits of the case, as opposed to what to wear and techniques to charm the jury. Finally, if you are thick-skinned enough, consider soliciting comments from surrogate jurors who have viewed your presentation live or on videotape. If you want the comments to be honest and (painfully) candid, you will need to be absent so jurors are uninhibited in their comments.

Examination of Witnesses

Obviously, the presentation of witnesses and evidence is critical to winning any lawsuit. Primarily, the witness must produce the testimony promised in the opening statement. This is a key area where a juror, perhaps leaning toward your side, may be lost. For the most part, however, jurors will be looking for the testimony that supports their pre-supposition. Whether the witness is perceived to have been demolished in cross-examination is very much affected by how they unconsciously want the outcome to be. In cases that involve a

"battle of the experts," chances are, this testimony will "wash" and the jurors will determine their verdict on other factors. This tends to be the case even when one expert's credentials are superior to another's. A surprising number of jurors do not really know the difference between a Masters and a PhD, so they are not particularly impressed with the fact that Dr. X's articles have been published in more prestigious journals than Dr. Y's.

This is not to say that experts are not important. Their ability to present a coherent and understandable explanation is essential to educate the jury. Where this testimony seems to be most useful, however, is in providing jurors supportive of your case with logical and factual information to use as ammunition during deliberations. Considerable research, particularly in the area of sales and persuasion, suggests that many people are "sold" due to emotional factors,[8] e.g., "I fell in love with it," but when asked to explain their decision, they often use logical rationalization, e.g., "It's reliable and gets good gas mileage."

Such has been the case in numerous shadow jury studies, whereby a juror, notably leaning towards one party early on in the trial, subsequently uses the factual testimony of a witness as ammunition during deliberations. It may be hypothesized that this juror made his decision early, based on what "felt" just and accurate from themes presented during opening arguments, then sought logical reasons for arguing his position to the others. This has also been discussed in research regarding the use of right brain (emotional) vs. left brain (verbal/logical) processing.[9] The extent to which a particular juror is prone to quick affective/ emotional decisions can sometimes be identified during voir dire. For example, highly affective/emotional jurors tend to be the poets and artists of the world, while cognitive jurors are the bankers, lawyers and bookkeepers.

Improving Direct Examination

As with many aspects of a trial, most witnesses, particularly experts, tend to be overly technical and long-winded. Consequently, valuable information is lost due either to lack of comprehension or inattention.

Similar to opening statements, each expert should have a presentation that is well-organized, simple and persuasive. It is the attorney's responsibility to structure questions and prepare witnesses thoroughly. The following is recommended:

First, focus on the high points of the expert's credentials with emphasis on unique and special accomplishments. Jurors become bored after more than about ten minutes of the expert's background.

Second, have the expert state his conclusions (3-4) up front. This accomplishes two primary goals: 1) The jury gets the key points while they are fresh and attentive, and 2) It enhances the jury's interest in the ensuing explanation because they realize these are key questions that must be determined to decide the case.

Example:

Question: Mr. Biomechanical engineer, you indicated you have reviewed all of the documents in this case, examined the subject vehicle and visited the accident sight. Have you reached a determination as to the cause of this accident?

Answer: Yes. It is clear to me that the cause was not due to mechanical failure but human error. There are three very simple reasons and once you understand these three factors you realize there is simply no other conclusion. May I show the jury a chart?

In all aspects of trial, keep in mind that 85 percent of what is learned visually is retained, in contrast to 15 percent verbally.

Third, work with experts to develop visuals to enhance and simplify their presentation. In all aspects of trial, keep in mind that 85% of what is learned visually is retained, in contrast to 15% verbally. The witnesses' testimony on direct should be easily understood at about the 8th grade level. Visuals will help in this respect. Finally, due to the fact that both witness and attorney become intricately involved, it is oftentimes insightful to have another uninvolved lawyer or secretary sit in on a mock direct examination.

Cross-Examination

In regards to cross-examining experts, surrogate juror feedback suggests that the following techniques can be utilized successfully with nearly any paid expert:

EXPOSE MOTIVES: While most jurors are aware experts are being paid, many are shocked at the amount they are charging. Exposing the total amount the expert has made is a simple and effective means for reducing credibility and the impression of total neutrality, especially for those who earn a handsome living from such work.

TEST CASE KNOWLEDGE: Question experts regarding which documents, depositions, and so forth, they received. Then question as to why they did not receive X, Y and Z? "Isn't your conclusion based on incomplete information? Select information fed to you by the lawyers?"

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EXPOSE LAWYER MEETINGS: Eventhough attorneys know it is common practice to meet and prepare witnesses, jurors do not. In one particular trial, several shadow jurors, questioned at break following the witnesses' direct, completely changed their opinion of the witness when they learned under cross that he had spent the entire day before (Sunday) with the lawyers who then treated him to dinner at the Ritz. Again, the perception of neutrality and objectivity was thoroughly diminished.

Objections and Sidebars

Shadow juror responses suggest it is advisable to utilize objections sparingly in jury trials. In general, jurors view objections and sidebars as lawyer games designed to win cases and prevent the truth from coming out. Jurors like to see their job as a search for truth. They hate the lawyers and judge whispering "little secrets." They usually view unfavorably any "sabotage" by an attorney who is "afraid" to let certain evidence or testimony come out. When attorney's objected repeatedly, most jurors saw this as nit-picking, desperate actions of an attorney who was losing the battle. This, of course, is especially true if these constant interruptions are primarily being overruled. In essence, jurors became irritated and viewed the continuously objecting attorney as a spoiled kid saying "no fair." Further, they begin to sense that the objecting attorney may have the weaker case, or is hiding something. In this area, a trial attorney must judge carefully the importance of the trial record vs. the negative impact repeated objections have on the jury.

Closing Arguments

Because of the primacy and recency effects, both openings and closing are believed to carry considerable weight with jurors. However, as indicated earlier, much research suggests that the majority of the panel will have already made up their minds by this point. Yet the closing arguments are critical for three primary reasons:

First, it is the last chance to sway the remaining jurors who have not yet made up their minds. In a close case, with an evenly divided jury, this could mean the difference between winning and losing.

Second, it provides an opportunity for presenting arguments not yet considered that, in some cases, may change the minds of one or two jurors.

Third, it provides some of the most memorable arguments that jurors supporting your case can utilize in their attempts to persuade others during deliberations.

Some Tips for Closings

As with the opening, follow a well organized format that simply and concisely summarizes your case. If all has gone well during the trial, consider using your well-presented opening as a script, e.g. "We told you the evidence would prove...., and that is what you heard." Also point out areas where opposition has failed to refute such evidence.

In addition, if your opponent has failed to deliver on any points brought out in opening, highlight this intensely. Finally, give jurors reasons why they must find in your favor. Review the commitments that you have either gained verbally during voir dire, or non-verbally during opening--that they must follow the law--and therefore, must find in favor of your client.

In summary, what jurors truly want is to be provided with the facts and issues in a concise and objective manner and be allowed to come to an informed choice. Most jurors take their jobs very seriously and resent any attempts by lawyers or parties to manipulate their thoughts, feelings and emotions. However, litigators who structure their case with an awareness of how, when and why jurors formulate decisions can gain a significant edge. Additionally, attorneys perceived by jurors as straight forward and willing to even-handedly present the good and bad parts of their case are most effective. Jurors usually have a clear sense whether or not the attorney is truly committed to and believes in his client's cause.

For the trial attorney, the true critics and ultimately the ones who decide his or her competence are jurors. Attorneys who try cases from a "jury-centered" rather than "self-centered" approach will find enhanced success.

NOTES

1. Matlon, R. Communication in the Legal Process. Holt, Rinehart/Winston, 1988, p. 178

2. D. Vinson Jury Trials: The Psychology of Winning Strategy, 1986

3. Id

4. Paraphrased and revised from professional speakers workshop "Speak With Impact." Malandro Communications

5. A. Julian, Opening Statements, Wilmette, IL. Callaghan and Company, 1908. 2.

6. Ford, The Role of Extra Legal Factors in Jury Verdicts, 11 Jus. Sys. J. 16, 1986

7. Spence, How to be a Trial Lawyer, "Trial," Feb 1992, p. 19.

8. R. Willingham, The Best Seller, Prentice Hall, Inc., 1984, 129.

9. Boyll, J., Maximizing Voir Dire and Jury Persuasion, Arizona Attorney

10. Boyll, J., Enhancing Juror Comprehension and Memory Retention, T. Dip. J.

11. Matlon, R., Ibid at 270