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Getting Jurors to Give a Damn
By G. Christopher Ritter

Jury Selection virtually guarantees that jurors are "blank slates." They do not know the parties. The only thing they know about the dispute is what they can glean during voir dire. They are probably unfamiliar with the specialized (dare we say "arcane") knowledge involved. And they may know little about legal proceedings.

The fact that jurors start as disinterested parties does not mean they have to be uninterested as well. A highly skilled lawyer knows how to transform jurors from passive, disinterested observers into advocates who will actively lobby for his or her side during deliberations. In other words, a highly skilled lawyer knows how to get jurors to "give a damn" about the case.

Courting the Active Juror

How do lawyers do this? The first step is realizing there are two kinds of jurors: "I Just Am" jurors and "Active" jurors.

"I Just Am" jurors do not really know why they are voting for one side or the other. When asked, "Why are you siding with the plaintiff?" these jurors typically respond, "I don't know. I just am." As such, they do not have much influence over their peers during deliberations.

Conversely, "Active" jurors are engaged in the proceedings. They have followed the trial arguments closely in their pursuit for the truth and can readily continue the arguments during deliberations in the jury room.

"Active" jurors are those the attorney wants to court, convince and educate, because in the jury room, they are most able to influence their peers.

In order to help them do their best, the attorney needs to provide them with tools for their dual roles as truth seekers during the trial and advocates during the jury deliberations.

The Truth-Seeker's Toolbox

The tools that active jurors most need during the trial itself are those that help them comprehend the case.

The attorney and client have had months, if not years, to consider and work through the issues. The jurors have no background in or experience with the dispute. Indeed, they likely neither want nor need all the background had by the attorney. They just want to

know enough to make up their minds about the case and feel good about any decision they and the other jurors render.

As such, the truth-seeking toolbox should contain tools that simplify your case. These tools include:

• a single coherent story. The author Willa Cather observed that, while the specific subject matter may differ from story to story, all literature is based on one of the half dozen or so recurring themes. But those themes can only be presented one at a time. Throw in too many theories and the jurors' heads begin to spin.

Instead, apply Occam's razor: "If two theories explain the facts equally well, the simpler theory is preferred." Once you choose your storyline, give it a strong beginning and ending. Discuss motive (if the attorneys do not, the jurors will — endlessly and distractively — in the jury room). At all costs avoid arguing in the alternative, because although opposing counsel and the judge will understand that line of reasoning, the jurors will think the attorney is confused about his or her own case.

Of course, sometimes the simplest story is the one with the best supporting evidence. In one case we worked on, an international banking firm with strong ties to New York was managing the assets of several very wealthy individuals. Unfortunately, the firm ended up losing a lot of the clients' funds. Plaintiff's counsel could have argued that the firm had acted maliciously. Or counsel could have argued that the firm lost the money by being negligent. But counsel couldn't say both (i.e., "the bank acted maliciously, and if it didn't, it was negligent.")

• case themes that add credibility to your version of events. Most cases fall into one genre or another. A case might be a "plaintiff is failing to take responsibility for his or her actions and trying to shift responsibility to a deep-pocket" kind of case, a "plaintiff violated the trust of the defendant" kind of case, a "greedy corporation sought profits at the expense of human health" kind of case, or a "look, stuff happens and sometimes it is nobody's fault" kind of case.

Whatever it is, making the theme transparent helps active jurors to quickly understand an attorney's version of events. In one recent securities case, for example, a company that had made a promise to Wall Street about potential earnings ended up not producing those earnings. Rather than admit the mistake, the company moved funds around to make the earnings look bigger. The case theme that plaintiff's counsel developed? "The company was fully committed to fulfilling their promises, even if it needed to lie to do so." Jurors get that kind of theme.

• analogies. When confronted with unfamiliar material, the human mind tries to make sense of it by comparing it to something already known. Analogies, in which one thing is compared to another, provide the perfect tools for helping jurors understand new material.

Need to explain how the Big Box store squelched the independents in one particular region? Recall the story of the bully in the elementary school play yard. Need to explain how computer memory works? Conjure the image of a parking lot with lettered and numbered rows.

Sometimes analogies can be even more dramatic. For example, in one case, the plaintiff alleged that radiation from industrial sources had caused her cancer. As it turned out, however, she had been a two-pack-per-day smoker for most of her life. The amount of radiation she received from the industrial source was two millirems. The amount she received from the cigarettes was 38,000 millirems. The task then, was to show what a 1:19,000 ratio would look like. The lawyers presented a graphic showing that the amount of industrial radiation exposure relative to the amount received from cigarettes was like comparing a fraction of an inch to the height of the Empire State Building, a very compelling, and memorable, image.

• ways of making the invisible visible. Jurors can understand a gun, a memo, or a faulty engine part because such objects are tangible and familiar. What is harder to understand is a concept like "fiduciary duty," "in loco parentis," or "enabling a patent." These can be made tangible with the use of clear, meaningful graphics.

For example, the use of graphics and facts to convey the relationship between two people can often aid and speed the jury's appreciation of the situation presented. Similarly, concepts that are too big or too small to imagine need to be made real.

Need to explain what one part per billion is? Describe it as one second in the life of a 32-year-old woman. Or how does one show how large a 1-micron defect is on an 8" silicon wafer? Create a trial graphic that shows that this is like finding four soccer balls lost amid the 322 square miles of New York City's five boroughs. (Believe it or not, that is the accurate ratio of a 1-micron defect to an 8" silicon wafer!)

Five Rules of Jury Information

These basic tools (using analogies, case themes, coherent story lines, and making the invisible visible) are of no use whatsoever if one does not follow five simple rules about any information given to jurors:

1. The material must be presented with simple, every-day language. This doesn't mean that the presentation has to be "dumbed down." Instead remember that people learn best when the concepts are made simple.

For example, technical or legal terms like micron, and a 32-bit single-chip, enabling a patent, can be introduced, but it has to be explained in language that anyone can understand.

2. It must refer to familiar topics. Remember, people learn by comparing the new concepts to concepts they already understand. So while they may not have the foggiest understanding of what 2 millirems of radiation is compared to 38,000 millirems of radiation, they do know how small an inch is and how tall the Empire State Building is.

3. It must be memorable. Attorneys should aim for having jurors remember some fact from the case not only in the jury room and during deliberations, but also at cocktail parties for weeks afterward. In other words, all the analogies and clever case themes in the world will not convince a jury of a point if the comparison is as unintelligible (or boring) as the technical point that is trying to be made.

4. It must create a "buzz." It's hard to explain a "buzz," but most people know it when they see it: The jurors (or the judge) lean forward with interest and perhaps murmur with surprise or appreciation. Sometimes they even laugh — not a loud guffaw, by the way, but the laughter of relief that comes from finally understanding a difficult concept.

5. It must be credibly presented. Sniveling and whining never win cases. Likewise, appearing to be a bully in court rarely does either. What does win is an attorney taking an active "teacherly" role toward the jurors and showing them that he or she cares enough about the case, and their understanding of it, to present a version of events in a manner that is easy to understand and hopefully even interesting.

The Advocate's Toolbox

Most attorneys think of their closing argument as the final punch line of their case. To be successful; however, the case must continue after the judge's charge and into the jury room where the jurors with whom the attorney has connected can continue to advocate for his or her version of the facts.

In order to be successful in this way, the attorney must give jurors the tools to analyze and explain his or her side of the case to the jurors who have not been completely convinced. Those tools include all of those in the "truth-seeker's toolbox." In addition, the attorney's directions on how to decide the case should be clear and coherent. These tools should include:

• methods to compare and contrast. Trial research may have allowed the attorney to delve into the case by topic, but trials are structured by the testimony of parties and witnesses. That means that evidence about, for instance, how the money-laundering scheme at issue in the case actually worked may come up on Days 2, 8, 10 and 23 of the trial, which can make it difficult for jurors to reshuffle the evidence into the narrative theme of the case.

To help active jurors process the trial evidence, the attorney could provide them with graphics during closing argument that organizes the evidence introduced at trial. This might be as basic as a graphic with the opposing party's key statement at the top one-third of the board and citations to all of the contrary evidence arrayed on the bottom two-thirds.

Or it may be far more sophisticated. In one case, for instance, an attorney had to present a lot of very complicated information about a problem with the vinyl siding on houses in a development. To keep all the information together, counsel commissioned a computerized graphic of a house that organized all of the demonstrative evidence in the case, including charts, definitions, animations, and diagrams into a central case database. Not all of this was showing at once, of course, but by having one graphic act as an organizing platform, the attorney was able to easily call up the information he needed on any particular aspect of the case and go back to evidence presented days earlier when needed.

• annotated jury instructions. Jurors often take the jury instructions very seriously; after all, the judge gives the instruction to the jury and these instructions are often the only

outline with which the jurors have to work. Nevertheless, far too few trial lawyers take full advantage of the jury instructions as critical persuasion tools.

Counsel should pick the one or two instructions most crucial to their case; define the key legal terms for the active jurors in a way they can use them during deliberations; point active jurors toward the evidence that allows them to then argue that the necessary elements in the instructions have or have not been met.

Here's an example: Several years ago, the San Francisco District Attorney's office was prosecuting a very tragic case against a couple whose dog had killed a resident in their apartment building. Based on more than 30 earlier violent incidents, the defendants were well aware of how vicious their dogs could be. In order to prosecute the couple, the district attorney needed to convince the jury that the defendant who had been walking the dog at the time of the attack had acted with implied malice.

Most people understand "malice." But few lay people know what "implied malice" means. So to help the jurors in the case, a graphic was developed that showed four cubes. On the top of each cube, the four elements of implied malice:

• there was an intentional, dangerous act;

• the defendant realized the risk;

• the defendant disregarded the danger; and

• a human death resulted.

Through a series of slides, it was then added how each element existed at the moment the dog killed the victim (as well as created an image to underscore the point).

Organizing the information this way helped the jurors not only understand the prosecutor's directions; it also gave them a structure for continuing her argument in the jury room.

Not convinced? Attorneys who give their jurors a coherent plan have a distinct advantage over those who do not. That is, jurors who favor the side that provides the guidelines are usually out of the blocks faster during jury deliberations and are more likely to dominate the early (and important) discussions about the trial. These jurors can do so because they don't need to spend time at the outset trying to figure out how to go about analyzing the facts. They know how to analyze the facts because counsel taught them how to do so.

If You Give a Damn, So Will They

Trial lawyers who watch mock juries deliberate are often humbled as they watch these individuals raise questions they never considered (but seem obvious in retrospect), speculate about relationships (and motives) that counsel never saw, and catch inconsistencies that counsel had hoped were deeply buried.

Contrary to the opinion of many lawyers, most jurors are not only capable of "getting it," but also take their responsibilities as jurors very seriously. Trial counsel should realize that they can help their jurors understand and advocate for their side, by giving them the tools to do so.

Counsel's job is to give their jurors the usable information and tools they need to do their job. If jurors have those tools, they will give a damn.

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