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Giving jurors what they want and expect to hear at trial

GUEST COLUMN

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This article serves as a guide to understanding and appreciating juror perception and information processing in the courtroom. It also provides information and advice for dealing with the most common trial issues by taking you through the steps of how jurors perceive your case.

It'll give you insight on how well your case plays to jurors and how they understand and interpret case facts to arrive at a verdict. Perhaps, the most important thing is this article shares some tips on the importance of building effective case themes.

Case themes: When I am first consulted by an attorney, I ask them to tell me their case theme. Instead, they tell me the case facts. They often tell me they have excellent facts but that alone will not win the case.

In order to help communicate your theme, you can use Aesop's Fables, children's stories like Paddington Bear, folklore or other mythology as a source to represent your important case facts having to do with topics such as death, grief and causation. Your theme could also be an allegory or metaphor.

At trial, you will need one case theme for damages and another for liability. Once the themes are identified, which should be short, memorable and compelling, you only need about three discriminating questions to ask the venire to help identify jurors unsympathetic to your case.

Make a who's who chart of the cast of characters. All wrongful death and medical malpractice cases are complicated, often involving five or more doctors and a smaller number of nursing staff. What steps are you taking to minimize juror confusion? One way to accomplish this, in voir dire and later in opening, is to show a simple visual introducing the main witnesses and a summary of what they are expected to say.

Make a chart showing activities the plaintiff can no longer do. One effective way of presenting a persuasive and memorable graphic is by showing life activities your client can no longer do because of the injury. One way to communicate this

is to use a prohibitive red circle with a line through it, sometimes referred to as the 'no symbol' to highlight your client's injury. I recommend selecting the most impactful three or four lost activities. For example, a bed placed inside the circle demonstrates a person who can't sleep, an automobile in the circle shows a car that a person can no longer drive, and food in the circle represents a person who has difficulty eating or swallowing.

Create a chronology of events. Easily understood graphics are a must for getting your point across. Most trial graphics are cluttered, too small and confusing to be impactful. All visuals should advance your case theme.

Explain what the defendant did wrong. Summarize in a single visual what the defendant did wrong. This should be shown in opening and be used as an opportunity for you to reinforce your theme. This visual should contain up to three things that the doctor failed to do. You can use a visual for each defendant if there is more than one. This visual should be simple, clear and large enough for all jurors to see. On a second board, you can then plug in your strongest evidence which supports each claim.

Use photographs. Oftentimes the trial attorney shows photographs to illustrate what the plaintiff's life was like prior to injury or death. The most commonly used photos at trial include weddings, vacations, graduations, birthdays and some missing hobbies. Your photos should help to reinforce your theme.

Make several variations of your opening and closing statements. Sometimes I ask focus groups to analyze the effectiveness of an attorney's proposed presentations. By using this technique, the strongest and most persuasive parts of each presentation can be synthesized. This way, you too, will have more confidence and make a better argument.

Choose words carefully. Never say the word "mistake" or "accident" unless you are representing a defendant. This is a common error in many trials. Keep in mind that opposing counsel, and perhaps even your client, will refer to the situation as an "accident." As soon as you utter the word "accident" at trial, it not only reveals your subconscious perception of the case, it also reinforces the jurors' perception that things just happen. An example of something not to say is, "We're not saying the doctor/driver is a bad person...just that s/he made a mistake..." It's universally acceptable to make mistakes but it is not acceptable at trial. Jurors oftentimes

will conclude the injury was 'an act of God' or an 'oops' moment, so be sure to anticipate this probability.

Tell why, not how. Many attorneys believe they have a good chance to prevail at trial because they have good case facts. Your job, as trial attorney, is to communicate the case facts to the jury in a clear and persuasive fashion and offer an explanation as to why the event happened. Keep in mind, jurors want to hear WHY the negligence happened, not merely HOW it happened. Be explaining, not describing.

Recently, I watched the NCAA Women's Basketball Championship. The television cameras were taken to the locker room, and I was fascinated to see the coach giving her team a pre-game pep talk. Surprisingly, the coach did not rely on a technical X and O strategy for a winning game plan. Rather, she encouraged them to "be their best" and "reach their goals". She was selling sizzle, not steak. She was telling why they were going to win.

Prepare witnesses. Many attorneys rely on someone in their office to do witness preparation. Although it may be practical, it is not effective to allow an associate to handle this important part of your case. When working with witnesses, it's important that the witness or plaintiff be videotaped with particular attention to body language, manner of dress, speech patterns, pauses and the words used to describe an event. For example, when I asked one attorney about witness preparation, he assured me that it had been addressed. Yet, at trial, plaintiff appeared wearing a bright, cheery Hawaiian muumuu in a wrongful death case. In another case, many jurors revealed in post-verdict interviews, that they did not like that plaintiff wore the same clothes throughout much of the trial.

A simple technique that can be used to help witnesses feel more confident and relaxed is to give them a simple handheld trinket which says "I've Got This" or other similar affirmation. The trinket is something they can hold in their hand and helps to keep them grounded throughout their deposition and trial testimony.

Ask jurors to take notes and ask questions during trial. Many state and federal courts allow jurors to ask questions of the witnesses in real time. Attorneys are sometimes reluctant to ask that jurors submit questions to witnesses because this could introduce a new unanticipated

area that you have intentionally avoided and would rather not explain. The benefit to this procedure is that it allows jurors to have a more user-friendly trial experience and minimize potential juror misunderstanding. Another benefit is to promote juror participation. More importantly, the questions can indicate any underlying confusion of the testimony and show where the jurors might be headed.

Speak like you mean it. In other words, attorneys sometimes have a habit of presenting their closing statement without emphasis and enthusiasm, causing jurors to tune out. This is especially true during longer trials. To correct for this, you can use voice inflections, pauses and utilize different locations of the courtroom to emphasize your point.

Offer a compelling reason for damages. Every trial involves a damage request. Most attorneys, when requesting for damages, fail to offer a compelling and justified reason. Always explain to the jury the supporting reasons and explanation of why your client deserves damages. When considering verdicts, jurors are likely to ask themselves: Is the plaintiff worthy? How will the money be used?

Jurors may also increase the damage amount when they are told that some of the money is going toward a charity, shrine or a related benevolent cause. It's easier to justify giving money to plaintiff when the reasons are noble and believable.

Anticipate juror reaction to jury instructions. Research is clear that jurors do not fully understand common jury instructions and find them boring. It is helpful for an attorney to learn what focus group members believe each instruction means. By anticipating this area of juror confusion, you should take extra time finding out how jurors interpret your instructions.

This article examines how jurors reach verdicts in complex civil litigation. Jurors initially want you to win your case until you convince them otherwise. Understanding jurors will help you present your case in a crisp and user-friendly manner.

For additional insights, I recommend two books: "Trials and Deliberations" by my mentor, Amy Singer, and "Blue's Guide to Jury Selection" by Lisa Blue.

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