Panel: Know What You Don't Know - Jury Research

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Know What You Don't Know: Using Focus Groups in Jury Research

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Overview

Law school prepares attorneys for many things. Thinking like an average juror is not among them. Understanding how jurors will evaluate the facts and legal issues in your case is mission critical information. Framing facts and legal issues properly is essential for success. Knowing the frames that work and those that don't may determine whether you win or lose. Detailed below are practical considerations on how to determine the optimal frames for a jury verdict in your favor.

Knowing What You Don't Know

Thinking critically at all times about proving the elements of a case is what trial lawyers do. Too often, smart attorneys can become enamored with facts or issues that are simply too dense, complex or inaccessible for typical jurors. In every case, there are limits on what you can expect the jury to consider, evaluate, process and decide. Jury research helps define those limits. It is dangerous to assume how a jury will process facts and issues. Observing that process through a focus group of prospective jurors—a surrogate jury-- takes away the mystery and helps the trial team focus the presentation of the case.

Learning What You Don't Know

Focus group research with mock juries is an invaluable tool. There is simply no substitute for getting real reactions from a surrogate representative jury to the facts, witnesses, evidence, demonstratives and arguments. Discovering jury biases, attitudes and expectations about the case, the parties, the claims and the evidence, informs on the packaging and presentation of the case.

All jurors have underlying biases, attitudes and expectations. Some are so strongly held or pernicious that there may be a basis to challenge the seating of the prospective jurors. Others are less so but may become important drivers during the deliberation process. These biases, attitudes and expectations are important to understand because they often influence in material ways whether a representative juror will accept your theory of the case. The ability to persuade is informed by these biases, attitudes and expectations. This is often the space in which tough cases are won or lost.

Putting your case to a focus group of surrogate jurors helps identify the biases, attitudes and expectations of jurors. That information informs what information you must provide as part of your burden of persuasion.

A baseline inquiry that informs on all presentation decisions is how the surrogate panel perceives your client. What juror biases and expectations need to be addressed in the presentation of the case about your client and the products or services it provides? If you are defending a financial service company in claims arising from a consumer transaction, for example, it is helpful to know what level of engagement and interaction jurors believe is necessary of the company to have acted reasonably. Answers to this may inform how much you address the atmospherics of the company's relationship with consumers as opposed to the actual conduct at issue. Knowing the starting point of juror attitudes informs on how long a journey the burden of persuasion may be.

Discovering What the Jurors Want to Know

Focus group reaction to your facts, theories, evidence

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and witnesses is by itself invaluable. But equally important is learning from the mock panel what they needed to hear, see, and understand to be persuaded. Pushing the mock jury from mere reaction about your case to active thinking about what may have helped in the persuasion process often yields powerful insights. Asking jurors about what was missing from the presentation helps identify the evidence and witnesses that may help persuade. The absence of gap-filling evidence or information that jurors really want to hear indicates that the trial team needs to take on and inoculate the omission. In either circumstance, the case presentation is strengthened by knowing this important juror feedback.

Using What You Learn

Once the biases, attitudes and expectations are unearthed, and you have the benefit of juror insights into what information would impact their view, trial counsel is best equipped to structure the presentation of witnesses, evidence and demonstratives. This information helps bring into focus essential information for successful persuasion. The information provides a useful filter to determine what witnesses, evidence, demonstratives and subjects must be part of you effort to persuade. Further, it helps the trial team tailor instructions and legal arguments to meet the burden of persuasion.

Rigorous application of the jury research results focuses the case and helps to ensure that all facts and issues are reviewed through the proper framework. This information obtained from the jury research should impact all decisions about the case. Every exhibit, witness, demonstrative and argument should be evaluated for its ability to meet the bias, attitude and expectation identified. Through consistent review of the case through the lens of the jury research, the trial team can focus its themes and theories and through consistent messaging meet its burden of persuasion. Success starts by knowing what you don't know.

Articles by Richard Gabriel

Framing your case - Using cognitive science to focus a trial

As the presidential primary season shifts into high gear, candidates from both parties are spending millions on think tanks where cognitive behaviorists, neuroscientists and linguists use a concept called "framing" to hone the messages voters will use to choose our next president.

Litigators can use these same principles to hone a message that will persuade jurors to find for their client.

Framing is a way that people organize information into the cognitive structures of the brain to help them explain the world. New concepts, whether political or legal, are interpreted through these cognitive structures which are comprised of a person's genetic predispositions, values, experiences and beliefs.

While listening to days, if not weeks of testimony and dozens of witnesses, jurors struggle to understand complex and often conflicting information about a range of topics from securities to medicine - and even legal instructions. They use cognitive "frames" as a way of making sense of the case and to validate their verdict.

By conducting pre-trial research with focus groups, mock trials and community surveys, litigators can understand the frames jurors are likely to use in deciding their case. Just as national elections are about getting as many voters as possible to accept a political party's worldview, so plaintiffs' and defense attorneys campaign to get a judge or jury to accept their respective frames or worldviews of the case.

If we think of a frame around a picture, it focuses the viewer's attention on anything inside the frame and draws it away from the rest of the stuff outside the frame. So the frame contains everything the artist (or the litigator) wants the audience to focus on.

For example, a plaintiff's attorney in a medical malpractice case would create a frame: "Doctors are supposed to be perfect," and inside that frame, they would include their high level of training, specialization, certifications, monopoly, licensing, expertise, medical fees, etc. In this frame, patients are reliant on doctors to help them and medical professionals are responsible for their understanding of the risks of the treatment. This creates a heightened "standard of care" that places the defendants in a superior position to the patient. In this frame even a minor mistake by the doctor or hospital is malpractice.

Even reckless conduct on the part of a patient is the responsibility of the defendant because it is foreseeable and preventable by the all-knowing and all-seeing medical professionals. This plaintiff frame carries more force because it contains values for jurors to relate to:

expertise and reliance.

The defense attorneys in that same case want the jury to accept their worldview. They have to create their own frame instead of just defending the allegations inside the plaintiff's frame. So the defense in this case cannot just say, "We met the legal definition of the standard of care because our Board Certified surgeon says so." Within the plaintiff's frame, the jury is still focused on the care of the doctor or hospital.

In order to create a new frame, the defense needs to shift the focus of the case to other causes, perhaps the patient's medical history and lifestyle choices. So their frame might be, "The plaintiff chose to put himself at risk," and inside that frame you would include the patient's family history of heart disease, lack of exercise, smoking, the fact that they signed a waiver etc. Since jurors are likely to put themselves in the shoes of the plaintiff to see if these choices were reasonable, this new frame has the plaintiff with clear knowledge of the hazards of his or her own choices. This frame also has an emotional component: the plaintiff's recklessness.

Although they work together in the communication of a case, frames are different than themes. While themes are important in helping the judge and jury organize and integrate your case into a meaningful story, themes also invite them to compare the two stories, finding parts of both cases that they can mesh together into one story. Framing attempts to direct the focus of the fact finder on what the lawyer has determined to be the only story of the case and the only required decision arising from that story.

Tobacco lawyers have long wrestled with competing frames, as have lawyers on both sides of the recent Vioxx litigation. We can recognize these different frames in the comments of jurors following two high-profile Vioxx trials. In looking at the following post-trial comments, we can note the different frame of reference of these juries.

> Juror David Webb (Ernst v. Merck) on Good Morning America. Plaintiff's verdict. "$229 million was the amount of money that Merck had to gain if they put off changing the label."
>
> Juror Vickie Heintz (Humeston v. Merck) in a news conference after the trial. Defense verdict. "I just think Mr. Humeston had way too many health issues to pinpoint it to Vioxx. Stress was a huge factor in my decision."

The Ernst juror used the frame of Merck's failure to warn in explaining the verdict amount, while the Humeston juror emphasized the medical causes of Mr. Humeston's heart attack.

Successful litigators employ the use of frames in the following ways:

The frame of the case should be articulated in short declarative sentences stating the priority in the case: "The most important issue in this case…" or "The most important issue for you to decide…" or "This whole case is about…" These phrases must be repeated constantly during the trial.

Frames should create a job description for the judge and jury. "Your role is to decide…" or "We are here to decide…" These frames are affirmative - an action that the judge or juror should take or what they should conclude.

In planning the presentation of evidence or the cross-examination of witnesses, counsel should spend a majority of time in the case on their framing issues. Jurors spend time deliberating on what they feel are the most salient issues. Salience for jurors is often created by the amount of time spent on a topic at trial. As a result, all frames should be repeated often until they are adopted. As Juror Stacy Smith said following the $253 million verdict in Ernst: "That was the number they kept saying over and over. It was in our mind. When you're sitting there for five weeks and you keep hearing that number, it sticks in your mind."

Framing can create a presumptive reality for the jury. For example, instead of stating, "This case is about whether Company X infringed on Company Y's patent," you can state, "This case is about how Company X infringed on Company Y's patent." This latter statement assumes that it is obvious that infringement had already been established and the jury's job is to only figure out how it happened.

> Frames should ascribe motivation to the opposing parties. For example, the former owner of a technology company sues the parent company that bought him out. You represent the parent company and create the following framing statement: "Even after selling his company for millions of dollars, John Doe could not let go. He tried to undermine the authority and destroy the business rather than

let someone else control what he had spent years building."

Frames should characterize the failures of the opposing party. These negative frames are actually natural to the law since a jury's or judge's job is to assess liability or guilt. The easiest way to characterize these failures is by showing that the other side violated some accepted standard - behavioral norms (a plaintiff's excessive speeding in an accident), internal policies (a defendant's failure to follow-up on complaints of workplace harassment), or objective standards (statutes, regulations or common practices in an industry).

Frames should be concrete. Themes about "greed" or "individual responsibility" are either too clichéd or too abstract for jurors. It is easier for jurors to understand, "$967 in postage would have saved these shareholders millions of dollars of their life savings." Or, "7 miles an hour over the speed limit cost this plaintiff nearly a second in reaction time. With another second, he could have avoided this accident." Frames should be reinforced with demonstrative evidence to make sure they have an impact on the judge and jury.

Framing in litigation requires commitment to the message and discipline to stay "on message" throughout the trial - pre-trial motions, mediations, settlement discussions, opening statements, witness examinations and closing arguments. Text analysis programs can be employed to analyze trial transcripts to ensure these framing messages are being repeated frequently enough and are not being lost in the length or the complexities of the trial. Post-trial interviews will also let attorneys know whether their frames were actually used by the jury.

Framing creates a compelling reality that dovetails with the experiences, beliefs and values of the fact finders, and in doing so, makes it easier for litigators to reach and convince their real constituency: the voting jury.

Utilizing the interactive trial - Jurors learn by participating

On an average day, Americans watch two and a half hours of television and spend as much as three and a half hours on the Internet, according to polls by Time and CNN. As a result of this information inundation, they have become sophisticated and skeptical consumers of news, entertainment and technical facts.

So how does this apply to the American jury?

With Americans spending more hours at work, commuting and shuttling kids to various activities, the real battle in the courtroom is not between litigants, but for juror attention.

Expecting jurors who are already on information overload to listen attentively to hours - possibly weeks - of complex and conflicting testimony is becoming increasingly unrealistic. With so much at stake, it seems relevant to ask whether we are giving them the tools they need to best understand and decide these complicated trials.

Television and its advertisers have certainly realized the power of interactive communication in building brand loyalty, whether it's allowing audiences to vote off American Idol contestants or helping fans create fantasy footballs teams to increase NFL viewership.

Recently, the courts have started recognizing that an actively engaged juror is more satisfied and better informed than a juror who simply listens passively. By utilizing these new communication possibilities, you can help build "brand loyalty" to your case.

Notes and questions

Most courts allow jurors to take notes these days. However, we rarely direct jurors as to what we want them to take notes on. Lawyers can focus jurors on specific testimony, evidence or arguments by asking their experts:

- "What are the three most important findings you discovered when you examined…?"

- "What is important for the jury to know about that?"

- "How would you summarize your conclusions?"

A lawyer might also simply tell the jurors, "You may want to write this down," before making a crucial point.

You can also emphasize a point by getting a witness to stand up and write his or her three most important points on a white board or flip chart. If the witness writes it down, jurors are more likely to think it is important. Moreover, just having the witness write on a board or work with a demonstrative exhibit creates a dynamic

teaching environment that is more engaging for jurors.

It is also becoming more common for judges to allow jurors to ask questions during a trial. While many judges and attorneys are still reluctant to embrace this development - largely out of fear of losing control - juror questions have not been shown to unduly prolong a trial, take the jurors down an errant path or influence their verdicts.

The simple act of allowing them to write down questions and submit them to a judge shifts their role from passive listeners to active investigators. While some may argue this should not be a juror's role, it is how most jurors see their jobs.

Juror questions can also provide lawyers with a valuable clue into the jurors' thought process and highlight areas where they need clarification.

Interactive visuals

While no one doubts the importance of compelling graphic evidence, interactive visuals provide another way for attorneys to involve jurors in their evidence. A simple version involves boards where magnetized or Velcro pieces can be added or subtracted.

Instead of a static timeline that is presented as a single line with multiple events, attorneys can use PowerPoint to create an interactive timeline where the lawyer or witness can click on the listed event on the timeline and pull up a subset of documents, pictures or deposition testimony that is associated with that one event.

Although passively viewed by a jury, animations are actually an interactive device. Because trials often require lawyers to recreate historical events, the side that creates the most coherent, consistent and memorable version of those events has an advantage.

Although subject to evidentiary objections and stringent Daubert challenges, animation give jurors context for the event being described. For example, in a personal injury case involving a forklift accident in a warehouse, animations give jurors a sense of timing of the accident, environment of the warehouse, positioning of crates and machinery and point of view of the witnesses to the accident.

Virtual reality

Although rarely used or admitted, virtual reality puts jurors into a 3D simulation in which viewers can steer themselves through the scene.

The first U.S. case to allow virtual reality evidence was Stephenson v. Honda Motors Ltd., No. 81067 (Cal. Super.Ct. 1992). This products liability case involved a motorcycle accident in which Honda contended that the terrain where the accident occurred was obviously too dangerous for the safe operation of its motorcycle. Honda's lawyers argued that two-dimensional photographs and videos would not give the jury as realistic sense of the danger as a three-dimensional view of what the rider would see as he navigated the difficult terrain. The court allowed the evidence, agreeing that this view was more informative, relevant and probative.

As software advances are being made, the cost of animations and even virtual reality demonstrations will come down.

Props and models

Although live demonstrations should always be rehearsed and controlled - I'll never forget watching the prosecution's botched "glove demonstration" while working for the defense on the O.J. Simpson trial - they can bring a visceral reality to a trial that is sure to grab jurors' attention.

This is illustrated by an impromptu jury demonstration during the Scott Peterson jury deliberations. Jurors asked to see the fishing boat, tidal charts and the eight pound anchor and apparently boarded the boat while it was stored on a trailer and began rocking it to test its stability and the defense's contention that it would have capsized if Mr. Peterson had thrown his wife overboard.

Although defense attorney Mark Geragos moved for a mistrial, claiming that the demonstration was akin to an impermissible experiment, the judge rejected that motion noting that he gave a special instruction warning the jury not to infer too much from the experience since a boat will behave differently in water.

What these events demonstrate is that jurors were determined to test a kinesthetic component that was important to reaching a conclusion about a key piece of evidence in the case. This kinesthetic element is important to help jurors in both civil and criminal cases experience what the litigants experienced.

It is one thing for an attorney to tell the jury that a witness was fifty feet from an accident. It is another for that same attorney to pace out the fifty feet in the

courtroom. One asks the jury to put themselves at the scene, the other brings the scene into the courtroom.

Evidence books for the jury
Because jurors have so much control over the content they view on a computer in their personal and professional lives, it can be frustrating for them to listen passively while witnesses and attorneys describe documents and what they think are the relevant passages.

If allowed by the court, personal evidence books allow jurors to view, organize and analyze the document for themselves. This personalizes the evidence for the jurors, making it their evidence that they are assembling for themselves instead of the witnesses' or attorney's evidence. This process of assembling evidence engages them in analyzing and organizing the relevant documents in the case.

Jury visits
One of the best examples of courtroom interactivity involves a jury view.

It can be as simple as going outside the courthouse to view a car in a products liability case, or as involved taking a detailed tour of a crime scene.

While working for the defense in the Phillip Spector trial last year, we were granted a jury visit to Spector's mansion, where prosecutors say he shot the actress Lana Clarkson. When inside the house, jurors saw large posters of evidence photographs, including bloody pictures of Clarkson slumped in the chair. Jurors themselves slumped in a replica chair, trying to recreate the body positions of Clarkson and Spector.

The court denied several other juror requests: for someone to make a loud noise to replicate a gunshot; to sit in a car outside with the radio and air conditioning on to see if a limousine driver could have heard the gunshot; to have someone speak in the front doorway to see if a noisy fountain would have drowned out Spector's alleged confession to the driver. It was clear that jurors were trying to acoustically test the evidence for themselves rather than just take the witnesses' word.

What is clear from consulting in hundreds of criminal and civil trials is that most jurors have a natural desire to recreate the events in dispute. Planning and integrating interactivity in a trial allows jurors to become actively engaged and function as fact finders instead of fact listeners. This increases the amount of information they retain and use from your case.

In a time when attorneys are competing with the glare and din of a media culture and hectic personal schedules, interactivity helps to grab and hold the fleeting attention of the most important decision makers in the case - the jurors.

Another voice - Using jury research to mediate and settle cases

What is a case worth?

The answer to that complex question is usually determined by three factors: the calculation of actual and economic damages, the cost of litigation and appeal and how jurors will actually value the case.

To Thomas Tune, an attorney and mediator in Phoenix who has conducted more than 1,700 mediations in the last 20 years, this third category is the linchpin in mediation strategy. "To me, that is the paramount issue: to convince the other side that this is the amount that the jury will award," he said.

However, in mediation and settlement talks, "what the jury will award" is usually pure speculation. The parties talk about how sympathetic the plaintiff will appear, how persuasive the sparkling oration of the defense lawyer will be, how angry the jury will be about a certain memo or e-mail and how the nationality of the defendant will have a negative impact on the jurors. Most of these projections will be dismissed by the other side as partisan wishful thinking and countered with their own reasons why the jury will award the amounts they are demanding or offering.

In a growing number of cases, jury research, in the form of focus groups and mock trials, is being used in mediations and settlement discussions to show the parties how a jury will actually decide and value the case.

Using jury research in negotiations
Once the focus groups or mock trials are completed, the trial consultant will usually prepare a report, including charts detailing the juries' verdicts, the damages they awarded (both collectively and individually) and how they apportioned fault. The report may also include charts of some of the jurors' key life experiences related to the litigation and their general attitudes about the main issues in the case.

Then the consultant prepares, with counsel, selected clips of jury discussions or deliberations on the main issues in the case and the reasoning behind their verdicts and award amounts.

Although there are a variety of ways to use jury research to settle cases, I will discuss four common ways in which this research is used.

> The least effective use of jury research is when the attorney walks into the mediation with a series of talking points, summarizing the main findings of the research as well as arguments as to why the research informs and validates his or her view of the case. Because there is nothing more concrete than the attorney's word, this can be dismissed as merely an advocate's view of the case, perhaps backed by a few people paid to give the lawyer the result he wants.
>
> Another way is to present the mediator with the findings in the form of charts and DVD clips. For example, in a contract case involving the sale of a computer company, the plaintiff was offered the insurer's $100,000 policy limits. After seeing a first set of focus groups, which showed juror confusion about the contract and criticism of the plaintiff, the attorney was close to accepting the defense offer.

But a second set of focus groups allowed the plaintiff's attorney to refine his approach and focus on the misconduct of the purchasing company. This reframing of the case, along with charts and clips of the research results, allowed the plaintiff to persuade the mediator to negotiate a $2.3 million dollar settlement instead of settling for the $100,000 policy limits.

Jay Welsh, Executive Vice President and General Counsel of JAMS, a judicial arbitration and mediation companies based in Irvine, Calif., points out that it is common in mass torts for both sides to reveal to the mediator, under promise of confidentiality, that they have done mock trials or focus groups that have come back in a certain dollar range. However, when the parties do not let the mediator reveal these results to the other side, it minimizes the effectiveness of this tool. "This research can tell you, 'This [part of the case] looks good but you may have problems in that area.' I would think this is something the general counsel of a company would want to know," said Welsh.

> Jury research can also be used to minimize damages in a case that is clearly going to be decided in the plaintiff's favor.

In a race and gender discrimination case against a Japanese multinational corporation, the defense conducted focus groups that revealed some surprising reactions. While jurors were extremely critical of the behavior of one of the executives in the company, they were not nearly as outraged as the attorneys expected. They were also judgmental and disapproving of the conduct of the plaintiffs.

Liability and damages findings were given to opposing counsel along with a selection of clips of the focus groups discussions. While plaintiff's counsel was initially dismissive of the research, the defendant company was extremely happy about the final settlement in the case.

> A technique that is being used more and more frequently is to have the consultant who conducted the research present the jury findings at the mediation, preferably to both the mediator and the other side.

In this process, the consultant would describe his background and credentials, how he or she designed the research and why the mock jurors were truly representative of jurors who would sit on this case. Most importantly, the consultant would describe how he or she presented the best possible opposing case to make sure that jurors received an accurate and full account of both sides. This component is critical in overcoming the natural skepticism that the other side will have about whether the research was skewed to achieve a specific result. After describing the design of the research, the consultant can review the results and show selected DVD clips.

Why bother?

Why would you go the expense and trouble of presenting your jury research at mediation or settlement discussions? There are number of reasons:

> It provides the mediator and opposing side with your strongest evidence and arguments articulated by jurors rather than by you. While they can try to dismiss you as an advocate, they cannot ignore the inherent credibility of a group of postal workers, engineers, teachers or other representative jurors discussing and deciding the case. "The plaintiffs have their expert, the

defense has its expert, the jury is going to use their common sense," said Mark Modlin, a trial consultant in Edgewood, Kentucky who has appeared at more than 2,000 mediations.

It telegraphs to the other side that you are serious about the case and have done your research. It shows that you know your vulnerabilities and have studied how to address them.

It shows that you know the community where your case will be tried – culturally, socially and demographically – and that you know how to speak persuasively to a jury in that venue.

Jury research can address the concerns of multiple parties in mediation or settlement discussions. Not only can it can favorably position the case in the mediator's mind, it can also help move entrenched parties, whether it be opposing counsel, in-house counsel, an insurer or even the client. It is often gratifying to clients to hear their own feelings echoed by jurors. While this may strengthen their resolve, it also may allow them to feel heard and move off a fixed position.

Mock jurors often come up with alternative settlement strategies. We often hear them talking about awarding $375,000 and an apology or wishing to set up a college fund for the children of parents who died in an accident, or a small settlement with the assurance that company policies will be revised. While actual jurors do not have the ability to come up with creative settlement resolutions, suggestions made during deliberations in a mock trial can be considered in a mediation or settlement discussion.

There are two key issues that need to be addressed before presenting jury research in a mediation setting. First, check the confidentiality of the disclosure. Most states have a mediation privilege that protects anything that is discussed. However, this should be researched before proceeding. Second, it is important to make some strategic decisions about what you reveal. Hopefully, you will discover some new strategies and arguments through your research. Obviously, you would want to protect these so that you can use them at trial if the case does not settle.

Some cases should be tried and some should settle. In looking at settlement options, jury research takes 'What would a jury do?" out of the realm of speculation by using the voices, experiences, opinions, and decisions of real people to persuade the mediator and the opposing side of the value of your case.

Feelings or Facts: How Jurors Use Emotional Information to Decide Cases

A mother sobs gently in her deposition, describing the last moments of life that her teenage daughter experienced after a head-on car accident collision on a highway. She cries as she talks about the plans that her daughter had to go to medical school and how she will never hear her daughter practice the piano in the house again.

This is a nightmare for an attorney defending the damages portion of a case where liability has been established, right? Surely many cases have been settled for high dollar amounts based on such emotional testimony. However, when this video deposition testimony was played for a mock trial jury, what were the comments? "I felt that she was just turning on the waterworks to play to my emotions." "She knows that if the jury feels bad for her, we will want to award more money. I kind of resented that." "I feel bad for her but if it was my daughter, there is no amount of money that would be enough. I have a problem with parents asking for money for the death of a child."

Whether it be a personal injury action, death penalty or patent infringement case, the role of emotion in the courts is one of the least understood phenomena in the legal system. In fact, there are a number of myths (or at least misconceptions) about how emotions affect the trial process. A few of these myths include:

Myth #1: Sympathetic parties or witnesses automatically create an emotional connection with the jurors.

Myth #2: Emotional evidence will make jurors emotional.

Myth #3: Jurors can set aside their emotions.

Myth #4: Attorneys who are able to evoke strong emotions usually prevail.

Myth #5: Emotions in the courtroom are only expressed in basic, negative terms, e.g. sadness at a loss, anger at a contract breach, etc.

Myth #6: Intellectual property, complex commercial, and securities cases do not have emotional components.

Myth #7: Witnesses should never display their emotions unless they are the plaintiff or the victim.

Because the judicial system operates on the concept of rational, linear and intellectual decision-making, the courts have been reluctant and even hostile to the role of emotion. Whenever highly charged testimony is presented in trial, a judge or opposing counsel is quick to admonish the jury that they are prohibited from using "passion or prejudice" in rendering their verdict. In actuality, the role of emotion is impossible to separate out from a juror's (or judge's) decision process.

"People use their emotions to stabilize themselves in unfamiliar environments," claims noted psychologist Dr. Zoltan Gross. "Look at what jurors have to go through. The courtroom is intimidating. The attorneys are adversaries who fight with each other in open court. Some of the cases involve potentially tragic circumstances; some cases involve days, if not weeks of complex testimony. Jurors then have to arrive at an important verdict with a diverse group of strangers, a verdict that will significantly affect the lives of others. Given these circumstances, jurors are constantly in an emotional state."

Since emotions have both a subtle and strong way of affecting trial outcome, there are a number of ways that trial counsel can make sure he or she controls the emotional temperature of a case.

Understand the subtle and complex nature of emotions.

Most psychological theory considers emotions to be a combination of physical sensations, thoughts, and behaviors. Within this theoretical framework, boredom, confusion, and even doubt are emotions. In fact, they may be some of the primary emotions that jurors most commonly experience. Even when there is seemingly no "emotional" evidence or testimony, jurors are still experiencing emotions. "What the heck is going on in this case?" "Not another economist!" "Man, that lawyer is annoying!" are all thoughts that can prompt juror emotion. Clarity can provide relief to a jury. By understanding the rich complexity of emotional color that is prompted by evidence, witnesses and attorney presentations, it is easier to plan for the emotional impact of various aspects of the trial.

Plan the emotional story of the case.

Every case contains a story. Every story contains emotions. Yet, we are remarkably unsophisticated when it comes to presenting emotional evidence in court, presuming soap opera motivations of good and evil characters in the courtroom drama. Jurors watch nuanced psychological stories all the time. The 'Curious Case of Benjamin Button', 'Slumdog Millionaire' and even 'The Dark Knight' presented multifaceted characters.

Don't be afraid to present jurors with a full picture of your clients, even if it exposes some of their vulnerabilities. While care must be taken to avoid admissions that lead to liability or guilt, you can describe the struggles a client had with particular issues in a case. A plaintiff mother in a medical malpractice case involving the delivery of a child can embrace some of the challenges she faced in her per-natal care. A defendant insurer in a bad faith insurance case can describe the difficulty they had in evaluating a complex claim. Jurors already believe that criminal defendants are not model citizens. They believe that corporate defendants are not models of altruism. They understand that plaintiffs are not pure victims. The struggles of your clients convey credibility because jurors inherently understand that the world is comprised of human beings struggling to overcome adversity.

In looking at sequencing the story of a case, remember that anger is much easier for a juror to experience than sympathy. As a result, both plaintiffs and defendants usually try to focus on the misconduct of the opposing party rather than try and engender pity or good feelings about their client. They can do this by showing that the plaintiff or defendant had knowledge, experience or power to have made other choices than they did. For example, a plaintiff in an employment case points to practices of a company that violated their own policies. The defendant in the same case points to plaintiff's abrasive conduct that alienated co-workers, leading to their termination.

However, credibility can also be gained by creating a balance of positive and negative emotions. A paraplegic who shows the jury how they are struggling to use the tragic accident to move ahead in their life will often garner more sympathy than a plaintiff who mournfully describes their depression and inability to function. In testifying about their design process, a defendant in a patent case can show all of the good they hoped to achieve with their invention.

While the emotional story is important in any case, it

is more important in seemingly dry, technical cases like intellectual property, commercial disputes, or securities actions. These cases involve complex expert testimony, industry standards, regulations, laws, and usually a lot of acronyms. It is very easy for a juror to get lost in this tangle of jargon. However, since jurors are always searching for a story to explain the case, it is important to show jurors the human emotion behind these technical cases. Why did the seemingly sophisticated bank rely on their brokerage for these lower rated securities? In buying Company "X", what kind of company was the M&A firm trying to create by matching these two companies? Why were they so disappointed when they discovered the misrepresentations of value by the plaintiff? These story elements help to anthropomorphize a company culture as well as supply the human motivations that jurors require in every case, no matter how complex.

Communicate the emotional tone of the case.
Jurors don't like being overtly told how to feel about the evidence. They also react negatively to outsized emotion that does not match the evidence; rage, excessive weeping, or gimmicks like jumping on tables or the throwing of books. Jurors also have clear expectations about how they expect witnesses to look in trial, and they do look to the attorneys for subtle cues as to how to feel about the case. This information is conveyed through body language and vocal tone. Years ago, I was helping to work with a young man who was accused of vehicular manslaughter. Because he was looking at spending many years in prison, he would sit at counsel table, aggressively take notes, and stare at the witnesses. This could easily have been nonverbally mistaken as hostility by the jury. Since the young man was still living at home with his parents, I merely asked him how he would feel if he had suddenly lost his father in a tragic accident. His shoulders slumped and he stared at the floor. All of that aggressive energy had been changed into a more passive and sorrowful demeanor. This was much more in keeping with the expectations of the jury. Similarly, attorneys can telegraph doubt in a witness' testimony by communicating the true signals of doubt; upward inflection in the voice, a pause after the witness's response, a slight furrow of the brow, a tilt of the head. These behaviors should never be planned or manufactured but come out of the attorney's true emotional reactions to the testimony of the witness.

Talk about the emotions in the case.
Jurors are suspicious of strong emotions in testimony or in an attorney's presentation. Attorneys can also sidestep some of this suspicion in voir dire by stating clearly that they will be presenting emotional testimony as evidence of the loss and for no other purpose. Jurors who have immediate negative reaction to such testimony can be challenged for cause or struck with a peremptory challenge, depending on the nature of the evidence and the composition of the jury pool. Counsel can even state that they do not want the jurors to be unduly influenced by the emotion but to judge it fairly and rationally as evidence of the loss.

Understanding juror emotions.
Finally, a juror's life experiences and their individual personalities determine their emotional reaction to evidence and witnesses in the case. It is important to explore these potential emotional reactions as they will affect the way that jurors listen to cases. Despite admonitions and rehabilitation by the Court, would a juror who had recently lost their job at a failed bank really be able to "set aside" their feelings in a wrongful termination case with a claim for retaliation? Similarly, it is important to explore other life events that may create emotional turmoil for a juror such as recent medical problems, divorce from a spouse, or loss of a loved one.

In looking at your jury and your case, it would be important to evaluate the kind of emotional temperament that you want in a jury. Do you want an angry or tempestuous jury? Do you want a coldly calculating jury? Do you want a jury with a sense of humor, wry and skeptical? Do you want a jury that calmly works together or a jury that fights and divides? Each case story requires a slightly different jury sensibility. Knowing these preferences help you to make better choices in jury selection.

We experience a vast variety of emotions in our everyday lives, small and sublime as well as tumultuous and tragic. The more we can understand and use the rich complexity of human emotion, the better we can represent the stories of our clients.

I doubt it: New methods to overcome juror resistance

Every day, attorneys and their clients walk into courtrooms across the country counting on jurors to be fair, impartial and keep an open mind. Yet two fundamental juror conditions – skepticism and pseudo-expertise – make neutrality hard to achieve in the courtroom. Advocacy in today's media-saturated,

information-inundated, technologically-tuned society requires new thinking and new skills for the litigator.

Skepticism is a particularly pervasive problem. In Gallup's annual poll on the honesty and ethical standards of various professions, only 15 percent of the American public rated lawyers highly. This problem is compounded when lawyers are defending business leaders, who rated highly among only 14 percent of those polled.

Pseudo-expertise is an equally daunting problem for litigators. Google gets an estimated 200 million hits per day, while Wikipedia alone receives more than 10 million hits per day with an average of five page views. With Americans sitting at their computers for more than four hours a day, Google and Wikipedia are changing the way jurors relate to information.

Any visitor to a website can read the content with accompanying graphics and click through to numerous other pages and sites with related articles. This means that all initial information is seen as a gateway to richer, more in-depth and more relevant facts.

Jurors are instructed to only consider evidence from the witness stand and law from the judge. But when we are missing information in life, we use our laptop, Bluetooth or I- Phones to give us instantaneous answers. This makes us pseudo-experts on a multitude of subjects at the tap of a keyboard or touch of a keypad. (This does not even address the legal and forensic "expertise" jurors gain from watching CSI and Law & Order.) As trust and reliance in political leadership, the news media and traditional institutions shrinks, jurors become mistrustful of source material, desiring to both investigate and judge evidence for themselves.

Resistance persuasion

According to Dr. Eric Knowles, a Professor of Psychology at the University of Arkansas, there are four types of resistance to persuasion – and each of them applies to jurors: Reactance: The initial "I don't like it" reaction that a juror may have to the case.

Distrust: Juror suspicion of the motives of the witness, party or attorney. Scrutiny: The process by which jurors pick apart evidence and arguments. Inertia: The failure of lawyers to move jurors.

A variety of factors during trial can contribute to this resistance. First is selling. This includes anything that jurors perceive as a commercial for your client: the "good company" story or the charitable contributions your client has made to the community both raise juror suspicions.

Emotion can also cause suspicion among jurors. If they feel you are manufacturing emotion to tug at their heartstrings, they become defensive.

Cleverness and gimmickry can also work against you. That finely crafted analogy or metaphor is turned into opposing counsel's theme. A prop or staged demonstration backfires, making the other side's case.

An authoritarian manner is likely to grate on today's jurors. Many will grind their teeth every time you tell them that they must follow the law or that they must accept the recognized standard of care.

Many jurors instinctively resist anyone purporting to be an expert. Expertise is a close cousin to arrogance. If jurors perceive that an expert is asking them to believe his or her opinion merely because he or she is an expert, they will resist. The two-hour resume may be seen as overbearing. It can also create an unreasonably high standard for the expert, causing even small inconsistencies brought out on cross-examination to quickly dilute the expert's credibility.

Finally, confusion begets boredom and boredom begets suspicion. Since the jury has not lived with a case for four years, pored over thousands of documents and interviewed dozens of witnesses, they do not know where the case is going or what to listen for. When they get lost, they get resistant, asking, "Why are so many high-priced attorneys and experts not making this clear to me?"

A box of tools

To overcome the twin obstacles of skepticism and pseudo-expertise, we need to shift our focus in presenting our cases. We need to ask ourselves where jurors are likely to doubt our evidence or testimony and construct persuasive strategies to address these weaknesses.

Instead of focusing on what will convince the jury that you are right (an attitude that will definitely make them resistant), view your job as providing the jury with the tools to best decide the case. Here are a few of those tools. Please note that all of these strategies should be tested in jury research to make sure they fit your case.

Give jurors the power to decide the case.

It may even be a good idea to say this directly in your opening statement. Tell the jury, "You have the power to decide this case." By communicating your confidence in them to decide, you are communicating confidence in your case.

Put yourself on the jury.
Constantly ask yourself, "If I were a juror in this case, what would I need?" If jurors get the sense that you are introducing evidence that is answering their questions, they will start to see you more as a teacher and less as an advocate.

Being a better teacher is being a better advocate.
Good teachers don't just tell students what they need to know. They lead students to discover the truth for themselves, piece by piece, letting them put together the puzzle.

Put the jurors in the shoes of your witnesses.
Trials are re-creations. Could a product have been designed better? What really happened the night the decedent died? By walking jurors through the observations and thought processes of the witness, you invite them to see the case from your point of view.

Make your jurors the experts.
I have seen excellent attorneys state outright to a jury, "Don't trust me, trust the evidence. Don't believe me, believe the evidence. You follow the evidence and see where it leads."

Layer your expert testimony the way you would a web search. Think of different topics as different pages in a search. Let your experts "click through" to another topic as one issue leads them to another question that needs to be researched. Make sure you highlight these new topics so the jurors can "click through" with you.

Diffuse juror reaction to difficult personalities.
Jurors will always ascribe personality and motivation to the different parties in the case. If you have a combative witness, it is sometimes better to say to the jury in opening statement or closing argument, "Witness X has a strong personality and some very strong opinions. But listen to what she has to say and not just how she says it."

Avoid overt emotional appeals, such as the plaintiff sobbing on the stand or tales of the sad struggles of the defendant. Sequencing and highlighting the right details of the story will convey its own emotional punch.

Admit innocuous vulnerabilities to the jury.
Jurors are always suspicious of parties who seem too perfect. While lawyers must take care not to concede liability, disclosing small faults controls where jurors are likely to find blame.

Don't be afraid to acknowledge that jurors may be skeptical about aspects of your case. Your candor in addressing their suspicions again conveys confidence and tells jurors that you will do your best to help address their questions and concerns rather than trying to force-feed them your verdict.

We think we have control over how the jury decides our cases – that jurors will bend to the instructive will of the court and the rhetorical eloquence of counsel. But as sophisticated consumers in the information age, jurors are more active as fact finders and more critical of the facts they are given as well as the messengers who deliver those facts. By understanding juror resistance, we understand what they need to get to the right verdict. And that is persuasion in today's courtroom.

About Richard Gabriel
Richard Gabriel is the President of Decision Analysis, Inc. a national trial consulting firm with offices in Los Angeles and Chicago. Since 1985, Mr. Gabriel has been a leader in the field of jury research, jury selection and litigation communication with experience in nearly a thousand trials in both the civil and criminal arenas across the country. In a recent "48 Hours" show, CBS News said Mr. Gabriel is "by reputation, one of the best trial consultants in the country." Mr. Gabriel has assisted counsel in the Casey Anthony, OJ Simpson, Enron, Whitewater, Phil Spector, and Heidi Fleiss trials as well as the recent Kwame Kilpatrick public corruption case and numerous other high profile civil and criminal matters. Three cases he participated in have resulted in United States Supreme Court decisions.

Mr. Gabriel is the co-author of Jury Selection: Strategy and Science, printed by Thompson-West Publications and now in its Third Edition as well as contributing to Bennett's Guide to Jury Selection and Trial Dynamics, Mr. Gabriel is a regular columnist for Lawyers USA on trial strategy and has authored numerous articles on litigation communication, social science, and litigation research for numerous State Bar Journals and other legal publications including the American Bar Association CLE Journal, the Daily Journal, and the Notre Dame and Loyola Law Reviews.

Mr. Gabriel is the President of the American Society of Trial Consultants Foundation, which is currently studying and developing national initiatives on litigation efficiency, jury comprehension, satisfaction, and participation in trials. He recently completed work with IAALS, ABOTA, and the NCSC on national recommendations for implementing Expedited, Summary, and Short Jury Trials. Mr. Gabriel is the innovator who recently designed and developed Jury Mediation: a resource for litigators and their clients to use mock jurors to resolve their cases in the mediation process. He has been a guest lecturer of at numerous law schools and has participated in judicial education programs as well as more than a hundred training CLE programs on witness preparation, jury and judicial decision-making and litigation persuasion.

He has appeared regularly on ABC, NBC, CBS, CNN, Fox, MSNBC, CNBC, and NPR as a commentator on high profile trials.

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Scott O'Connell is deputy chair of Nixon Peabody's Litigation department as well as the practice group leader of the Commercial Litigation team and the Class Action & Aggregate Litigation team. He represents integrated financial service companies—including banks, securities firms, insurance companies, and regulated subsidiaries of nonfinancial parents—in federal and state court litigation and before regulatory agencies.

Scott has extensive experience defending financial institutions in class actions concerning lender liability, breach of contract, breach of fiduciary duty, breach of good faith, unfair and deceptive trade practices, fraud, misrepresentation, fair debt collection practices, and civil RICO. He has particular trial experience litigating complex financial relationships between parties, unfair and deceptive trade practices claims, corporate control issues including corporate freeze-out, lender liability, and civil RICO.

While at law school, Scott served as an editor of the Cornell Law Review and as chancellor of the Moot Court Board. He was also an instructor in the Cornell undergraduate government course, "Law: Its Nature and Function."

Affiliations

Scott is currently a member of the Federal Court Advisory Committee for the District of New Hampshire. In January 2003, he was selected by New Hampshire state-wide paper, The Union Leader—as one of the state's "Forty under 40." Scott is a former vice chairman of the Farnum Center, a statewide alcohol and drug in-patient recovery program; former member of the Board of Directors of the New Hampshire Food Bank (a program of Catholic Charities); past president of the New Hampshire Task Force to Prevent Child Abuse; former captain, Heritage United Way Community Investment Process; founding director of the St. Lawrence University Alumni Lawyers Association; and New Hampshire coordinator of the Cornell Law School Alumni Association. Mr. O'Connell is a graduate of Leadership New Hampshire.

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