JURORS: DO YOU REALLY KNOW WHAT CONVINCES THEM?

CLE Credit: 1.0
Wednesday, June 18, 2014
11:50 a.m. - 12:50 p.m.
Ballrooms D-E
Northern Kentucky Convention Center
Covington, Kentucky
A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.
TABLE OF CONTENTS

The Presenters........................................................................................................................................... i

Jurors: Do You Really Know What Convinces Them? ................................................................. 1

A Note from Juror #5......................................................................................................................... 5

Connecting with the Jury ................................................................................................................ 7

Jurors Judge Lawyers ...................................................................................................................... 11

What Jurors Want You to Know .................................................................................................. 19

How to Connect with Jurors ........................................................................................................ 27

Jurors’ Perception of Expert Bias .................................................................................................. 35
THE PRESENTERS

E. André Busald
Busald Funk Zevely, PSC
226 Main Street
Post Office Box 6910
Florence, Kentucky  41022-6910
(859) 371-3600
andybusald@bfzlaw.com

E. ANDRÉ BUSALD is an attorney with Busald Funk Zevely, PSC in Florence, where he practices primarily in the area of automobile accident and injury litigation. Mr. Busald received his B.A. from Holy Cross College and his J.D. from the University of Kentucky College of Law. He has served as a Boone Circuit Court Special Trial Judge, Kentucky Supreme Court Special Justice and Federal District Court Special Justice. Mr. Busald is a member of the Northern Kentucky, Cincinnati, Kentucky, and Ohio Bar Associations, as well as the Kentucky Justice Association, Ohio Association for Justice, American Association for Justice, Southern Trial Lawyers Association, and American Jury Trial Foundation. He is a past President of the Kentucky Justice Association, Northern Kentucky Bar Association, and American Inn of Court. Mr. Busald is the recipient of the Kentucky Justice Association's 1999 Peter Perlman Trial Lawyer of the Year Award and the Northern Kentucky Bar Association's 2001 Lifetime Achievement Award and 2005 Distinguished Lawyer Award.

Judge Anthony Frohlich
Boone Circuit Court
6025 Rogers Lane, Suite 444
Burlington, Kentucky 41005
(859) 334-3270
anthonyfrohlich@kycourts.net

JUDGE ANTHONY W. FROHLICH is the Chief Circuit Judge for the 54th Judicial Circuit, Commonwealth of Kentucky. He has served as a Circuit Judge since 2004. Judge Frohlich previously served as a prosecutor of felony cases (1980-1989) and as Master Commissioner (1989-2004). He is a graduate of Northern Kentucky University and received his J.D. from Salmon P. Chase College of Law. He received his diploma from the National Judicial College in general jurisdiction in 2005. Judge Frohlich has held many civic and legal positions over the years. He has served as the President of the Board of Governors for Salmon P. Chase College of Law, House of Delegates for the Kentucky Bar Association, Board of Directors of the Boone County Bar Association, and numerous others. Judge Frohlich is an author and frequent lecturer of law and history.
STEVEN C. MARTIN graduated from Northern Kentucky University in 1976 with a degree in political science and philosophy; he received his J.D. from Salmon P. Chase College of Law in 1979, after which he began practicing law in Kentucky, focusing primarily on criminal defense and smaller civil litigation matters. In 1982, Mr. Martin was offered a position with the Kenton County Commonwealth’s Attorney’s office as an Assistant Commonwealth’s Attorney. In 1987, he rejoined private practice, continuing criminal representation and developing his more advanced civil trial practice. As a member of Ziegler & Schneider’s Business & Corporate Practice Group, Mr. Martin handles all types of litigation matters, including personal injury, medical malpractice, products liability, and insurance coverage.

THERESA M. MOHAN is an associate attorney with the law firm of Wallace Boggs, PLLC. Ms. Mohan received her B.A. from Michigan State University and her J.D., with honors, from Northern Kentucky University’s Salmon P. Chase College of Law. She is admitted to practice law in the state of Ohio and the Commonwealth of Kentucky. Ms. Mohan’s practice includes bankruptcy and false claim act cases. Her labor and employment practice includes representing employees and employers in unemployment hearings and appeals. In addition to representing people in whistleblower, harassment, discrimination, class action and civil rights matters, Ms. Mohan also represents children and families in a variety of family court cases. She is certified to act as a Guardian ad Litem in Kentucky and Ohio courts. In addition to being an alumni member of the local Junior Chamber of Commerce, she is a graduate of Leadership Northern Kentucky and is involved in Chamber of Commerce committees in the Northern Kentucky Region. She is currently involved with several non-profit organizations and is an active member of several professional associations including the Northern Kentucky, Cincinnati and Kentucky Bar Associations and the National Employment Lawyers Association. Ms. Mohan is a Barrister with the Salmon P. Chase Inn of Court and serves on the executive board.
DAVID M. SPAULDING graduated from Marshall University with a Bachelor of Business degree and a minor in Economics, and received his J.D. from Northern Kentucky University’s Salmon P. Chase College of Law. While at Turner, Mr. Spaulding has drafted, negotiated, and executed over one billion dollars in contracts. Prior to his career at Turner, he was a solo practitioner focused on litigation. In August of 2011, Mr. Spaulding was appointed by the Judge Executive of Kenton County as the Commissioner of the NKY Water District and was elected as Vice Chairman in January 2014; he served two previous terms as Treasurer. He also serves in the following capacity: President Elect of the Board of Governors for Chase College of Law, Chairman of the Transportation and Infrastructure Committee, Board of Trustees for the Chase College Foundation and several others.
I. INTRODUCTION

The humorous video skits you will observe during this presentation are meant to emphasize things that jurors see both inside and outside the courtroom which have a profound influence upon them. These skits were prepared based on input from attorneys who have experienced (either favorably or unfavorably) what effect the depicted influence has had on juries.

As trial lawyers we become obsessed with the facts and law of our case and often overlook how we [and our client(s)] appear to jurors, and potential jurors who are in the courthouse, hallways, restrooms and parking lots, and who will be making value judgments about us based on that appearance. Remember the general rule "Perception is reality." Regardless of the facts of our case and how we are supported by the law the Judge gives them in the Final Instructions, many jurors will have formed lasting impressions that will influence their judgment on credibility and who wins or loses even before they hear the very first words in the courtroom!

As you view the video vignettes, ask yourself how many times similar situations have presented themselves in cases that you've tried; and also ask yourself what you can do in the future to avoid these things from occurring. One suggestion is to review the points made in this presentation with your client(s) at least once (and probably a number of times) before their day in court. A second suggestion is to actually take your client to the courtroom where they are to appear in order to familiarize them with the surroundings and again reviewing some of these points with them at the actual site where they could ultimately occur. There is no substitute for familiarity with your surroundings. Even though you may have been in this particular courtroom dozens or even hundreds of times; it is probably the first time your client(s) will have ever been there. Judge Frohlich also recommends that you [and your client(s)] attend Juror Orientation for each Judge you have a case before (because each Judge does it differently) at the beginning of each jury term. It is during this presentation BY THE JUDGE, that all potential jurors learn FROM THE JUDGE what their role is, what their duty is and ultimately what is expected of them. It is interesting how much more favorably your Voir Dire, Opening and Summation is accepted by the jury when they hear, from you, language similar to what they heard during Jury Orientation FROM THE JUDGE!

Set forth below are a few ideas and observations I have borrowed from other lawyers over the years. These "Rules of the Road," so to speak, should be followed in every case whether it is tried before a jury or Judge.
II. WHAT CONVINCES JURORS (JUDGES)

A. Verbal vs. Non-Verbal Communications

1. Verbal.
   a. Articulation.
   b. Sentence structure.
   c. Cadence/modulations (series of threes or fours).
   d. Delivery.
   e. Short, clear, non-technical and simple questions.
   f. Brevity.

2. Non-verbal.
   a. Appearance.
   b. Impression.
   c. Likeability.

B. What Wins Their Approval?

1. Preparation – knowledge of the law and mastery of the facts.
2. Humility.
3. Honesty.
5. Simplicity.
6. Brevity (goal is twenty minutes per witness).
7. Respect.
8. Witnesses, jury, judge and opponent.
10. Importance/Dignity of the case and the juror's role in it.
C. What Gets Their Disapproval?

1. Repeating the questions or information (maybe they get it even though we are afraid they don't).

2. Wasting their time (bench conferences, delays in witness appearances).


4. Exaggeration.

5. Not having exhibits ready.

6. Not having video/PowerPoint, etc. ready.

7. Personal attacks (witnesses or other lawyers).

8. Talking down (arrogance).
   a. To jurors.
   b. To witnesses.


10. Too much video – They are used to broadcast TV quality; not what we give them.

11. Too many bench conferences.

12. Too many objections (what are you hiding) – Use motions in limine instead.

D. What They See but You Overlook

1. Parking lot/elevator/restroom.

2. Your client while you are at a bench conference.

3. Poor background and surrounding in video depositions.

4. Annoying habits (yours/your witnesses).

5. Most jurors’ expectations are based on what they see on TV.

III. ACKNOWLEDGEMENTS

This presenter wishes to acknowledge the following authors and their articles from which this presentation was partially prepared:


E. "How to Connect with Jurors," by Amy Singer, *Trial Magazine*, April, 1999

Your Honor

I am tired of spending day after day waiting my time listening to this bullcrap. This is cruel and unusual punishment. The plaintiff is an idiot. He has no case. Why are we here? I think my cat could better answer these questions... and he wouldn't keep asking to see a document. I've been patient. I've sat in these chairs for 7 days now. If I believed for a second this was going to end on Thursday, I might not go crazy. This is going to last for another 4 weeks. I cannot take this. I hate these lawyers and prayed one would die so the case would end, sitting...

I shouldn't be on this jury. I want to die. I don't want to be thanked for my patience. I want to die! Well, not die for real but that is how I feel sitting here. I am the judge, you've said that over and over. Well, I am not fair and balanced. I hate the plaintiff. His ignorance is driving me crazy. I know I'm writing this in vain but I have to do something---for my sanity. These jury chairs should come with a straight jacket. An entire day today and we are still on the same witness. The defense hasn't even started yet and we have 3 days left. 3 days my ass. Not that the defense needs a turn considering the plaintiff and his lawyer (who looks like the penguin) have no case!! Thanks for letting me get this off my chest. Please keep the disorders nearby. I may need them.

Juror #5
Every trial attorney worth his or her salt aspires to be that top-notch attorney that the plaintiff bar envies, and the defense bar respects. You know the type ... the one who regularly gets his name in this magazine, reporting his biggest verdict to date; the one that judges sometime refer cases to; the one that reporters quote as "sources" in big cases; the one whose name invokes fear into the corporate boardrooms across the country. In my zeal to become that mythical person, I believe I read every trial practice book and article I could get my hands on, as I was convinced that my work ethic would carry the day for me, as it had since my law school days. Of course, what I have learned in the past fifteen years of trial work, as I am sure most of you have figured out by now, is that instinct and the ability to read and "connect" with the jury is the most sound and successful way to victory at trial.

Oh, I know what you are saying to yourself ... that first you have to have a strong liability case, or the damages have to be significant; that the discovery has to be concise and thorough; or that you have to have a favorable jurisdiction in which to try your case. All this is true, but any successes I have had (and even some of the failures) are directly attributable to my ability to connect (or not connect) with the jury. I am equally confident that my experience has taught me that no book, treatise, manual, or magazine article can teach one how to "connect" with the jury; it must be done by trial and error. What can be learned in this limited space are some basic principles that have helped me over time connect with the jury. Although these rules are not an iron-clad formula for success, they have helped me over time during the actual trial itself. For you golfers out there, these rules can be considered "swing throughs" for the trial process.

WHITFIELD'S RULES TO JURY CONNECTION

I. HUMILITY, HUMILITY, HUMILITY

Do I even have to say this? You bet I do, as way too many attorneys during trial work today get carried away with what they perceive as their superior powers of persuasion. Perhaps early victories in the litigation wars breed such arrogance, but the truly great trial attorneys, both plaintiff's counsel and defense counsel, that I have worked with understand the premise that the jury, for the most part, is not real interested in being at your trial in the first place, and is surely not interested in listening to an advocate with an attitude. Once arrogance of any kind is detected by the jury, you will be turned off in a heartbeat.

Make no mistake that arrogance can take many forms. The most blatant example is talking over the heads of the jury; using words that are eloquent to you and to your partners and associates, but that the jury does not understand. Speak simply, making sure that the jury understands where you are and how you got there. Do not belittle lay witnesses at any cost; a majority of the time this will hurt you. If you have to initiate a strong cross examination, get your elements into the record without that trace of sarcasm that invariably will slip into your voice. Humility and politeness will by far score more points than being mean spirited.
Never get provoked into a fight with a witness; use grace and good manners to quickly obtain the information you need for your closing. Remember that it is easier to stick the knife into the adverse witness with your arm around him than at arm's length.

My experience with adverse experts, on the other hand, is somewhat a different matter. Still use humility to elicit the information you need, but you may need to get somewhat rough. Exit interviews I have done with jurors after a case have, for the most part, indicated that juries almost expect a confrontation of some sort with a hired gun.

Perhaps my small town upbringing and particular trial style demands that I utilize this humility approach. What I do know, however, is that it WORKS. The point is to be yourself with your own style, and attempt to be at ease, exhibiting a humble attitude. As I stated before, the same amount of information can be elicited during the trial of the case through humility in a much easier manner than otherwise. Make this your number one characteristic throughout the entire trial.

II. CREDIBILITY

It goes without saying that the overall goal in practicing a case in front of a jury is to create the impression of credibility. The studies that I have examined indicate that a jury is more willing to listen to your case if they deem that you are credible from the start. Just how to become credible with the jury is the whole point of the process, but there are numerous techniques you can utilize to become credible with the jury.

From the plaintiff's work that I do, which is a substantial portion of my practice, I never overstate my case. As we all know, this is sometimes more difficult with particular clients, but the clients must understand the true value of the case from the early stages of it, so that at trial their expectations will not be out of line. Mediation conferences and mock juries are very helpful in educating the client in regard to the true value of the case. The importance at trial is that juries have a sixth sense of determining when the lawyer is out of bounds in regard to the strengths and weaknesses of the case, not only in terms of liability, but especially in damages. I have tried cases where I felt particularly strong in the liability phase at closing, in that eye contact with jurors was made and even some of the jurors nodded their heads; but when I got to the damage phase, I noticed some of them were rolling their eyes, which of course struck fear in my heart. After the trial, when the damages were not given like I expected, I was able to realize that I was overstating my case; and quite frankly, the jury saw through my effort to "high ball" them, hoping they would come down to the true value of the case. This is a poor tactic, in that it insults the juries' intelligence to award damages consistent with the proof. Argue your case to the best of your ability and admit your weaknesses if you have to; but for whatever reason, do not stretch the truth or overestimate it, as a jury can see through that as clear as day.

Make sure your witnesses are fully apprised of the facts and of the questions you expect to ask them. I do not know how many lawyers I have talked to that fail to properly prepare their witnesses for trial. I have even talked with some that have indicated that their witnesses did not know for sure exactly what type of
questions were going to be asked before they got up on the stand. As we all
know, our ethical responsibility is not to coach the witness such that he or she
would be espousing testimony that is not truthful. On the other hand, witnesses
need to be comfortable, and nervousness is a trait that is easily exploited by the
other side and is picked up by the jury. Your witnesses must come across as
telling the truth, and adequate preparation prior to their appearance can at least
ensure that they will not be nervous, which is the first true sign of lying.

III. SIMPLICITY

One of the mistakes I made when I first started trying cases was the thought that
the jury will understand the facts and nuances of my case better than they
actually did. The rule of thumb needs to be to assume that the jury has no
understanding or care, for that matter, of the facts of your case, and they must be
educated in a very simplistic way. I have found that the use of large, bright,
simplistic exhibits does more for my ability to educate the jury than anything that I
can tell them. They remember exhibits, and in this television generation, are
almost expecting them. Use those exhibits frequently in your testimony so that
the jury can obtain a good grasp as to where you are going with your case.

I additionally like to use computer generated "chalkboards" that can be used at
opening and closing, which reinforce the points of the case. Microsoft makes an
excellent program to use for this purpose. I have found this simplifies the
elements you are hoping to prove.

Creating a theme is also essential in keeping the facts simple. If the jury does
not have a theme from which to rely upon, they may understand the facts, but
certainly will not understand why you are even bringing a case like this. Every
good trial lawyer knows to create a theme with the case, and unless things take
an adverse turn, stick to it. This will keep the trial and facts simple for the jury,
which will do nothing but help you.

IV. WITNESS TESTIMONY

It took me some time, and numerous trials, to understand that the witnesses who
testify at trial are utilized to prove certain essential elements of the case, and
nothing more. Jury sympathies may attach to particular witnesses, and this
sympathy is an important part of the plaintiff's case, but too many times attorneys
"overtax their invitation" with certain witnesses, introducing testimony that is not
needed nor relevant. Make your points with the witnesses, and move on. The
closing is where you can explain why a certain witness was needed, and how the
testimony fits into the theme. The jury will appreciate your brevity.

V. HUMOR

I am sure that most of us have our own ideas about whether or not humor should
be utilized within a trial, but I have found that well placed jokes throughout the
trial go a long way in "connecting" with the jury. Like it or not, we must admit to
ourselves that juries are members of the community at large who, for the most
part, do not have a very high opinion of the legal system or of lawyers in general.
Many individuals see us as cold-blooded killers, whose main goal is to obtain
money without regard to justice or the concept of doing the right thing. Humor tends to make us more normal, and I have used jokes, at voir dire and at opening that have gone a long way into letting me walk into juries' lives for the amount of time that I will spend with them. Be careful here though, as you do not want to create a cavalier attitude by making light of the situation. Self-deprecating humor helps to break down the barriers with juries, and assists the jury into helping them. Consider it when you present your case.

VI. APPEARANCES

Like it or not, we are in an age where appearance means a lot. I know that the Lord has not blessed me with superior looks, but at least blessed me with the fact that I know I need help in that regard, and that I will try to at least dress appropriately. I have seen attorneys come into court wearing a suit and Air Jordan's on. This does nothing but reduce your credibility, and it creates the impression that you are not a successful attorney. Try to back away from the dark “power suit” image so popular with many attorneys and try a more subtle color scheme in your dress. Good appearance and tasteful dress goes a long way toward connecting with the jury.

VII. PORTRAY THE IMPORTANCE OF YOUR CASE

The case of demonstrative evidence in the form of enlarged exhibits helps to portray your theme, but also creates the message that your case is important and must be considered. Stay away from the video depositions if at all possible, especially with your experts, as this again indicates to the jury that your case must be significant due to the live testimony. Be cognizant of the fact that the jury watches your subtle gestures with your client. Make sure your contact with your client portrays to the jury that this is the CLIENT'S case, not yours, and that this is the only day that the client has to present his or her case. Place the emphasis on the client and how important this trial is.

VIII. EXPLAIN THE INSTRUCTIONS TO THE JURY

Instructions tend in many cases to be confusing and burdensome to the jury. More often than not, they do not understand them, and may be embarrassed by that fact. They may understand your theme and the facts, but simply do not know how to award for your client under the instructions. Tell them at closing what the instructions mean, and the effect of voting in a particular way. Be careful not to invade their province by "demanding" to vote a particular way. Simply tell them how to vote in your client's favor and give them directions, preferably in large exhibit form, of exactly how to do it. They will appreciate your assistance in this regard.

I know these rules are extremely elementary and may seem all too obvious, but it is my belief that to stray too far from them is a prescription for failure. I hope they can be of some help.
"You know nothing for sure . . . except the fact that you know nothing for sure."
— John Fitzgerald Kennedy

Baseball players have superstitions. Moviegoers are fascinated by illusions. Lawyers harbor myths. One of the greatest of all lawyer myths is that they instinctively "know" what impresses juries. In fact, most of us can only guess about such things. To help fill this void in real knowledge, the author recently interviewed a panel of jurors in Kenton County, Kentucky.

The jury panel interviewed served the first three months of this year. It sat on a variety of cases, both criminal (such as murder, rape, possession of drugs and one in which a man's dog bit a policeman) and civil (such as medical malpractice, auto accident, and a case against a motel for failing to protect a woman from sexual assault).

The Process

After the end of the jury panel's term, one judge sent a letter to them informing them that they would be contacted to see whether they would volunteer to participate in interview sessions about their jury service. Twenty-one jurors were eventually interviewed, all in groups, ranging in number from as few as two to as many as seven.

The interviews were designed to determine how the jurors viewed their service, particularly how they viewed the styles of the lawyers and the lawyers' interaction with others in the courtroom. They were told their comments would be used to prepare this article. They were assured the author would be the only one who would have access to their actual remarks and that they would not be identified in the article itself. The jurors impressed the author as remarkably candid in their comments.

The results of these interviews are not considered statistically significant, but for number fans, a little information is provided about the jurors. The jury pool as a whole had marginally more men than women, an average age of 43.1 years and an average educational level of 13.2 years. The jurors who were actually interviewed were representative of the pool as a whole, with the exception of there being marginally more women than men interviewed.

The author asked the jurors about a number of aspects of their jury service, but not about their deliberations. Some jurors, however, volunteered information about how they or their fellow jurors handled things in deliberation. Some of these comments are included herein.

The jurors' comments can be summarized into the following categories.

* The author acknowledges the assistance of Campbell Circuit Judge Gregory Bartlett in providing the idea for this article and for writing an introductory letter to the jurors. He also acknowledges the assistance of Candace Smith and her staff for scheduling the interview sessions with the jurors and providing a place for the author to meet with them.
Preparation

The jurors commented most about the lawyers' preparation. They said that all but a few of the lawyers who appeared in front of them were well prepared. They were impressed and a little surprised by that. The author was interested in the number of things they saw as indicators of ill-preparation.

One attorney was termed ill-prepared because "he kept flipping through his legal pad" looking for notes and questions as he cross-examined witnesses. Another lawyer was deemed ill-prepared because he entered the courtroom with "only a legal pad" and nothing else. Another was seen as well-prepared when he entered the courtroom with a "large binder full of papers," even though he seldom referred to it. Yet another was seen as unprepared because he stopped many of his questions in the middle, then went on to other questions without finishing the preceding ones.

The Lawyers' Courtesy

The jurors noticed how the lawyers treated each other, the judge, the witnesses and the jurors. They accepted it as "part of the job" when lawyers vigorously cross-examined witnesses, made objections and argued their cases. The exceptions to this acceptance were some of the jurors in a sexual abuse case, where a lawyer attacked the character of the plaintiff and that of her family. They very much resented those attacks, since they felt her character and those of her family members had nothing to do with whether she was sexually assaulted. They also resented it when they observed lawyers do such things as use sarcasm or roll their eyes at rulings made by the judge.

The jurors were not offended by lawyers who strongly advocated their cases. In fact, many were impressed by the lawyers they saw as really caring about their clients. Their strong advocacy was a part of that. But, when the jurors perceived the lawyers as not caring about their clients, they felt that histrionics and appeals to emotionalism were not persuasive to them. But, they were not offended by it because they felt the lawyers "were only doing their jobs."

They did not like it when lawyers made personal attacks on other lawyers. Two jurors who served on the same case commented, for instance, about statements one lawyer made about the other's style of dress and his lifestyle. They felt those comments were offensive and believed it worked against him.

Another juror was offended when a lawyer, in closing, walked up to the jury box and commented he would not treat them as some lawyers do who feel they have to kick the jury box to get their attention. To emphasize his point, he then kicked the jury box, startling and offending the juror.

A couple of jurors were highly offended by what they saw as the arrogance of one male lawyer. Though they talked about it generally, they gave as their example of his arrogance that he usually took a coffee cup with him to the podium and left it there when he finished questioning the witness, leaving it to his female co-counsel to retrieve it.
The Lawyers' Styles of Presentation

Several jurors commented that some of the lawyers who appeared in their cases needed to work on fundamental communication skills. They mentioned everything from several lawyers needing to work on their basic speaking skills, to others who needed to learn how to phrase simple questions. A couple of jurors noted that some of the lawyers who appeared in their cases needed to establish a bond of trust with the jury before they asked the jury to move in favor of their clients. They felt that, when lawyers asked the jurors to see things the lawyers' way without first establishing that trust, they were ineffective. The jurors felt that those lawyers were merely acting, and they were not persuaded by it. The jurors were not able to say what changes lawyers could make to earn their trust.

The jurors were aware that, in some of their cases, the witnesses for one side or the other had to be lying to them. They saw part of their job as sorting out which side was lying. When they felt they could trust the lawyers, they were helped in making that decision.

Several jurors commented about one criminal trial in which a lawyer put her arms around her client and cried while arguing during the sentencing phase of a case. The jurors were split on how they felt about it. Two jurors were reduced to tears themselves by the passion of the argument. One of those jurors, though, felt it was unfair for the attorney to do that. The jurors commented that their job was "hard enough" without having also to deal with that emotionalism. Other jurors felt the crying was an act. Interestingly, however, they voted in favor of the sentence recommended by the crying attorney. A couple of jurors commented that, when the lawyer cried, there was no way they could then vote for the harsher sentence.

The jurors did not like it when the lawyers took too much time selecting a jury, or when they argued their case in *voir dire*. They found the arguments to be offensive because it was contrary to the admonitions of the judge and was done to persuade them at a time they knew they were not supposed to be persuaded.

How the Lawyers Treated the Jury

Most of the jurors felt the lawyers treated them well. A number were particularly impressed by the lawyers who took the time in their closing arguments to notice and comment on their attentiveness throughout the trial. The jurors took their jobs seriously. They felt they had been working hard and were about to work hard during the deliberations and they appreciated it when their efforts were noticed. (They also noticed when the judge thanked them after they announced their decisions.)

The biggest complaint they voiced, and a large majority of them did, was that they felt the lawyers talked down to them. Most of them said they got the information the lawyers wanted them to get the first time and did not need the lawyers to keep asking the same questions, to keep showing them the same exhibits and to keep repeating the same statements in closing. On the other hand, they did appreciate lawyers who got expert witnesses to use "real language" and not professional jargon when they testified.

Another issue which bothered several jurors was being contacted after their verdict by attorneys with questions about how they could improve in future trials. They felt they
had an important duty as jurors, but that once they discharged that duty by doing their best in court and in deliberations, they had a right to their privacy. Other jurors, however, were impressed with the initiative shown by those lawyers who approached them afterward and they appreciated being asked.

Two jurors told of chance meetings with lawyers after trials. One was in a courthouse elevator and the other in the courthouse parking lot. In both cases, the attorneys were ones whose clients had not prevailed at trial. Both jurors tried to make eye contact with and smile at the attorney. Both lawyers looked away, one with what the juror described as "a look of contempt." While there may have been legitimate reasons why the lawyers behaved as the jurors perceived they did (they may, for instance, have had another trial coming up before the same panel and did not want to be seen as trying to improperly curry favor), the jurors were offended.

Jurors from one trial were incensed when, after the trial was concluded, they read a story in the newspaper the next day where one of the attorneys criticized their decision to the press. They believed they had done the best job they could do with the information provided to them and that it was improper for the losing lawyer to publicly question their decision. If anything, they believed the lawyer should have done a better job of giving them information. (The author suggests this lawyer never try a case in future years in which any of these people is a juror.)

Jurors generally did not like questions being asked directly of them during *voir dire*, but accepted it as part of the process. One juror, however, had an unusual job title. Nothing in the title itself makes the author believe the details of his employment would be an innate conflict in the case the juror was to decide. Yet, one of the lawyers, apparently out of some level of personal interest, inquired of the juror about it. The juror found those questions unnecessary and therefore unreasonably offensive.

The jurors who commented on it said they felt that polling the jury was not appropriate. They believed they had already made their decision and that having to announce it again was an attack on their integrity. If they must be polled, they strongly felt they should not be polled by name, but by juror number or in some other way. They had concerns for their personal safety when the parties and the parties’ families and friends (especially in criminal cases) knew their names.

**How the Lawyers Treated the Judges, the Witnesses and Each Other**

The jurors agreed that the lawyers consistently treated the judges, each other and the witnesses with courtesy and respect. They were impressed with that. Some jurors expected more bitter exchanges, especially between the lawyers. They were impressed that objections and other disputes were handled professionally.

**How the Jurors Judged the Judges**

The jurors felt, without exception, that the judges were well-prepared and maintained control of the courtroom. They said the judges treated the jurors well. While they had some complaints about “wasted time” (especially for bench conferences and the delays in getting started in the morning), they accepted that as part of the process.
They appreciated it when the judges gave them breaks, inquired about their conditions and did such simple things as opening the door to the courtroom during an after-hours deliberation rather than just leaving the door shut. Several jurors were concerned ahead of time whether they would have sufficient bathroom breaks, and were pleased to learn the judge cared about that, too.

They uniformly felt the judges treated the lawyers professionally, impartially and with courtesy. Upon being asked directly about any perceptions of favoritism, not one juror expressed any feeling that any of the judges favored one lawyer over the other or one party over the other. Several were especially impressed with that, since they apparently expected otherwise.

The only substantive complaint they had was that the judges were too lenient in letting people be excused from jury duty. The jurors felt they were there to serve and that they had better excuses than some of those who were let off, but chose not to use them. Several jurors noted that, in order to be able to serve, they were going to their jobs both before and after being at the courthouse. They felt others who were excused because of what they saw as less significant work conflicts should have been required to stay.

A couple of the jurors felt the judges, or someone, should find a way to impress upon them the importance of the instructions. They were surprised when they got back into the jury room to find out how much those instructions would guide their deliberations. They also felt that it was important for the judges to emphasize the importance of taking notes during the trial, especially trials which would last for more than one day.

The jurors also noticed how the bailiffs treated them. They gave high scores to those who inquired about their needs, made sure they were comfortable, took their parking vouchers to the judge and the like.

**Expert Witnesses**

Several jurors commented on the expert witnesses used in their cases. Most of them said the expert witnesses were not very persuasive. One reason is that the experts seem to cancel each other out, but there were other reasons as well.

A question that lawyers commonly ask of expert witnesses on cross-examination is "How much are you being paid to come here today and testify?" Of the jurors interviewed, only one was surprised that expert witnesses were compensated. A couple thought that, by asking the question, the lawyer was unfairly attacking the witness’s credibility.

Some jurors thought that compensated witnesses were less reliable than those who were not paid. As one juror said "Lawyers need to trust us enough to use just the treating doctors and perhaps other local doctors."

Several jurors commented about videotaped depositions. None liked them. They considered them boring and not very effective. They were observant of the demeanor and annoying habits of videoed experts; one was observed to pick his nose, another to crack inside jokes with knowing glances to people off-camera, others to use so much jargon that they were not understandable.
They also noticed things about the other expert witnesses who appeared in court. One such witness, in a case involving a woman who had a mastectomy, referred to the woman's breasts as her "boobies." The jurors were irate about that. That destroyed his credibility enough that his testimony was pretty much ignored. Another witness, an expert in hotel and motel security, lost credibility at the outset of his testimony when he gave his name: Norman Bates. They felt it was a joke. The jurors asked why any lawyer would hire a hotel and motel security expert with that name.

The jurors felt expert witnesses in general were not very helpful to them in making their decisions.

**Objections**

The jurors were forgiving about the objections the lawyers made. Though the objections slowed down their trials, the jurors regarded them as the lawyers just doing their jobs. The only complaints, in fact, were not to the objections themselves, but, in one case in particular, a number of objections in a relatively short time being heard at the bench, lengthening the trial.

In addition, the jurors were offended by lawyers who rolled their eyes when the other lawyer made objections and those who did the same when leaving a bench conference with the judge.

**How the Jurors Viewed Their Service**

Several jurors said they did not want to serve when they first received their notices, but afterwards every single juror seemed pleased that he or she had done so. They used words like "educational," "a real civics lesson" and "a lot more interesting than they thought it would be" to describe their experiences.

Some of them found their service stressful because of the importance of their decisions, but, in spite of that, they found satisfaction in serving their community in such an important way. They wanted other potential jurors to know that. In fact, several jurors were disappointed that this article would appear in a publication only lawyers and judges usually read. They wanted to communicate with potential jurors about the satisfaction of serving.

Several jurors commented on the stress they felt in serving. They felt their jobs as jurors were important and they wanted to do it well. They were very aware they held in their collective hands the futures of many of the people who appeared in front of them, whether it was the freedom (or indeed the lives) of criminal defendants, the economic future of injured people or the professional reputations of physicians whose skills and judgment were being questioned.

One juror commented that some jurors need "a debriefing" after serving on certain cases. That juror specifically mentioned a tough decision a jury made in a death penalty case and noted that several jurors felt they needed someone to talk with afterward about their shared experience, perhaps a court worker, one of the attorneys, or a social worker.
The jurors clearly understood their responsibility was to decide cases based on the facts presented rather than on other factors. Generally, they agreed they did so. A few jurors, though, said that, in some cases, they were not given enough facts to enable them to make a decision. On those occasions they looked for intangibles to help them reach a decision. These intangibles included the trust they had in the lawyers, their perception of the parties’ demeanor in court and similar things.

**Conclusions**

Jurors are important people. The ones interviewed for this article took their jobs seriously and expected to be treated as people who did so. They recognized when they were treated with respect, but they made conscious efforts to decide the cases on facts rather than the styles or attitudes of the lawyers. They appreciated good preparation and were willing to forgive personal inconveniences when they saw them as a result of the lawyers doing their jobs.

The jurors interviewed seemed to believe that most lawyers do a good job in court. As with every aspect of practice, however, there are things we all can learn to do better.
Realizing jurors would confide truer feelings about lawyers to a judge than to the lawyers, I recently set out to gather juror impressions of the judicial system immediately after trial. More than 120 civil jurors were interviewed and given questionnaires. I also interviewed approximately 60 more civil and 250 criminal jurors. The questionnaires are pseudoscientific at best and the conversations hopelessly biased. But with that disclaimer, I offer the observations of a trial judge unabashedly enamored with the interaction of lawyers and jurors.

OBSERVATION #1: JUROR’S FREQUENT COMPLAINT ABOUT WASTING TIME IS MOST OFTEN JUSTIFIED

After being pulled from home, job, and routine, jurors are told by everyone their service is vital to the very existence of democracy as we know it and the courts could not exist without their unselfish sacrifice of time. Then they are asked to sit through hours of repetitive questions, fumbling for exhibits, request for a brief recess to locate witnesses, smoke breaks and endless bench conferences (which give the impression someone is trying to hide something). "Waiting for attorneys to find things" and "tedium of hearing the same thing over and over" were typical as the least enjoyable part of jury service.

Jurors expect you to be prepared. So be prepared, be on time and always be aware of how actions may look to the juror. You do not want your credibility cast with the cost of wasted time. If you tell jurors, "Your time is valuable to me," you’d best behave accordingly. Jurors advise attorneys to "get to the point" and "don't be so long-winded when you are not saying anything."

OBSERVATION #2: CREDIBILITY WITH THE JURY STARTS IN THE PARKING LOT, NOT DURING VOIR DIRE

A juror arrives at the courthouse like a nervous amateur Sherlock Homes, collecting clues from the beginning and often feeling compelled to use them. By the time you sit at the counsel table, jurors are forming opinions about you. Try to demystify the proceedings. Act like you are working to save them time and they will appreciate your concern.

Give jurors nothing to wonder about other than your evidence. Ask the judge to sequester witnesses in front of the panel so they will know they are under oath. Make use of pretrial motions in limine. Have evidence tagged, if not numbered, and at hand when needed. Minimize use of equipment that takes lots of set-up time, e.g., overhead projectors. All equipment should be set up during a jury break. (Show you are working while they are on break.) Don't waste time in protracted argument with the court. Jurors identify with the judge, and repeated losses cost you, normal admonitions notwithstanding. Make your objection, preserve your record, and thank your judge and proceed.
OBSERVATION #3: MOST JURORS' EXPECTATIONS ARE BASED IN PART ON TELEVISION

Use the analogy and explain the difference in *voir dire* or opening. Television court can be a valid reference point, but don't try to compete with the television lawyers. While you may be as competent as any television actor, their scripts are fiction and yours are not supposed to be. Matlock appears organized in court. Jurors expecting the same degree of preparation frequently advise lawyers on the questionnaire to be well-prepared; not fumble with what you are presenting; be more organized.

OBSERVATION #4: VIDEOTAPED MEDICAL DEPOSITIONS ARE OVERUSED

Unless your expert is as smooth as Paul Newman, consider having a law clerk read the deposition. The assumption that people believe what they see on television holds true for one-minute spots with $100,000 production values. Invest $6 million and you too can hold jurors' attention for an hour or so! The exaggeration is obvious, but remember you generally have a poorly lighted talking head with questions coming in from the cosmos, not the talking Chihuahua on the Taco Bell commercials.

A static television setting is more foreign to a juror than the normal courtroom procedure. You train the jurors to learn from question and answer, then effectively serve up only answers on the tube. Most jurors would rather see a live person mispronounce spondilolithesis than have a television screen say it properly. (Anyone knowing the difference has already been cut from the panel.) A dynamic expert with demonstrative aids may be better on tape, but get in what you want on direct within the first twenty minutes and on cross within the first ten. Jurors' attention may wane by the end of the curriculum vitae.

Other factors to consider are cultural differences. A heavily accented foreign doctor may be close to unintelligible on video. A deposition read aloud is more comfortable to the jury when you can control the pace, inflection, etc. It also is done with the courtroom lights on, a definite aid to comprehension right after lunch. I don't advocate never using videotaped depositions. One juror even responded that the video was the most enjoyable part of the trial. Just have a reason other than it's possible. Nothing beats a competent local doctor live.

OBSERVATION #5: JURORS TRY HARD TO USE THE INFORMATION THEY GET

Make sure the evidence presented has a place to go and that every place is filled with evidence, or else have an explanation why such evidence is not available. Legal relevance does not ensure actual relevance. Jurors feel compelled to use what they perceive to be evidence. Present it in an order that gives it some meaning and closing argument will flow. Out of order evidence makes closings disjointed.

OBSERVATION #6: THE COLLECTIVE IQ OF THE JURY IS GREATER THAN THE AVERAGE OF ITS MEMBERS

Unnecessary, useless, constant and redundant questions waste time and insult the jury's sense of intelligence. Both cost credibility. Rarely will a case go completely over the head of a jury. More often jurors question why a lawyer repeated so much by asking, "Did he (or she) think we were so stupid?" Obviously, this is not the desired impression.
Jurors realize the seriousness and importance of their role. Frequently listed comments in the most enjoyable list are: "Being a member of the court." "The importance and respect given to the jurors by all who work with them." "Being on it (the jury)." "If society will trust me to do this I must be all right." "Making the final decision" made both the most and least enjoyable lists.

Juries have, or develop, a unique personality. Make your presentation jury-specific rather than asking jurors to conform to how you want to present your case. Maintain some flexibility in case preparation.

OBSERVATION #7: JURORS ARE DISTRACTED BY MANY ANNOYING HABITS

Jurors complain about lawyers pacing back and forth, clicking ink pens and making faces or other distractions during their opponent's examination and argument. Don't flash outrage and indignation at the least provocation. One juror wrote, "Chill on hostile attitude or at least don't show this to (the) jury...stick to presenting evidence." Another found "the childlike regression of the attorneys a complete circus act." Don't insult and belittle a witness unless the witness really deserves it. (I've only seen one effective hostile cross-examination.) However, do not be afraid to show emotion. At some point the jury expects you to get angry. Laugh at a funny occurrence, but never at a witness. Sincerity is key, so at least act sincere.

OBSERVATION #8: MOST GENERALIZED OBSERVATIONS ARE SUSPECT

I offer these comments hoping only to give you a glimpse of jurors' reaction to serving. Their reactions vary, depending on jury composition, degree of judge's interaction, case type, and countless other variables. With every generalization, the exception often proves most dramatic and impressive. The trick is knowing when the exception rules the day. I hope an appreciation of the jurors' perspective will help you make that call.
I. THINGS JURORS LIKE

A. Learning about and experiencing first-hand, the judicial/legal process.
B. The knowledge that you are doing your duty as an American citizen, performing a service and working together for the good of others.
C. Meeting new people and other jurors.
D. Jury deliberations.
E. Watching the interaction of the attorneys, judge and witnesses.
F. The testimony and the evidence.
G. The judge's informative explanation about the legal system pertaining to the jury's duties and responsibilities.
H. The importance and respect given to the jurors by all who work with them.
I. Seeing people get a fair deal.
J. The entire experience, from jury selection to the verdict.

II. THINGS JURORS DISLIKE

A. Long hours, sitting and waiting.
B. Jury deliberations.
C. Repetitious testimony.
D. Videotaped depositions.
E. Disruption of daily routine.
F. Facing the plaintiff/defendant after making a decision.
G. Unprepared attorneys.
H. The legal process in general (too slow, too formal, jury selection procedures, frequent recesses).
I. Uncomfortable chairs.
J. Being unable to ask questions, trying to be objective and unemotional during testimony.
III. SUGGESTIONS FOR ATTORNEYS

A. Be brief, succinct and accurate. Get to the point.

B. Don't repeat evidence, questions and other points so often.

C. Don't confuse the jury. Establish as many facts as possible, leaving no questions or doubts. Give more background on some points. Cover all bases of a case sufficiently.

D. Be more organized, prepared and familiar with the information required. Make sure your client also is prepared with factual information at hand.

E. Keep in mind a lay person's lack of knowledge of legal or medical terminology. Speak in simple terms and have witnesses do so also.

F. Do not underestimate the intelligence and ability of the jury.

G. Be factual, fair, courteous. Don't make the other attorney's questions look stupid and ridiculous. Don't show hostile attitudes, at least not to the jury.

H. Don't object so often.

I. Try to settle out of court.

J. Be nice but don't take it to extremes.

IV. RECOMMENDATIONS FOR IMPROVING JURY TRIALS

A. Provide more comfortable seats.

B. Provide a phone, soft drinks, and water in the conference room.

C. Clean the bathrooms.

D. Ask the court reporter not to chew gum; it's unprofessional and distracting.

E. Have shorter lunch breaks.

F. Jurors should receive protected parking at no charge or parking tickets should be validated.

G. Send a copy of the laws being read with the jury into deliberations.

H. Rethink videotaped depositions. They are, for the most part, monotonous and tedious. It's very hard to listen to the evidence being presented while fighting to stay awake.

I. The clerk of court should aid attorneys more in setting up visual aids during presentations.
J. Continue to advise the jury about what they can and cannot do; let the jury know what's going on step by step.
To establish positive feelings with jurors, plaintiff attorneys must understand and respect them.

Recently, I was called for jury duty in Broward County (Fort Lauderdale), Florida, where I live. I assembled with the other venire members in a large and sparsely furnished room deep within the Broward County Courthouse. After 30 minutes, the clerk entered the room with a smile and competently explained in both English and Spanish the court procedures regarding our duties as jurors. I was struck by her friendly professionalism.

Later, the 17 other venire men and women and I were escorted by the bailiff, a genial man, to one of the courtrooms for voir dire. He got a laugh when he said, "You can all tell the truth when the lawyers question you. No one here is running for office." I could sense the venire members bonding with the easy-going bailiff, just as they had with the smiling clerk.

The judge, an elderly man with a "good old boy" Southern disposition, also made us feel positive about the prospect of our being potential jurors. He established eye contact with us as he spoke and discussed our upcoming duties as jurors in a polite and sociable manner.

Then there were the lawyers.

Neither the prosecutor nor the defense attorney – both in their early thirties, one a woman, the other a man – looked up as we took our seats in the jury box. They were too busy shuffling papers and whispering back and forth to assistants. The attorneys' demeanors made me think of two automatons, programmed to do their jobs. It was like both attorneys had chips in the back of their heads. Neither of them cracked a smile as they pawed over the papers in front of them.

The case concerned a charge of drug peddling. The defendant, a short man in his mid-30s, was attired in the flashy manner associated with drug dealers. He also did not look at us, but stared at the prosecutor with a menacing air.

During voir dire questioning, both prosecutor and defense attorney positioned themselves safely behind the podium. Each prattled on about obscure points of law, lecturing us like schoolchildren regarding our "solemn duty" as jurors. Both clumsily tried to sell their cases to us before any evidence had been submitted.

* Amy Singer, Ph.D., an expert in the psychology of jurors and juries, is the founder and president of Trial Consultants Inc., headquartered in Fort Lauderdale, Florida.
I was eventually excused as a juror because of my background as a trial consultant. I am sorry to say that the lawyers – not the clerk, bailiff, or judge – made my short stint as a potential juror a largely unpleasant experience.

This experience, plus my trial work of nearly two decades, indicates to me that many attorneys need to do a better job establishing rapport with jurors. Before discussing how to accomplish this, it will be helpful to examine possible reasons why some attorneys find it difficult to connect positively with jurors. It will also be useful to consider why jurors often don't receive the respect they should from attorneys.

**Lack of Understanding**

While in law school, attorneys receive excellent training regarding the law. But I don't think they learn much about jurors – who they are, what they care about, or how they feel about their experiences in court.

Most important, I don't believe many attorneys learn how to deal effectively with jurors as people. This failing damages attorneys' attempts to establish rapport and to build positive feelings with jurors.

Few attorneys, for example, seem able to put themselves in jurors' shoes. They forget that jurors have been pulled from their normal routines of home and job and thrust into an unfamiliar and often unfriendly environment – a place where judges wear robes and guards are outfitted in government uniforms and where the key players speak in legalese.

In today's busy world, time has become one of our most precious commodities. But a chief complaint of jurors is the time they must waste in court – a transgression for which they hold attorneys largely responsible. Yet, some attorneys continue to fritter jurors' time away with pointless *voir dire* questioning, rambling open statements and closing arguments, repetitive questions to witnesses, numerous objections, and regular requests for recesses.

Wasting jurors' time is problem enough. But I believe the most egregious insult against jurors is that some attorneys fail to treat them with respect.

In the 1997 movie *Devil's Advocate*, Keanu Reeves plays a young plaintiff attorney hired by a blue chip New York law firm to pick a jury in a criminal case. He and the lead attorney spend five minutes during *voir dire* staring at panel members while whispering back and forth to each other regarding which individuals should be deselected. Both of the lawyers treat the prospective jurors as if they were little more than specimens under a microscope. I have seen this scene repeated too many times in court.

I don't know why it is, but not enough attorneys treat jurors with courtesy. Jurors enter a courtroom like people entering a bar; they want to be recognized and made to feel comfortable. They search for a friendly, smiling face. Seldom does that face turn out to be an attorney's. He or she is almost always too involved with some task to show jurors a little respect.

Many attorneys fail to respect jurors because they fail to acknowledge that jurors – and not attorneys – *own* the case. They mistakenly think (and act like) jurors are just along
for the ride. After all, it is not the jurors who have spent countless hours planning, organizing, and constructing the case or who will be responsible to fire it up and fly it around in court.

This is dangerous thinking on the part of attorneys. Yes, it is the attorney who labors long and mightily on the case. But it is not the attorney who retires to a little room at the trial's conclusion to decide the case – this is the jurors' task. So it is the jurors, and not the attorney, who truly own the case. The attorney who fails to understand this does so at his or her peril.

Numerous post-verdict interviews conducted by my firm indicate that jurors feel closer to the judges and bailiffs than to attorneys. "I really like the judge (or the bailiff)" are common comments. Jurors feel this way because judges and bailiffs are "warm and friendly," are "down to earth," "make us feel great," and "seem interested in each one of us personally.

But our interview findings often fail to register many positive feelings toward the attorneys who try the case. "They'll say or do anything to win their cases" is a common sentiment. Some others: "They treat us like idiots during jury selection," and "They don't try to connect with us as human beings." Jurors indicate that it is rare for an attorney to go out of his or her way to "make us feel good as jurors."

Of course, it is easier for judges and bailiffs than it is for lawyers to be friendly with jurors during the trial – judges and bailiffs do not have a client whose very life, freedom or financial well-being may be riding on how successfully his or her case is presented during trial. Nor are the judges' or bailiffs' earnings or professional reputations at risk, depending on the nature of the verdict to come.

**Too Fact Oriented**

Not enough attention is paid in many law schools to the fact that jury persuasion is primarily a psychological, as opposed to a legal, phenomenon. Consequently, teaching young attorneys to focus on the psychological needs of jurors often gets short shrift.

A trial is a message-dense environment in which two opposing parties present conflicting viewpoints regarding how jurors should interpret the same set of facts. Often, both sides craft their arguments and courtroom presentations to be compelling. Trying to make sense out of such a highly divergent set of arguments, and to render a verdict concerning this disparate information, is bound to prove confusing to jurors. Indeed, many suffer acute anxiety as a result of this.

One way attorneys can help jurors eliminate this problem is to use a thematic approach to the overall courtroom presentation. This means supplying jurors with an easily graspable theme – for example, "safety first, not last" in a products liability case – and then hammering home the message during every phase of trial.

The correct theme, when properly presented in court, helps jurors to reduce and even eliminate their anxiety concerning conflicting arguments. It is like a lifeboat that helps jurors stay afloat during the trial's most raging tempests. A good theme enables jurors to look for evidence that "fits" the trial story and to disregard evidence that does not. The theme becomes the primary filter through which jurors evaluate all the case facts.
Yet, despite these advantages, far too few attorneys employ a thematic approach when they plan or present their cases. The tendency for many is to focus case development on complex legal issues that jurors may neither understand nor care about. It's the old problem of lawyer perspective versus juror perspective.

During trial, many attorneys will tightly nail down one legal fact after another in dogged, even obsessive, fashion – but many times to no avail. Remember the elaborate chart Marcia Clark used to outline the dozens of key facts arrayed against O.J. Simpson during his murder trial? The jurors didn't care about any of that. But they could easily respond to Johnnie Cochran's easy-to-understand message concerning the glove Simpson supposedly wore the night of the murders: "If it doesn't fit, you must acquit."

The Song Jurors Want to Hear

When it comes to many courtroom presentations, it's as if the typical attorney knows the words, but can't feel or hear the music. As a result, he or she can't sing the song – at least not the one jurors want to hear.

When I lecture on jury psychology topics in legal seminars, I am always struck by the tendency of many attorneys in the audience to try to reduce everything to a strict set of facts about jurors, or to "do this, then that"-type formulas in terms of dealing with them. This approach seldom works with jurors, who are not easily pigeonholed, labeled, or classified.

Working psychologists like me don't hold seminars. Instead we engage in workshops – experiential learning events where we use role-playing, psychodrama, and similar techniques to address the most deeply felt feelings of the people whom we assist professionally. Attorneys need to develop similar approaches in order to learn how to establish that all-important bond with jurors.

The great hunter Frank "Bring-'Em-Back-Alive" Buck was famous for learning every characteristic of the animals he planned to capture. So, too, the attorney must learn everything possible about jurors – and especially their primary likes and dislikes – if he or she is to gain their understanding and sympathy in court.

Following are some of our post-verdict interview findings regarding common juror likes and dislikes.

Jurors often side with the judge during trial proceedings. This means they will not look fondly on the attorney constantly at odds with the judge regarding points of law. Such bickering can come back to bite the attorney during deliberations.

Jurors don't like videotaped depositions ("poor production values," "boring"). They also dislike attorneys who spend time fumbling with exhibits and other presentation aids.

Along this line, the current heavy reliance on elaborate graphics, charts, and multimedia exhibits may have gone too far. These aids should be used judiciously. (Please see the sidebar by Samuel H. Solomon on this page.)

"Wasting time" is probably jurors' most common complaint regarding their trial experience. They dislike the time spent while they must wait to be called as jurors.
They also object to overly long *voir dire* questioning, long-winded attorney oratory, long bench conferences, and long trial recesses.

Many jurors feel no one involved in the trial values their time. The credibility of attorneys can be negatively affected if they are seen as people who waste jurors’ time. So attorneys should quickly get to the point in opening statement and closing argument, eliminate unnecessary repeat questions to witnesses, and avoid being long-winded.

Also, jurors dislike much of *voir dire* questioning ("The attorneys treat us like children," or "they ask insulting questions such as 'Can you be fair?'"). Not surprisingly, jurors often feel the chairs in the jury box are uncomfortable and the meals served during deliberations are not very good. (At least attorneys can't be held responsible for these shortcomings!)

Of course, jurors register a wide range of positive and negative feelings regarding many other aspects of their courtroom experience, but the opinions above come up on such a regular basis they merit highlighting here.

**Credibility**

In today's skeptical society, it is not easy to establish trust, particularly for attorneys. The O.J. Simpson trial, the Lewinsky scandal, and the dozens of legal "talking heads" blathering away incessantly on TV have made many people suspicious of attorneys. Tort "reform" sentiments haven't helped either.

How can attorneys build rapport with jurors under such circumstances? Following are some suggestions attorneys may wish to adopt to establish positive feelings with jurors at trial.

Although many attorneys often perform competently during the latter trial segments, they may come up short during *voir dire*. This is a big problem because *voir dire* represents the key trial segment when jurors and attorneys meet for the first time. And just as in life, in courts, first impressions count dearly.

One reason attorneys often perform poorly during *voir dire* is because the process makes them uncomfortable. Like the nervous suitor, they end up talking far more than they should, while leaving jurors little time to speak. Attorneys are afraid to let jurors reveal their true feelings for fear of contamination.

Attorneys ask close-ended questions to control juror responses, instead of using open-ended questions to enable jurors to state how they feel about the key case issues. Attorneys inadvertently insult jurors by questioning their ability to be impartial.

The fact is many attorneys are not sure what, or what not, to say to jurors during *voir dire*. Each juror is approached as a confounding Rubik's Cube impossible to figure out or as a deadly time bomb waiting to go off.

Attorneys need not fear *voir dire*. The term translates from French as "to see them talk" – a direct and clear concept. *Voir dire* is the trial component organized to let jurors "speak the truth.”
The key to *voir dire* – and to immediately establishing rapport and trust with jurors – is to simply ask them how they feel about the primary case issues, then be quiet, and let them speak. Most people like to volunteer their opinions but are seldom asked to do so.

Attorneys should allow jurors to tell them how they feel during *voir dire*, and they will appreciate them for it. Plus, attorneys will discover juror attitudes concerning the central issues associated with the case.

What about "contamination"? The chance of jurors becoming contaminated by one juror's expression of bias is remote. People do not suddenly alter lifelong opinions due to the remarks of others.

Another tip: Attorneys shouldn't be nervous motor-mouths. This means avoiding talking too much during *voir dire*.

Most important: Attorneys need to evaluate jurors on the basis of their opinions, not on their demographics. Deselecting jurors on the basis of sex, gender, age, religion, and so on is insulting, not only to the jurors deselected but also to those who remain. The subliminal message the attorney sends to jurors is, "I don't think you can be fair and impartial. Indeed, I have selected you for jury duty because I believe demographic factors beyond your control will automatically prejudice you in favor of my client and case."

Attorneys can rest assured that jurors at some level will receive this derogatory message. And because it is so negative, some may even be prompted subconsciously to prove that the attorney is wrong during deliberations.

My nearly 20 years of experience indicate that the bedrock principles jurors hold most dear – not demographics – correlate most closely with verdicts.

Attorneys should think of the courtroom not as a stage upon which they strut, but rather as a room they temporarily share with jurors. Attorneys need to display good manners in the courtroom, just as they would in any other social setting.

It may sound trite, but attorneys should be sure to smile when they speak to jurors. It is surprising how many attorneys forget this simple rule.

If the judge permits, attorneys should come away from the podium – a needless barrier between them and jurors. Six to eight feet is a proper distance to maintain from the jury box; four feet or less is too close for comfort.

When possible, attorneys should maintain appropriate eye contact with jurors. It is not a good idea to block jurors' views of witnesses or to turn one's back on jurors.

Attorneys should not speak to jurors as if they are students in a law or medical class. Attorneys should use simple words and phrases and advise their witnesses to speak accordingly.

Attorneys should treat jurors as trusted partners whose shared goal is to guarantee justice in the case and should try to convey the attitude that they are exploring the case
with the jurors, not explaining it to them. This subtle yet important distinction is one jurors will be sure to appreciate.

This means jurors need to be included whenever possible in attorney-witness discourse. For example, in direct: "Can you please share with us ..." instead of "Please tell me ..."; and in cross: "Do you expect us to believe ..." rather than "Are you trying to tell me ...". Along this line, attorneys not want to exhort jurors during opening statement and closing argument, but to reason with them instead.

Top trial lawyers know one of the best ways to positively involve jurors is to tell them a story. Indeed, colorful storytelling in the courtroom has an illustrious history. In the Old West, the best trial lawyers were the great celebrity stars of their day. People would travel for miles to watch the attorneys perform in court. Invariably, the lawyers would use simple stories that all could understand in order to support their arguments, often relying on the Bible for material.

Plaintiffs who have been hurt or injured often have powerful stories to tell. The key to connecting with jurors on behalf of these plaintiffs is to help jurors see what the client sees, hear what the client hears, and feel what the client feels. This requires a strong degree of empathy and understanding, not only toward the client, but also toward jurors as compassionate individuals who can be touched and moved.

**Sincerity**

No attorney can hope to connect with jurors unless he or she is sincere with them. Sincerity cannot be feigned – jurors will sense false emotion. But what does sincerity mean in court? Perhaps this rhetorical question will help illustrate: Does the attorney plan to truly connect with jurors or to manipulate them through clever words and tactics instead?

Along this line, the attorney will never be able to connect with the jury unless he or she has first been able to connect on an emotional level with the plaintiff.

To be able to connect with others, a person must first be in touch with himself or herself. While self-knowledge is important for any professional, it is vital for attorneys who must successfully plead the cases of others in court. This is why therapy can be a useful self-knowledge tool for any attorney. Sensitivity training and psychodrama can also be helpful.

Credibility is, by far, the most important personal and professional quality an attorney needs. As we become more credible to ourselves, we become more credible to others. Indeed, "know thyself" is an essential verity for successful trial attorneys.

And how should this translate in court? Simple. Attorneys should exhibit sincere fellowship toward jurors. Attorneys should smile. They should act "real." They should project warmth and humanity. They should rip those chips out from the back of their heads.
I recently lost a trial in which I purposely pitted the testimony of a highly experienced accident reconstructionist expert against the unanimous testimony of several lay witnesses. My theory was that I could discredit the expert simply by showing that he was both paid to testify and in opposition to all the lay testimony. Although not bringing an expert to trial is always risky, I wanted to pursue this approach for two reasons. First, I was polarizing the case, and I thought the presentation of the defendant corporation as an unsympathetic, willful actor would dovetail nicely with the revelation that it hired testimony when it couldn't find a lay witness with a story it wanted to hear. Second, I held unspoken faith in the idea that jurors would judge the testimony of an unpaid lay witness more credible than any paid expert when set in opposition.

The strategy backfired spectacularly. The jury discounted all four lay witnesses in favor of the defendant's expert, including one lay witness who testified about an admission made by the defendant's driver at the time of the accident. This made the defense verdict especially surprising to me. Because this verdict shook my aforementioned, unspoken faith in jurors' suspicion of paid expert testimony – and because I'm appealing and want to make the second trial better than the first – I researched studies on the effect experts' paid status has on jurors. The findings of those studies could help you in your next trial.

DO JURORS DISFAVOR PAID EXPERT TESTIMONY?

Various juror surveys have been conducted to determine jurors' opinions regarding expert testimony, but as far as I can tell, none has asked jurors to assess the credibility of paid expert testimony vs. unpaid lay testimony under controlled settings. Thus, that answer must be derived indirectly from other studies that focused on factors affecting jurors' perception of expert witnesses' credibility. At the outset, interesting statistics emerge that may affect jury selection for cases in which one side relies heavily upon expert testimony.

First, multiple studies have found that fewer than half of jurors believe that an experts' paid status results in untrustworthy testimony. In one study, 50 percent of jurors surveyed said, "expert witnesses say only what they are paid to say." In another, 35 percent of jurors surveyed stated "payment of the expert by the lawyers meant that the expert could not be trusted to be unbiased." After analysis, these numbers are worse than they look. One must consider that the "jurors surveyed" in these studies had already sat through trials in which experts testified, and in which the experts' compensation was brought into evidence via testimony. For some reason, 50 to 65 percent of all jurors found evidence of the experts' payment insufficient to show bias. Thus, it is likely that the majority of jurors in your jury pool will not be convinced that

---


2 ABA Special Committee on Jury Comprehension, "Jury Comprehension in Complex Cases" 40, 42 (1989).
payment for testimony can bias an experts’ opinion. Further, it is likely that a much higher percentage of potential jurors enter the trial without a clear predilection to believe unpaid lay testimony over paid expert testimony, since it is unlikely that jurors become more convinced of an expert’s neutrality upon the introduction of evidence that the expert has been paid.

Second, there is an interesting gender variance on the issue of expert bias. A separate study found that, "82 percent of male jurors compared to 64 percent of female jurors agreed that lawyers could always find a compliant expert."³ This study did not focus upon a jurors' perception of expert bias specifically, but rather, attempted to determine what expert characteristics best resonated with jurors.⁴ The finding that men are more likely than women to believe attorneys simply bring a compliant expert to trial is interesting, especially for lawyers who tend to prefer more women than men on their juries.

Third, multiple studies found that personal characteristics of the expert – such as an expert's payments from counsel, credentials, mannerisms, etc. – only become important when the jury does not understand the expert's testimony.⁵ This makes an accident reconstructionist perhaps the worst kind of expert to discredit with evidence of bias due to financial gain. An accident reconstructionist's testimony discusses the operation of a car – something the jurors do every day and can easily visualize.

Finally, studies show that jurors tend to disfavor highly paid experts.⁶ However, jurors have no conceptual framework to determine whether an expert is "highly-paid" or not. Consider the blue-collar worker who hears testimony from a medical expert: the blue-collar worker will expect the doctor to make a vast sum of money. Arguably, contrasting the defendant's expert with a comparatively lower paid expert of your own is the best way to give the jury a conceptual framework to determine that the defense expert is "highly paid." Again, this suggests against offsetting expert testimony with exclusive lay testimony; rather, it suggests following the wisdom of using experts to cancel one another out.

---


⁴ For this reason, the higher percentage of jurors in the Ivkovic and Hans study does not conflict with the study in the Aronson study mentioned previously. The two studies asked different questions, with the Ivkovic and Hans study's questions covering a broader array of topics.


WHAT IS THE BEST WAY TO SHOW EXPERTS BIAS?

Knowing the answer to this question will probably make you a very successful attorney. The answer will obviously change based on the expert, jury and case, but one series of studies shows a sort of hierarchy by which jurors measure expert bias.\(^7\)

As stated above, if jurors consider experts' fees at all, they will measure experts' fees for testifying against one another. The lowest fee will become the anchor by which the other expert fees are measured. However, the effect of higher credentials may offset the effect of higher fees. For example, if an economist who teaches at a community college is stacked up against an economist who teaches at Harvard, jurors may anticipate – and forgive – that the Harvard economist commands a higher fee.

To answer this question, researchers conducted mock trials in which different juries were given the same case but with varying information regarding the expert's fees and credentials.\(^8\) Unsurprisingly, they found that the lower-paid/higher-credentialed expert was most convincing. The lower-paid/lower-credentialed expert was considered just as convincing as the higher-paid/lower-credentialed expert. The mock jurors found the higher-paid/higher-credentialed expert least convincing. The results led the researchers to two conclusions: first, that the expert's financial gain had no effect upon a juror's perception of credibility without some indicia that it was excessive, and; second, that the information regarding expert's credentials and financial gain were not considered separately from one another.

The researchers speculated that their mock jurors used the information about fees and credentials in combination to infer greater frequency of court testimony in other cases, with the highly paid, highly credentialed expert marked as the "hired gun." To test this, the researchers conducted additional mock trials where the financial gain and frequency of prior testimony were varied. Credentials of the mock expert and case facts were held constant. In this study, mock jurors found the higher paid expert who had testified in only one prior case most reliable, followed by the lower-paid/novice plaintiff expert, the lower-paid/frequently testifying plaintiff expert, and the higher-paid/frequently testifying expert. In short, jurors believed the number of times an expert testified previously was more likely to show bias than the experts' fees. Further, the mock jurors were willing to overlook a high fee if they knew the expert did not testify frequently.

Focusing on experts' fees is therefore not the best way to discredit an expert. While high fees can turn off a jury, frequency of testifying is a far more potent way to infer bias.

These findings suggest the following:

1. Don't set an expert up against lay witnesses and expect to show bias. The expert's paid testimony is not per se evidence of bias to the average juror, and experts that testify on matters that most lay witnesses will have

---


\(^8\) *Id.*
knowledge of – such as the operation of a car – are the least likely experts to be judged based on their credentials or payment history.

2. When dealing with defense experts that closely guard their financial records from discovery, it may be advantageous to instead ferret out information regarding the frequency with which they testify. For example, if presented with such a defense expert in a state court case, try to obtain a copy of his or her federal case list. This is not to say you should not insist upon the experts’ financial records; however, tips for doing so are best left to a future article.

3. If your case depends heavily upon discrediting a defense expert, make sure you are paying your expert less than the defendant is paying theirs. If you are paying substantially more, it could be a problem. Further, take a good look at the expert’s history of testimony to offset potentially higher fees.

When the defendant tries to win your next trial with a trumped up opinion, you’ll be ready for them. Good luck out there.