From the Classroom to the Courtroom: Adopting a Juror-Focused Mindset

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Three years of law school can teach us many things. But what they do not do very well—as we typically discover soon after graduating—is prepare us for the actual practice of law. For those of us who always planned to be litigators, law school offered many opportunities to develop our legal writing and oral argument skills. It taught us that if we had the right facts, mastery of the law, and the ability to craft superior arguments, victory would be ours. And that was certainly the recipe for success in law school.

However, consider that this recipe omitted one tiny ingredient: the jury who will decide your case. In my years since law school, particularly those as a jury consultant analyzing juror decision-making, it has become increasingly apparent just how consequential that omission was. In fact, many seasoned trial attorneys rue how late in the game they learned some of the essential truths about jury trials.

So, with a new year upon us and an eye toward adopting a fresh perspective in our practices, I would like to draw attention to how litigators—whether you are fully established or just out of law school—can refocus their trial paradigm for a jury audience. To do so, I offer the following five lessons, gleaned from speaking with, observing, and studying thousands of jurors.

1) Story Elements Can Beat Legal Elements

Law School vs. Reality

Attorneys are trained to take a set of facts and apply the relevant law to those facts. In many instances, the legal standards will involve several elements that must be proven to find a

party liable. The simplest example is a negligence claim: a plaintiff must prove duty, breach, causation, and harm. Law school training leads us to believe that if the facts fail to support even one of those elements, the claim fails.

In a courtroom, however, whoever tells the best story—not necessarily the litigant who proves all the elements of their claim—often wins. This is because jurors, being people, think and process information in stories. They are looking for protagonists, antagonists, motives, a good plot, and a satisfying ending. I have listened to thousands of mock jurors deliberate, and I cannot recall a single instance where one mentioned a case being weak on "duty" or "cause." Most jurors did not go through our three years of schooling to train their brains to process information in such a linear, defined way.

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On the contrary, I commonly observe jurors working backward through verdict forms. That is, they enter deliberations with a preferred outcome in mind and rationalize or manipulate the legal standards to align them with that outcome. When jurors see a seriously injured or sympathetic plaintiff, many have already mentally written the ending to the story: the suffering person receives justice and lives happily ever after (or as close as possible). When jurors see a corporate defendant that has done a few suspicious things, but none of the evidence firmly links those things to the alleged damage, many are not agonizing over causation and burden of proof. They are writing a mental tale as old as time: where there is smoke, there must be fire.

Solutions

Your story must be as good as or better than your opponent's. While it can be tempting to fall back on your legal training and argue the elements to jurors, chances are it will sound like a bunch of legal jargon and deflection.

In a recent case involving a trucking accident, the defense had conceded liability and planned to try the case solely on causation, as the plaintiff had pre-existing health problems that continued after the accident and were not, in fact, caused by the accident. The plaintiff's story was simple: their client was driving, obeying all laws, got in an accident, and now needed several surgeries, stints in rehabilitation, and potentially lifelong care. The defense needed to try a causation case, but it also needed to tell a compelling story of its own. We developed a timeline of the plaintiff's physical health struggles, dating back years before this accident, and used themes to get jurors to focus on causation without burdening them with legal jargon. We told the story of an individual whose health was rapidly deteriorating and an accident that occurred in the midst, not the beginning, of his decline.

2) Your Facts Are Only as Good as Your Witnesses

Law School vs. Reality

In law school, facts come in summaries or paragraphs, balanced on each side. There is no consideration as to how those facts will get into evidence or how jurors will receive them. But, like premium product packaging or the plating of a fine meal, how something is delivered can be as important as its content. It sets the tone; it conveys the quality. If your witness is delivering great facts poorly, that greatness may be overlooked.

Take, for example, a recent medical malpractice case in which the plaintiff alleged that a surgeon had breached his duty of care in performing complex surgery. Every medical record and every testimony of subsequent care providers supported the defense that this surgeon's treatment was well within the standard of care. As we prepared for trial, however, it became increasingly clear that no matter how strong the evidence, the surgeon's testimony would make or break the case. Jurors needed to see him as calm, confident, and compassionate, whereas during our preparation sessions, he struggled to express emotion, and his confidence read like arrogance. Only through careful discussion and practice did he learn how to present himself in a way that accurately conveyed his intent and his dedication to patients.

This lesson is just as important when a corporate defendant is involved, as your witnesses become the face and voice of the corporation to jurors. No matter how much you push your "good company" story, it will ring hollow if it clashes with your corporate representative(s). In another recent case involving a gas explosion, the defendant company's case relied heavily on its strong safety policies and enviable track record, claiming the training of its employees was a top priority. When mock jurors viewed the corporate representative's deposition, however, his tone and demeanor told a different story; terse responses and aloof body language suggested this was just another corporation that favored profits over people.

Solutions

Even from the nascent stages of your case, keep an eye toward your likely witnesses, their depositions, and their eventual testimony. Witnesses must be carefully prepared for the stresses of testifying and the traps of cross-examination. But, furthermore, both you and your witnesses must understand the defined, limited role they have to play—their "piece of the puzzle"—within your case and its overall story.

It is therefore critical to get feedback on those witnesses before trial, or even better, before they are deposed. While jury research offers one method to do so, even showing a video clip to a few colleagues (preferably those who are not working on the case) can be an option to gain informal feedback on whether each witness's message—including their words, body language, and demeanor—is coming through loud and clear.

3) "Jury Instructions" Is a Misnomer

Law School vs. Reality

Jury instructions are written in a secret language understood by the few people who went to school to learn that language. After three years of law school, we may even pride ourselves on being conversant in that secret language; we may have been rewarded with high marks for being best able to understand and use that secret language.

In the courtroom, however, jury instructions are meant for jurors, not fellow attorneys. So, while intended to instruct laypeople on how to apply the law, they are frequently more confusing (and boring) than instructive. Most jurors read them, reread them, and then give up, taking little guidance from the jury instructions over which you and opposing counsel nearly came to blows. Further, jurors often struggle to match up the relevant instruction with the verdict form question. (In a recent mock jury exercise, one juror bemoaned the fact that the instruction numbers did not match up with the verdict form question numbers.) In law school, we were trained for years to properly apply the facts to the law, yet we too easily assume that others will—on their first try—be able to do the same. Instead, when jurors feel overwhelmed by jury instructions, they may just abandon them, falling back on their own experiences and their sense of right and wrong.

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In a recent case involving a negligence claim against an auto manufacturer, mock jurors were deliberating a design defect issue. After struggling to define a "reasonable" person, the group then struggled to define "negligence." In an interpretation that was quite favorable to the defense, one juror stated, "The issue here is whether they were negligent when designing the car—in other words, did they intend to create harm when designing the car?" The group quickly agreed that although the company did not design the car for the average person's needs, it certainly did not intend to harm the plaintiffs, and thereby found that it was not negligent. Here, plaintiffs' counsel had unknowingly made a major error, not only in assuming jurors would read the applicable jury instructions but also that they would understand the key terms and correctly apply them to the facts.

With a frequency that may shock you, jurors will redefine crucial, even verdict-hinging legal language in their own terms. Without an authority to guide them or provide ammo to counter the personal definitions put forth by others in the room, these new characterizations can quickly stick. Counsel must draw explicit connections between the instructions, the law, and the facts, lest the interpretation and application of jury instructions be left to chance—and often in the hands of the most vocal juror.

Solutions

Jury instructions need their own instruction manual, so provide one. During closing, take ownership of those instructions and focus jurors on which instructions are most important (and favorable) to your case. Break them down into simple terms, and guide jurors on how they apply directly to the verdict form decisions they will go on to make.

4) The Burden of Proof Is on the Attorney (to Explain)

Law School vs. Reality

Any first-year law student can recite the various burdens of proof and provide their textbook definition. Jurors, however, do not live and breathe ideas like the burden of proof. Their points of reference mostly come from news and TV shows (generally involving criminal cases) and tend not to provide realistic guidance on what the burden means and why it is so important when reaching a verdict decision.

One recent group of mock jurors was deliberating the issue of punitive damages in a wrongful death case. Without even discussing the legal standard for awarding punitives, their deliberations headed straight into how much to award. When I had the opportunity to speak to them afterward, I asked whether anyone knew the standard or burden of proof for awarding punitive damages. Not a single juror could answer. (It was in the jury instructions, of course, but we have discussed why those offer no guarantee.) After reading and explaining the standard, I followed up by asking what the defendant had done to warrant punitive damages—and heard crickets once more. Deafening silence from a group that had just awarded tens of millions of dollars in punitives without a second thought.

Solutions

Gifted trial attorneys work the burden of proof into their closing arguments in persuasive and powerful ways. Jurors want to hear how that burden applies to *this* case. For example, in a criminal tax matter, one skilled defense attorney explained to jurors, "If you cannot go home and explain to your family members what my client did wrong, what laws he broke and how he intended to do so, then you must find him not guilty." He recognized that most jurors had little understanding of the US tax code and particularly the technical provisions at issue in this case, and he reminded jurors that they cannot be certain "beyond a reasonable doubt" if they cannot even explain the case to their partners.

Clarifying the burden may also include *re*-educating jurors in response to opposing counsel's tactics. For instance, in civil cases, a plaintiff's attorney may represent the burden of proof as a set of balanced scales, remarking that a "preponderance of the evidence" means a mere feather can tip the scales toward a plaintiff verdict. Objections and motions in limine can head

off some of these faulty characterizations. But, if needed (and allowed), you may want your own explanation queued up to reorient jurors to the fact that both sides start at *zero*, and it is the plaintiff alone who must get all the way past the 50 percent mark through compelling evidence.

5) Jurors Want to Get It Right

Law School vs. Reality

I cannot recall a minute of my law school education spent discussing jurors or juries. We never talked about how to help jurors understand legal concepts that we would learn over three years or how to contextualize evidence we would have the advantage (or curse) of being immersed in for months or more. Instead, the emphasis was on the attorney getting it right—with the implication that if we got it right, jurors would too. So, when jury verdicts do not go our way, it is all too easy to blame the jury.

In reality, most jurors are doing their best and truly want to get it right. Any attorney can get a rough jury, yes, but it is dangerous to assume one can go back and try the same case with a new jury and prevail simply because the last *jury* was the problem. Assuming your case facts are strong, when the jury gets it "wrong," it is most often because they did not have what they needed to get it right. Maybe your trial story was difficult to understand or had holes in it. Perhaps your witnesses were not as credible on the stand as they were in preparation. Your graphics may not have been designed with your jury pool in mind—what is effective in Silicon Valley can be quite different from what works in rural Kentucky.

Several years ago, I listened to a group of mock jurors deliberate on a False Claims Act (whistleblower) case. Anti-corporate attitudes overflowed in its plaintiff-friendly venue, yet the group hesitated to find in favor of the Relator. They did not mince words—they really hated corporations—but many struggled nonetheless to identify adequate evidence of wrongdoing. In other words, they were doing exactly what they were tasked to do as jurors: set aside their biases and experiences to render a fair and impartial verdict.

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However, when a vocal plaintiff supporter asked those jurors to rebut the plaintiff's allegations, they could not. The defense had put on a long and complicated case, relying on a series of expert witnesses who testified as if they were speaking to an MBA class rather than to a jury. And because jurors now struggled to articulate the defense position, the lone plaintiff advocate eventually wore them down.

Solutions

If we adopt the paradigm that most jurors *want* to get it right, then our primary goal becomes giving jurors the tools to do so. Does your case need a compelling story? Spend time building and telling that story. Does it rely on expert testimony? Ensure your experts are prepared to speak to the jury, not their expert peers. Is your case complex? Develop graphics, themes, and analogies to make the case accessible.

In Conclusion

Law school teaches us the foundations of legal advocacy, but advocacy requires an audience. Failing to account for that audience's role in your verdict can lead to some surprising—and disappointing—outcomes.

While many jurors are not thrilled to be called for jury service, by the time they are sworn in, they are invested in the process. Once trial starts, they are going to put all their cognitive effort into understanding your case and making the right decision. The problem is that jurors have only so much cognitive effort to give; do not let them waste it trying to decode your case story, the witness testimony, and rampant legalese.

Wherever you are in your career as a litigator, the start of a new year is the perfect time to reassess our best practices and our approach to litigation. One critical step in that process is to learn what lessons we can about how jurors perceive and decide cases—which might just save you the hardship of learning them when your next verdict comes in.

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