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To Deal Better With Juries, STOP THINKING LIKE A LAWYER!

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Most of your most cherished beliefs about juries are wrong. How do I know? I used to believe them too. Before becoming a trial consultant, I spent over eight years litigating and trying cases, learning from some of the best and brightest lawyers in the country. However, after hundreds of hours debriefing actual jurors and watching mock juries deliberate, I now know that a great deal of the accepted wisdom about jury psychology is completely baseless.

For example, everyone knows that closing arguments are critically important to winning cases, right? Wrong. Time and again post-verdict interviews confirm that jurors generally make up their minds on the basis of witness testimony, long before the trial concludes. By the time you get to closing arguments, the cows are not only out of the barn, they are three states away.

Such truisms, or trial myths abound. Based on fundamental misconceptions about jury psychology, these hoary adages are accepted as fact by generation after generation of lawyers—even though almost thirty years of empirical research demonstrates that they're way off target. This article examines some of these myths and the faulty thinking underlying them. It also explores the mindset that makes lawyers so vulnerable to confusing jury lore with jury wisdom.

LAWYERS AND JURORS LIVE IN DIFFERENT WORLDS

Lawyers are skilled at many things, but understanding and connecting to jurors is generally not one of them. This shouldn't be a surprise when you consider that most lawyers actually have no frame of reference. In the first place, they rarely see juries in action. The vast majority of civil cases settle before trial, and few litigators ever serve on juries or watch mock jurors deliberate.

In addition, lawyers typically have little in common, either socially or economically, with the average juror. Most lawyers spend their time with colleagues and friends who, like them, tend to be affluent, well educated and privileged. In other words, lawyers aren't like regular people. In fact, by design they don't even think like regular people.

Law school changes how students think; it trains them to think like lawyers. They are taught to logically and dispassionately apply a set of rules or legal precedent to a set of facts. Snickers of derision greet first year students who worry about whether case outcomes are fair. In exam questions, emotional issues like fairness and moral justification are usually red herrings, used to distract from the correct analysis.

In contrast, fairness and moral justification are very relevant to jurors. They believe their job is to right wrongs and they don't compartmentalize or set aside their emotions when they make decisions. Jurors look to the law for guidance, but their verdicts are based on fairness, justice and their own life experiences. As a result, there is an inherent clash between legal reasoning and jury logic.

This clash or disconnect underlies many of the common jury myths and misconceptions. For example, the closing argument myth presumes that jurors will hold their decisions in abeyance until the end of the trial when the lawyers wrap it all up and tell them how to think. However,

this isn't how people make decisions in real life, and it's unrealistic to expect that simply because jurors are in a courtroom the rules of human behavior don't apply.

Over a quarter of a century of jury research shows that most jurors make their decisions by observing the witnesses and assessing the evidence as it comes in. By closing arguments the majority of jurors have already made up their minds, and they essentially use the closings to identify facts and evidence that support those decisions. The remaining undecided jurors will make their decisions in the jury room, persuaded by arguments made by fellow jurors—not by the lawyers.

Another widespread myth is that jurors make up their minds during opening statement. Again, this simply doesn't comport with common sense. Jurors want to see the evidence. They want to hear from the witnesses. They won't simply accept what the lawyer says on faith.

Which is not to say that the opening statements aren't important. Indeed, we believe opening statements are critical to jury persuasion. The problem is many lawyers don't use this opportunity to its full advantage. For example, many litigators spend opening statement describing every single piece of evidence they will present at trial. In typical lawyer fashion they go into all the minor nuances of their case, including every last little detail.

The result is information overload. Giving jurors too much information before they have a context confuses them. Rather, you should stick to the broad strokes in opening statements. Identify the key themes and facts that tell your story and provide moral context. Use the opening statement to frame your case, to establish the wrong that jurors must right.

Ask yourself—Is this a case about someone failing to take personal responsibility? Is this a case about someone trying to cash in on an unfortunate accident? Is this a case about a big company taking advantage of the little guy? Set up your frame at the outset and then backfill with those facts that support your theme. This will help jurors organize and assimilate the evidence as it comes in during trial. Inundating them with unnecessary detail at the outset not only interrupts the flow of your story, it damages your connection with jurors.

This connection is critical to persuasion and every time it's broken, your case falters. Even little things can trigger a disconnect. For example, we often see lawyers start their opening statement by intoning, "This is an opening statement" or "I'm going to give you a roadmap." Jurors know that; everyone in the courtroom knows that. By stating the obvious the lawyer puts distance between himself and his audience. He has disconnected from the jurors.

In contrast, look at a 30 second television commercial. The result of millions of dollars and years of research into the art of persuasion, commercials don't start by announcing that the viewer is about to see a commercial. They don't start by describing what you're going to hear. Instead, commercials grab the viewer's attention and start right into the advertiser's message.

An effective, persuasive commercial speaks directly to the viewer, identifying a problem and a solution ("Your smelly underarms are why you can't get a date; our deodorant will make them smell great!") Using emotional cues and evocative imagery, commercials frame the problem so the obvious solution is the one the advertiser is selling. When it comes to persuasion, think less like a lawyer and more like Procter & Gamble.

LAWYERS OVERESTIMATE THEIR IMPORTANCE

For generations lawyers have told each other that the jury's opinion of the lawyer is important to their decision in the case. Trial lawyers think that what they wear and how charming they are influences jurors. They think they can dazzle juries with their eloquence. This is a huge misconception.

To begin with it underestimates the jury's intelligence. Juries are actually very smart and extremely rational. The common sense of 12 people randomly brought together is amazing. Collectively they are excellent at reading people. They can almost always spot liars and they are difficult to fool. In addition, jurors know that lawyers are salespeople selling their side of the case, so they factor that into the equation.

This doesn't mean that jurors don't appreciate good lawyering. They are impressed by professionalism, they are grateful for clear explanations and they recognize showmanship. However, far too many lawyers believe this translates to a vote for their side. Indeed, I recently heard a prominent defense lawyer say that in picking jurors, he looks for jurors who "like" him.

The reality is jurors have no problem voting against a lawyer they like if he fails to put on enough evidence to support his case. After watching lawyers over the length of a trial jurors usually have a lot to say about them. Yet these opinions almost never drive their verdicts. The one exception to this general rule is if the lawyer loses credibility with the jury. Once a jury loses trust in what the lawyer says, it has a ripple effect that tends to taint the rest of the case.

LAWYERS DO NOT LOOK BEYOND STEREOTYPES

Another area that's rife with legal folklore is jury selection. Many lawyers judge prospective jurors using outmoded stereotypes, reflecting an overly simplistic view. For example, the conventional wisdom is that Asians are pro-defense and African Americans are pro-plaintiff. However, relying on such two-dimensional stereotypes alone is foolhardy.

Each juror is a unique individual, and the interplay of race and ethnicity with other factors like experiences, values and attitude is what really provides insight into the juror's thinking. For example, while many first-generation Asians, especially those with backgrounds in finance, science and engineering tend to be pro-defense, third-generation, highly assimilated Asians with degrees in art or psychology are more likely to be pro-plaintiff.

Similarly, the stereotypical view that African Americans will side with plaintiffs in civil cases and the defense in criminal cases is an unsophisticated one. As society has changed and African Americans have moved throughout all strata of society, race may not be as significant. Other factors like education, occupation and life experience can be equally, if not more, important.

In fact, we experienced this in the Martha Stewart trial. Working for the prosecution, our research showed that across the board, the more educated and financially sophisticated people were, the more they believed that Stewart had broken the rules. Therefore, with respect to African American jurors, their race was not the important factor; their socio-economic status was.

The so-called "helping professions" are another area where lawyers get into trouble. For instance, many attorneys assume that nurses are plaintiff-oriented because their job is to help people. They see these jurors as sympathetic or empathetic types. However, if you really think about what these people do all day you can see that this is an erroneous assumption.

Nurses, who spend all day caring for sick and dying people, are usually very pragmatic and fairly callous. They spend a lot of their day saying no: "No, the doctor can't see you yet," or "No, it's not time for more pain medication." They also worry about liability all day long in every aspect of their work. As a result, nurses are much more likely to be defense jurors than plaintiffs'.

LAWYERS MISAPPREHEND THE PURPOSE OF VOIR DIRE

A good voir dire is designed to elicit information that helps you to see the jurors as individuals. This sounds obvious, but many lawyers don't seem to get it. Instead, they use this valuable opportunity to try and educate or condition jurors. This is largely a waste of time.

Jurors' opinions and biases are formed over their lifetimes. It is impossible to change them in the brief time they spend listening to and/or answering a few questions. Do you really think a diehard football fan will reconsider his passion because a lawyer says, "You know a lot of people are injured playing football, don't you?" Will a lifelong Democrat start thinking like a Republican after hearing another juror extol the virtues of the GOP or denigrate the DNC? Of course not.

Rather than effecting a change in the jurors' thinking, such questions actually puzzle them and cause them to feel manipulated. In the jurors' minds the case hasn't begun. They haven't seen any evidence and at best they only have a vague idea of the issues. The lawyer's questions seem pointless because the answers don't provide any meaningful information. Moreover, leading questions designed to elicit rote affirmative answers are not the kinds of questions people use in real life. Jurors experience the lawyer talking at them, not to them and that essential connection is broken.

Another myth predicated on the belief that voir dire can change long-held beliefs is the concept of contamination. Accepted lore is that you need to avoid this at all costs. As a result many lawyers will avoid asking important questions just so juror Three isn't contaminated by juror Five's bias. For example, a lawyer in a bad faith case might worry that Mrs. Smith's description of problems with her insurance company will affect other jurors. They think hearing about Mrs. Smith's problems will cause other jurors to suddenly start disliking insurance companies too.

However, research and common sense show that jurors are unlikely to change their beliefs on the basis of a stranger's situation. It's far more dangerous to avoid probing the depth of Mrs. Smith's bias than to have the other jurors exposed to it. Indeed, careful observation of other jurors' reactions to her statements can provide valuable information, which might not be uncovered otherwise.

Seeking commitments from jurors that, for example, they will follow the judge's instructions or return a verdict for the defendant if the plaintiff fails to meet his burden of proof is also a wasteful and potentially adverse use of this valuable time with jurors. Jurors find these questions patronizing. Instead, you should spend your time

during voir dire building a rapport and getting to know the jurors as individuals in order to most effectively utilize your preemptory challenges.

This brings us to one of the most obvious, and most common misconceptions, i.e. that the purpose of voir dire is to identify your best jurors. Nothing could be further from the truth. The real purpose of voir dire is to identify the most unfavorable jurors, because in reality what you are doing is not jury selection, but jury de-selection.

During voir dire you want to spend your time asking questions to determine which jurors have biases or attitudes that will negatively impact their impression of your case. In addition, you should be using this time to get those adverse jurors talking, leading them towards a potential cause challenge. Every juror you get to talk himself off the jury saves a precious preemptory.

HOW TO STOP THINKING LIKE A LAWYER

The first step to reorient your thinking is to critically evaluate the conventional "wisdom." In this article I have attempted to debunk some of the more common lawyer myths. There are many others. You should make it a practice to consider any statement about juror tendencies or behavior carefully. Does it comport with common sense? Is it is based on empirical evidence? Or is it just something that "everyone knows."

In addition, you have to recognize and acknowledge the lawyer overlay that colors all of our thinking. When making trial strategy decisions, formulating arguments and designing graphics don't rely on the feedback from other lawyers. Ask yourself, "Would this be comprehensible and persuasive to my postal worker, my grocery clerk or my maiden Aunt Betty?" Better yet, ask these folks directly.

Consider too whether your case, and the way you've framed it, is based on clever legal arguments or on righting a wrong. As discussed earlier, lawyers are trained to place a very high value on the former, and too often forget that jurors do not. This clash, between legal analysis and jury logic, was illustrated recently during a discussion with new clients.

Our clients represented defendants, who sought specific performance of a settlement agreement. During the course of litigation, plaintiff's counsel had offered to settle if defendants withdrew a dispositive motion. Defense counsel carefully confirmed the arrangement via email before taking the motion off calendar. However, after the motion was withdrawn, plaintiff refused to settle.

The attorneys were confident that a jury would hold plaintiff to her lawyer's agreement. We disagreed, explaining that jurors strongly believe you are free to change your mind until you actually sign an agreement. "Not a problem," countered one of the lawyers "all we have to do is explain the law."

Wrong. Legal arguments alone rarely influence jurors. Jurors live in the real world and their solutions are real world solutions. They will not ignore their life experience and core belief in fundamental fairness for a brilliant legal analysis. Yet time and time again we hear lawyers say they can remedy case problems with a particular jury instruction or that jurors will ignore negative facts because they're legally irrelevant.

The bottom line is that in many ways legal training hinders your ability to understand, persuade and communicate with juries. And while you can never really undo the damage law school and litigating have wrought (just ask your non-lawyer friends and family), with respect to jury matters you can try to compensate by recognizing how your legal overlay affects your conclusions. In other words, ask yourself, "am I thinking like a regular person or am I thinking like a lawyer?" ■

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Steele received her JD, *cum laude,* from Georgetown University Law Center and practiced law at O'Melveny & Myers and O'Neill, Lysaght & Sun. She was a member of the American Inns of Court, and Special Counsel to the Warren Christopher Commission. Steele also earned an MFA from UCLA's graduate film program, where she was awarded a Fulbright Scholarship in Journalism. Her work has appeared on NBC, ABC and PBS, and has won both Emmy and Associated Press awards. Steele was a contributing producer to The Center for Investigative Reporting and a Fellow at USC's Annenberg School of Justice and Journalism. She is a member of the American Society of Trial Consultants.

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