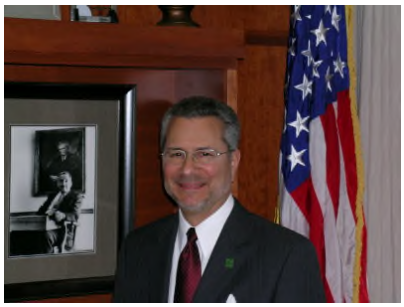
Oregon State Bar
Litigation Section

Judge's Corner

Article Index

The Honorable John V. Acosta, United States Magistrate Judge
District of Oregon
(June 2015)



What Jurors Want: A Look Into the Minds of Jurors

How do we know what works?

Trial lawyers are always looking for effective ways to persuade jurors, but how do we know our methods are effective? We've probably taken trial practice in law school to learn the fundamentals of presenting a case to a jury. Maybe we've attended a trial college since then, where experienced and well-regarded colleagues taught us the finer points of trying cases. We've also probably sat in CLEs presented by other lawyers instructing us on persuasive trial techniques. And, of course, we've tried our own cases, and won (and lost), and tried to learn from those experiences what does and what doesn't seem to work. But rarely, if ever, do we have the opportunity to learn from the best source: jurors.

This article presents actual jurors' thoughts and insights on effective and not-so-effective trial techniques and practices. The jurors' comments were obtained immediately following trials in my courtroom. Their comments produced common themes that have emerged over the course of different trials over the years. Also, where noted, I've added my impressions as an observer from the bench and compared those observations to my experiences as a trial lawyer. And, I've used my recent experience on jury duty to add some additional (and hopefully useful) insights about the voir dire process.

Finally, I note this is not an article about trial strategy or a scientific study of how jurors decide cases. Instead, this article contains candid comments, and summaries of candid comments, from real jurors in real cases, mostly about the mechanics of presenting information to jurors during trial. I hope these collected comments, observations, and thoughts provide useful information about preparing and presenting cases to jurors.

Through the looking glass.

Quite often, jurors' knowledge about trials is gleaned from depictions on television, in movies, and in books. When jurors encounter the real trial process it can be a surprising and sobering experience for them. The difference between jurors' perception of trials and the reality that is trial creates a context within which trial lawyers should consider and plan their trial presentations.

A common theme among jurors is how long and slow trials can be, even when they last only a few days or a week. One juror commented: "I did not understand how slow trials went. We see movies and TV that show us perfectly scripted testimony and questions and answers. It's just not that clean in reality." Another juror said: "[T]here were interesting moments, as well as a lot of tedium as evidence was presented." Using trial time well and finding ways to inject interest into the process can be effective techniques in presenting cases to jurors.

Related to this point, jurors appreciate when the judge and the lawyers work to keep trial smooth, efficient, and on course. Jurors have said they appreciated that trial was kept "on track," that there was no "drama," and that things didn't stray or get out of control. They are grateful when they are not in the jury room often or at length, and when they are not kept waiting. Jurors like and appreciate being informed of what's happening and why it's happening. These comments highlight the importance of using trial time well and, as importantly, making sure jurors know you're respectful of their time.

Another common theme from jurors is that they prefer a trial conducted by lawyers and judges who don't act like the lawyers and judges on television and in movies. Jurors regularly express their appreciation at being shown respect and politeness, at receiving explanations about the process, and at being told what is about to happen. They also have noted in some cases the "kindness" with which they were treated by all participants. Politeness and good manners are important components to an effective relationship with jurors.

Jurors also take their role seriously, and they often find their task difficult and taxing in ways we lawyers probably never realized. Jurors have commented that the process is "emotionally exhausting." One juror went farther and said "I lost some sleep thinking about the details." Some commented how tired they were after working through the evidence to reach a verdict. These comments underscore the importance of keeping trial efficient, focused, and as simple as appropriate to the case.

Participating in a trial also gives jurors a sense of pride in the legal system. One juror said: "Nothing really conveyed just how much this thing called the U.S. legal system matters until I sat on this trial." Another juror commented: "After it ended I told some friends and work colleagues that I felt proud to be an American – and fortunate to have had this week-long experience!" We can enhance our relationship with jurors by bringing to all phases of the trial process an appropriate level of solemnity, respect, and dignity.

Difficult questions must be answered before they are asked, Judge Edward J. Jones, Multnomah County Circuit Court (December 2014)

Judicially Hosted Settlement Conferences, Judge Jamese L. Rhoades and Sr. Judge Don Dickey, Marion County Circuit Court (November 2014)

Working together to make discovery more efficient, The Honorable Youlee Yim You, Multnomah County Circuit Court (October 2014)

Court Trials - A Jury of One, The Honorable Katherine E. Tennyson, Multnomah County Circuit Court (September 2014)

Making the Most of Short Evidentiary Hearings, The Honorable Daniel R. Murphy, Linn County Circuit Court (August 2014)

Vouching, The Honorable Jay McAlpin, Lane County Circuit Court (July 2014)

Appropriate Jury Instructions Can Help Litigators Win Trials, The Honorable Paula Brownhill, Clatsop County Circuit Court (June 2014)

Evidentiary Hearings and Motion Practice in the era of Oregon e-court, The Honorable Benjamin Bloom, Jackson County Circuit Court (May 2014)

Motions in Limine - Tips for "Newer" Litigators, The Honorable Jodie Mooney, Lane County Circuit Court (April 2014)

"What is going on?"

Sitting in the back of a county courtroom with 30 or so of my fellow prospective jurors, I could easily discern the lawyers were having great fun with voir dire, but I was not. I'm fairly certain my fellow prospective jurors weren't having much fun, either. After a while, I realized why: I had no idea what was going on. Notwithstanding twenty-five years as a lawyer and seven years as a judge, I was completely unfamiliar with the process unfolding before me in this particular county's courthouse. No one, lawyer or judge, told us much of anything about how the process worked, how long the process would take, how likely it was that we'd be selected, how the questions the lawyers were asking were relevant to serving as a juror, or how long we would be required to serve if selected.

Then something else occurred to me: prospective jurors in my courtroom must be thinking these very same things during jury selection. Huh; I never thought about that. (Probably because I was too busy having fun running voir dire.) But, I also realized, this only makes sense, because in post-trial conversations jurors regularly express their appreciation at having had the process explained to them so that they understood what was happening or was about to happen, and why. (Ed. note: After my voir dire experience, I completely reworked my own voir dire script to make my own voir dire script more juror-friendly.)

Jury selection can be the legal equivalent for jurors of an invasive medical procedure. Lawyers (and in federal court, the judge as well) are probing jurors' minds on a wide range of personal topics and private thoughts. The voir dire process often can be awkward for prospective jurors and make them uncomfortable, especially if they don't understand why they're being questioned about seemingly irrelevant or personal matters. These feelings make less likely a juror's willingness to be forthcoming with information helpful to the lawyers' decision whether to strike or keep the juror.

Help jurors understand the relevance of the questions to their selection and to the issues they will be asked to decide if they are selected to serve. Make clear your questions are intended to learn only the information you need to make an informed decision about their service in the particular case. Keep voir dire short, clear, and focused. Be mindful that while sitting through the voir dire process, prospective jurors are worrying about jobs or classes they're missing, child care theyneed to manage, and commitments they migh be unable to keep. And always be aware that most jurors are not near so comfortable in a courtroom as we are, so that you always try to make jurors as comfortable as possible during the voir dire process.

Meandering toward something or other.

Once selected to serve, jurors want to know the parties' respective stories, so do your best to give them a good rendition of your case. Sometimes lawyers don't use their openings to provide jurors a theme that will guide them through the evidence during the trial. Whether the case is simple or complex and whether trial will last two days or four weeks, presenting a unifying theme in opening statement is important. A cohesive story at the start helps jurors understand how testimony and exhibits fit into the facts they'll hear and the questions they must decide.

Jurors have pointed out that simple tools would help them better understand the evidence. For example, they have commented that a time line of important events would have been helpful, especially when numerous events occurred in short period of time. Jurors have said creating their own time line is difficult because they must rely on their notes and the exhibits to construct it. Jurors also have observed that where damages are claimed, having a chart summarizing the categories of damage and their amounts would have helped them understand and follow documents and testimony related to damages.

These comments illustrate how our familiarity with a case, and particularly the case's facts, can cause us to overlook what jurors need to understand our case. We are accustomed to knowing our case, to living with a case for months or even years. As you prepare your opening statement keep in mind that jurors don't know what we know about your case, and the chances are good that you'll more effectively convey your story to those who are hearing it for the first time.

"But I want to make sure they get the point."

During a conversation with an experienced lawyer I relayed a comment from a juror in a previous trial that captured a sentiment expressed by many jurors: "We're pretty smart – the lawyers didn't need to ask the same thing over and over." Upon hearing this comment, the lawyer immediately responded, "Yeah, but I always want to make sure they get the point." We can be assured that they do, even without the repetition we were taught must be used to convey our point.

These days, most jurors are intelligent, attentive, and sophisticated. As another juror told me after a different trial, there was too much repetition, too much of the lawyers coming back to points already made. I know I was taught as in trial practice class and as a young lawyer to use repetition as a technique to make my case, but as a judge, I've learned that repetition frustrates jurors and, in fact, doesn't help lawyers make their case. So, if you were taught as I was to use repetition as a technique to make your case, then you might want to reconsider the effectiveness of technique.

We also can make sure jurors get the point by being clear and direct about the point we're trying to make. Themes that have emerged from juror comments are that the lawyers need to be more concise; that questions should be to the point, clear, and short; that the lawyers talked too much or kept talking; and that lawyers didn't get to the point. One juror said that "80% of what the lawyers talked about was irrelevant." We enjoy access to deposition testimony, produced documents, and (in federal court) interrogatory answers and pretrial witness statements, all of which prepares us to ask good, clear questions of witnesses, and thereby make our point to jurors. As we prepare for trial, we should be mindful that in the eyes of many jurors we often can do better at using those tools.

Jurors hold witnesses equally accountable in this area. Jurors comment that witnesses, like lawyers, don't need to say the same thing over and over. Jurors also have observed that witnesses should answer a "yes or no" question with "yes" or "no." Witnesses who tend toward excessive narration, non-responsive answers, and arguing with the lawyer undermine their credibility and persuasiveness with jurors. The lesson here is to be attentive to witness preparation and ensure that our witnesses, on both direct and cross-examination, are clear and concise, answer the questions they're asked, and never try to build a watch when the question is only whether they know the time of day.

"Wait – what was that?"

We often don't use exhibits well at trial. By the time a case begins trial, we have spent a lot of time with the documents we will use as exhibits at trial. This creates a familiarity with the exhibits that can cause us to forget that the exhibits are completely new to the jurors.

One common oversight is not giving jurors enough time to read the exhibit we are using. We display an exhibit on an evidence machine or projector, ask the witness a question or two about it, then whip it off the screen to be replaced by the next exhibit we intend to use. Often, this surprises even frustrates jurors; they were presented with evidence they weren't able to read and weren't able to link to the testimony being given or argument being made.

Consider having exhibit binders for the jurors' use, even if the binder doesn't contain all the exhibits but only the truly critical exhibits for your case. In fact, jurors have suggested this approach. Alternatively, allow jurors a reasonable amount of time to understand what the exhibit is and to locate the passages being used to question the witness. However it's accomplished, the goal is to make sure the exhibit has the impact with the jurors that caused you to mark it in the first place.

We also can do a better job of making exhibits legible for jurors. Jurors have complained of exhibits, especially those with smaller print, being hard to read on the electronic evidence machine, and even when shown on a large projector screen. Jurors also have mentioned that during the trial they were not always able to see the exhibit number, so they couldn't identify in their notes the document by exhibit number (and, because we often are focused on the exhibit's contents, we often don't recite the exhibit number for the record). Most of these occasions occur because the electronic evidence machine is used to enlarge the part of the document being discussed, in the process taking the exhibit number out of the screen's viewing field.

To make exhibits more readable, consider using call-outs of the key passages in less legible exhibits, as some jurors have recommended. Remember that many exhibits are copies of grainy PDF documents, single-spaced email messages, or contracts or loan documents in small print. A call-out solves the legibility problem, highlights the critical language in a visually effective manner, and conveys to the jurors the message we intend the exhibit to deliver.

Jurors also have complained about the number of exhibits presented to them during trial. They have observed that voluminous exhibits are difficult to go through and work with, especially exhibits such as medical records that aren't ordered chronologically. Consider, as some jurors have mentioned, providing jurors with an exhibit list to help them track exhibits referred to during trial. This will help the jurors follow your evidence and assist their note-taking, particularly when exhibits are linked to key testimony. They've also suggested use of a timeline, which would allow them to put exhibits into a sequential fact context and thus make more clear the order in which important events occurred. Remember that the power of an exhibit is only as strong as the jurors' ability to see its importance to your case, so look for effective ways to help jurors understand the importance of the exhibit to your case.

Finally, jurors can be overwhelmed with the number of exhibits and the amount of information contained in exhibits. Consider ways to separate the truly important documents from those which are informative and perhaps even helpful, but ultimately redundant, duplicative, or less important to your theory of the case. One method is to identify the ten documents most important to your case, then work outward from there to determine what additional documents you need to prove your claims or defenses, or support your theory of the case. Compare those additional documents to the "Top Ten" you've identified and ask whether each additional document adds something necessary to your case that the Top Ten don't contain. Jurors will appreciate your effort to minimize the number of exhibits, and your case is likely to be more clear and more forceful to the jurors.

"Are we there yet?"

Even short trials can be long trips for jurors. When prepare your closing argument, remember that your jurors sat through the entire trial and were attentive to all the evidence, and that they are ready to decide the case.

In recognition of this reality, consider incorporating one or more of the following practices into your closing argument. First and foremost, keep it short. Focus on the key points of your case and the two or three things about the other side's case you really must discredit or rebut. Share your insights about the evidence by showing the jurors how it all connects to support your opening theme. On this point, familiarity with your case is your ally. Your months or years on the case translates to insights about and interpretations of the evidence that trial's time constraints preclude jurors from forming themselves. Punctuate your presentation with the truly critical exhibits and with slides that visually reinforce your key points. Above all, avoid giving closing arguments that merely summarize each witness's testimony and each exhibit's contents. And remember – keep it short. (Yes, I just used repetition to make my point, but I used it judiciously.)

Parting thoughts.

Next time you prepare for trial, keep in mind how a juror might think if faced with your voir dire questions, while listening to your opening statement and closing argument, when hearing your witness examination, and upon encountering your exhibits. If you do, you're likely to make your case more juror-friendly and stronger throughout all aspects of the trial process.