

What One Litigator Learned Serving On A Jury

By **April Isaacson** (January 8, 2024)

As a litigator, my first legal position was in the U.S. Navy Judge Advocate General's Corps, handling cases first as a defense attorney, then as a prosecutor.

Since leaving the Navy, my practice has focused on patent litigation. But I've never had an opportunity to serve on a jury and see the courtroom from the other side of the banister.

So, when the summons came to serve on a jury in state court, I looked forward to the opportunity to experience a trial as a juror.



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As I entered the jury box, I did not necessarily expect to come away with significant new insights or changes to how I prepare for trial. But seeing the lawyers, the judge and even the physical space of the courtroom itself from the jury's perspective brought a few surprises and several lessons that all trial lawyers should take to heart.

Even though this was a domestic violence criminal case — a subject matter that is far removed from my practice area — I believe that many elements of the jury experience do not change much with the specifics of the case, and that therefore this summary of my observations may be helpful to any litigator.

Juries develop social bonds quickly.

The voir dire process introduces the jurors not only to the judge and lawyers, but also to each other. We answer personal questions about ourselves in front of our fellow jurors. It's a vulnerable moment, and it creates empathy in the other individuals who are going through the same experience.

Not being able to discuss the one thing we had in common — the trial — also meant that we engaged in small talk, learning more about each other and thereby deepening our sense of camaraderie.

This dynamic is important for an attorney to understand because from the very outset — before we can speak about the case itself — the jury is not composed of siloed individuals. It is a group that can influence each other even while no discussion of the case itself takes place.

For example, when an attorney kept editorializing and saying "sure" after every point her witness made, an eye roll from one juror elicited knowing smiles from others, and a group impression started to solidify about that attorney.

Therefore, attorneys must recognize the comradery that jurors forge and remember that they are presenting to a group and not to individuals. Even if we think one or two specific people are more persuadable than others, focusing too obviously on them is likely to backfire because of the jury's group dynamics.

A jury remembers unkept promises.

An opening statement is a promise made to the jury: Here are the things that my side will prove to you. The jury remembers this promise and compares the evidence that was presented to what was promised.

In our case, for example, the defense promised to prove several facts based on witness testimony. But that testimony never materialized, and the promised witnesses were never called.

The opening statement's unkept promises created a significant and negative impression on the jury. This is a good reminder that attorneys should be prepared to fulfill every promise they make in their opening statement, because jurors won't forget.

Voir dire may not tell you the full story.

As litigators, we often try to understand how things will go in deliberations — who's going to be assertive and opinionated, who's going to follow without expressing an opinion, who may be the contrarian dissenter, and so forth.

Voir dire is one of our best opportunities to observe the jurors. But in my experience on this jury, I learned that the impressions attorneys get of jurors during voir dire can be quite wrong.

On our jury, several people behaved very differently during deliberation than they did in voir dire. For example, one individual who seemed to say as little as possible on voir dire turned out to be a thoughtful and outspoken member of the jury and made significant contributions to our deliberations.

Therefore, attorneys should be careful about giving too much weight to their impressions of prospective jurors during voir dire, and pitch their case to the entire jury.

Jargon is not your friend.

My jury service showed me just how much we lawyers have a language of our own. It's not just Latin phrases or the names of certain documents or processes, it's also the numerous acronyms. Even a simple acronym like, "DV" — which stands for domestic violence — is not something that most people normally hear.

I was able to decipher some of those acronyms because I'm a lawyer, but many of my fellow jurors were left in the dark.

When jurors' brains are busy trying to decipher an acronym or a term they don't know, they cannot also pay attention to the rest of the presentation. So, to present a case that everyone on the jury understands and follows, lawyers must become aware of our use of jargon and eliminate it as much as possible.

Credibility is more important than trying to minimize damaging facts.

The credibility of witnesses is both critically important and highly fragile.

When a witness can't recall anything while they're testifying for the other side, then suddenly remember everything when they're testifying for your side, the jury is likely to find

this witness's testimony to not be particularly credible and ascribe little weight to it.

In our case, we saw this play out with a key witness for the prosecution, and it left a significant negative impression on the jury.

Theatrics are off-putting.

Whether it's thumping your hand on the desk in a show of exaggerated frustration, or objecting in a loud and dramatic tone to every question opposing counsel asks, the jury can see right through the phoniness.

Such theatrics do nothing to obfuscate or distract from the weak points in one's case. In fact, it's an almost sure way to focus the jury's mind on trying to figure out what the attorney is trying to hide, shining a more glaring spotlight on these weaknesses.

In our case, we had one attorney who went for the dramatics, and one who played it straight. The attorney employing a low-key, professional manner and objecting only when it was warranted was seen as much more credible by the jury. Trial attorneys should thus be sparing in overt displays of emotion, and especially avoid them if they are insincere.

Clear and understandable jury instructions are critical.

We had the benefit of an excellent judge in this case. He kept control of his courtroom, permitting both sides to put on their cases in full while also being highly respectful of the jury's time and pushing the case along. He also read the jury instructions in a clear manner.

The jury instructions themselves, however, were complicated, and several jurors did not fully understand them.

Our jury consisted of educated professionals, but I was the only person on the jury with a legal background. Yet, as the jury foreperson, I noticed that some members of the jury were unsure of what they were supposed to do, so I reread the jury instructions as well as the elements of the offense and reasonable doubt out loud during deliberations to ensure all jurors understood the work we had to do.

I now see how many elements of the instructions I take as a given are not at all clear to a lay audience. Trial attorneys should incorporate this lesson when drafting jury instructions and try to anticipate any questions the jury may have, especially when their cases involve complex issues like new technologies and complicated laws.

Lack of preparation is highly noticeable.

One of the attorneys in this case asked questions that were obviously off-the-cuff and not rehearsed. Practice tip: When a judge has to repeatedly paraphrase your questions to witnesses, you're probably not as prepared as you should be.

The questions this attorney asked did not simply suffer from bad form or incoherence. They did not move her presentation forward, nor help the jury see the case from her client's side.

Compounding the impression that she was not sufficiently prepared, the attorney took long pauses in the middle of questioning witnesses, as if she had to constantly rethink her approach or revise her questions.

Adding a visual component to the sense of unpreparedness, the attorney also kept a disorganized pile of folders and papers on her counsel's table. It looked like she had brought everything she could think of because she didn't know what she'd need to use that day. This presentation style earned neither the confidence nor the trust of the jury.

By the same token, preparation is also highly noticeable. By contrast, the other attorney worked through an outline. We could see that he had a checklist and that he followed it during his presentation of his witnesses, as well as through his crosses of the other side's witnesses. No testimony came as a surprise to him. There were no lengthy pauses as he tried to find a piece of paper or rearrange his line of questioning.

Moreover, his counsel's table was mostly bare, except for the few items he needed for that day's work, reinforcing the impression that he was prepared and not flying by the seat of his pants. This, in turn, reflected favorably on his presentation in the eyes of the jury.

With this in mind, attorneys should be careful to both be well-prepared and appear well-prepared. Otherwise, they risk doing a disservice to both their case and their client.

Constant breaks and sidebars feel disrespectful of the jury's time.

Even though breaks and sidebars are a necessary part of any trial, realizing their impact on the jury is important.

From our perspective as jurors, these delays added a significant amount of time to our jury service — in fact, taken together, they pushed the end of the trial from a Friday to the next Monday, causing the members of the jury to spend the weekend in jury purgatory — unable to speak about the case to anyone, while not being able to think about much else.

It is safe to say that the attorney initiating most of the sidebars and seeking most of the breaks did not engender the jury's goodwill through these actions.

Unconscious habits can drive members of the jury mad.

One of the attorneys in our case had the habit of flipping his pen while listening to opposing counsel. Jury members found it to be distracting and irritating. Even when trying to fully pay attention to opposing counsel, we could see constant movement from the corner of our eyes.

Many of us have habits that are invisible to us but are very apparent to others, such as fidgeting, playing with a long strand of hair or constantly adjusting one's clothes. Becoming conscious of such habits and taming them is important because they add to a jury's opinion of you, even when you think the jury's attention is focused on opposing counsel.

Demonstratives should be visible.

A hard-to-see demonstrative is ineffective. In our case, some demonstratives were too small to make out from the jury box.

Moreover, the demonstratives were not squarely facing the jury box, and the angle made it more difficult for the jury to see some of the finer details of the demonstratives presented.

It's imperative for trial lawyers to familiarize themselves with the courtroom and understand how far and at what angle the demonstratives will be presented to the jury.

In addition to the size of any visuals, think about the font size of the caption, as well as the colors used for any writing and other visual aids, like arrows and boxes.

Conclusion

While the observations above may not come as a surprise to many litigators, they are a good reminder that juries are diligent and observant. Many of the things we've become blind to through experience and familiarity can have an outsize impact on how the jury perceives us and the case we're arguing.

We have an opportunity to shape the impression we create through our presentation style, preparedness, professionalism and mindfulness of the jury's time, and we should revisit all of these elements when preparing for a jury trial.

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