



A trial lawyer's inside look at trial from the jury box

Sitting as a juror is an eye-opening experience, and not to be missed

BY KIMBERLY WONG

As a trial lawyer, have you ever wondered what it would be like to experience trial from the jury's perspective? Have you ever wished you could be a fly on the wall in the jury room to see how jurors deliberate to reach their verdict? Last year, I had the privilege of serving as a juror on a three-week felony criminal trial where I gained an inside view of how jurors analyze, weigh, and discuss evidence.

This article addresses some of the most significant lessons I learned and observations I made from my time serving as a juror. My experience confirmed several things I had already known or suspected about how jurors perceive trials, but also provided several new insights.

Attorney presentation – do not oversell

To maintain your credibility, do not oversell your case. You lose credibility when you overstate the evidence and when you do not concede points that you should. Jurors also dislike it when attorneys give their own description of something when there is photographic or video evidence that does not match up with their description.

Repeating a line of questioning with different witnesses or emphasizing the same point in argument may affect jurors differently. To some, this tactic seems unnecessarily repetitive and they feel that you should just move on because you have clearly made your point and are wasting their time. However, other jurors may need to hear the same evidence or same arguments several times for it to register with them. Thus, while repetition may annoy some, it may be necessary for other jurors to understand your position. Consider who your intended audience is.

Jurors get tired from extended breaks, long lunches, and listening to hours of testimony at a time. Use visuals to break up the monotony. When planning your presentation of evidence, appreciate that post-lunch tiredness and end-of-the-day fatigue are real. During this time, jurors may begin to doodle and tune out.

Closing argument is an important opportunity for attorneys to summarize and explain how all of the evidence should be put together to support their position. At this point, jurors may have forgotten evidence in the earlier parts of trial and have few or no notes to remind them.



Evidence, burden of proof and witnesses

Not surprisingly, the party with the burden of proof has the hardest task of proving their case. When jurors are on the fence, they will vote in favor of the party who does not have the burden of proof.

If photographic or video evidence exists, that can be the most crucial piece of evidence for the jury. Such evidence is too difficult to ignore because seeing is believing.

No witness has perfect memory, so all witness testimony is flawed to some degree. Witnesses may lie and witnesses may be mistaken. Where there is a material conflict in the testimony between key witnesses such that neither seems particularly credible and there is no other helpful evidence on the issue, the testimonial evidence becomes a wash. At best, the jury feels 50/50 on the issue, which is not enough to tip the scale in favor of the party with the burden.

Jury instructions

Jurors find that several of the instructions are confusing in how they are worded and in how to apply them to the case. Jurors whose first language is not English may experience additional challenges in interpreting the instructions.

Some instructions allow jurors to decide whether they will consider particular evidence or what weight they will give to certain evidence. These instructions give jurors the choice to



consider some, all, or none of a specific kind of evidence. These are important instructions to focus on because they permit jurors who view the exact same evidence to reach different conclusions and decisions on the verdict form.

For example, see:

CACI 107 (Witnesses), which provides in part: “You will have to decide whether you believe each witness and how important each witness’s testimony is to the case. You may believe all, part, or none of a witness’s testimony.”

CACI 202 (Direct and Indirect Evidence), which provides in part: “As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.”

Instructions that contain undefined terms with ordinary meaning give jurors a lot of latitude in their decision-making. For example, CACI 401 (Basic Standard of Care) provides in part: “You must decide how a reasonably careful person would have acted in [name of plaintiff/defendant]’s situation.” In applying this instruction, jurors may each come up with different definitions of what is “reasonable.”

To the extent possible, it is helpful to have several copies of the instructions in the jury room for efficiency in deliberations as it reduces the need to share with several jurors. Keep in mind that there are numerous instructions that jurors are digesting for the first time and most jurors have no prior legal training, so re-reading them several times will likely be necessary. Also, there are jurors who are primarily visual learners and will need to read the instructions to be able to understand them.

Jury dynamics and deliberations

During trial, jurors share the experience of serving together and it is only natural that they will form bonds. Besides

sharing personal stories with each other during breaks, it is common for jurors to go out to lunch together or travel on public transportation together.

Jurors are human. Personal feelings about whether the law is right, whether the claim or charges are meritorious, and the likeability of parties can surface directly and indirectly. Jurors have to make a conscious effort to acknowledge those feelings and set them aside in reaching a decision. Jurors will remind each other that they cannot consider their own personal beliefs, but rather focus on the evidence presented. Jurors will also remind each other about the correct standard of law (e.g., beyond a reasonable doubt, not beyond all doubt).

There are commonly many perspectives on what evidence is most important and how to handle certain witness testimony. Even when jurors agree on what the evidence is, the weight and the relevance they give it can really vary, which can lead to different conclusions.

However, jurors can also reach the same decision on a verdict question by making different inferences from the same evidence or by relying on completely different evidence. And interestingly, in doing their own examination of the evidence to administer justice, jurors will sometimes find that a party satisfied their burden of proof based on a theory of evidence that the attorneys never argued.

When jurors enter the jury room for the first time, some have their minds made up and are ready to do an initial vote immediately and others will want to see the verdict form, jury instructions, and evidence first. Ideally, the initial vote will be done by secret ballot so everyone can feel comfortable voting honestly without the influence of whether they fall in the majority or minority.

Although the foreperson is ultimately responsible for maintaining an orderly discussion, other jurors will step in to facilitate the conversation whenever they feel they can be helpful.

With a group of 12 jurors, not everyone will regularly speak. There will be some who will be fairly quiet and only speak when required for a vote or to explain their position. There will be other jurors who will take the lead in voicing their opinions and facilitating discussions.

By the time a jury deadlocks, jurors are pretty set on their votes. However, when the court encourages them to employ new deliberation techniques some votes may change. When this particular jury deadlocked, we had each juror role play using the evidence to advocate how they would reach a decision that was opposite of their original vote. This exercise was challenging for most, but it brought out new perspectives and ultimately resulted in a changed vote.

Visual aids

Visual aids are great to break up the monotony of testimony or to help illustrate arguments. Visual learners will find these aids particularly helpful. However, keep the demonstratives as simple as possible. Cluttered lists and graphics just create more confusion and will be disregarded because they are too complicated.

When using demonstratives during closing argument, jurors fail to appreciate that they will not have the opportunity to review them in the jury room during deliberations. If using a timeline, chart, or other visual aid that identifies key points and evidence, you may consider gently reminding jurors to write down the parts they want to remember to make it easier when reviewing the evidence in the jury room. Also, be sure to keep the visual aid up long enough to allow jurors the time to write down what they need.

Juror demographics

The jurors who worked as journalists, engineers, and in finance seemed to be harder on the party with the burden of proof. They tended to want direct evidence and more evidence from the party



with the burden of proof than did other jurors. They were also strong in their convictions and difficult to persuade once they made up their minds.

If you have a lawyer on your jury, it seems almost inevitable that at least some jurors will recommend that the lawyer serve as the foreperson and will look to the lawyer for leadership. A lawyer on the jury is not necessarily a bad thing provided that the lawyer is not seen as having superior knowledge or influence. In fact, a good lawyer on the jury can be helpful in explaining the jury instructions and facilitating the discussions in a more effective manner.

What the jury notices - and talks about

Jurors are very observant of everything that goes on in the courtroom. They notice and discuss:

- what the attorneys wear every day;
- which attorneys are prepared and those who are not;
- which attorneys behave professionally and those who do not;
- unnecessarily repetitive questions of witnesses and repetitive arguments;
- insensitive and insulting comments by witnesses and attorneys;
- when attorneys take a statement out of context during argument;

- when attorneys unfairly take advantage of a witness's language difficulty;
- when attorneys misstate or overstate the evidence;
- tactics that seem designed purely to elicit sympathy and have no apparent relevance to the issues;
- the facial expressions and reaction of the parties and litigants anytime they are in the courtroom;
- the conduct of the attorneys and parties outside of the courtroom; and
- the time they are at court on long breaks feeling like their time is being wasted.

Although many of these things will generally not affect the jury's evaluation of the case, they can serve as an unwelcomed and unnecessary distraction from the evidence and issues. The goal for trial attorneys should be to minimize these avoidable distractions.

Concluding thoughts

Serving on a jury and witnessing the process firsthand reaffirmed my faith in the jury system. Everyone took deliberations seriously – even those who really did not want to be there, those who thought the case was black and white, and those who disagreed with the law or the District Attorney's charges.

As trial attorneys, we can be too close to our case to appreciate how jurors

might interpret and weigh the evidence, so focus groups can be an invaluable tool to open our eyes to perspectives we have not considered.



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