

Trial Myths and Misconceptions

by Howard Varinsky and Paulette Taylor

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The field of trial practice is fraught with mythology about how jurors think and react. When social scientists first came into the field of jury consulting 20 years ago, they often heard lawyers make such statements as, "if the trial goes on too long, the jurors will hold it against us." After conducting hundreds of post-verdict interviews, it became clear that jurors in fact never associated a lengthy trial with one side or the other. They blamed the system, rather than the plaintiff or defendant.

Over time, empirical research demonstrated that many of the beliefs about jury behavior that attorneys cherish actually are not true. They are not based on observations or discussions with jurors about their thought processes, other than an occasional chat with a juror after trial, which in no way should be confused with scientific research. Instead, these beliefs are based on law school lore and myths passed down in practice from partner to associate. Reliance on this widely accepted legal folklore of long-forgotten origin can lead to poor decisions in preparing a case for trial and may result in an unwelcome jury verdict.

After two decades of talking with jurors and conducting research to understand jury behavior and decision-making processes, this article is an attempt to identify and disavow some of these widely held myths and misconceptions, which too often interfere with the trial lawyer's goal of making his or her case as persuasive as possible to jurors.

Voir Dire — Myths exist at every stage of trial practice and nowhere are they more evident than in the jury selection process. For example, many attorneys are convinced that if a prospective juror relates a negative personal experience in front of the other jurors, it will contaminate the pool and have a negative impact on their client's case. Nothing could be further from the truth.

Just because one juror describes a particularly negative experience with his or her employer, landlord or insurance company does not mean other potential jurors will be influenced by it. Considerable research reinforces the common-sense notion that individuals are influenced by their own experiences and attitudes and by those of their parents, siblings, spouses and close friends. They will not set aside their own lifetime of experiences and attitudes in favor of those espoused during a stranger's two-minute anecdote related from the jury box. A life-long Republican is not going to switch party affiliations after hearing a fellow juror espouse a liberal viewpoint, nor will a Catholic convert after hearing a two-minute monologue on Judaism. People just don't change belief systems that easily.

The same myth leads some litigators to believe that they have a genuine opportunity during voir dire to convince potential jurors to change long-held beliefs through the use of "conditioning" and "educational" questions. Post-verdict interviews indicate that jurors do not get conditioned or educated by these types of questions. In fact, many of these questions are asked in a leading fashion that begets rote, affirmative answers. When interviewed afterwards, jurors state that they experience these types of voir dire questions as insulting and an affront to their common sense.

Along the same lines, attorneys frequently try to get jurors to commit to certain things during voir dire — for example, to keep an open mind until the defense puts on its case, to follow the judge's instructions, to bring in a verdict for the defense if the plaintiff doesn't put on enough evidence to meet its burden of proof. Virtually all jurors answer "yes" to these questions, which they consider meaningless and promptly forget. Meanwhile, the attorney has wasted valuable time that could be better spent building rapport with the jurors and eliciting information about their demographics, experiences and attitudes that will result in the effective use of peremptory challenges. In fact, by asking meaningless questions the attorney may squander his or her chances of forming rapport with the juror and erode the respect the juror initially accords the attorney.

Too often attorneys focus their voir dire efforts on discerning which jurors will be best for their case. The myth here is that the purpose of jury selection is to search for and identify the most favorable jurors, when

in reality attorneys should think of jury selection as jury "de-selection" and focus all their efforts on ferreting out those jurors who need to be excused because of experiences, attitudes and biases negative to the case. Once counsel senses that a prospective juror is a keeper, he or she should stop questioning immediately. The temptation to ask just one more confirming question inevitably leads counsel to reveal a "good" juror to the other side, resulting in a certain challenge of that juror by opposing counsel. Let the other side do their own work in jury selection.

Other myths that frequently rear their ugly heads during jury selection involve stereotypes of race, culture and class. For example, it is widely believed that Asians are highly likely to vote defense in civil cases, while African Americans are virtually always pro-plaintiff. If this was ever the case, it is no longer. Each individual juror must be looked as a unique person, taking into consideration their demographics (including race and ethnicity), experiences, values and attitudes.

While it is true that many first-generation, older Asians, especially those with educational backgrounds in finance, science and engineering, tend to be pro-defense, it is equally true that third-generation, highly assimilated Asians with degrees in psychology or art are likely to be pro-plaintiff. At the same time, while most attorneys rightfully view African-Americans as pro-plaintiff, a growing number are actually socially liberal but fiscally conservative, especially educated males. This type of juror looks much harder at liability and damages than the stereotype assumes.

Another stereotype that often leads attorneys astray during jury selection is that of the "helping professional." Nurses and teachers are often viewed as favorable plaintiff jurors because their jobs call for them to be caring and supportive. However, experience indicates that nurses who spend their days caring for the sick and dying have often insulated themselves against suffering and tend to vote for the defense. The same can be said for teachers whose work focuses on applying rules and teaching responsibility and accountability. Of course, while there are always particular nurses or teachers who may be plaintiff-oriented, attorneys often over-generalize these occupations to their detriment in jury selection.

Opening Statements and Closing Arguments — No doubt the most wide-spread myth in the trial attorney's repertoire is that jurors make up their minds during opening statement whether they will vote for the plaintiff or defense, the prosecution or the defendant. This myth stemmed initially from a University of Chicago study conducted in the 1950s, which indicated that jurors in criminal cases made up their minds which way they were leaning during opening statement before they actually heard any of the evidence.

Post-verdict interviews, coupled with more recent studies, indicate that jurors begin leaning towards one side or the other at some point during the trial itself. In fact, in one study between 90 and 95 percent of jurors reported that they made up their minds based on percipient witness testimony and key documents. Experience shows this to be true in nearly every case. Jurors withhold judgment until they see and hear witness testimony; cases rise and fall on the basis of witness credibility.

Although research debunks the opening statement myth, this does not decrease the value of opening statements. Clearly, this is the jurors' first opportunity to hear about and, most importantly, begin to develop an understanding of case facts, themes and theories. Opening statements are important as a teaching device and can provide a leg up to the attorney who is the better teacher.

The importance of closing argument is another myth lawyers hold dear, but research shows this is irrelevant to jurors' decision-making processes. In fact, in more than 2000 post-verdict interviews, not one juror has stated that they made up their mind during closing argument. As stated, the vast majority of jurors make up their minds during the trial itself on the basis of witness testimony and documents; the remainder reach their decisions in the jury room after deliberating with their fellow jurors. Attorneys need to understand, therefore, that by the time closing argument begins, the horse is not only out of the barn but also in the next county.

For jurors, the purpose of a closing argument is to summarize for them the information and arguments they need to deliberate with each other in the jury room. Themes and theories, on the other hand, should be front

loaded in the opening statement and reinforced by witness testimony, where they have the best chance of shaping jurors' perceptions of the case.

Many attorneys also make the mistake of saving until closing argument the glue that holds their facts together. This oversight is risky because jurors, searching throughout the trial for connections, will fill in any blanks the attorney leaves with their own assumptions, misinformation and misapplied life experiences. By the time the attorney connects the dots in closing argument, the juror is already invested in his or her own interpretation of the facts and, therefore, is resistant to changing it.

Witness Testimony — The major myth in this area of trial practice is that the witness who is conversant with his deposition and has reviewed his testimony with counsel is well prepared to take the stand. Nothing could be further from the truth. In addition to the facts, witnesses have to be taught the nature of direct and cross-examination and the psychological aspect of the testimony "game." The witness who knows how to communicate effectively during direct testimony and how to hold his or her own successfully during cross-examination will be a much more effective witness. Research has also demonstrated how jurors perceive, evaluate and react to witnesses. Using this information, it is possible to prepare witnesses so that jurors will respect, believe and identify with them.

Some lawyers, for example, don't want witnesses to look at jurors because they believe it is not important or makes jurors feel uncomfortable. What researchers have learned is that jurors, like everyone else, judge credibility by whether someone looks them in the eye when conversing. When a witness consistently fails to make eye contact, especially during direct testimony, jurors have a hard time believing him or her. Jurors often read this behavior as evasive, and in every case, it erodes the witness's credibility.

Another myth is that witnesses should not fight back during cross-examination because they will be perceived as too argumentative. As long as they are respectful of courtroom protocol, jurors admire and value witnesses who are strong, stick up for themselves and don't let lawyers push them around. An effective witness must be able to withstand the most rigorous cross-examination, since a bungled performance on cross is the biggest single factor that causes a witness to lose credibility with the jurors. On the simplest level, jurors expect witnesses to answer the cross-examiner's questions with a respectful "yes" or "no" before they make their own points.

The best way to prepare witnesses for cross-examination is to explain to them how it differs from direct examination: that opposing counsel is attempting to control them at all times; that they have no intention of letting them tell their story, but will use every technique at their command to use the witness to make their case and establish their points. Witnesses must learn how to deal with hostile questions, interruptions, abrupt changes of subject and sarcasm by taking control of the cross-examination. After all, there is no eleventh commandment that says, "thou shall give up your personal power when you get on the witness stand." Lawyers don't need to be afraid to teach their witnesses to be strong albeit respectful.

Trial Techniques — Demonstrative evidence is another area where misconceptions can wreak havoc. For example, too often defense counsel are fearful that professionally prepared graphics will make it look like the evil, large corporation spared no expense to defeat the small business or individual. On the other hand, plaintiff's counsel clings to its "little guy" approach to graphics because they don't want to give up the underdog image.

The reality is that jurors do not evaluate the merits of the case based on the relative sophistication of the graphics. Today, jurors from every walk of life are exposed to incredibly sophisticated graphics — from Web sites to animated films and revolving billboards. The only thing crude blowups accomplish is to make the lawyer appear unprofessional. Creating graphics that educate and persuade help jurors learn, remember and identify with the client's case. They also enhance the juror's perception of the attorney as sophisticated and professional.

Many lawyers believe strong testimony at day's or week's end will sink in better and have a lingering effect on jurors until the next court day. In reality, the minute court is dismissed, jurors begin thinking about their commute and picking up the kids. They leave the trial behind in the courtroom and truly don't give it

another thought. Nor does the timing of testimony have any impact on how jurors view cases as a whole. Most jurors are perceptive enough to pick up the salient details of the case, regardless of when they are presented.

An allied myth is that jurors recall deposition testimony read into the record or portions of videotape depositions played during trial. Research shows that jurors' attention spans and abilities to focus on testimony of this kind are somewhere between six and twelve minutes, after which time they start drifting in and out. When presenting material of this type is necessary, make sure to highlight in opening statement what the jurors should look for and introduce the testimony when jurors are fresh and not after lunch or at the end of a tedious day when their attention will wander and the information won't stick.

Another old saw is that over-objecting turns the jurors against the attorney who makes the objections. In reality, except in the most extreme cases, jurors become involved in the drama of the trial and simply assume the objecting attorney is trying to stop something from being said. In fact, jurors may even view the objecting attorney as the one who is trying to keep the record straight.

A few other misconceptions that some attorneys fall prey to and should be eliminated include:

Establishing the same facts a dozen times will cement them in the jurors' minds. In reality, jurors detest what they consider to be the endless repetition in which lawyers engage. As they often put it in post-verdict interviews, "that attorney must have thought we were really stupid!"

Jury instructions will supercede jurors' logic and overcome common sense reactions. Actually jurors will not go outside their own logic to follow instructions. Instead, they will often rationalize their logic to make fit within the jury instructions but still reach what they consider to be a fair and equitable result.

Sometimes attorneys think they can make points with the jurors by making gratuitous gestures and communicating their feelings about a witness or a judge's ruling by rolling their eyes or throwing up their hands. In reality, jurors view this behavior as unprofessional and it diminishes their respect for the attorney.

If the plaintiff is a minority or a woman, it is important for the defense to have a minority or a woman on their trial team. If that lawyer is an integral part of the team and plays a real role in the trial, the jurors will appreciate their professional talents. But they won't find the defense's case any more meritorious than they would otherwise. On the other hand, if the minority or woman lawyer appears to be window-dressing, their presence at counsel table will backfire because jurors will see through the ploy and find it offensive.

Trial attorneys need to watch out for jury lore disguised as jury wisdom. The assumptions contained in platitudes of uncertain origin should be rigorously questioned and routinely discarded in favor of scientific jury research. The best trial preparation decisions are based on what jurors actually think, not on what attorneys think jurors think.