

Conditioning The Jury: From The Plaintiff's Perspective

All of us have participated in a lawsuit where the amount of the jury's verdict did not measure up to our pretrial evaluation. Needless to say, a result of this sort can come as quite a shock. It is hard to explain this type result to a client who has turned down a substantial settlement offer. In every such case, there is a valid reason for the jury's verdict. The manner in which a case is presented to the jury generally determines whether or not the jurors will meet or exceed your expectations. In every case where the jury's verdict is in the \$1,000,000.00 plus range, all jurors must have been properly motivated in that direction. Large verdicts don't just happen. Neither do bad results. We will now explore the conditioning of a jury to return a substantial verdict in a proper case.

It is extremely difficult for a juror to vote for a multi-million dollar verdict in a case, regardless of the merit of the case, if that juror does not like the Plaintiff or the Plaintiff's lawyer. It will be virtually impossible for that juror to do so if he or she has not been totally convinced that the Plaintiff is entitled to a verdict that will amount to more money than the juror has ever seen or will ever see over a lifetime and that doing so is the right thing to do. I am totally convinced that jurors must be conditioned to think in terms of returning large money awards long before a case gets to the closing argument stage.

Fortunately, devastating injuries leading to total and permanent disability and impairment are rare. When they do occur, communicating the real impact of your client's case to the jury requires careful preparation and skillful presentation by the Plaintiff's lawyer.

The trial lawyer must condition the jury to think in terms of a verdict in an amount that will be totally and completely adequate in every respect, under the facts and circumstances of a specific case, to compensate the Plaintiff. This conditioning process can be handled in many different ways and by utilizing varying techniques. It is essential, however, to understand the psychology of the process. In every case, you will have placed twelve men and women together for the first time. They probably won't know each other and will be from differing backgrounds and experiences. Their education levels will vary as will their occupations, religions, and the like. Some of these people won't even like each other at their first gathering. They will tend to segregate themselves into sub-groups within the jury structure as the case progresses. You will be asking this diverse group, not only to agree on a verdict, but to respond to your request for a very large verdict for your injured client. How do you accomplish your goal within a fairly limited period of time? Your jury will hear a set of facts with which they are totally unfamiliar. The trial judge will give them a legal charge that crams years of law school into thirty minutes or so. All of this makes the practice of trial law the most fascinating of all types of work known to man. It will be equally challenging, frustrating, and rewarding.

Trying a lawsuit before a jury requires maximum use of all communicative skills at your disposal. If you cannot communicate effectively at this level you will soon find yourself taking on a new line of work. Good trial lawyers, even though they must work hard and prepare their cases thoroughly, operate on instincts. They generally have a feel for people and know how to motivate groups.

How do you condition a jury to respond as you would have them respond? There is obviously no textbook answer to this query. It is much like hitting a baseball - either you have a natural talent to do so or you don't - and most of us strike out more than we should. Of course, you can always improve your talents and utilize fully your learned skills. This applies equally to either baseball or trial practice. Where do you start? I suggest you start the conditioning process with your very first contact with the prospective jurors.

L. Selecting the Jury

It is essential to use the voir dire examination of jurors effectively. The goal for the trial lawyer is to not only eliminate jurors whom you believe to be unfavorable, but to wind up with jurors who will respond in a proper fashion if you do your job. The jury-selecting process will vary depending on whether or not the trial judge allows the lawyers to conduct voir dire examination. It has been my experience that most defense lawyers would rather have the trial judge handle voir dire examination. For some reason these otherwise excellent lawyers are willing to submit written questions for this most important phase of the trial. I have never understood their rationale fully. I believe Judge-conducted voir dire tends to result in jurors being more intimidated and far less open with their responses. This results in both sides selecting a jury with less than full disclosure from the jury. It is my belief that voir dire examination by lawyers, if handled properly, should work well for both the Plaintiff and the Defendant. Valuable information will always be obtained that will assist both sides in seating a jury that is as neutral as possible. It is also possible for all lawyers to develop an early rapport with the jurors and to get a feel for the twelve persons who will ultimately decide your client's case. If the lawyer feels inadequate in this area, he or she is probably deficient in other areas of trial practice.

We should always remember that prospective jurors check the lawyers out very carefully. They tend to make personal evaluations of lawyers very early during a trial. I believe that on occasion jurors actually try the lawyers as much as they do the case itself. For this reason, we must be extremely careful to control our conduct both in and outside the courtroom when jurors are present. For example, most jurors do not understand how a lawyer can joke around with the opposing lawyers prior to the selection of a jury, or at recesses during a trial, and really be dedicated to representing their client in an area that sometimes resembles a battleground. I believe lawyers should be courteous to opposing counsel during a trial, but refrain from unnecessary contact.

Our personal conduct can influence a juror's thinking without our even realizing that we are being scrutinized at the time. Lawyers come into the courtroom with not the best of reputations. This is due in large part to the actions of a small number of lawyers and the tort-reform public relations campaign against trial lawyers. We should never do anything to justify any negative conceptions of lawyers on the part of jurors.

When voir dire examination of the jury panel is completed, each juror should have a general idea of what the case is all about. They should actually know what the theme of the Plaintiff's case is at that stage. They should certainly know from the Plaintiff's side that the case is a good one and something that will be interesting to hear as the case unfolds. It is perhaps shocking for a juror to learn for the first time during the opening statement that he or she has been selected to sit on a very important lawsuit when the voir dire examination had given no hint of such. It is always possible that certain jurors do not want to be on an important case for reasons known only to themselves. If so, that is always bad news for the Plaintiff if one of these persons lands on your jury. If this happens, you will have a difficult time finding anybody to blame other than yourself.

If your case involves tragic circumstances and the need for a substantial verdict, the jury panel must know that before a jury is actually seated for the trial. They must be given a general idea of the nature and seriousness of the injuries involved and why the Defendant is responsible.

If the case involves punitive damages, you must let the prospective jurors know this early-on and eliminate those who do not favor punitive damages. Cases that involve punitive damages must be handled differently from those dealing solely with compensatory damages. Some jurors have fixed opinions against the awarding of punitive damages in any amount.

As we all know, forces outside the courtroom have had an increasing impact on jurors. Plaintiff's lawyers - from the beginning - have had to deal with negative predilections about the courts and especially the jury system. These same feelings now exist concerning injured persons and their lawyers. We have to overcome this influence during every trial. During the tort reform battles of recent years, the public was bombarded with false information relating to the jury system. Without question, this left a negative impression with many persons in our State.

Much of our time, as a result, has to be spent in changing pre-existing opinions. This time could be better spent in selling our clients' legitimate and deserving claims. Nevertheless, since we live in the real world, we take the situation as it exists. We cannot combat the expensive advertising campaigns by insurance companies that create a new false "crisis" ever so often. We must do our work in the courtroom as they say in the football vernacular "between the lines." Jurors may come into the courtroom as more conservative, more skeptical, and more cynical. It is our job to overcome those feelings and convince them during the course of a trial to do what is right by our client.

II. The Opening Statement

In my opinion, the opening statement is the most important part of the trial of any case. Regardless of the methods, techniques, and tactics employed, it is absolutely essential for the Plaintiff's lawyer to get his injured client's message across in such a manner so that the jury will understand fully what the case is all about. The Plaintiff gets the first shot and should take full advantage of the opportunity. The Plaintiff's lawyer is somewhat like a producer and director of a play or a Broadway show all wrapped into one. You will be presenting your client's case to a small, select audience during a relatively short period of time. How you do this will determine the type review you get from these twelve critics. This review in the form of a verdict will come shortly after the final curtain of your production falls. The time between a knock on the door and the reading of a jury's verdict is something every person should experience at least once.

It is my personal belief that most jurors make up their minds on the liability issues to a large extent during the lawyer's opening statements. This may not always be true insofar as damages are concerned. In any event, I do know that the combination of good liability and substantial damages, properly presented in word pictures during an opening statement, will condition the jury to later be receptive to evidence that justifies the type verdict required to adequately compensate an injured Plaintiff. This is not to say that minds made up cannot change dramatically during the course of a trial. When you finish the opening statement, each juror must know at the very least that your client has suffered a tremendous wrong at the hands of the Defendant and as a result has been damaged greatly. Each juror must have a good feeling for the nature and extent of your client's injuries and damages and want to hear more. The theme of your case, first introduced during voir dire, should be driven home early-on in your opening statement. This theme will then be developed fully during the

remainder of the trial.

The jurors must like you and your client at this stage. If they do not come out of this stage properly motivated and wanting to help your client, your job will be much harder during the remainder of the case.

If you will be dealing with unusual and complex matters during the trial, you should educate the jury at the outset on the terminology involved as well as the substance of what they will later be asked to understand. This should be done in non-lawyer language and must come across as a helping hand rather than a lecture. All lawyers sometimes have a tendency to talk down to jurors. This is a mistake and will usually be disastrous. In every case, it is damaging to your client's case and should be avoided. Lawyers must learn to think and talk like jurors.

It is most important that a lawyer be credible and come across as a person who can and should be trusted. If even one juror feels that the Plaintiff's lawyer cannot be trusted or is not telling the complete truth during the opening statement, there will be little chance of changing this juror's mind during the course of the trial. It is difficult to overcome this usually self-inflicted wound.

We all form opinions of jurors during the jury selection process. We form likes and dislikes as we communicate with the jury panel. On occasion, our opponents will even leave as jurors persons we actually know. This is always disturbing to me. I find myself asking - why would they leave that person on my jury?

We carry over our feelings concerning jurors into the actual case. It is extremely easy to play favorites with the jury. Avoid trying your case to these favorites and thereby ignoring the rest of your jury. Remember that each juror will have a chance to have a say during deliberations and at the very least will always have a vote. Each juror wants to feel that his or her role is important. This is largely because they will hear how important they are many times during the trial. Saying a juror is important is not enough, however; you must treat the jury in that manner. You should spread your attention to all persons on the jury. It is important to make eye-contact with each juror at least once during your presentation which should be natural and not forced. Do not make jurors feel uncomfortable or ill at ease by anything you do or fail to do. Remember that many jurors come into the jury box with some reluctance and with a feeling of not being real sure of what to do and when to do it. Do not add to their discomfort.

Finally, if you don't feel comfortable with a juror over the course of the trial, you can rest assured that the juror shares the same feelings. Most good trial lawyers can tell you who the foreperson of a jury will be and can spot the bell-cow. Normally, these two are the same person. Never ignore this person during the trial.

III. Presentation of Evidence

A great deal of thought must be put into how your evidence will be presented at trial. Tremendous amounts of planning must go into this phase of the trial. The order of witnesses is critical for a proper and logical presentation of your case. It is again somewhat like directing your play on stage and before a live audience. There must be a sensible approach to what you are attempting to do and why. You must not only consider the types of evidence to present, but also what witnesses to put on and in what order. Your evidentiary presentation should compliment your opening statement. A lawyer without a good plan will never be a good trial lawyer. It is essential to plan and then to carry out the plan.

Jurors, like all of us, have a limited time during which they totally concentrate on what they see or hear during a trial. You must take full advantage of these critical windows of opportunity. I am firmly convinced that jurors want to be entertained during a trial. For this reason, among others, you should be entertaining and put on a good show. There is a vast difference, however, in being an entertainer as opposed to a clown. A good trial presentation is more than theatrics and must have substance. If you don't believe your injured client's case is a serious one, you can rest assured that the jury won't either.

By using such things as charts, blow-ups of exhibits, enlarged photographs, models, and the like, you will keep the jurors alert and responsive to your message. All of these props should be utilized in major litigation.

You must keep all of your presentation at a level where the jurors understand and feel comfortable with your client's cause. They should want to help the Plaintiff and have a burning desire to do what is right. It is your job to assist them and to make their job as easy as possible.

You should have a goal in mind and that goal is to make your jury sincerely believe that they are on an honorable mission and that their verdict will make a difference in a substantial way in your client's life.

Serving on a jury is a high-calling. It is one that should be respected in everything the trial lawyer does in and out of the courtroom. Most people go through life not having the chance to make much of a difference in anything outside their own family and circle of friends. Jury service gives each of us the opportunity to be a part of something worthwhile.

IV. Closing Statement

By this stage of the case, you should have fully convinced the jury that your client's cause is a just one. If you have done your job properly, and the facts and law of the case justify it, each juror should now be ready and willing to make a decision that will fully and adequately compensate the Plaintiff. The conduct of the Defendant, combined with the Plaintiff's injuries and damages, should justify a substantial verdict. The likelihood of obtaining that verdict will be much greater if the jurors now expect and want you to ask for a substantial award. On the other hand, if for the first time the jury realizes that you are asking them to award a very large amount of money to your client, you probably will not get that result. In fact, you may well be quite disappointed in the jury's reaction to your request. One or more of your jurors may believe your request to be totally outrageous. Unless by this stage of the trial, the jurors know they are sitting together on a "big" case, you can forget your dreams of a fair and reasonable verdict and one that will take care of your client's needs. You can rest assured that the defense lawyer will let the jury know that you are asking for much too much money and are greedy if you have not conditioned them from the outset so they will want to return a substantial verdict for your client because that is the right thing to do. I try to remind the jury that I told them in the very beginning that this was an important case and that I would be asking them to respond by awarding a substantial verdict to my client. Finally, no lawyer will ever participate in a "big verdict" case if he or she is timid about asking for a large sum of money. You certainly can't duck your head and whisper the amount to the jury and expect much in return.

V. Conclusion

We can all do a better job of trying lawsuits. None of us will ever quit learning, nor will we ever stop making mistakes. We must learn from our mistakes, however, and work diligently to make sure that the system works for our clients and that justice is done.