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June 2010 Jury Tip: “Preach to the choir in your closing”

I’ve often preached about the importance of persuading jurors early on in your case—by the middle of your opening statement if not during jury selection. Probably more times than you can count, I’ve told you that research studies (and my own mock jury research data) have found that 85-90% of jurors make up their minds in trial by the end of opening statements. And while it is true that 85-90% of jurors, when asked to guess a likely verdict after hearing only opening statements, give an identical verdict at the end of the case or the mock trial, the phenomenon can be a little misleading.

It is true that jurors made immediate decisions in trial about which side seems credible, which side’s case seems to make sense, and which side’s version of what happened seems more likely, based on what the jurors themselves already believe. It is true that, once the juror has ideas about which side seems more likely to make sense and has framed the case a certain way, the juror will view the evidence subjectively, and unfairly. Every juror—every human—is unwittingly guilty of something psychologists call confirmation bias, which is loosely defined as a tendency to interpret information in a way that confirms their own preconceptions, hypotheses, and what they already believe. It is true that the vast majority of jurors makes their minds up after hearing the opening statements and don’t change their minds during trial. When you ask them to tell you which way they’re leaning after openings, they’ll tell you that they have no idea, haven’t heard evidence, and don’t want to guess. But when they do take a guess, that guess becomes the same verdict they’re certain of at the end of the trial 85-90% of the time, and that’s no coincidence.

But it’s also true, and usually unsaid, that actual and mock jurors ROUTINELY change their minds and their verdict during deliberations. So to turn a complex story into a simple one, nothing the lawyers or witnesses say will change most jurors’ minds, but other jurors seem to have no trouble persuading each other.

Why? Peer pressure is a large part—many jurors lose confidence in their verdicts when they realize that others have a completely different verdict. How would you feel if you solved a math problem but found that 90% of your classmates have a different answer? If you’ve ever seen a jury deliberate, you will have noticed that only two or three of the jurors stand firm, argue their side, dominate the discussion, and influence the others. Now you know why; the other nine or ten jurors lack the confidence and stubbornness necessary to hold their ground when others have differences of opinion and verdicts.

Another key to this puzzle lies in credibility—the other jurors have much more credibility than you do. Even if your jurors trust you, they realize that you and your witnesses are advocates for your client and paid to be subjective. For the same reason that jurors listen much more closely to an objective, by-stander witness (with no stake in the case and no relationships with the parties) than to experts or litigants, jurors trust each other much

more than they trust anyone else because the jurors are the only truly objective people in the courtroom. So they'll take what you and the witnesses say with a grain of salt, but not each other.

By the end of trial, your jurors have long-since decided which side is right and which side is wrong. Don't fool yourself into thinking that half your jurors are still on the fence. Don't fool yourself into thinking that a powerful closing might change the minds of jurors who are against you. That ship has sailed, probably even before the trial's first witness. Don't waste your breath trying to sell your case or be persuasive during closing arguments. Instead, your focus should be entirely on preaching to the choir. Your only chance to win the case is to prepare the jurors who are already with you to persuade the rest of the jury, because they have a much better chance than you do to change minds.

As I told you last month, your opening statement should be all about building credibility, demonstrating that you're patient and reasonable, and explaining to every juror why your case makes sense. During your closing, you need to assume that your jurors (or at least some of them) already trust and believe you. It doesn't hurt to remind your jurors why your case is reasonable, but don't be afraid to be an unapologetic advocate for your case throughout your closing. The entire point of your closing argument should be to arm your jurors, emotionally and factually, to argue with the jurors who are against you.

Don't simply recite what's happened in the case, summarize what the witnesses said, and conclude with a powerful speech about right and wrong. Instead, I would ALWAYS recommend walking your jurors through the verdict form—blown up as a visual that the jury can see. On each liability, causation, or damages question, prepare your jurors for the arguments they're likely to hear from the other jurors and arm them with the arguments they'll need to fight back and persuade the other jurors. NEVER assume that your jurors will understand the questions on the verdict form and ALWAYS take the time to carefully explain what each question means and what they're being asked to decide. Never rely on the baffling jury instructions to guide the jurors—if you've ever seen a jury deliberate or talked to jurors about the verdict questions after a real trial, you might be shocked at how confusing they find the jury instructions and how many unwitting mistakes they make.

Don't forget the emotional part of your closing argument, either. You need to help your advocates on the jury become emotionally invested in your case and emotionally prepared to fight for your client, especially when they're being asked to fight for you against stubborn, dug-in jurors. Giving a fiery closing argument that inspires your jurors never hurts—I've often recommended that trial teams choose the even-keeled lawyer to give the opening and the feisty, passionate lawyer to give the closing. The first lawyer's job is to come across as reasonable, the second's is to fire up the jury. Make sure your closing arms your jurors with more than the facts—give them general principles, trial themes, and larger-than-this-case reasons to fight for your client. I've often advised plaintiff lawyers to tell the jury that a large verdict “might be the only way to help these defendants and companies like them to be more careful and more responsible.”

Nearly every research study in psychology tells us that your job changes throughout trial. Try to persuade all of your jurors early on, tailor and present your case in a way that appeals to the unique values and perspectives of your specific jurors, and preach only to the choir at the end of trial.

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