

What does that even mean?

By: Douglas H. Wilkins and Daniel I. Small ◉ June 27, 2019



Ever spend time with friends or on the internet laughing about incomprehensible rock music lyrics? In "Ticket to Ride," doesn't Paul McCartney clearly sing: "She's got a tick in her eye. But she don't care." Who can forget the Clash's "Rock the Cat Box"? Or Creedence Clearwater's "There's a bathroom on the right" And, out of decency, we'll refer to the true lyrics of Manfred Mann's "Blinded by the Light" cover: "revved up like a deuce, another a runner in the night." What does that even mean?

Not so funny are juror misconceptions about what lawyers and judges are telling them. We heard of a juror (not in one of our cases) who thought that, because the defendants sincerely "do care" about the plaintiff's injuries, the judge's "due care" instructions supported a defense verdict.

A famous study of juror comprehension quoted a juror as saying, essentially: "I don't get the preponderance of the evidence instruction. I thought we weren't supposed to pre-ponder the evidence until deliberations begin?"

Another juror misunderstood the instruction about proving that "more likely than not" the plaintiff's negligence was a cause of the accident. It sounds like more than 50 percent causation, i.e., the primary cause of the accident, which is not the law.

These anecdotes share an underlying truth: People hear what sounds familiar. Familiar meanings are not necessarily what we want our sometimes odd word usage to convey. However, we have to recognize reality and deal with it carefully.

Plain language matters. It is true that a dozen (or so) laypeople will act intuitively. After serving on a jury, one friend said, "I knew how I was going to vote after hearing the evidence, no matter what the judge said." But it is also true that she, like many jurors, did try to understand the law and apply it.

We have found that jurors consistently take their job seriously and, despite the difficulty, honestly do try to understand and follow the law.

If the judge and lawyers speak in terms that jurors can understand, it is far more likely that at least some of them will use the law, and the judge's instructions, to try to persuade other jurors during deliberations.

The clearer the argument and instructions, the greater chance that deliberations will include some significant focus on the law, or on the key point for your client. If the jurors don't receive a comprehensible statement of the law, though, they have little to go on but their intuition.

Many of the jury arguments we make and instructions we give are correct statements of the law. Sometimes they are even direct quotes or close paraphrases of the Massachusetts Reports. They are not going to lead to appellate reversal.

However, they may lead to distorted results based on juror misunderstanding of the law. After all, lawyers spend a whole year studying torts, contracts, etc. We ask laypersons to understand the law in one of these complex areas after a summary presentation addressing many different rules, devoting only a few minutes to each key concept. The challenge is already formidable. We can't afford to add needless linguistic obstacles.

We are not advising you to "dumb down" what you tell jurors, much less to talk down to them. But even the most highly educated people understand plain language more easily than convoluted or technical discussions.

The more time it takes for a juror to understand what you just said, the less likely he or she will catch the next thing you want to say. Sure, you can pause and let it sink in, but you want the facts or arguments to sink in, not your grammar or jargon. Juror attention is a perishable commodity.

So try to speak as directly as you can. If you are preparing an argument, or submitting proposed instructions, think about how you want to express the legal (and other) concepts. You may want to practice these arguments at home and talk about it with non-lawyers, so that the best rhetoric and simplest phrasing come naturally to you (don't memorize it all, though). Avoid jargon and technical or ambiguous terms.

Note that people pay closer attention to actions than to things or concepts. So speak in terms of action (verbs) rather than things (nouns) when possible. You'll be surprised how often lawyers use many words that include a noun when a simple verb will work.

Avoid the passive voice. Use fewer words if possible (very often, it is). Avoid run-on and complex sentences. Use case-specific language, not abstract or generalized language (e.g., use parties' names, not "plaintiff" and "defendant").

Even when we think we are clear, maybe we are not. People sometimes ask what is meant by "speak in terms of action (verbs) rather than things (nouns) when possible." They ask for an example. Good point: Examples are often the clearest way to explain concepts in briefs or oral presentations (although you may need to get advance approval from a judge if you try it with a jury).

So here's an example of changing nouns into verbs (and eliminating unnecessary words). You could say: "The consumption of alcohol or drugs may trigger or intensify (make worse) a defendant's preexisting mental disease or defect." Or you could say: "Drinking alcohol or using drugs may trigger or aggravate [John Smith's] preexisting mental disease or defect." Which is easier to understand on first reading/hearing?

No one will think that you are condescending by doing what we suggest. They will think that you are being clear. And clarity is essential to communication.

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