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Five most common faults of trial lawyers

By: F. Dennis Saylor IV and Daniel I. Small December 31, 2015

One of the great privileges of being a judge is to be able to speak with jurors after a trial, to thank them and to ask them questions about the process.

Many jurors, with a little encouragement, will offer their views about the presentation of the case — what worked, what didn't, and how it might have been done differently. Many lawyers might be surprised by the relative consistency of the answers.

Every trial, of course, has its own twists and turns, and every jury is different. Sometimes a case founders for its own unique set of reasons.

Still, jurors as a whole tend to complain about the same broad issues over and over. Here are the five most common types of complaints:

1. Lawyers are disorganized

Jurors generally believe that they are undertaking an important duty, and most of them take it very seriously. They complain with some frequency about how disorganized the lawyers seemed to be. Lawyers who do not prepare adequately, and are therefore disorganized, are seen as disrespectful — to the judge, the jury, the parties and the process itself.

Too often, lawyers make rambling, discursive arguments that sound like they were made up on the spot. They fumble with their questions, or ask questions without any logical sequence. They can't locate exhibits. They can't locate deposition pages. With each sign of disorganization, the subliminal message the attorney sends is: "I don't care enough to be prepared!"

Careful organization and preparation does not just improve the technical presentation of your case, it also improves your relationship with the people you are trying to persuade.

2. Lawyers waste time

The time of jurors, like all people, is precious. Their attention spans are limited. If you waste their time, they won't like it, and they may well stop listening.

Too many lawyers don't take the trouble to simplify their presentation. They ask too many questions. They talk too much. They allow too many gaps and pauses in the process.

Sometimes this is the result of over-preparation — getting so wrapped up in a case that every little detail seems important. Sometimes it's under-preparation — not taking the time to sort through the facts to determine which details are not important. Either way, the result can seriously undermine your case.

3. Lawyers don't show the jury the evidence

By the time the case gets to trial, you've lived with the documents or other pieces of evidence for years. It's easy to forget that no one else has.

Too often, lawyers get an exhibit admitted, sometimes with great effort, but then leave it on the witness stand or counsel table, without giving the jury the chance to comprehend it.

Make sure you give the jury a real opportunity to see (or touch or hear) and understand the evidence. That may take time. In the electronic age, attorneys frequently display documents on a screen, but they often use too many and flash them up and down too quickly.

If the jury doesn't have a chance to read and understand a document, it may as well not be in evidence at all.

4. Lawyers confuse the jury

Attorneys are sometimes surprised by questions from a deliberating jury that show confusion over basic facts or issues. Generally, that's the lawyer's fault, not the jury's.

It's your job to make sure that your presentation is clear and simple. Lawyers often put on too much evidence, on too many issues, with too much legalese or jargon. They bury the jury in unnecessary detail. They go for quantity, not quality.

In fact, the trial lawyer's challenge is just the opposite: to reduce clutter, and to find the best ways to make the presentation of the evidence as clear and simple as possible.

5. Lawyers don't explain the evidence to the jury

It's not enough to just get evidence admitted; you have to show what is it, what it means, and how it fits into the story. Some lawyers seem pleased with themselves (or maybe just relieved) to get everything admitted, and don't use charts or other visual aids to help explain it. The pieces of the puzzle have to be put together, or they won't have any impact.

Prosecuting a money laundering trial, Dan Small made a simple blowup chart tracking the pot of money being broken up into multiple checks, then recombined into a single account. It made the structuring effort dramatically clear. More than that, though, the visual web of money being broken up and recombined became the visual manifestation of the "web of deceit" theme of the whole case.

Of course, the details are usually important, too. It's not enough to get the broader issues right. A lawyer can easily lose a case for a technical reason that has nothing to do with juror impatience or confusion.

Nonetheless, trial lawyers need to keep in mind what they're trying to accomplish and who they're trying to persuade. Lift your eyes up from the piles of paper stacked on your table, and consider your audience carefully. Respect their time, recognize their needs, help them understand the case, and try to make yourself an object of their respect.

Most importantly, keep your case as clear, simple and organized as you possibly can.

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