

Drowning in complexity

By: F. Dennis Saylor IV and Daniel I. Small September 29, 2016



Complex trials are an occasional necessary evil, although they are not as occasional as they ought to be, and for the most part they are not all that necessary. Still, they occur. And sometimes, it seems, the last thing the lawyers who try those cases are interested in is the impact on the jurors.

Jurors are not normally masochistic. They don't enjoy long trials, and they don't enjoy being bombarded with hundreds and hundreds of exhibits. They also don't enjoy feeling lost, ignored

or bored.

Nonetheless, a common phenomenon in complex trials is that jurors feel overwhelmed, confused and frustrated by the case. The cause is not hard to figure out; it's because lawyers do one or more of the following:

1. They bring too many charges (criminal) or assert too many claims (civil).
2. They offer too much evidence.
3. They don't explain things.
4. They won't shut up.

The government creates this problem with some regularity, particularly in high-profile criminal cases. Part of the problem arises from a group decision-making phenomenon, in which cases are brought by teams of lawyers and agents. Every participant can insist that something should be added, but it's difficult for any one person to say "no."

Dan Small learned this lesson early in his career. As a brand new Justice Department lawyer, he was assigned to the trial team prosecuting former U.S. Budget Director Bert Lance.

The task force that investigated the case — believing that just about everything was important — charged an extraordinarily complex financial conspiracy. To make matters worse, it brought the case in Lance's hometown of Atlanta. Had it been satisfied with a simple false statement case to a bank located in, say, Chicago, the result might have been very different.

Instead, the overly complex indictment resulted in three things: 1) it took too long to try; 2) it confused the jury; and 3) it allowed Lance to put forward a simplistic but sympathetic defense. The result: a hung jury.

In a complex case, the need for economy is particularly acute. It ought to be obvious that it is a bad idea to overwhelm and confuse the jury.

Again, complicated disputes do arise and sometimes need to be tried. But if you're involved in a complex trial, you should be thinking constantly about how it can be streamlined.

Here are some other cautionary examples. First, an excerpt from a news account of the retrial of former Illinois Gov. Rod Blagojevich in April 2011:

Prosecutors have streamlined their case against the disgraced former Illinois governor, dropping some of the most complex charges to address complaints by the previous jury that the evidence was too hard to follow.

The government's case so befuddled jurors at the first trial that they drew up their own time lines of alleged misdeeds and taped them to a wall as they deliberated.

Former juror Stephen Wlodek complained that prosecutors failed to fully explain the case. "It was like, 'Here's a manual. Go fly the space shuttle.'"



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In pretrial preparations, prosecutors have been working to simplify everything. They've dropped racketeering charges, which have stupefying legal points and subpoints. They also dismissed all charges against Blagojevich's brother and co-defendant, Robert Blagojevich, allowing them to focus entirely on the former governor.

"They've been like a ship tossing excess baggage overboard to get through a storm," said David Morrison of the Illinois Campaign for Political Reform.

The results? In August 2010, the first jury hung on 23 of 24 counts. In June 2011, the second jury found Blagojevich guilty on 17 of 20 counts.

Next, from a news account of the retrial of the Holy Land Foundation, a Muslim charity accused of financing terrorism, in November 2008:

Prosecutors this time pared down what observers had criticized as a bloated and complicated case. ...

Tightening their case from the initial trial, prosecutors dropped most of nearly 30 counts against Mufid Abdulqader and Abdulrahman Odeh.

The results? In July 2007, after 19 days of deliberations, the jury either acquitted or hung on all charges. In November 2008, the defendants were found guilty on all remaining charges.

Here's one more. In October 2015, a mistrial was declared in the criminal prosecution of the former leaders of the law firm Dewey & LeBoeuf. The case took months to try, and after acquitting defendants on dozens of charges, the jury remained "hopelessly deadlocked" on the remaining 93 charges. As of this writing, the retrial is yet to occur.

The lessons are clear: Figure out what really matters and strip away everything else you can. You may think that other things are "important." You may think that the record needs to be "complete." Those things may well be true in the abstract. But it's hard to win if the jury feels lost, overwhelmed and doesn't understand the case — and has given up trying.

Previous installments of Tried & True can be found at [here](#). Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.