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Learning from jurors' reactions to trial counsel

Acting in a condescending manner toward jurors often tops their list of annoying trial lawyer behavior.

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A senior trial lawyer we know enjoys recounting in detail his favorite experience from his days as a young associate at a litigation powerhouse. Like many young litigators, he was eager to gain exposure to trial work. On his first day at the firm, he was asked to join a team that was going to try a client's products liability cases throughout the country, an exciting opportunity from his perspective. But some bitter came with the sweet—the team's leader had a "difficult" personality.

One of our colleague's assignments was to interview jurors after each trial and to report back to the client and trial team. According to our colleague, regardless of the forum in which a case was tried or whether the client won or lost, jurors never seemed to have a kind word for the team leader. Of course, our colleague felt he had no choice but to deliver the jurors' unfavorable comments unedited, given his job responsibilities (and dislike of his boss). Besides enjoying the comeuppance to his boss, our colleague claims he learned more about trying cases from those juror interviews than from anything he has done since. It is, after all, difficult to persuade jurors if you irritate or are unable to communicate with them.

What, in our experience, most annoys jurors about lawyers who try cases before them? Acting in a condescending manner toward jurors often tops the list.

THE PRACTICE
Commentary and advice on developments in the law

Although you, as trial counsel, will often expend a great deal of effort in order to present a complex case at a level that your particular jury can understand, it is usually dangerous territory to characterize these efforts for the jury. Telling jurors in voir dire or a jury address that the case is complex, but that you will simplify it for them, can be off-putting. Similarly, telling jurors that a case is easily understandable when it in fact is not can also be perceived as patronizing. Usually the better approach is to go about the gritty business of presenting the case as simply as you can and to leave characterizations of your efforts to others.

Jurors also can resent as patronizing a lawyer's admonitions concerning their responsibilities, including reminders about their oath and requests that they pay close attention to the case because it is important to a client. The same concern applies to counsel's expressions of gratitude to jurors for their service. Tread carefully if you address these topics, because the vast majority of jurors already take seriously their commitment to arrive at what they understand is an informed and fair verdict. Consider leaving the heavy work to the judge, who has an entirely different relationship with the jury.

A related point is that jurors feel more empowered, and embrace a conclusion more strongly, if they believe they have reached it on their own. Plant many seeds, but let jurors decide for themselves. Jurors will perceive that you respect them. They will also stick with a conclusion more resolutely if they view it as the product of their own reasoning. The best way to plant seeds in openings and closings is to focus on specific testimony and exhibits. This doesn't mean that you should strip your jury addresses of forceful arguments or of blunt criticisms of your adversary's case. Just avoid dictating the result for the jury.

DO NOT WASTE JURORS' TIME

In addition to resenting condescension, jurors can also become irritated with a lawyer who they believe wastes their time and is overly argumentative. Jury service places heavy burdens on most jurors. Unless you do all you can to minimize that burden, jurors will resent you. You also lose credibility with jurors if you are unable to control and move your case.

Accordingly, isolate the major issues in the case and make them comprehensible


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for the jury. Trust your instinct for the jugular. Avoid repetitive evidence once an issue is no longer meaningfully in dispute—you can remind the jury of the point in closing. Skip the legal jargon—no "did there come a time" or "what, if anything" or "I direct your attention to." Be well-organized and prepared; equally important, appear to be well-organized and prepared, and have precise transcript references and control over exhibits. Avoid platitudes. Instead, focus on an incisive and disciplined presentation of evidence on key points.

In addition, resist the temptation to oppose every point your opponent makes. Instead, make necessary concessions candidly and early, and narrow the scope of the dispute to what is truly important to your case. Regarding objections, in order to avoid delay and to maintain credibility with the jury (jurors understand that the point of your objections is to keep them from hearing information unfavorable to your case), object only when it matters and only when you believe you will win. This is particularly advisable given the obstacles posed by "harmless error" appellate review of evidence rulings. Also, reconsider any presumption you have, because of a fear of educating your opponent pretrial, against addressing evidence issues during pretrial conferences or by in limine motions. Fewer bench conferences during trial (jurors detest them), and fewer opportunities to appear defensive about your case as a result of objections, are often significant compensating benefits.

RESPECT FOR ALL PLAYERS

A third area of concern for a trial attorney, in terms of how she is viewed by jurors, involves unfairness to other players in the courtroom—to witnesses, to opposing counsel and to members of the attorney's own team.

Jurors expect lawyers to act respectfully toward all witnesses, even witnesses who are biased or untruthful. This does not mean that you are precluded from pressing a witness until she has made the concessions compelled by the facts. But an overbearing approach, particularly if it appears to preclude the jurors' consideration of the "entire story," will often alienate jurors.

Disparagement of opposing counsel or, worse yet, an attempt to demonize counsel, usually backfires with jurors too, particularly in longer trials. As trials progress and jurors get to know each of the courtroom actors, the jurors tend to focus more on the evidence and are less likely to view counsel and witnesses in black-and-white terms. And as a wise old saying goes: Never wrestle with a pig because the pig is better at it and likes it, and you always wind up getting dirty.

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It also is not good practice for lead trial counsel to appear to be ordering around other members of her trial team. Lead counsel should attempt to organize things so that she is the sole performer. Avoid barking at junior lawyers to "get me this document" or to "put that chart up." Using a lot of other people to help with documents suggests that you have a bunch of young people at your beck and call. Jurors can often view this as arrogance and dominance, and resent it.

Finally, jurors also dislike bombast, grandstanding and phoniness. These devices can come across as diversionary tactics. This does not mean that a passive approach is advisable—jurors react favorably to lawyers who are genuinely enthusiastic for their clients. Rather, it means that, whatever you say in, say, voir dire or in opening statement, you had better be prepared to prove. Make sure you are absolutely correct on the facts and the law.

It is also critical, in our view, to use a style of presentation with which you are most comfortable. Being yourself gives you far better odds of connecting with jurors than if you attempt to imitate a style that does not fit you.

Trial attorneys usually do not have opportunities to serve as jurors, even in states where lawyers are not exempt from jury service. This is unfortunate. The more trial attorneys understand how they are perceived by jurors, the more effective their presentations to jurors become. The frequency with which trial court judges, who have the most access to jurors, comment in state bar and other publications on practitioners' deficiencies in this area gives us reason to believe that it is an area for careful consideration by trial attorneys.