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Honing Your Craft



LEARNING FROM REAL PEOPLE — KNOWLEDGE IS POWER



Jeff Boyd

By Jeff Boyd

I have been a trial lawyer for 35 years. In addition, for nearly the last 20, I have been involved in a wide range of trial consulting — helping other plaintiff’s lawyers improve their cases. I have conducted hundreds and hundreds of interactive focus groups in more than 60 jurisdictions across the county, including dozens in Oregon. I have learned if you have the courage to expose your case to real people and are willing to listen to what they say, you can gather the information you need to create a presentation at trial that meets the needs of the jury and provides the foundation for a great result. The following are some of the most important things I have learned by spending thousands of hours talking to real people — aka jurors.

Jurors think like people, not lawyers

You, as a lawyer, with your legal education and constant immersion in the profession, are on one side of a bridge that crosses the river of justice. Jurors are on the other side — don’t expect them to come to your side. You need to go where they are. Jurors have a magnificent ability to make wise and fair decisions when they are given the information they need to make decisions in a case. But we, as trial lawyers, must ask ourselves, “Are we willing to put aside our prejudices and deal with jurors as they are, not as we think they should be?”

One of the best uses of focus groups is to get great themes or sound bites. In one case, a juror reduced a very complicated presentation of the plaintiff’s arguments to “It’s like going to Taco Bell and ordering a hamburger.” Fabulous; those 10 words made that case. Or, a juror called out the defendant’s position in a sex-abuse case where a religious order refused to discipline the offender, by declaring “it was all about protecting the brand.” Boom!

Jurors don’t stay in the box defined by admitted evidence and jury instructions. They often attach great importance to facts lawyers don’t feel are relevant.¹ They have their own ideas about “the law.” They see your trial through their personal experiences. You have to accept this and work with it. You won’t get very far

driving the square peg of how you think jurors ought to be into the round hole of reality. At the end of the day, real people fill out the verdict forms, not lawyers or judges.

Focus groups can be used to evaluate a case, to find out if the existing case, as presented, is a winner. However, the far better use is to learn:

- How a jury fits the facts of your case into the mental boxes we call liability and damages.
- What people need to know that you aren’t telling them.
- What problems your case has from the jurors’ perspective, and how to fix those problems.
- How jurors feel about your witnesses and exhibits.

You can take that knowledge and improve your presentation to get a great verdict. I tell the lawyers I work with that “I can make you feel good or I can help you to find out how to get a better result, but I can’t do both.” You have to be willing to look the ugly in the eye and lose the case at the focus group level to find out how to win at trial.

Simple = strong, repeat

The #1 mistake plaintiff’s lawyers make is they allow their case to become too complicated. We drown in the endless parade of facts and experts that has become the modern negligence case.

Complexity favors the defense. Time and time again in focus groups I see defendants win cases because the plaintiff doesn't clearly and simply make the case for why he or she should win.

Don't over-try your case. There are only a few things in any case that matter. Use focus groups to find out what those are and stick to those issues. Also, don't underestimate the fact that jurors don't "get it" if they only hear "it" one time. If it is important, bring it up again and again, in *voir dire*, in opening, with every relevant witness, in closing and in rebuttal.

Liability drives damages

The most important thing you will learn in focus groups is jurors never stop talking about liability. Unlike lawyers, real people don't think of fault as a "yes" or "no" decision, but as a long sliding scale that takes all kinds of things into account. Those factors include the evidence and the jury instructions, but in the decision-making continuum, those sacred pillars are often secondary to the jurors' personal life experiences and values. What happened to Uncle Joe or what they learned in Sabbath School will carry more weight than the instructions Judge Smith reads to them at the end of the case.²

I focused a case involving an important surgical monitor, with a documented history of problems that the manufacturer was ignoring. The monitor failed and a baby was severely brain injured. Some people, as always, said "These things happen." I asked the focus group [short version], "What is the acceptable death rate? How many babies can die before you will find against the manufacturer?" One very reasonable-appearing juror said "It depends." Great. I asked "On what?" She said "It depends on whether I know the child. If I know them, then 0. If I don't know them, well [more than 0]." Wow. You need to know such people are out there, and how to spot them.

Jurors evaluate damages only through the context of liability. Gruesome X-rays and million-dollar life care plans mean nothing if the jury thinks the injuries were caused by an "accident." Juries spend 80 percent of their time discussing liability and 20 percent of their time discussing damages, even in so-called stipulated liability cases.³

If lawyers explain their cases in the language of the jurors' beliefs about liability issues, they will get greater damage awards. In fact, you should constantly talk about what the defendant did wrong, even in cases where liability is admitted or seems obvious.

Most jurors will tell you they want to award a fair amount for damages. The problem is they don't really decide what an injury is worth, they decide what the defendant's fault is worth.⁴

Jurors don't know what their job is

When prospective jurors walk in the door, there are two questions on their

minds: "What am I supposed to do?" and "How am I supposed to do it?" Jurors often don't know, don't understand and don't accept the differences between a civil case and a criminal case. At least 90 percent of their "experience" with the law — books, movies, the television programs that endlessly loop on late-night TV — is criminal law. Then we come in and start talking about "preponderance" and "standard of care" and "compensatory non-economic damages."⁵ Put another way, most prospective civil jurors do not know what their job will be — that they will be asked to decide fault, causation and damages based upon the civil standards for those issues.

Think about this — my experience is many, if not most, prospective jurors are surprised to find they will be asked to decide damage issues. Many are downright perplexed to find that "pain and suffering" is compensable, let alone that they have to "put a value" on it. Don't

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assume. Teach, starting very early in *voir dire*. Introduce and educate about the job of a civil juror. They will be grateful. The worst thing you can do at trial is to make a juror feel stupid.

The four questions

I can't tell you how many times I have talked to good lawyers who are months or years into their case and yet they struggle to give clear and simple answers to the following four questions. Jurors are only going to give you so much mental energy. Throwing it up to see what sticks is a formula for frustration and loss. Simple equals strong:

1. What did the defendant do (that the plaintiff thinks was wrong)?
2. Why was it wrong/who says it was wrong?
3. What was the alternative — what should the defendant have done?
4. What difference did it make?

Personal experiences

Jurors see and judge everything that happens in the courtroom through the filter of their personal experiences. Few real facts override what they think they know. In *voir dire*, ask about jurors' personal experiences with the key issues in your case. Do they ride a motorcycle (or refuse to ride one)? Have they ever worked on a construction site? Have they or someone close to them had the kind of surgery, taken the kind of drug or experienced the kind of procedures in the hospital that are going to come up in your trial? If so, you need to know what the experience was like for them. Let them tell you their stories. Listen. Be very wary of jurors with strong emotional connections to their stories. Strong or emotionally involved jurors have an enormous influence in the jury room. Beware, especially, of the "expert witness" juror — a juror who has some familiarity with key concepts in your case the other members don't have. The so-called

"expert" will "testify" in deliberations and you will have no idea which way that person will spin the story.

Facts, not emotions

Tailor your case presentation toward jurors who are interested in facts, not emotions. Trial lawyers tend to be emotional people, driven by important causes. The jurors who end up on a panel after *voir dire* are usually people who are quiet, steady and conscientious. Why? Since they are less assertive and talk less during *voir dire*, they are less likely to be kicked off. These people are sympathetic and cooperative, helpful people who like working behind the scenes, performing in predictable and consistent ways, being good listeners and avoiding conflict. Their priorities are cooperation, stability, quality and analysis. They want data, not drama. They are turned off by harsh trial tactics and emotional appeals.

Anchor your damages

The vast majority of jurors have no idea what a case is worth. As lawyers, we take it for granted cases have value and the factors that affect that value. We underestimate the importance of the fact that many, if not most, jurors have no idea what a case is "worth."

The key here is to give the jurors an anchor. In the old days, we used to think it was rude or presumptuous to ask the jury for a specific number or a range. Modern juries will actually punish you if you don't. Over and over in focus groups, we run the case with no guidance as to the value or what the plaintiff is seeking, which results in a crazy patchwork of values all over the map. We then run the case and tell the jurors how the parties value the case. Almost every time, this results in the numbers being higher than with no anchor⁶ and closer together — a much better base for deliberations and consensus.

A juror in a wrongful death focus group once told me she decided the life

of a long-married man with children was worth \$10,000 "because that's what a really nice dog would cost." Jurors need an anchor, starting early in the case. I favor giving a range in *voir dire* ("I want you to know that I will be asking you for several hundred thousand dollars in this case. . .") rather than a hard number, but do give a hard number in closing.

System failures

Define your case as a "system failure." Jurors are reluctant to judge individuals — it feels too personal. The failure of a system is at once more comfortable to judge, and also more threatening, as the failure of a system presents a danger to the jurors: "If it happened once, it could happen again — to me." Dig deep — and back up the negligence in time so your presentation is based on the months or years a system was doomed to fail instead of what happened in the minutes or seconds just before the harm. Think about the difference between the negligence that allows a commercial driver to be put behind the wheel without a background check versus a driver "who did everything he could do" to avoid a wreck at the last minute. The system failure is harder to defend.

Be visual

Use visuals at trial for all important facts and concepts. Cognitive research has shown people process information in this order:

1. Color
2. Pictures
3. Shape and symbol
4. Printed word
5. Spoken word⁷

But what do lawyers use the most? The spoken word. Nowhere else in jurors' lives are they asked to absorb important information based on lectures (opening and closing) and question-and-answer sessions (direct and cross) without extensive visual support. Give it to them. Simple timelines. Pictures and diagrams. Even just an outline of who the key

witnesses are and what they are going to talk about, with a headshot picture to introduce/remind the jurors who these people are.

Conclusion

Trials are not won over fights about the 28th page of the 14th deposition. Today's jurors want a clear, short statement of what's right and wrong and what they should do about it. Put aside what you think about a case and get in touch with what matters to the real people who will decide it.

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- ¹ I call these "legally insignificant facts." Although they may be insignificant in your mind, if they matter to the jurors, they matter, and such factors often drive the verdict.
- ² Try to get your jury instructions read as early as possible in the case. Jurors need to know what the legal standards are before they know what to think of your evidence. Am I the only one who thinks it is madness to have a jury sit there day after day without knowing, for example, the legal standard for a property owner, or that the law imputes the conduct of an employee to her employer? All that time they are uninformed, they are guessing about those things. In my experience, most guessing works against the plaintiff.
- ³ Believe me, jurors discuss fault in stipulated liability cases. They just don't have as many facts to work from, and so they make up more facts, again, usually to the detriment of the plaintiff.
- ⁴ This is not to say that bad injuries don't get greater awards than minor injuries. It is to say that bad injuries are not as important, overall, as bad actors doing bad things.
- ⁵ All fairly meaningless terms to nearly all jurors unless the plaintiff's lawyer takes the time and effort to comfortably educate them at trial.
- ⁶ Chapman & Bornstein, *The More You Ask for, the More You Get, Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOLOGY 519, 538 (1996); Campbell, et al., *Countering the Plaintiff's Anchor: Jury simulations to Evaluate Damages Arguments*, IOWA LAW REVIEW, Vol. 101.543.
- ⁷ See, www.exhibitography.com, with thanks to Amy Gallaher Hall.

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