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Complex Litigation

What Real Jurors Like/Dislike About Lawyers

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With valiant and devoted efforts, our state and federal judiciary is implementing a gradual process of reopening courts, including jury trials. Some of the planning contemplates use of remote, virtual or Zoom proceedings while some venues are slowly reopening courthouses for in-person litigation—with major attention to safety protocols. Most of us recognize that—institutionally speaking—the courts simply have to return to some kind of effective function.

Yet, there is another "institution" that has become a serious COVID casualty—the precious jury trial. There is emergent debate as to whether the judiciary's plans to hold virtual trials or in-person jury trials in altered physical surroundings with fearful or limited jury pools is "good medicine." See e.g., P. Hinton & T. Melsheimer, "The Remote Jury Trial Is A Bad Idea," Law 360 (June 9, 2020); G.J. Hauck, "Virtual Trials Are No Longer Just A Remote Possibility," Lexology (Sept. 4, 2020); K. Broda-Bahm, "Expect Attorney Resistance To Online Trial Innovations," Lexology (Sept. 7, 2020).

Worries about institutional changes to a jury trial's chemistry and dynamics are not hollow. The sanctity of a fair jury trial is iconic. Trials reflect the abiding sense of justice itself, particularly in what largely has become an "administrative" country. Jury trials also have a practical benefit. Though many view them as slow, expensive, ponderous, and ceremonial proceedings, the threat of going to trial actually acts as a forceful catalyst to conclude reasonable settlements. Without settlements the system would bog down. Reshaping in-person jury trials to resemble some kind of virtual back-and-forth has risks. So, perhaps, while COVID still materially affects our behavior, we should be cautious about preserving the integrity of the in-person jury trial.

Because Jury trials have been suspended for months and will likely resume slowly, I thought it might be helpful to refocus trial lawyers and their teams on what real jurors actually like or dislike about lawyers trying cases before them. Lawyers will have to resharpen their skills. Though many use the services of jury analysts and so-called "mock jurors" to craft trial themes, the latter are not real jurors who actually have served in the courtroom.

Is there any hard, empirical evidence as to what real jurors like or dislike about lawyers' practices? Turns out there is. Problem is, most folks don't know about it. So I thought trial masters, their troops and litigators generally might consider plugging real jurors' insights into their strategic reserve, as they recalibrate approaches to a renewed trial season. Perhaps, too, after the following discussion, judges might consider similar efforts to inform litigators on what real jurors think about their experience.

As a federal district court judge in the Northern District of Illinois, Amy St. Eve had a great idea. Typically, at a trial's conclusion, she met with jurors to thank them for their service and to discuss their experience. She found that jurors were eager to talk about the trial. They were especially expressive about the lawyers trying their case. St. Eve realized that the jurors' insights would be of value to the trial bar. She decided to design and conduct an informal study to capture—in the jurors' own words—that information.

But how could the information be systematically gleaned and packaged into a practical and useful format for attorneys? She decided to ask jurors to complete a voluntary, anonymous survey at the conclusion of their service. This was done via a questionnaire. The jurors were not obligated to respond. Comments and responses would remain anonymous. As a result, more than 500 juror questionnaires were gathered regarding some 50 trials conducted from the years 2011 until 2017. Both civil and criminal trials were included.

Real Insights

The objective was to provide the trial bar with real jurors' insights on what they thought about the lawyers. Further, what did the lawyers do that irritated the jurors? To achieve the objective, four open-ended questions were asked:

1) Please list three things that the lawyers did during trial that you liked, in the order you liked them.

2) Please list three things the lawyers did during trial that you did not like, in the order that you did not like them.

3) What would you have liked to see the lawyers do differently, or better?

4) Any other comments about the trial.

The response rates were high. The vast majority completed at least a portion of the questionnaire. The first and second questions had response rates of 90% and 89%, respectively. Response rates for questions 3 and 4 were around 54% and 50%, respectively. The open-ended questions were purposeful. St. Eve wanted unfiltered feedback from the jurors to determine what themes emerged unprompted from the responses. The jurors were free to comment on whatever they wished. Several common themes quickly emerged and persisted throughout the multi-year time frame.

The judge (now serving as a judge for the U.S. Court of Appeals for the Seventh Circuit Court since May 2018) then decided to issue the findings and analysis in a law review article. See A. St. Eve & G. Scavo, "What Juries Really Think: Practical Guidance For Trial Lawyers," 103 Cornell L. Rev. Online 149 (2018). The authors found that, despite varying backgrounds, views and personal

experiences, jurors appear to hold “common beliefs about what they expect to see and hear from attorneys in the courtroom.” Review of the questionnaires was “both fascinating and enlightening.”

The jurors did not hold back in providing both praise and criticism—likely due to the “anonymous written” medium rather than oral responses. The judge’s findings are valuable lessons and practical cues for trial lawyers (and their entire legal teams) in preparing for effective trial advocacy. Overall, the responses were grouped into four “primary categories,” some of which overlap:

- Organization, Preparation and Efficiency: The judge concluded that jurors pay attention and can tell when attorneys are “winging it” versus when they are prepared. Jurors expect attorneys to have a plan, to know where the relevant materials are, to organize evidence with opposing counsel, and proceed efficiently.
- Style and Delivery: Jurors expect attorneys to excel at basic presentation skills, including “appropriate eye contact and speaking loudly and slowly enough for the jury to hear and understand.” They appreciate when attorneys are personable. They do not like “courtroom drama and theatrical presentations.”
- Attorney Behavior and Other Professionalism Indicators: Jurors commented frequently about the level of respect the attorneys showed to individuals in the courtroom, to opposing counsel, witnesses, the judge, courtroom staff, or to their own colleagues at counsel table. “Professionalism extends not just to behavior but also to appearance.”
- Evidence Presentation: Jurors were mindful of how attorneys elicit testimony and present other evidence. The order in which testimony and evidence were introduced mattered to the jurors. They prefer when attorneys use technology … to organize and present evidence.” They also like when attorneys “use timelines and make other efforts to marshal the evidence in a meaningful way.” And jurors “despise—and are even insulted—when attorneys excessively repeat questions and concepts.”

The highest number of the “most negative” responses on the theme, “What Did The Attorneys Do During Trial That Jurors Disliked The Most” were: 1) Too much repetition (90 responses; 20.2% of responders); 2) Unprofessional conduct (43 responses; 9.6% of responders); 3) Bad behavior towards opposing counsel, witnesses, and/or jury (43 responses; 9.6% of responders.

Wasting Time

Jury service takes jurors away from their other commitments. It is thus much easier and more pleasant for jurors to sort through complicated evidence, argument and legal theories when attorneys neatly package and present it in an organized and efficient way. That will permit the trial to progress more quickly and resolve the dispute sooner. As St. Eve writes: “In short: do not waste the jury’s time.” Juror statements commented that they liked that attorneys were “very organized” and “did the trial in a timely manner.”

Some jurors wished the attorneys “would have prepared more thoroughly” and asked the next question “without long pauses.” Some wanted to see attorneys “get to the point quicker with clearer details.” One wanted more “to the point questioning with less fluff.” Another wanted to see attorneys “be more direct and get to the point.” Some did not like “lack of preparedness; they seemed to wing

it.” A commenter wanted to see attorneys “be more concise,” noting that “brevity and clarity are so important.”

A repeated comment wished attorneys could stipulate to more facts to streamline and focus the trial—a suggestion St. Eve thought was “something to consider seriously.” Another series of comments suggested to limit the number of sidebars, which jurors viewed as a waste of time, as well as a sign of being unprepared and unorganized.

On the theme of “Presentation Delivery,” the delivery and style of the lawyer presentations was the second most common topic, eliciting both positive and negative responses. This includes “nonsubstantive aspects” such as: volume of speech, eye contact, clarity of speech and tone. 181 jurors (36% of responders) commented on this theme. St. Eve concludes that lawyers should not overlook the positive impact of basic manners: introducing yourself at the outset of the case; speaking to the jury directly; and making appropriate eye contact. These are methods of “connecting” with the jury.

One juror called out the defense attorneys for failing to introduce themselves at the very outset of the case. The judge said it was “remarkable” that this particular juror remembered that failure at the outset even after all the proceedings concluded. Other kinds of negative attorney behaviors were recalled by some jurors: “came across as smug, arrogant and presumptuous;” also: “staring, raising eyebrows with arms crossed;” not trying to make a connection with the jury (no smiles); arms crossed “way too much.”

Jurors repeatedly said they liked when attorneys spoke “loud” and “clearly.” Speaking too softly or too quickly was disliked. St. Eve comments that the same advice applies to witnesses, “who counsel should advise to speak up and speak slowly—particularly because they may be nervous and uncomfortable on the stand.” On the other hand, one juror did not like the lawyer’s “loud, booming voice;” another didn’t like that attorneys “raised their voices.” The judge makes a sound point (pun intended): every courtroom carries sound differently so, before trial, lawyers should test the acoustics with a colleague in the jury box. This would be “time well spent.”

Despite movie and TV depictions, attorneys should refrain from “extravagant and dramatic displays during trial.” Jurors frequently commented about this conduct. Though sincere passion and belief in a client’s case is expected, “crossing the line into theatrics is disfavored.” It makes the jurors uncomfortable and can make jurors believe that the resort to drama was because the substantive case is weak.

Jurors were very mindful of so-called “Professionalism Indicators.” Lawyers’ behavior toward jurors, opposing counsel, witnesses (including parties), the judge, courtroom staff, and even their own co-counsel evoked many responders’ comments. Jurors like when opposing counsel get along and treat each other with respect. Conversely, negative attitudes, “while entertaining, took away from the case,” said one juror. Commenters didn’t like facial expressions, eye rolling, negative body language or dirty looks. They liked cooperative interaction.

Jurors are empathetic to witnesses so they don’t like verbal attacks or irrelevant questions designed to embarrass. Jurors “see through these tactics,” concludes St. Eve, presenting numerous examples

of disliked behavior. Staring at the jury was a “no-no” for some. Several jurors criticized parties sitting at counsel table who acted disinterested (e.g., sleeping, snoring, or using cellphones). Says the judge: trial participants—especially those sitting at counsel table—should always behave “as if the jurors are watching them—because they are.”

Jurors also disliked attorneys’ childish behavior, name calling, arrogance, sarcasm, appearing to share inside jokes, laughing and snickering while other lawyers talked. Some humor can go a long way with the jury but lawyers should be careful not to take it too far. The responses made clear that jurors view the courtroom as a formal setting and, so, lawyers should not appear too relaxed or casual. A small percentage commented on attorney appearance. Some didn’t like that one attorney had a hole in the seam of his jacket. Others disliked wrinkled shirts, sloppy appearance, a disheveled look or being in need of a haircut, for example.

Other important guidelines are: 1) Avoid unnecessary repetition; 2) Ask clear and relevant questions; 3) Focus on relevant facts and avoid confusing the jury; 4) Closing arguments matter to jurors significantly more than opening statements, according to the responders; 5) Make effective use of technology and visual aids; and 6) Present evidence as chronologically as possible. There are more insights, plus noteworthy quotes from jurors’ comments, but space limitations here preclude further detail.

Conclusion

What real jurors like and dislike about the lawyers trying their cases is informative. St. Eve has done the trial bar a great service in revealing, in their own voluntary statements, what more than 500 actual jurors in some 50 trials found pleasing and irritating about trial counsel. Given the current upheavals in processing in-person jury trials, it may be worthwhile for New York’s state and federal judges to conduct similar survey efforts and publish the findings. Perhaps select bar association committees can work with judges to structure voluntary, anonymous, meaningful surveys. Or just emulate the one elaborated here.

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