



# LESSONS FROM THE OTHER SIDE

## *Observations as a Lawyer on Jury Service*

BY MURRAY FOGLER

Imagine my surprise when I was “selected” to sit as a juror in a seven-day trial of a commercial dispute. Having never before served on any jury, this would be a rare opportunity to see a trial from the other side.

There was much to like. My jury service reinforced most of the beliefs and objectives we all share about trial by jury. Jurors are, by and large, conscientious. They take their oaths seriously. Though every one of us formed opinions about the lawyers, the deliberations focused only on the evidence. Well, *mostly* on the evidence. The system works.

But there was also much to provoke frustration. Wasted time abounds. It was hard to sit silently, with no ability to ask for more details about certain points and less repetition on many others. Maybe that was just the trial lawyer in me.

With that brief introduction, I’d like to offer some comments on each stage of the trial. My hope, gentle reader, is not merely to corroborate or debunk conventional wisdom on trial techniques, but also to stimulate debate on how we might improve the process.

## VOIR DIRE

If “voir dire” is French for “to speak the truth,” what is French for “dead time”? I wish I had some bright ideas for streamlining this process. We assembled at 8 a.m. in the large jury room, and 48 of us were formed into a venire about 9:30 a.m. With the three-block walk from the jury room to the courthouse, reordering of position, and attorney review of our information sheets, it was 10:30 before we were in the courtroom. Two hours of group questions preceded another hour and a half of individual questioning. Most of my colleagues had no clue how long this would take. The lucky 12 of us got sworn in around 4 p.m. We already know we must be mindful how jury service imposes on our citizens, but nothing makes this hit home like a full day to get a jury in the box.

## OPENING STATEMENT

Because many judges today limit the lawyers’ discussion of the facts in voir dire, the importance of opening statement has become magnified. It is the first time the jury hears the details of the case. The lawyers did a fine job introducing the critical exhibits, but I found myself wanting more. We use the term “roadmap” for a reason — I wanted to know the witnesses we were likely to hear from, the claims and defenses of the parties, and the positions of the parties on those claims and defenses. I had to wait for the charge to learn for the first time about some of the plaintiff’s causes of action. Most jurors are probably content to hear the evidence as it comes in, but there will be a few who can watch for important evidence when you tell them what to look for.

## THE EVIDENCE

Jurors focus in deliberations on the witnesses who are called and those who are not. Even in a commercial case where the documents are critical, the witnesses tell the story. But so much has been written about witness examinations in journals of all types that I have little to add.

I do have several observations about the mechanics of putting evidence to the jury. First, I formed definite preferences about the handling of exhibits, and I was not the only one to do so. At the top of the list, the display of documents from a computer to our screens was head and shoulders above all other methods. The ability to enlarge and highlight passages had its intended purposes. We paid attention. All of the jurors appreciated being able to read the document that was the subject of the examination.

Less effective was document presentation on the “elmo.” It was slower, fuzzier, and less flexible. At the bottom, naturally, is just having the witnesses shuffle through binders of exhibits without showing the jury what is being referred to.


Many of us came to dread the use of the big-pad-on-the-easel. The back and forth trudging of the witness to the easel to write, their back to the jury, in shorthand became tiresome. If you must do this, do it sparingly.

The use of the easel to present the evidence of attorney’s fees was most annoying. In this case, the attorney’s fee claim was in the mid-six figures — not an insubstantial number. Yet,

it seemed like an afterthought. The witness wrote several big pages of numbers on the easel, summarizing the hours spent by each lawyer and paralegal. Why not make a spreadsheet to display on the computer like the other evidence?

I might add that the evidence opposing the attorney’s fees claim was just as bad. The defense counsel put himself on the stand and mildly criticized the hourly rate of the plaintiff’s firm, but he offered nothing concrete for the jury to use in their deliberations. We were basically left on our own to decide on fees. My advice? Don’t treat attorney’s fees as the red-headed stepchild. It’s worth spending time and effort to present the claim and to attack it like any other aspect of damages.

In many trials, lawyers offer and introduce dozens of exhibits, usually many more than they will need, and certainly more than they will ever mention. Often, these exhibits are put in binders that sit on the court reporter’s desk or the ledge in front of the witness. The jury does not get the binders until deliberations begin. I can tell you that in our case, the binders sat on the table unopened for virtually the entire deliberation. When we had a specific question, it became very difficult to find the evidence we sought. Much of the evidence was never read or referred to. I know my plea to reduce your exhibit list will fall on deaf ears, but if you want the jurors to find your evidence, at least put your exhibits in chronological order and put a list of them in the front of each binder.



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## FOGLER

In every case, there are only a few key documents. I, for one, would have liked my own copy of those documents, even if parts of them get flashed to the screen. From now on, I will consider giving each of the jurors their own binder of key documents, if the judge permits.

I've often said that style points don't win cases. But I am a student of style and there is nothing like watching other lawyers try a case to help you form an opinion about what works and what doesn't. Take, for example, the sitting vs. standing issue. I have questioned witnesses for years while seated. This trial changed my mind. Given a choice now, I will stand, either at a podium or at my place at counsel table. Your voice projects better, you are more visible, and it is easier to move when needed. I'm sold. But, a caveat — don't move too much. It can be distracting when the lawyer constantly goes back and forth from his seat to the witness. You want the jury to watch the witness, not you.

Finally, a word about objections. We had relatively few of them in our trial, and I doubt the other jurors thought anything at all about them. To most of the jurors the significance of the court's ruling on individual questions was pretty much lost. But here's another style point. If you are going to make an objection, make it with conviction, like you mean it. A mumbled objection or one sheepishly made impressed me, but in the wrong way.

### CLOSING ARGUMENTS

I know the jury was ready, after four days of evidence, to get to deliberations, but they were equally ready to hear the summations. I had three nits to pick about the closings.

One, they were too long. Just because the judge gives you a block of time doesn't mean you have to take it. We had heard some of the points hundreds of times (maybe I exaggerate), and they do not bear repeating more than once. We got it. Really.

Two, some of the exhibits put on the screen in closing had never been mentioned during the trial. I found myself wondering why we were seeing new evidence in the closing arguments. If it is important to the case, don't wait to spring it on the jury in your closing.

Three, particularly if the jurors have a copy of the charge, don't feel compelled to tell us how to answer every question. You can't give a unified and passionate closing if you are mechanically flipping through each page of the charge to explain it to the jury. You have to trust us.

### THE JURY CHARGE

We have to find a better way to get a verdict. After voir dire, the charge is the single most important part of the trial, and it was the least satisfying for me. Let me explain.

The evidence finished late one afternoon. The judge initially wanted the jurors to return at 9 a.m. the next morning, but I helpfully suggested to the judge that we wait until 10 a.m. to give the parties time to finalize the charge. We assembled at 10 a.m. The charge wasn't ready until 12:30 p.m. Enough said about that.

I understand the reason why the judge reads the charge aloud to the jurors. It is required by the rules, and you have to give the jurors some idea of the questions they will have to answer before the closing arguments. But for a long charge (ours had 13 questions, some covering a full page or more), the reading aloud is ineffective unless it is accompanied either by displaying it on the screen or by giving the jurors their own copies to follow along. The first thing we did when we got back to the jury room was not read the charge aloud again but request that each juror get a copy of the charge. Everyone wanted to *see* the questions and instructions, not just hear them.

I don't understand the purpose of the instruction that the jury is not permitted to consider the effect of their answers. Why should that be kept a secret? We had four sets of questions to answer about one defendant, and one set for a second defendant. The jurors could not understand why two of the questions were so similar, with virtually identical instructions. They also wanted to know why we were being asked about the same elements of damages in three different questions. What is so wrong about telling the jurors either that one claim is an alternative to another or that one claim is in addition to another? I can tell you the jury will speculate about this whether we tell them or not.

The big problem, though, is the legalistic way the charge is written. There is no question in my mind that juries fail to grasp many of the nuances of the charge. I was repeatedly asked by my fellow jurors to help them navigate through the language. I know they would have muddled through even without my help (it might have taken much longer than the 3.5 hours), but surely we can write the questions and instructions more simply and with greater clarity. I am almost sold on the general federal charge — who should win? If you find for the plaintiff, how much do you award in damages? You'd still need to give some basic instructions, of course, but do it in plain English.

That won't happen in my lifetime, but the parties don't need wholesale rule changes to simplify the jury charge. If you are the plaintiff, eliminate duplicative claims and submit only your best ones. Consider in advance whether your claims are pure alternatives or if you seek to add one on top of the other and write the charge accordingly. I realize the pattern jury charges are safe harbors, but don't be afraid to consider ways to make your questions and instructions as jury-friendly as you can.

### CONCLUSION

I want everybody to write 50 times: "I will not waste the jury's time ever again."

Unless, of course, it can't be helped.



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