



Practical Tips

Don't Blame the Jurors

by Noelle C. Nelson | November 2013

Earlier this year during the Jodi Arias murder trial in Phoenix, the blogosphere buzzed with chatter about the many questions that jurors asked the court during deliberations. However, questions from a jury aren't unusual.

Nor should it come as a surprise that jurors, left to their own devices, sometimes conduct their own case investigation - even though such conduct is expressly forbidden by instructions read to jurors both before and after evidence is presented at trial. (See CACI Nos. 100, 5000.) For example, a juror in one case went home and used a broomstick to determine how difficult it would be for a passenger in a car to raise a rifle and fire out an open window. (*People v. Vigil*, 191 Cal. App. 4th 1474 (2011).) In another matter, a juror bought toy cars during a lunch break in deliberations, and used them to reenact the accident in question. (*People v. Cook*, 154 Cal. Rptr. 3d 306 (2013) (rehearing granted).)

Juror experiments often result in a mistrial or a lengthy appeal (which may itself be followed by a burdensome retrial of the substantive issues). But these efforts by jurors also indicate that lawyers are not doing their job in the courtroom - delivering a clear, complete presentation that won't leave jurors scratching their heads.

Provide the Basics

A straightforward way to ensure that jurors get the information they need is to address the *who*, *what*, *when*, *where*, *why*, and *how* of every key issue or piece of evidence, and to do so with visual representations. Visuals do not need to be expensive. (As the *Cook* case cited above demonstrates, a few toy cars would have done the trick.)

Of course, trial attorneys cannot know all the questions jurors may come up with. But they can anticipate potential questions by using tools such as a jury focus group. By assembling a panel of individuals who are demographically similar to residents in the case venue, attorneys can learn what the eventual "real" jurors may want to know about the case. Then, the attorneys can take steps to provide that information during trial.

Focus Your Focus Group

The best way to gain insight into a focus group's thinking is to develop questions for the panel and then ask them in a way that elicits opinions and encourages discussion.

Open-ended questions are best to elicit opinions. For example, "What do you think the truck driver could have done differently in this situation?" yields a variety of responses, all potentially insightful. In contrast, a close-ended inquiry such as "Did the truck driver follow the rules of the road?" will yield too many "yes" and "no" answers, which are not nearly as helpful.

It is a mistake to just put focus group members in a room, tell them to elect a foreperson, and then listen to the discussion. Counsel will only hear from the strongest voices, and those voices may not reflect who will be influential at the time of real deliberation. A facilitator, well versed in the case, should actively solicit useful feedback from each and every focus group member.

Don't Delay

Lawyers should run focus groups well before the discovery cut-off. Nothing is more frustrating than finding out that focus group members are interested in an issue, only to realize that it's too late to conduct further discovery.

If the case warrants it, consider running your presentation past a second focus group after you've reworked it based on feedback from the first mock panel. The second group's responses will confirm that potential juror questions have been addressed - and may also reveal other areas that require more work.

Every trial tells a story. But when trial lawyers leave out crucial details or are unclear in their storytelling, jurors will fill in the blanks on their own - perhaps to your client's detriment. Anticipate what jurors will want to know, and then do your best to present that information in a way they will understand.

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