

# THE NATIONAL LAW JOURNAL

DAILY UPDATES ON WWW.NLJ.COM

THE WEEKLY NEWSPAPER FOR THE LEGAL PROFESSION

MONDAY, FEBRUARY 4, 2008

ALM

## IN FOCUS

### THE MODERN JURY

# How to build sympathy for the big guy

Successful defense litigators explain how to work with, and around, jurors' prejudices.

By Diane P. Sullivan and Hope S. Freiwald

SPECIAL TO THE NATIONAL LAW JOURNAL

TO BE A TRIAL LAWYER is to engage in the art of persuasion. The trial lawyer has many tools at his or her disposal. The ability to persuade a jury comes not just from the questions asked or the arguments made, but also from actions in the courtroom, an ability to connect with witnesses and the jury, and skill at weaving facts into a credible and memorable story. Personal credibility, atmospheric, visual aids, choice of witnesses who will connect with jurors, positioning and use of language and voice modulation all have an impact. This article will examine ways to use some of these tools in maximizing a defense trial lawyer's ability to reach and persuade jurors, from the moment he or she steps into the court room.

There is, perhaps, nothing as impor-

---

*Diane P. Sullivan is a partner in the Princeton, N.J., office of Dechert and a member of its mass torts and products liability group. The National Law Journal featured her as a top litigator in its "Winning" special section last year for her win on behalf of Merck & Co. Inc. in a contentious Vioxx trial in New Jersey. Hope S. Freiwald, also a partner in the firm's Philadelphia office and a member of that group, has successfully represented clients including Merck and GlaxoSmith-Kline PLC.*

tant as jury selection to the outcome of a trial. While isolating and eliminating those jurors who will never give one's client a fair shake is certainly the main goal of this exercise, a second important aim is to begin from the outset to persuade potential jurors toward one's client's view of the case. This is the first opportunity the jurors have to see the lawyer and defense team. First impressions are critical. If the attorney is representing a large corporate defendant, this is her shot at starting to put a human face on the company, thereby neutralizing jurors' instinct to view the battle as David versus Goliath.

During jury selection, no more than one or two lawyers should be at counsel table—the gallery of lawyers and expensive suits, expensive or excessive jewelry or accessories and Evian bottles should be left at home. The attorney should be courteous and polite to everyone from the jurors to the court staff. The attorney is the company she represents, and people notice. To the extent she is allowed to ask direct questions, the goal is not just to get information, but also to plant the seeds of ideas that will be important in her case. The attorney should give the jurors a chance to think that she is credible, interesting and interested in them and their role in what she is doing. The attorney wants jurors to see her as someone they could like, respect and listen to through what might be a long trial.

Second only to jury selection in impor-

tance, the opening statement is the attorney's chance to provide jurors with a framework in which to see and fit the evidence. Numerous surveys have found that jurors make up their minds after opening statements, and during the rest of the trial look for and marshal the evidence that supports their initial view of how the case should be decided. See, e.g., Thomas A. Pyszczynski & Lawrence S. Wrightsman, "The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial," 11(4) *J. Applied Social Psychol.* 301-313 (1981). The attorney should tell her story. Too often, defense lawyers spend too much time rebutting specific allegations from the plaintiff's opening statement and fail to present their client's affirmative story. Better to decide upon a couple of themes that are core to the client's case and that will resonate with jurors.

The attorney should structure her opening—indeed, the whole case—around these core themes. They should be revisited and highlighted throughout the trial, during examination of both plaintiff and defense witnesses. The attorney should use plain language that jurors can understand and relate to. It is best to avoid notes and barricades such as podiums between the attorney and the jury.

The attorney should make eye contact and speak to the jury as if talking to one's friends or family. Analogies and anecdotes can help highlight particular points. Relentlessly focusing on the cli-

ent's affirmative story and message is an effective tactic—perhaps the only effective tactic for letting the jury know that the trial ahead will not be merely about the plaintiff's view of the world.

Only then should the attorney concentrate on rebutting the other side's accusations—highlighting for the jury how the adversary's opening statement was unfair in one or two key respects—i.e., evidence was cherry-picked to show only parts favorable to the plaintiff. The goal isn't to answer all of the attacks the plaintiff's lawyer made. It is merely to undermine his credibility and create room for doubt. The message is that there are two very different sides of the story, and the jury has to stay tuned for what's ahead.

In high-profile trials, it often is impossible to avoid the fact that potential jurors will have heard something about one's client or the case in the press. Media-created biases should be explored during voir dire and appropriate jury instructions should be requested from the court before, during and at the close of the evidence to attempt to neutralize the influence of the media. The trial lawyer should acknowledge the press and embrace it—telling jurors during the opening statement what everyone knows: that the case was filed and is being decided in the midst of media frenzy and public controversy. The attorney should emphasize the dangers of rushing to judgment based on less than the whole story (and should give some examples of cases in which the press blamed someone or something before knowing the whole truth—e.g., Richard Jewell, the Atlanta Olympic bombing suspect who turned out to be innocent).

The attorney should tell jurors how her client is looking forward to finally getting the chance to have people hear the whole story, all the evidence. She should emphasize how the jurors are in a special position in that regard, as opposed to the media and others. They will actually get all of the facts and decide the case based on that evidence, as opposed to media reports and partial truths. They are the only ones in a position to give the client a fair shake. They

are not interested in selling newspapers, but in doing justice.

### **Making a good impression**

Jurors will scrutinize the lawyers closely. A positive impression of the trial lawyer can translate into a more positive view of the client and vice versa. Likability and credibility with the jury are important factors for any witness, and are equally so for the trial lawyer. The attorney should be as mindful of how she

## **Lawyers must frame a case within a jury's preconceptions.**

conducts herself during trial itself as she is during jury selection. The attorney should avoid giving jurors any reason to dislike or mistrust her, because they will likely hold it against the client. Of course, it helps for the attorney to believe in her client and case—jurors often can tell when lawyers do not. Using humor (judiciously) can enhance a juror's view of the attorney. People like to be around—and to side with—people who make them feel comfortable. The witnesses chosen and the manner in which attorney and witness present the client are fundamental to the art of persuasion.

Trials certainly can be boring for jurors. Animations, visual aids and demonstratives can serve to spice up a trial, hold jurors' interest and persuade jurors as to the client's point of view. Visual aids are among the trial lawyer's most powerful tools, and their effectiveness as a tool of persuasion and clarification is largely unrivaled. Such aids can be invaluable in making complex concepts and science understandable to jurors. While using multiple visual aids is recommended, having one or two that make critical points and can be used with witnesses throughout the trial can be really effective. The jurors will remember these aids and these critical points in deliberations.

It is one thing to argue that the client

did warn of a potential harm from its product; it is much more effective, in conjunction with that argument, to show an animation of a warning sheet that went with the product. Using such a visual aid in the closing argument, in conjunction with jury instructions, to persuade jurors can be effective. The use of pop culture references and humor in such aids, if appropriate, can help jurors to remember key points. The attorney should take care not to overdo it, and not let the visual aids distract her from connecting with the jurors. There should be significant points in such presentations when the lawyer speaks from the heart without distraction.

Jurors inevitably will enter the box with their own preconceptions about issues and industries. Trial lawyers must determine how to tell a story that fits within those values and those beliefs. Rather than ignoring or challenging a juror's belief that pharmaceutical companies make a lot of money, the attorney should argue that that is a good thing and should continue, because a lot of that money goes back into new research and development of the next generation of cures for diseases. The attorney should give perspective to the profits by highlighting all of the costs, regulations and trial and error that goes into developing a new medicine, and by noting that pharmaceutical companies undertake that research and those risks.

Jurors similarly will believe that it would be easy for a big company just to pay some money to an individual plaintiff. The attorney should acknowledge that, embrace that fact and explain to the jury why the case is not about money, but about a company's good name, its reputation and fairness. The attorney should empower the jurors with the belief that the values they will embrace in finding for her client are consistent with their values and are more important than awarding money to the plaintiff. **NLJ**