Knowing Your Audience –
The Importance of Entertaining The Modern Jury

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The classic form of extracting information at trial, through the methodical use of direct and cross examination is surely the one that is the least effective in maintaining the attention of the audience. Learning through the oral transmission of information is difficult and requires both clear articulation and reception. The use of a question and answer form of presentation is not only hard to follow, as the information from each witness is seldom placed before the jury in a self-contained and comprehensive fashion, but it also tends towards the tedious in tone and character. While older jurors who recall Perry Mason may appreciate the careful organizational framework of an element by element examination, younger jurors will tune out long before they hear the *raison d' etre* for the line of questions. Being able and ready to tailor the manner of presentation to the audience means more today than tinkering with the case theme in light of the jurors' substantive life experiences. Likewise, although the form of oral combat that constitutes cross examination has been described by the profession as the "crucible of truth," and traces its roots to Socrates' artful questioning of his accuser Meletus, the typical exchange between examiner and witness is far less dramatic (or interesting) than common cinematic treatment would suggest. Worse still is the bland and prepackaged direct examination, with its premium on making a record that complies with evidentiary strictures that tend to distance rather than engage the jury.

Entertainment today is marked by the shear volume of variety available, both in content and methods of delivery. By contrast, the importance of delivering an entertaining presentation in civil jury trials is often forgotten in the face of the desire to convey, convince and create a record. An audience that is not entertained, however, is less receptive either to becoming a silent advocate for the presenter or even merely considering the application of new concepts. Over the last several years, there has been a decline in the art of presentation in all forms of courtroom proceedings as the expense of litigation and the pressure to settle cases before trial has limited the opportunities available to develop and practice this skill. Fortunately, the strategies that help achieve success at trial are not mysteries that are the exclusive province of wizened trial attorneys.

Volumes have been written on jury selection, and much of the attention has focused on the need to determine the predispositions of prospective jurors with respect to particular facts or issues. For example, in a patent infringement case it is important to know whether any juror has strong feelings about the right of a patent holder to preclude others from enjoying the ability to sell or use an invention that reads on the claims of the patent. But just as knowing the substantive beliefs and prejudices of your audience is a key aspect to making any presentation successful, determining what method of delivery works best in reaching and holding the attention of this form of audience is paramount. Is the audience generally older, and more familiar with the pace of Mayberry RFD? Or do the jurors appear never to have experienced life before IM, You Tube and Facebook, such that they need a rapid fire stream of content to remain intellectually engaged?

One of the difficulties in deciding how best to entertain a jury arises from the fact that, unlike most other audiences, jurors do not self-select into a group which has some base level of interest in the subject matter being presented. The ability of counsel to select the members of the panel and thus mold the composition of their audience has diminished in recent years. While most judges once gave counsel wide latitude to *voir dire* prospective jurors, the pressure to move matters forward has resulted in stricter limits on the scope of questioning and sometimes, particularly in federal court, no ability to directly pose the questions to the jury.

In one of my earlier trials, I was able to ask a prospective juror a number of follow-up questions regarding a television show she watched "religiously." Not only did this exchange provide

interesting clues regarding her values, but her observations also provided insights regarding her preference for oral versus written communications. In a recent trial, all of my *vior dire* questions had to be presented in advance to the judge for her review. While the judge asked most of the questions, my inability to ask the jurors for details made it dangerous to draw conclusions from the information.

Once sworn, jurors have no further input in determining whether they will hear any particular type of case, and do not have any say in the manner in which they will be entertained. There is neither a pause button nor can they "hop" to something more interesting during the dull points. As a result, the modern juror is stuck in a system that bears little resemblance to how they commonly receive or interact with the bombardment of sensory input available in their private lives. Rather, the average juror is essentially sequestered during the proceedings and treated as if they were willing to go to the movie theater without having any choice in which movie they will be allowed to watch. Further, while jurors cannot choose either the content or method of delivery in this setting, lead trial counsel will often make the mistake of focusing their efforts only on the choices that relate to the thematic elements of the case presentation. This aspect of the presentation is undoubtedly important, and alternative sub-examination dialogues should always be prepared in order to have the ability to emphasize or avoid issues that correspond to the backgrounds of the jury. But these choices can often devolve into subtleties that are lost on a jury which has mentally tuned out for the afternoon.

Careful attention during *vior dire* to clues regarding juror preferences in the *manner* by which they obtain information, as reflected in the method of transmission as well as the choice of entertainment that reflects the style of delivery, can greatly assist trial counsel. For example, in situations where none of the potential jurors use print newspaper to gather information about current events, an attorney should be flexible and adapt his or her presentation to meet the jury's preferences. Rather than merely walk each of the witnesses slowly through their testimony, the emphasis should be redirected towards eliciting from the witnesses emotive descriptions of the relevant facts. The subliminal point should be simple enough – if you can trust the messenger there is less reason to question the message.

Trial counsel, recognizing these issues, have increasingly relied on sophisticated demonstratives to engage their audience and make their points understood. Recognizing the need to enliven the proceedings, the use of poster boards and ELMOs have virtually become commonplace and a minimum requirement. These attorneys have realized that the introduction of various forms of media into the proceedings has become an essential vehicle though which they can maintain the interest of their audience through long proceedings. From "life in a day" videos to production quality graphics and animated tutorials, demonstratives are a sure way to break up the monotony of examination. But as the desire to inject flash has increased as more choices in technology has become available, caution is required as the pace of judicial acceptance has not always been as rapid.

Just as the jurors have no say in the case they will hear, trial counsel do not have the right to choose the judge that will preside over the action as newly filed lawsuits are assigned on a random basis to one of several trial departments. Notification of these assignments typically occurs prior to the first appearance by counsel. At the first appearance the newly assigned judge may ask counsel to provide an overview of the dispute and the nature of the issues which the court will be asked to address. However, while the legal issues on any given occasion maybe the same regardless of the particular judge who may be assigned, no two judges are alike and there is no guarantee that they will approach the identical issues in the same fashion. In that regard, a manner of presentation that may have been well received by one may not be allowed by another.

In federal proceedings, the court is given broad discretion in deciding evidentiary matters including demonstratives, experiments and reenactments. Usually addressed under the balancing test articulated in Rule 403 of the Federal Rules of Evidence, the issue of admissibility often comes down to whether the demonstrative is intended to illustrate general principles or is an

attempt to recreate an event, incident or occurrence. Where the latter is true, the proponent typically must demonstrate a “similarity of circumstances and conditions” between the tests and the subject of the litigation. *See Jackson v. Flecther*, 647 F.2d 1020, 1027 (10th Cir. 1981). Of course, innovation by counsel is not improper simply because it may have a significant impact on the jury, as demonstrated by the defendant’s ability to use a virtually life-sized mock-up of a portion of the aircraft as a demonstrative aid in the course of the jury trial in *Colgan Air, Inc. v. Raytheon*, 535 F.Supp.2d 580 (E.D. Va. 2008). There is little doubt that counsel in that matter had the full attention of the jury during the portion of the examination where the expert used the mock-up to illustrate his opinions.

Consideration of the manner in which the evidence will be presented should be an action item on the drive sheet from the beginning of the case. To that end, taking steps to learn about the assigned judge even before the first appearance therefore provides an opportunity to gain significant insights into the manner in which the presentation should be made, especially given the significant deference paid the to trial court’s discretion whether to allow counsel to proceed. To that end, local bar associations are good sources of information regarding the proclivities of sitting judges. Another source of information is the courtroom clerks, who can provide some guidance regarding the "unwritten local rules" judges apply in their courtroom. These "unwritten local rules," while tending more towards the manner in which the judge runs his or her courtroom, often reflects the judge’s pet peeves and compliance can avoid an embarrassing admonition. A third source, and one that provides greater insight into the judge's substantive legal reasoning, are appellate decisions that review the decision of the trial court or are authored by the jurist before you will be appearing.

The manner of delivery must also take into account both the time constraints imposed by the court as well as the amount of time that can be used in developing a point before the attention of the audience wanders. Trial judges have long been recognized as having the authority to set reasonable time limits on the presentation of evidence at trial. *See Crabtree v. National Steel Corp*. 261 F.3d 751, 720 (7th Cir. 2001). Likewise, it is hard to gain credibility and ensure the attention of the jury when the presentation takes an overly long time to develop. Further, for those courts that place strict time limits on counsel, careful thought must be given to the trade-off between the amount of time a given point takes to present, and the likely weight the jury will place on that point in their deliberations. Many lawyers are so close to the case, and their own work, that they have a difficult time understanding that the incremental value provided by a particular line of questioning is not worth the time or potential distraction from other, more direct, points. If you are not sure about the schedule, asking how much time is available is both a sign of respect as well as provides you an opportunity to modify the presentation to fit within the expectations of the audience.

In the theater every experienced performer knows that each performance is unique even though the lines and venue are identical. The differences arise from the composition of any given audience, as well as the significant differences in presentation formats depending on whether one intends on entertaining, educating or persuading. Knowing your audience means being able to adapt, as a presentation is only as effective as your ability to hold their attention.

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