

## Practice Center

LAW AND MANAGEMENT

# THIS IS YOUR JUROR



BY G. CHRISTOPHER RITTER

“Jurors who voted against Merck said much of the science sailed over their heads. ‘When-

ever Merck was up there, it was like wah, wah, wah,’ said juror John Ostrom, imitating the sounds Charlie Brown’s teacher makes in the television cartoon. ‘We didn’t know what the heck

they were talking about.’”

— *The Wall Street Journal*,  
Aug. 22, 2005

This stinging criticism should not surprise anyone. While it specifically comes from a post-verdict jury interview in a recent case that went squarely against a pharmaceutical company, similar comments are routinely made about scientific and expert testimony in all kinds of cases.

### Trial Strategy

As trial lawyers, we are increasingly presenting cases where much of the proffered expert testimony is neither understood nor used by the jury. Often jurors see our efforts as wholly ineffective. In such instances, when we are lucky, the jury merely ignores us. When we are less lucky (or when the testimony is particularly incomprehensible and thus infuriating), the jurors respond viscerally, often rendering an adverse verdict against the party who they feel needlessly wasted their time.

At the outset, let me reveal my personal prejudices. After working on several hundred jury trials, I have considerable respect for jurors and feel that for the most part they are capable of finding the right answer. And yes, I have occasionally had to admit this (privately of course) when my side lost.

Without feeling that we are unduly wasting their time, jurors want us to give them as much meaningful information as possible. They want to understand

what is going on in the courtroom. No juror wants to be in the unenviable position of knowing that he is legally required to make a very important decision while at the same time strongly suspecting that he does not fully understand crucial evidence. Given this, it is not surprising to find jurors trusting and, as a consequence, rewarding the side that makes the effort to help them understand and use expert testimony.

### SIX HELPFUL STRATEGIES TO AVOID ‘WAH, WAH, WAH’

While every case is unique, I want to suggest six strategies to increase your expert’s effectiveness and hopefully help your client avoid an outcome similar to the one described at the beginning of this article. These general strategies are equally applicable in all types of cases and with all kinds of experts.

To illustrate this point, I am including examples from a series of cases involving diverse types of expert testimony.

**Don’t hesitate to tell the jurors what your expert did, what she found and why it matters.**

You and your expert need to find succinct ways to answer “two whats and a why.” Specifically, you need to tell the jurors: “What did your expert research?, What did she find?, and Why is this important?”

If this sounds easy, that is because with a little bit of effort it generally is. Given this fact, it is discouraging how often trial lawyers will either fail to provide any of this basic information to the jurors or will do so in

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some ineffective manner.

The way you display this information — whether you write it down on a blackboard, project it electronically on a screen in the courtroom or have an exhibit board professionally prepared — makes little difference. The important point is that you provide this crucial information to the jurors and that you do so relatively early in each expert's testimony. This will maximize the chance that your jurors, including the ones who eventually zone out, will at least have the most basic information about each of your experts.

There are secondary benefits in preparing such an outline. To do so, you and each of your experts need to go through a two-step refining process. First, both of you are forced to determine what really matters and why. Second, you both need to work together to distill this information down to no more than three or four key bullet points. I often find both steps are easier to accomplish if you and your expert pretend that you are standing before your jury and are forced in as few words as possible to complete the following imaginary dialogue — “Members of the jury, why should you care? Well, let me tell you. Here is exactly why you should care: \_\_\_\_\_!”

**Your jurors need to feel that what your expert did seems fair and that the procedure he followed generally makes sense.**

Jurors rarely are able to understand and critique the expert's methodology from a technical perspective. Instead, what most want to know is whether what the expert did seems fair and, in a very general way, if the procedure seems to make sense. Jurors are more likely to accept your expert's testimony if they can answer both questions with “Yes.”

Let's look at an example in a class action in which a California county allegedly racially discriminated against its minority police officers. The plaintiffs' economic expert determined that the county disproportionately paid higher salaries to white officers and lower salaries to minority officers. The process by which the

expert came to this conclusion involved highly complicated tests and procedures. Instead of trying to explain all of the steps to the jurors, the lawyer had the expert do two things early in the testimony.

First, he made sure that the jurors understood that the data underlying the expert's conclusion was as unbiased as possible. To do this, the expert literally laid printouts of all of the data on a table in the courtroom. He then divided the data into three rather high piles: (1) data that came from the other side's expert, (2) material that came from a governmental agency unaffiliated with either party, and (3) data that came from the defendant county's own official records.

When the expert was done, all of the data was in one of the three stacks; there was no other or stray material.

The unspoken point was clear — “Ladies and gentlemen, I did not make up any of this stuff; it all came from neutral entities or even more importantly from the other side of this dispute. I don't know how I can be any fairer.” This preliminary step helped validate the result and added a sense of fairness and accuracy to everything the expert did.

Second, instead of describing computer modeling and regression theory, the expert described the procedure underlying his study using analogies. For example, he told the jurors that they might best understand what he did if they imagined him: (1) putting the name, race and salary of each officer on separate index cards, (2) mixing all of the cards in a big barrel, (3) pulling out a certain numbers of these cards in completely random order, (4) ranking the chosen cards in order of salary and (5) looking for patterns.

I have admittedly oversimplified this expert's testimony. Obviously the expert did a lot more than this and his methods involved a process considerably more elaborate. But the point is, this simple analogy helped the jurors understand and accept what was done. The analogy was probably much more effective than describing in detail the computer models and fancy theory that were used.

The unspoken point was again clear

— “Ladies and gentlemen, what I did seems fair and logical doesn't it? If you were going to do this, wouldn't you go about it in approximately the same way?”

Remember, jurors may not understand much of what the expert says, but



they will scrutinize that portion that they do understand to see whether it seems fair and makes sense based on their ordinary knowledge of how things work. I have heard numerous jurors say that they accepted what one particular expert said because, while they did not understand all of it, what they did understand seemed to be fair and make sense.

**Never forget that it is virtually impossible to learn something new unless you start with something familiar.**

We have all had this or a similar dream. We unexplainably find ourselves in a classroom. It is not a coincidence that for most of us this imaginary nightmare class usually involves science or math — fields most commonly related to expert testimony. The teacher begins talking about the “easy stuff” and we have no idea what is going on.

Learning something new always involves a certain sense of insecurity as the student (in this case, the juror) tries to relate to something that is unfamiliar. So long as this insecurity exists, learning and understanding are impeded. It is unlikely that you will ever completely eliminate this impediment at trial, but you can make the process easier by always starting with familiar concepts and building the expert's more complex testimony from

there.

Far too many experts and the lawyers who proffer their testimony forget how little they initially knew about what is now the object of extensive technical testimony. When asked to go back to the basics, some of these experts and lawyers express a fear that they will somehow end up “talking down” to the jurors. Obviously, there is a level below which you do not want to drop, but I have virtually never seen any expert approach this nadir.

**Always help your jurors be able to answer the question, “Compared to what?”**

The acknowledged dean of information architecture, Edward Tufte of Yale, believes that educators must always be striving to help their students answer a fundamental question — “Compared to what?” This is similar to my earlier tip that in order to understand something new most jurors need to relate it to something familiar.

By way of example, an expert once had to explain how certain technology could find 1-micron-sized defects on an 8-inch silicon wafer. Most jurors, like most of us lawyers, do not understand the metric system, and those who do have no way of comparing a micron to an 8-inch silicon wafer. This difficulty vanishes and the jurors cannot help but be impressed when the lawyer through the expert explained that finding such a defect would be the equivalent of finding a soccer ball in a 90 square-mile area, which from the perspective of jurors in San Francisco Superior Court would include all of the city, much of the Bay, parts of Marin County and some of Alameda County.

The need to answer the question, “Compared to what?” is often particularly important in explaining an expert’s conclusions. It is one thing to say that a person has less than a “one in a million chance of dying of cancer.” It is another to remind the jury that the same hypothetical person has a 95 times greater chance of drowning in the bathtub, 197 times greater chance of freezing to death, or a 20 times greater chance of

dying from a rattlesnake bite.

**Help the expert explain technical terms.**

Often experts cannot stop themselves from using (and sometimes are required to use) technical terms during their testimony. There is nothing inherently wrong with this so long as the lawyer and expert make time when the terms are first used to explain what they mean to the jurors.

I once watched an opposing expert testify for hours without even once explaining what he meant when he said that “settling soils had created a reverse gradient in the city’s sewer system.” I knew what he meant; most of the jurors did not. After the trial, in a post-verdict interview, one of the jurors commented, “I just wish when he first used the term ‘reversed gradient’ he had explained it. It took me several days to understand that there was a problem because crud [actually it was a more graphic word] can’t flow uphill.” Your in-court definitions are not likely to be so colorful, but they are no less necessary.

Whenever possible, use analogies. Instead of citing formal business text definitions to explain that in a “1 to 1,000 reverse stock split” have your expert use the analogy of a person taking 1,000 single dollar bills to the bank and converting them into a single \$1,000 bill. While the number of bills has decreased (from 1 thousand to 1), the value has not changed.

Consistent with this philosophy, avoid using the dry dictionary definition to describe key words. For example, in a patent infringement case the expert *showed* the jury the difference between the terms “equivalent” and “identical” by using the illustration shown here, which shows two slightly different but equally functional keys.

After showing the picture to the jury, he added, “You see, items do not have to be identical to be equivalent. Take these two keys. They are clearly not *identical*; I admit that. But, they are *equivalent* because for the part of the key that matters, they will do the same thing; they will open the same door; they will do the

same job.”

**Keep your expert focused.**

Some experts, even good ones, sometimes seem to have a difficult time focusing on what it is they are supposed to talk about. Experts who fail to stay on message can miss a crucial point or bury that point among unnecessary information uncovered someplace in their excessive wanderings on the stand.

If you have such a witness, you might want to consider using a trial graphic that lists or illustrates step-by-step or point-by-point the expert’s testimony. For example, we once had an expert who needed to explain (with hopefully minimal digressions) a six-step process he followed in preparing and examining biological samples in an alleged sexual assault case. The problem was that the expert always seemed to wander off at some point in the description of the procedure.

To help him stay on point we created a trial graphic that illustrated each of the six steps. Initially all six were covered by separate cover pieces. As the expert began talking about each step, the lawyer would pull off the appropriate cover piece, thereby revealing an illustration of that step. This graphic was the largest cue card in the courtroom, encouraging both expert and lawyer to stick to the point. Additionally, the illustrations increased jurors’ interest and helped keep their attention.

Will every juror fully understand every aspect of every case? Probably not. But most jurors take their jobs very seriously. They believe that “the truth is out there” and if you give them the right tools, they can and will more often than not find it without having to listen to too much “wah, wah, wah.”

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