



## Differ or Die: Prevailing in an Era of Rampant Anti-Plaintiff Bias

By Amy Pardieck

For what seems like several lifetimes, we've been reading about the importance of the story model in the courtroom. If you don't have a story, you had better have a perfect case with no land mines. Have you ever seen one? Probably not. But, there is an aspect of the story model

that deserves attention and will get you closer to your desired outcome. Just any story will not do.

Originally, the story model was about how to make your case story memorable for your juror. Then, it was about how to use your story to defend, attack or flank the defense. Next, it was how to use a story to promote your theme. Along the way came the notion that story telling was all about language and morals.

Many of us have studied the techniques of telling stories. We have heard tales about lawyers who told unforgettable stories and other lawyers who forgot to tell a story at all. At the heart of successful story telling are differences: differences which set your story apart from frivolous lawsuits, apart from the McDonald's case, apart from the defense's story and apart from what jurors perceive as characteristic of flashy, wealthy lawyers and their undeserving clients.

Explicitly telling jurors that your case is not frivolous does not make it so in their minds. Likewise, telling jurors your case is different does not make it different. Jurors must discover and become convinced, for themselves, that your case is worthy and that it is different from

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all the other lousy lawsuits they have been led to believe clog up our courts. The purpose of this article is to help you do that.

Every plaintiff lawyer must know and accept that years of lawyer bashing and tort reform, especially in personal injury litigation, have resulted in many plaintiff cases starting out at a disadvantage in jurors' minds. Despite this, significant plaintiff verdicts make the headlines and increasingly will, but they are remarkable in our present political climate. How are they successful? What is the difference between the significant plaintiff verdicts and the discouraging defense verdicts in what appear to be meritorious cases? There is no simple answer, but it is important to recognize some of the common denominators from both the winning and the losing camps.

Some of the Turn Offs are:

- Appealing for sympathy,
- Leading, closed-ended questions,
- Asking for commitments before jurors know anything about the case,
- Telling an inconsistent story,
- Listing the defendants' bad acts before setting a context for them,
- Failing to give jurors a road map from beginning to the end of trial,
- Using unsupported conclusions,
- Playing to the judge,
- Focusing on rebutting the defense, (to name a few).

Some of the Turn Ons are:

- Laying out the standards, rules, statutes, even the "gold standard" of the reasonably prudent person, lets the jurors know there is a way for them to do their job responsibly and that you are

not just asking them to take something on faith,

- Showing jurors what a person or company looks like when they act responsibly according to the standards, rules, statutes, etc.,
- Showing jurors the purpose of the rules and laws applicable to your story,
- Keeping the theme alive throughout trial,
- Sticking to your story,
- Showing jurors what the defendant did that was not responsible and their motive for doing what they did,
- Portraying the plaintiff as a responsible person,
- Revealing the consequences of the defendant not acting responsibly,
- Then, showing the good money will do and the benefits of deciding for the plaintiff, (to name a few).

Cases that do the above are different than the typical losing plaintiff's case. They show us how well the system works when jurors are presented with a story that gets them outside their biases and prejudices about lawyers, lawsuits and the other case issues that may prevent them from hearing your case story from the outset. Then, they are capable of evaluating your case on its merits.

To be different, we must avoid presenting jurors with more of the same. What is the "more of the same" we need to avoid? Feeding jurors' suspicions about you, your client and the court system. As the American Trial Lawyer's Association's *Overcoming Juror Bias Seminar* states, suspicion of the system is among the most prevalent biases driving jury

<sup>1</sup> For more information on the Overcoming Juror Bias seminars, see <http://www.atlanet.org/education/jurorbias/faculty.aspx> for Part I and <http://www.atla.org/education/jurorbias/> for Part II.

verdicts today.<sup>1</sup> Whether a story encourages that suspicion or discourages it depends on jurors' interpretation. Very often, if jurors come into the courtroom expecting to find a frivolous lawsuit—more of the same—they will find one. Simply because they are hearing a personal injury case, some jurors are more likely to deem it frivolous, no matter what the facts. They see what they expect to see. This expectation is a pattern of sameness that needs to be interrupted to make room for something different.

Jurors quickly give attention to the parties and decide their purpose based on what the attorneys emphasize at the very beginning of the trial, and on very few facts. Much of the jurors' impression of the whole case stems from what the attorney first emphasizes. The wrong impression is made and jurors' suspicions are fed when the attorney lapses into points from the Turn Offs list above.

Many story-telling attorneys fail to understand that, as trial consultant Eric Oliver suggests, their job is to manage jurors' perceptions about their case.<sup>2</sup> This job of managing jurors' perceptions is often challenged by the mismatch between the amount of information a person can assimilate and the amount of information an attorney has to present. Our ability to take in and store information is limited. One way of overcoming the mind's natural stinginess in accepting new information is to work hard at presenting your case story differently.

Because most jurors are generally motivated to do a good job (stealth jurors is a topic for another article), they are looking for direction that usually comes in story form. Showing jurors the right direction that leads them to a different story helps them sift through the information. You can help jurors find the difference by paving a direct path for them to

follow from start to finish.

Two story-telling traps from the Turn Offs list are especially deadly. They are focusing on:

- rebutting the defense or
- playing to the judge.

In so doing, attorneys often overlook the factors in their story that make it different. While it is important to keep your eye on the

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*Jurors must discover for themselves that your case is different from all the other lousy lawsuits they believe clog up our courts.*

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record for purposes of an appeal, to be aware of the need to maintain rapport with the judge, and the need for the proper foundation to get your evidence in the record, all that is irrelevant if

those technicalities prevent your story from reaching the jurors.

The successful plaintiff implicitly rebuts the defense and plays to the judge by sticking to a different story. That does not mean there is never a time or place to rebut the defense in a traditional, confrontational manner. However, picking the proper, small amount of time and place, usually the middle of your story, allows you to take advantage of primacy and recency by not distracting from a different story beginning and a different story ending. If people think you've got something different to convey, generally they'll open their eyes or ears long enough to absorb enough to get them headed in the right direction. Once headed in the right direction, much rebutting of the defense and playing to the judge can occur automatically by staying on track.

These two story-telling traps, and the Turn Offs previously mentioned, lead attorneys to focus on language, time frames, actions, characters or motives which ultimately make their stories more of the same, instead of different. For example, if you are suing a car manufacturer for design defect, the jurors are probably headed in the wrong direction

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<sup>2</sup> Eric Oliver is a specialist in implied and nonverbal communications. His firm, MetaSystems, Ltd., is located in Canton, MI.

if you start out telling them a story about the accident itself, the third party driver, the intersection, your reconstructionist's technical findings or your plaintiff. In this scenario, there is no car manufacturer and no design defect. Jurors are less likely to find the car manufacturer at fault if we start with the accident and the conduct of another third party driver. However, jurors will more likely be headed in the right direction if you start out telling them a story about the rules they have to follow to find how the car manufacturer's choices, made several years before this wreck ever happened, put motorists at risk.

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*Jurors quickly decide their purpose based on what the attorneys emphasize at the very beginning of the trial, on very few facts.*

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As we have learned from trial consultant David Ball, for jurors, your case story will be about what you spend most of your time making it about.<sup>3</sup> And, more specifically, what you spend most of your time making it about is usually the people, time frames, location, choices and motives with which you start.

Avoiding the Turn Offs and telling a different story assumes thorough preparation that will free the lawyer from worrying about, "Am I going to get these facts into evidence?" and, "Am I going to have an objection sustained by an irate judge?" Preparation is the key to having the freedom needed to tell your story differently.

The question is, what story differences does it take to open the minds and hearts of jurors in our present climate? There are many ways you can make your story different. In each case, the method may vary. Whether it's vocabulary, sequence, themes, characters or motives, they all portray a different part of the story that should be helpful in getting jurors started in the right direction. The trick is not to bury the differences of your story in legalities, the defense's story or

issues that invite harmful biases.

### **Where Do You Want Your Jurors Headed?**

The answer to that question is critical in launching any plaintiff's story. The wrong direction can cost you the whole case. Besides that, you'll get nowhere with today's killer preconceptions about plaintiff cases. For example, in most plaintiff cases these days, you do not want to start out inviting jurors down a path exposing your client's behavior to

scrutiny. This would be the wrong direction. The right direction is usually about setting a context that will give meaning to the defendant's actions. That could be about the rules governing the defendant, care standards, the law or dangers of wrongdoing. The specific starting place needs to be determined on a case by case basis.

### **Setting the Direction**

Focus groups are all about finding the right direction for a case story. What should your case's different story be? How should it be verbalized? How should it be brought to life? What sequence has to be changed? The proper answers can save you time and money in hiring experts, preparing for summary judgment hearings, mediations and going to trial headed off in the wrong direction, a direction that will produce little success.

For example, if jurors start out looking at the plaintiff's conduct, that is usually what their verdict will reflect at the end. Many jurors will be inclined to continue to look at the plaintiff's conduct because that is their first impression of what the case is about. However, if jurors start out looking at the defendant's conduct, historically what the defendant knows, when the defendant knows it, and what the defendant does about it, that will probably also be reflected at the end, because their focus on the defendant will drive the verdict. The jurors must focus on the defendant's antecedent

<sup>3</sup> David Ball is a noted trial consultant, author and teacher. His firm, JuryWatch, Inc. is located in Durham, NC.

behavior that culminated in the harmful event itself. Setting the right direction could lead to jurors finding the plaintiff substantially at fault or the defendant substantially at fault. Which one do you want to get the higher percentage of fault on the verdict form? The sequencing choice is yours.

### Building Juror Perceptions

Building helpful juror perceptions involves figuring out the vast array of meanings your listeners can attach to your case's facts. How does your case story become different in the jurors', the decision makers', minds? This is a process for which effective pretrial research can pave a path, step by step. No offense, but it's also a process that is contrary to most everything lawyers learn in law school and practice on a daily basis. Many lawyers learn to use deductive reasoning almost exclusively, and research focused on perception building benefits from an expansive, exploratory quest, distinct from reason.

### A Four-Step Process

To find the story that can make a difference, follow this simple process.

#### 1. Preset Context

Every juror starts out with preconceived notions about lawsuits, plaintiffs, defendants, lawyers and almost all the issues on which your case story touches. Stories are never made in a vacuum. There is always the defense trying to create stories of their own. Jurors walk in with their own individual stories. Your story has to make sense in this difficult climate with its specific facts. It has to start with what the jurors have heard and registered about you and the defendant, generally and specifically. In this phase, focus group research can show us trends which help develop a sense of the jurors' starting places. Their starting places are the beliefs and biases they bring to the courtroom and are triggered by only the introduction of your story. With very

little case specific information, what are the listeners' answers to:

- What are the rules here?
- Who is doing what to whom?
- Who is responsible for what actions?

With answers to these questions, the case story which jurors could consider different can be determined.

At this early stage, we can learn from focus groups the beliefs and biases that hurt us and help us, which ones we want to tap into right off the bat, and which ones we want to avoid triggering altogether. Biases hurt and

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*You will get further with a mediocre story consistently told throughout trial than getting a good one out there just one time.*

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help only as much as a story invites them into it. Focus group participants' responses to a short introduction of your case story tell us where to start our story to make it different,

how our story can be seen as an exception to the rule, and which interpretations of the beginning make it unique and which interpretations make it more of the same.

#### 2. Differences

The ingredients to making different stories usually lie in the basic story elements: segments marking out a beginning, middle and end, theme, sequence, main characters, point of view, active party, language and so on. These story elements are used to separate this plaintiff's story from the defense's story, from the frivolous lawsuits many listeners hold against plaintiffs, and from other disqualifying criteria they could impose on your client. The secret to this is understanding that the ways to make your story different are probably not fact related.

The meaning jurors make of your story determines whether it falls into the frivolous lawsuit category, worthy category, exceptional category, or whatever category labels you choose. Most of us have experienced in seminars how one stack of facts can be told many different ways, and how each different rendition of the same facts can

trigger different meanings among its listeners. Different meanings arise out of rearranging the content of the beginning, middle and end segments of your story, as well as changing the sequence, point of view, active party, theme, time frame and moral emphasized—not the facts. These story elements allow you to most optimally present your case story differences to jurors.

### 3. Consistency

While the perfect case won't go far without a different story, the best story won't go very far without consistently telling it each and every step of the way at trial. Some lawyers seem to think that all they need is a good expert or a good theme or a good closing or a good whatever to get their good ideas across. Rarely is that true. Determining whether your story is different takes place in the mind of the juror. You need to manage the jurors' perceptions to get your story difference into their mind. And you need your story to stay in their minds once you get it there. You will get further with a mediocre story consistently told throughout trial than getting a good one out there just one time.

Consistently telling your story means using the same sequence in voir dire, opening, direct, cross and closing. It means keeping your theme alive during each of the trial stages, it means using the same point of view throughout, referring to the same main characters with regularity, and painting word pictures with a distinct vocabulary that does not waver from beginning to end. Consistency also means marking out the beginning, middle and end of your story with the same content and in the same manner, again during voir dire, opening, direct, cross and closing.

### 4. Communicating Your Difference

You must build a case story behind your theme. A useful analogy is to view your differentiating story as a nail that you are going to drive into the jurors' mind. The theme of the case would be the hammer to drive this nail into the minds of your jurors. Develop visuals to drive the theme through the story to build your most significant points of difference.

There's been extensive research on profiling jurors, persuading jurors and winning juries. Today's jurors don't need scientific research-based answers on "How do I unlock the right verdict?" The question they need answered is, "What makes this story different? What makes this story different from the McDonald's case, from the other frivolous lawsuits the likes of which I want nothing to do with?" That answer gives them something to latch onto and run with. Real persuasion starts with the weapon of a story that is different from the defense's story and different from all the other lame stories that lawyers tell in these frivolous lawsuits. Then lawyers have the challenge to bring it to life in voir dire, opening, direct, cross, and closing.

If your focus stays on differentiating your story, you cannot fall into the storytelling traps of rebutting the defense, bombarding jurors with legalese, and distracting jurors with trial technicalities. That leaves the fourth trap which may need tending to: arming yourself with a different story. Focus groups are the ideal way to develop a story. Obviously, not all cases warrant focus group research. In such circumstances, do informal story testing with friends, family and colleagues. Deciding the direction the jurors should head, setting the context, finding your case story difference, consistently presenting your story and communicating it can best be developed in an exchange with others. These days, a case story developed inside only one plaintiff lawyer's head can hardly be different enough.

If your story sounds different, feels different and looks different than a typical trial story these days from a layperson's perspective, you are probably headed in the right direction.

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# You Don't Say!

## The Effect of Syndicated Court Shows on Jurors

By Edahn Small

**Judge Judy: Who are you?**

**Witness: I'm here for pain and suffering.**

**Judge Judy: Yours or mine<sup>21</sup>**

She's sassy, she's opinionated, and she (and her colleagues) may be causing jurors to interpret judicial silence inappropriately. According to a study published in the American Business Law Journal by Kimberlianne Podlas, "syndi-court" shows like Judge Judy's may be impacting jurors' expectations of legal proceedings.<sup>2</sup>

The study was conducted on 241 real jurors who were awaiting entrance into the courthouse or on break. Jurors were given questionnaires that assessed their syndi-court viewing habits, their expectations regarding judicial behavior, and prior court experience. Two-thirds of subjects were categorized as *frequent viewers* (two or more shows per week) and the remaining one-third as *infrequent viewers* (zero or one show per week).

Podlas found significant differences between the two groups regarding:

1. the belief that judges should be opinionated and voice their opinions;
2. the tendency of jurors to search for those opinions; and
3. the interpretation of silence.

Frequent viewers of syndi-court shows expect the judge to hold opinions about the proper verdict. These jurors expect the judge to make these opinions clear and obvious to the jury, just like they do in the shows. The frequent viewers also expect the judge to ask questions, be aggressive and voice his or her displeasure with dubious testimony.

So if the judge doesn't express his discontent, no problem, right? Wrong. The frequent viewers admit that they actively try to discern the judge's disposition about the case. Because they expect the judge to voice discontent, they assume that silence is an indication of agreement and approval. The infrequent viewers made this inference significantly less frequently. Whether or not the frequent viewers had prior court experience made no difference for either group.

These findings should be of some concern since judges are instructed to do the exact opposite. Canon 3(5) of the Model Code of Judicial Conduct requires that judges remain free of bias or prejudice, expressed through oral communications, body language or facial expressions. A judge I clerked for went so far as to hide his face from the jury. (He might have just been napping, though.)

On the other hand, if the judge is silent throughout the trial, then no one should have an unfair advantage, right? This would be true if all things were equal, but they are not. According to Podlas, since plaintiffs present their cases before defendants, judicial silence (and hence agreement) could give plaintiffs an unfair "head start" in the eyes of frequent viewers. This head start could affect the subsequent interpretation of the defendant's evidence. For example, jurors might interpret a judge's ambiguous behavior as disapproving of the defendant's evidence (and therefore breaking judicial

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<sup>1</sup>IMDB.com, *Judge Judy*, <http://www.imdb.com/title/tt0115227> (follow link entitled "memorable quotes").

<sup>2</sup> Kimberlianne Podlas, *Please adjust your signal: how television's syndicated courtrooms bias our juror citizenry*, American Business Law Journal, Fall 2001.

silence) in order to confirm their belief that the plaintiff should prevail.

What can attorneys do to avoid these potential problems? Podlas suggests that attorneys use instructive or investigative voir dire, just as they would to detect and prevent racial biases or tendencies to favor police testimony. Attorneys can also request a preliminary instruction to warn the jury not to look to the judge for help in determining the verdict.

While syndi-court programs have helped educate jurors about the fundamentals of litigation, they have simultaneously created misconception about the role of judges. The lesson here is that in some cases, it's not what the judge says that can hurt you, but what he doesn't say.

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### Quick Courtroom Tips

By  
Bob Gerchen

### The Lectern is a Tool of the Devil

There are two circumstances under which it is acceptable to stand behind a lectern (or podium):

1. You are in federal court.
2. You are terrified of the jurors.

If neither of the above is true, get out from behind the lectern. Turn it to the side, or on a 45-degree angle, if you need it for holding your notes. Let the jurors see you, come to trust you, and see you have nothing to hide.

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*For more information about Bob Gerchen's book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit [www.CourtroomPresentationTips.com](http://www.CourtroomPresentationTips.com).*

# Secret Ballot or a Show of Hands?

## Gain the Advantage With Your Preferred Voting Method

By Edward P. Schwartz, Ph.D., M.S.L.

When going to trial, a litigator always asks herself the same question: “How will the jury vote?” This is a great question, but maybe not for the reason you think. I encourage my clients to think about the *method*, as well as the *outcome* of jury voting.

This is important because the method jurors use to cast their votes can have a profound effect on the outcome of the case. For example, if the jury votes by a show of hands, a juror may be reluctant to vote her conscience if she is worried that her choice will be unpopular with her fellow jurors.

It is therefore important for lawyers to understand:

- the various methods juries use to reach their decisions,
- how each method might favor one side or the other, and
- how lawyers can subtly influence the jury’s voting method without running afoul of the court.

### Get in the Game

*Game theory* is the study of strategic interaction. The focus is on how people choose strategies in anticipation of the strategies chosen by others. For instance, a soccer player taking a penalty kick wants to kick the ball in the opposite direction from where the goalie is diving. The goalie, on the other hand, wants to dive the same way the ball is being kicked. Should the goalie dive left or right? Well, that depends on what he thinks the kicker is going to do.

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*A secret ballot maximizes the chance  
that those favoring your client will  
actually vote that way.*

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The application of game theory to voting situations is called *social choice theory*. Most voting institutions—traditional elections, the Supreme Court, and Senate votes to close debate—have well-defined voting rules. It is interesting then that the jury, comprised of ordinary citizens with little or no voting experience (other than in elections), is asked to reach verdicts without any guidance about how to structure their votes. A casual observer might think that the voting method would not matter very much.

A social choice theorist, however, understands that procedure can have a profound impact on outcomes. A litigator would be wise to appreciate this connection and try to influence the jury’s voting method accordingly.

### Common Voting Methods

Jury voting methods run the gamut from the traditional secret ballot to the simultaneous show of hands. Each comes with its own strategic dynamic and lawyers can gain an edge for their clients if they can somehow convince the jury to use a method that maximizes the strengths of their case.

Of course, a lawyer’s direct attempt to tell a jury how to deliberate and vote would likely meet great hostility from the judge, not to mention opposing counsel. That said, there are subtle strategic ways an attorney can couch her arguments that might “nudge” a jury towards deliberating in one way or another.

### Secret Ballot

Not all votes are created equal. If a jury uses a secret ballot, jurors will all feel fairly comfortable voting sincerely. As such, if your client has an unsympathetic, but principled case, a secret ballot might be your best option. It maximizes the chance that those favoring your client will actually vote that way.

Studies have shown that people become committed to a position when they have publicly espoused it. As such, when a juror votes for a particular verdict, it is harder to get her to

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change her mind than if her position had remained private.

A secret ballot increases the likelihood that your supporters will act on their beliefs. On the other hand, its anonymity will limit the level of commitment that such a vote will engender.

Once a litigator has a strong sense of how a jury is likely to split on the important issues in a case, perhaps because she has run a focus group or mock trial, a good trial consultant can help her to fashion her arguments accordingly.

For instance, an attorney could begin the final paragraph of her closing with "After you have deliberated on these important issues, and as you tear up little slips of paper to cast your votes, I would just ask that you remember..."

#### **Around the Table**

When a jury votes "around the table," there can be a cascading effect as votes pile up on one side or the other. Each juror might be reluctant to be the first one to vote "the other way." This effect can become more pronounced for the last few jurors to cast their votes.

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*Jurors who initially favor the defense position are less likely to switch their votes than pro-plaintiff jurors.*

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Research has shown that jurors who initially favor the defense position are less likely to switch their votes than pro-plaintiff jurors. As such, a plaintiff's attorney who anticipates majority support on the first ballot might have an advantage if the jury uses a voice vote, as it can limit the effectiveness of dissenting voices (which may never be heard).

Closing argument is a good time to sow the seeds of this voting method: The lawyer can point to each juror, in turn, as she sums up, "As each of you, in turn, informs the rest of the jury how you intend to vote in this case, keep in mind how the power is in your

hands alone to ensure justice for my client."

#### **Show of Hands**

The game of "chicken" recalls images of testosterone-crazed, teenage drivers, barreling towards each other on a deserted stretch of highway. If both try too hard to "win," they both lose in a big way. This game was famously used to model U.S./Soviet relations during the cold war.

While slightly less dramatic, a simple show of hands in the jury room can result in a game of "chicken." Suppose a juror fears that her position is unpopular, or appears insensitive or stupid. Before raising her own hand, she will look around the room to see how many other hands are going up. Other like-minded jurors might be employing the same strategy. The result can be zero votes for a particular verdict, despite the fact that several jurors actually support it.

As such, a show of hands is usually a good voting method for a plaintiff's attorney with a very sympathetic client.

Voir dire can be good time to plant the seeds of voting procedures. An attorney can ask a prospective juror: "Jurors often have tough decisions to make.

It's really important that each juror vote according to her conscience and her evaluation of the evidence. Do you think that you could raise your hand high to vote for the verdict you believe is right, without worrying

about whether it will be popular with the other jurors?"

The irony of this question is that it is designed to make sure jurors worry about their popularity with other voters.

Or maybe your main goal is to make sure the jury doesn't use this method. An attorney could then use voir dire to ask prospective jurors about their experiences with prior jury trials. "How did it make you feel when you were the only juror to vote for the plaintiff? Would voting by secret ballot have made you feel less self-conscious?" While this will not necessarily inspire jurors to use a particular voting method, it will at least alert them to a possibility that they otherwise might not have considered.

## Unanimous Consent

Sometimes a foreperson or other active juror will essentially call for “unanimous consent,” daring the other jurors to suggest that she is wrong. “I think we can all agree that Dr. Jones didn’t do anything wrong, so let’s move on to Dr. Smith.” This puts enormous pressure on any juror who thinks that Dr. Jones might have actually been negligent.

This is a particularly dangerous scenario in a case where jurors might feel ill-equipped to resolve issues, such as a patent or anti-trust case.

An attorney might try to exploit this possibility if she is confident that the foreperson is on her side, but it is very risky because you never know who will be controlling the agenda. Normally, I would recommend trying to avoid such a scenario by reminding the jury to deliberate and vote on every issue.

If you are concerned that your case is a long-shot and your best chance for victory is to have an advocate on the jury co-opt the deliberations, you can try to strengthen the hand of that advocate. Paint your verdict as the easy, most obvious verdict to reach. During closing, a lawyer could offer helpful advice on prioritizing the deliberations: “This is a very complicated case. It could take weeks to review everything that you’ve seen and heard. And, by all means, you should take all the time you need. We are confident, however, that if you focus on the important issues, pushing aside the smokescreens and diversions that the other side has thrown at you, it should be a simple matter to return a verdict for my client.”

## Playing The Game

Attempts to influence deliberations in these ways may lead to objections from opposing counsel, but I wouldn’t worry too much about this. First, since your suggestions appear completely

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verdict-neutral, jurors will wonder why opposing counsel doesn’t want them to listen to you. They are more likely to speculate about your opponent’s motives than your own.

Second, one mention of your preferred voting method may do the trick. If the judge objects to your choice of words, you can apologize and move on. In fact, the more time the judge spends dealing with your language, the deeper the seed will be planted.

And planting that seed can make all the difference in a close case. Just remember: sometimes it’s not how the jury votes, but how the jury votes that matters. Well, you get the point.

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