The Jury Expert™ For Excellence in Persuasion, Communication & Jury Selection

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Getting Beyond "Can You Be Fair?" Framing Your Cause Questions

By Ken Broda-Bahm, Ph.D.

This scenario happens at some point in nearly every voir dire. First, a juror reveals a bias for or against one of the parties.

> *Juror: I just really don't trust big companies. What with all the media stories and all the scandals, well, I just think that they are in it for the money and they aren't honest.*

Then the attorney that would be disadvantaged by that bias moves in to clarify and, in effect, to convince the juror that this bias really wouldn't apply to their client.

> *Attorney: But you understand that companies aren't all the same, don't you?*
>
> *Juror: Well, sure.*
>
> *Attorney: And if the judge instructed you in this case, to just focus on the facts and the testimony about this company, and not your view of companies in general, you would be able to do that, wouldn't you?*
>
> *Juror: I would try my best.*

Yes, the juror has made a verbal commitment to try to set aside bias. But no, there is no reason to believe that the juror has in the process recovered from their bias. The most pernicious juror biases are worldviews: frameworks that jurors will use to understand facts, reconstruct stories, and interpret testimony and other evidence. Jurors do not come equipped with an on/off switch, and they cannot escape such a bias just by making a solemn promise. In all likelihood, the juror in the scenario above will still be all too ready to presume that the corporate party is dishonest and greedy, and to disbelieve that company's representatives.

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WHAT'S INSIDE

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Experienced trial attorneys know that, of course. And the attorney in this case may indeed use one strike on that juror. However, what has been lost is the opportunity to use the cause challenge for its true and intended purpose: to remove a juror who cannot reliably be fair in evaluating the facts of the case. While any questioning attorney is subject to a judge's reluctance to allow cause challenges, and at the mercy of a juror's tendency to give the safe answer, attorneys too often compound these disadvantages by asking truly biased juror questions that lead them away from an admission of bias and not toward one.

The fundamental barrier that attorneys must confront is the very human tendency on the part of jurors to want to portray themselves in the best possible light. This "social desirability bias"[1] serves as a standing encouragement for jurors to answer all questions with what they take to be the "right" or the "good" answer. The courtroom itself, with its many trappings of official power and formality, can heighten for jurors a preference for an answer that they believe will satisfy the judge and the attorneys over an answer that honestly conveys a bias.

Jurors should understand that they are fulfilling the requirements of the system and not failing the test when they disclose bias.

To ferret out the worst forms of bias, attorneys need to prepare for cause questioning with an eye toward the tendency to give the "right" answer. The task of developing these questions, however, can be tricky. To avoid evoking the socially desirable response, attorneys should start by dispensing with several old standbys:

- Leading questions: *Wouldn't you agree that…?*
- Instruction based questions: *If the judge were to tell you that…?*
- Ultimate conclusions: *Can you be fair to my client?*

While those questions can be quite effective at rehabilitating a desirable juror, they are counterproductive if the goal is to discover and expose actual bias that could hurt your case. The average juror will tend to agree with you, to say they will follow the judge's instructions, and promise to be fair to everyone in the courtroom, while still maintaining a biased worldview.

To create the best possibility for a successful cause challenge, consider using a four-phased approach designed to increase the chances that a biased juror will honestly admit to their bias.

Phase One: Modeling

First, create a climate for effective cause questioning by modeling the types of undesirable juror attitudes for your particular case. Show that it is acceptable to hold such views by modeling through some of your own self-disclosure. A light-hearted approach might sound as follows:

> *Let me explain a bit about what this questioning is for. Like many of you, I'm sure, I am a basketball fan, and around here that means that I'm a big fan of the Miami Heat and Shaquille O'Neal. If there were a court case in which someone was suing that basketball team, or suing Shaq, I would be the wrong juror for that case. I would be the wrong juror because I would have a hard time setting aside my loyalty to the team and being fair to the person who was suing the team. And there would be nothing wrong at all for me to admit that opinion—to be fair, I would really want to admit that opinion because maybe I should be a juror for a different case.*

[1] Fisher, R. J. (1993). Social desirability bias and the validity of indirect questioning. *Journal of Consumer Research: 20,* 303-315.

The important part of this modeling phase is that it be genuine and that it establishes a comfortable climate of rapport in which jurors understand that they are *fulfilling* the requirements of the system and not *failing* the test when they disclose bias.

Phase Two: Priming

When a juror has provided an indication of a possible bias, avoid the temptation to immediately jump to the ultimate legal question of whether that juror can set aside that experience or attitude and render a verdict solely on the evidence. Asking that question too soon will simply prompt the juror to provide what they believe to be the correct response: "Yes, I can set aside that bias." Before asking the ultimate question, set jurors up for a more thoughtful and accurate response by sensitizing them to their own attitudes. Do this by inviting the juror to wear the mantle of that belief: to speak about the sources and depth of their feelings on the issue.

Jurors do not come equipped with an on/off switch, and they cannot escape a bias just by making a solemn promise.

- *How long have you felt that way?*
- *Was that experience an important one for you?*
- *What experiences helped you form that opinion?*
- *Is this a belief that you feel you have good reasons for?*
- *Why do you feel this way?*

Naturally, in group voir dire, you want to be wary of effectively handing that juror a microphone to broadcast their negative views to the remaining venire. If possible, it is always better to handle important cause issues through individual voir dire or at the bench. However, if you are faced with a choice between (a) allowing a biased juror to inject a small amount of poison into the venire by speaking candidly prior to being dismissed for cause during voir dire; or (b) allowing that same juror to inject a potentially fatal dose of poison into the actual jury, by allowing them to stay; then option (a) is clearly the better option. Jurors do listen carefully to their peers during jury selection, but the harms of a few negative comments at that stage pale in comparison to the harms of that juror's sustained influence during deliberations.

Phase Three: Building the Case

Before moving on to confirm that juror's bias, use additional priming questions to explore all other potential sources of bias for that juror. Fully building the case on all possible sources of bias, then asking jurors whether they could lay aside these attitudes, works better than asking that confirming question for each source of bias. If possible, before moving on to the final phase, work to connect the sources of bias.

> *Ms. Jones, in your questionnaire you noted that you have some negative opinions about people who bring lawsuits against large companies. Your exact words were, "Too many plaintiffs are just after money." You also noted that your husband's company was sued two years ago and lost a large sum defending and settling that suit. You also answered that you would tend to trust the science conducted by a large company like Smithco more than you would trust science conducted on the plaintiff's behalf. So, you have had a negative personal experience with lawsuits, you believe that too many plaintiffs are just after the money, and you would be less likely to trust the plaintiff's evidence. Is that right?*

Phase Four: Confirming

Once a juror has provided an indication of possible bias *and* has had an opportunity to "own" all of their potential biases a bit by speaking about them, conclude questioning for this juror by asking the legal question of whether these biases could be set aside in order to focus on the evidence. Still, at this phase avoid suggesting the socially desirable response by asking the question in a straightforward "Can

you be fair?" fashion. Instead, consider some of the following options that may create a more comfortable space for jurors to say "yes."

- *In what ways will this experience/attitude affect the way you view the plaintiff/ defendant?*
- *How likely do you think it is that you would change your opinion in the next 24 hours?*
- *Knowing that you wouldn't automatically decide the case based on this experience of yours, is it safe to say that with you, I would start off a step or two behind my opposing counsel on this issue?*

Finally, end this section by providing the judge with the language she is looking for.

- *So based on everything you've said, how difficult would it be for you to just set aside what you know and what you believe and render a verdict solely on the evidence?*

Note that you are asking not whether the juror can set aside that bias (it is still too easy to say "yes"), but rather you are asking *how difficult* that would be, and in the process setting the stage for the juror to frankly talk about that difficulty. Naturally, your selection and phrasing of these questions will vary based on what you know of the judge's preferences. But the common thread of the strategy is that you are undercutting the strong pull of social desirability in order to enable a truly biased juror to admit their bias. And that admission provides the best and most reliable answer to the basic question, "Can you be fair?"

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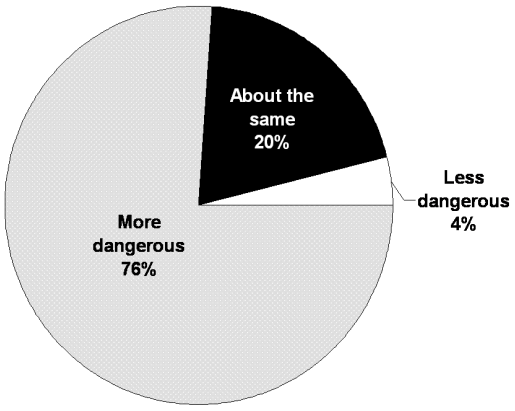
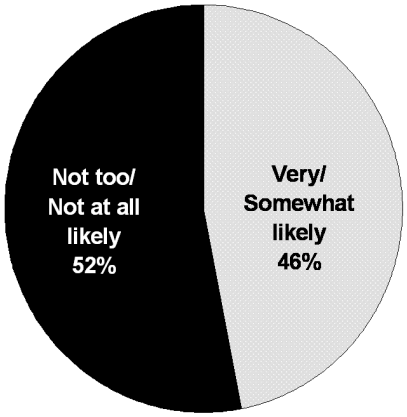
JUROR ATTITUDES: *American Feelings of Vulnerability*

In your opinion, would you say the world today is: more dangerous than other times in your life, about the same, or less dangerous than other times in your life.[1]



Perceived likelihood of a terrorist attack in the United States over the next several weeks.[2]



[1] Source: Gallup Poll, among US adults, N=1005, July, 2006.

[2] Source: Gallup Poll, among US adults, N=1005, July, 2006.

Where Did They Get That Number? Juries and Damage Figures

By Thomas M. O'Toole

The sheer amount of information that jurors are asked to process in a trial is daunting for some of the most sophisticated minds. Fortunately, humans seem to be preprogrammed for such tasks in their ability to cognitively store information by placing it into manageable categories, known as schemas. The most salient or influential schemas tend to be those that stem from concrete personal experiences. The sum of one's past experiences creates a prototypical schematic experience or norm, which in turn, functions as a frame of reference for understanding and interpreting new information.

For example, jurors evaluate the credibility of "the boss" on the witness stand in an employment case by drawing upon past experiences with their own managers and supervisors. Drawing upon these past interactions allows them to determine whether the witness fits their image of the boss, and consequently, construct attitudes towards the witness based on comparisons to their own personal experiences. Essentially, it creates a base-point reference. Jurors who have had bosses that they felt abused their power are more likely to be persuaded by the plaintiff's frame that the manager on trial is the type of person who would wrongfully terminate the plaintiff simply because he did not like her.

Most people intuitively understand the role that schemas play in processing information from our day-to-day experiences. However, we may be overlooking an even more influential role that schemas play in our assessment of legal disputes. It is here that schemas may impact the manner in which compensatory damages, particularly noneconomic, are awarded in personal injury cases.

Despite popular criticism of damage awards in personal injury cases, most research has shown that jurors arrive at damages quite rationally, basing them primarily upon the severity and permanence of the injuries sustained during an accident. This research compares damage awards with severity, permanence, and other factors across a wide range of cases using a variety of statistical methods. However, the research falls short, as it does not offer insight into how jurors arrive at damages for a particular injury within a particular case. One possible way to measure particular damages is to analyze the degree to which the event and injuries in question match jurors' schemas for such an event.

A recent study conducted by members of the psychology department at the University of Iowa showed that people tend to have schemas for common accidents involving personal injuries.[1] In this study, participants were given vague scenarios that led to personal injuries, including automobile accidents and defective products, and asked to describe what they believed would be the likely causes and resulting injuries. The results indicated that accidents with which a person has experience tend to produce similar and more consistent descriptions of likely injuries and causes. For example, in the scenario of the automobile accident, participants consistently described the injuries as including whiplash and head injuries. Additionally, participants had common explanations for how the accident occurred, despite not having been offered specific details. This establishes the notion that jurors do have expectations for what should occur in a particular kind of accident.

Despite popular criticism of damage awards in personal injury cases, most research has shown that jurors arrive at damages quite rationally.

Conversely, results also showed that there was much greater variation in descriptions of likely injuries and causes of accidents for scenarios that tended to be less common to the typical

[1] Hart, A. J., Evans, D. L., Wissler, R. L., Feehan, J.W., et. Al. (1997).Injuries, prior beliefs, and damage awards. *Behavioral Sciences and the Law,* 15, 63-82.

person's experiences. These included injuries sustained from defective products and medical malpractice.

These results have several implications. First, familiar accident scenarios involving injuries that match jurors' schemas will lead to greater consistency in damage awards across similar cases, allowing greater predictability of damages for the parties involved. Second, familiar accident scenarios involving injuries that fall further outside of the jurors' schematic range for that accident will likely lead to greater skepticism of the plaintiff's claims and, consequently, less predictability in terms of damages. Third, one can expect less predictability and greater variability in damage awards across cases involving unfamiliar accident scenarios. Finally, limited data suggests that unfamiliar accident scenarios tend to produce higher damage awards. A possible explanation for this is that juries hold greater sympathy for victims of unusual accidents as opposed to accidents that are perceived as common to the human experience. An implicit premise of this explanation is that accident scenarios that are more common to the personal experiences of most jurors are viewed as being less severe in nature.

Strategies stemming from this analysis can be highlighted for both the plaintiff and defendant. For the plaintiff, studies show that damage awards tend to be higher when injuries are atypical of a given accident category. This suggests that an advantage exists for plaintiffs when they can successfully differentiate their client's injuries from those that are "typical" of the particular accident category in question. Otherwise, juries will think, "This is just another case of whiplash," or "It'll be a nagging back injury but it'll eventually go away because mine did." This creates a lack of motivation for jurors to work for the plaintiff in the area of damages. Plaintiff's counsel will want to convey the uniqueness of their client's injuries or circumstances so that the jury finds higher damage awards.

Often, jurors do not feel compelled to award damages to a plaintiff when they or someone they know did not receive relief for a similar injury.

It is important to add that a fine balance must be struck. Injuries that depart too significantly from those that are typical of the accident category can create skeptical juries. For example, one recent case involved an individual who became severely ill from consuming food from a restaurant. This illness was so severe that the plaintiff will likely experience medical problems for the rest of her life. During mock trial deliberations, our consultants consistently heard jurors remark, "I've had food poisoning before and it wasn't that big of a deal," or "I just find it hard to believe

that food poisoning could have caused this." The implicit contention in these statements is that the injury sustained does not match what is typical for most people; therefore, jurors found it too difficult to establish a causal connection. Jurors' skepticism resulted in these mock juries altering their damage awards to make them more consistent with their expectations of what should have happened, or likely happened, in this particular case.

Success in such cases requires a clear, comprehensible explanation of why the injuries depart from what is typical for such an accident. This might be a difficult task for the plaintiff's attorney. Remember, personal experiences create very intractable schemas for jurors, making it more difficult for them to accept what they consider to be abnormal. Consequently, the plaintiff's attorney must establish the story of the client's injuries as unique, yet reasonably obtainable within the circumstances of an accident of that type. This will necessitate a carefully considered rhetorical strategy by plaintiff's counsel that draws upon the reasonability of a common experience. The focus of such a strategy should highlight the factors that differentiate the circumstances of the incident from those that are typical, rather that focusing primarily upon how the resulting injuries are different from the typical incident.

Injuries that depart too significantly from those that are typical of the accident category can create skeptical juries.

For the defense, damages may be brought under control by shifting the conceptual scope of plaintiff's injuries back under the umbrella of schemas for the accident category in question. The goal here is to get the jury to find that there is nothing especially necessary in terms of relief for the injuries sustained. Issues of severity and permanence are two areas that should be called into question either directly or indirectly, considering evidence cited earlier that indicates juries arrive at damages by examining these same factors. In doing so, there are a few possible outcomes.

First, the jury may believe that this is just another instance of a common accident with a corresponding common injury. In this case, when the jury fails to find anything especially unique about the plaintiff's circumstances, they will lack the motivation to aggressively compensate the plaintiff. In instances where the plaintiff's injuries do not match the jurors' schemas, jurors might reject the possibility that the injuries were caused by the defendant.

Another possible outcome is that jurors may identify the incident with one that they have personally experienced either firsthand or through a family member or friend. Often, we find that jurors do not feel compelled to award damages to a plaintiff when they or someone they know did not receive relief for a similar injury. While the likelihood of no damages being awarded is very low, this does keep the overall figures lower than what would otherwise be reasonably expected.

Overall, most readers are unlikely to be surprised by the notion that personal experience plays a significant role in jurors' conceptualization of issues at trial. Most attorneys are well aware of this. However, discussion of this relationship typically occurs within the context of determining liability. Instead, expanding the application of this relationship to cover determinations of damage awards may yield greater strategic options for both the plaintiff and defendant in anchoring damage figures.

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Getting the Most From Your Supplemental Juror Questionnaire

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

Whether the challenge is making the most of time-limited voir dire or encouraging potential jurors to fess up to biases and embarrassing life experiences, a supplemental juror questionnaire can be an important tool.

In many jurisdictions, the judge conducts a somewhat cursory voir dire in open court, where the jurors are asked, as a group, a series of broad questions about the case:

- "Does anyone know the plaintiff or the defendant?"
- "Has anyone ever been involved in a lawsuit like this one before?"
- "Does anyone work in law enforcement or have a relative who does?"

Prospective jurors will only be brought up to sidebar for further questioning if they raise their hands in response to one or more of these group questions.

This method is fraught with problems. Jurors are reluctant to volunteer information that might be personal or embarrassing. Given the hubbub of the courtroom, a juror might not hear a question perfectly, but may not be bold enough to ask the judge to repeat it.

These situations happen much more often than you may think.

In Washington D.C., Superior Court Judge Gregory E. Mize conducted an interesting experiment. Rather than interview only those jurors who answered a question affirmatively, he started interviewing each juror individually. He found that 28 percent of prospective jurors who *should* have raised their hands at least once during group voir dire (triggering an individualized voir dire) failed to do so.[1]

Remember that this number only represents those who "fessed up" when asked about their answers in private.

The most common excuses jurors gave for failing to reveal potential bias during group voir dire were embarrassment, shyness and a belief that their answers weren't very important. Needless to say, Judge Mize immediately started conducting individualized voir dire for every juror in every case.

Several other studies involving post-trial interviews have uncovered similar results.[2] In the Seltzer study, for instance, more than half of the jurors who had been victims of crimes failed to reveal this information during group voir dire. Only a quarter of those who had ties to law enforcement (which was more than a third of the sample) volunteered this information during voir dire.

A juror who will be active during deliberations can only help your client if he or she is on your side.

Since limited voir dire clearly does an incomplete and inaccurate job of eliminating jury bias, lawyers should concentrate on developing a well-crafted supplemental juror questionnaire to learn more about prospective jurors without stepping on the toes of the court.

Extensive voir dire jurisdictions

Even in jurisdictions that allow extensive voir dire, supplemental juror questionnaires are important tools for ensuring comprehensive juror profiles.

[1] Mize, G. E. (1999). On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room. *Court Review: Spring*, 10-15.

[2] Zeisel, H. & Seidman Diamond, S. (1978). The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court. *Stanford Law Review: 30,* 491–92. Seltzer, R. et al. (1991). Juror Honesty During the Voir Dire. *Journal of Criminal Justice: 19*, 451. Johnson, C. & Haney, C. (1994). Felony Voir Dire: An Exploratory Study of Its Content and Effect. *Law and Human Behavior: 18*, 487.

First, you don't want to exhaust the patience of the judge, opposing counsel, and the jurors themselves, by asking the same questions over and over. A well-crafted questionnaire will economize on voir dire time by securing a lot of background information before you even meet the jurors face to face. More importantly, the responses to the questionnaire signal to the litigator which follow-up questions should be asked of which jurors.

Also, face-to-face questioning is no guarantee of truthful responses. Many of the concerns regarding embarrassment and squeamishness that plague group voir dire are also present in individualized voir dire. Prospective jurors may not be comfortable discussing sensitive issues with lawyers and judges they don't know.

Several studies have shown that prospective jurors answer touchy questions more honestly on a questionnaire than when asked in person.

To prevent jurors from making strategic responses, ask tangential questions designed to uncover attitudes that might be correlated to those of interest.

Designing your questionnaire

As those who conduct political polls are acutely aware, the way a question is framed can have a dramatic impact on the answers you get.

Open-ended questions invite errors of omission. So, asking jurors whether they have any views on the tort system will elicit a lot of terse responses, often just "yes" or "no."

Multiple-choice questions, however, force the respondent to articulate a position. Consider the following:

Which of the following statements best describes your views about the legal system?

a. There are too many frivolous lawsuits because it's too easy for people to sue companies just to make money.

b. The legal system is stacked against plaintiffs because companies can get away with almost anything, knowing the average person doesn't have the resources to sue successfully.

While neither response might exactly describe a particular respondent's feelings, the juror will have to really think about his or her views and make a tough choice.

Another useful technique is to give prospective jurors a five-point (or seven-point) scale so that they only need to circle the answer that best reflects his or her views. One example is to follow a provocative statement, such as "Police officers routinely lie on the witness stand to secure convictions" with a seven-point scale that goes from "strongly disagree" to "strongly agree."

The wording of questions should be varied so that someone who is answering consistently will circle some numbers on both ends of the spectrum. This will allow the person interpreting the responses to detect a juror who mechanically answers the same way to all questions.

Jurors also naturally become suspicious of the questions, and there is a tendency to try to figure out the "right" answer or to resist attempts to elicit one's personal values. To prevent jurors from making these kinds of "strategic responses," it is a good idea to ask tangential questions, designed to uncover attitudes that might be correlated to those of interest.

For example, rather than asking about jurors' political beliefs, ask them to describe their favorite bumper sticker. Instead of directly asking about attitudes on social order, ask jurors what they think about body piercing and tattoos. Attitudes about home schooling can serve as good proxies for religious fundamentalism.

Who will dominate deliberations?

Shestowsky and Horowitz (2004) recently published a very interesting article linking mock jurors' scores on the "Need for Cognition

Scale" (NC) with their behavior as jurors.[3] The NC measures a person's affinity for cognitive tasks—a willingness to do tough thinking for fun, rather than for profit. Shestowsky and Horowitz discovered that high NC jurors tend to dominate deliberations. In their study, a full one-quarter of low NC jurors spent *less than one minute* speaking during their deliberations.

Apparently, a few trial litigators have convinced judges to include the entire battery of NC questions on the supplemental juror questionnaire. Absent such an accommodating judge, there are questions that should proxy fairly well for the NC survey. Try asking jurors about their hobbies and find out who plays chess, or does the Sunday crossword puzzle. I imagine that Sudoku enthusiasts are probably high NC types. On the other hand, jurors who watch a lot of network television or who knit for a hobby are probably low NC types.

A juror who will be active during deliberations can only help your client if he or she is on your side. As such, it is important to cross-reference your NC evaluations with your attitudinal ones. Keep the high NC jurors who you expect to be sympathetic to your case and use your peremptory strikes on the high NC jurors who seem likely to favor the other side.

Plan out your motion strategy

When you petition the judge for the use of a supplemental juror questionnaire, remember to emphasize its efficiency, convenience for jurors and capacity for truth revelation. The judge will likely be more sympathetic to your request if she thinks it will help her decisions on for-cause challenges, rather than your peremptory strikes.

Finally, don't submit an overly long questionnaire to a skeptical judge, and be sure to prioritize your questions so you can quickly make cuts if that's what the judge requires.

[3] Cacioppo, J.T., Petty, R.E., Kao, C.F. (1984). "The efficient assessment of need for cognition", *Journal of Personality Assessment: 48,* 306-7.

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Quick Courtroom Tips

By Bob Gerchen

Leave Documents on the Screen Long Enough for Jurors to Read Them

One of the biggest complaints we hear from jurors about documents in evidence is that the attorney puts up a document, reads about half a sentence from it, and then whisks it away immediately. Jurors have told us that it makes them wonder what you're trying to hide when you do that.

Give the jurors enough time to read the document—even if it's only a couple of sentences. You can read it faster verbally than they can read it silently. Let it stay up for a few extra moments so that their eyes can catch up with your voice.

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For more information about Bob Gerchen's book, ***101 Quick Courtroom Tips for Busy Trial Lawyers,*** *visit www.CourtroomPresentationTips.com.*

"Words In Action": The Extraordinary Power of Movement and Gestures

By Gary Genard, Ph.D.

"Suit the action to the word, the word to the action," advised Hamlet, adding that a speaker mustn't "overstep the modesty of nature." Sounds simple enough, doesn't it? But as we consider movement and gestures as part of courtroom performance, what exactly does it mean to match a physical action to the words one is speaking? What kind of action is Hamlet talking about? After all, Elizabethan England and twenty-first century courtrooms alike have witnessed speakers aplenty who "saw the air too much with their hands," and give their listeners too much of the "whirlwind of their passions."

How we move and gesture when we talk about important topics—a category that certainly includes court cases—has been a challenging area for speakers through the ages. We recognize, that is, that our body's relationship to space is a critical component of convincing our listeners. As J. Michael Sproule put it in his book ***Speechmaking,*** "the visual dimension of public speaking is directly linked to rhetorical success."

But that knowledge alone doesn't lessen the sheer jitters and self-consciousness this area always seems to conjure up in speakers. As with most things in life, however, the challenge of reinforcing and amplifying your advocacy though movement and gesture is equaled only by the rewards available for mastering it.

Let's look at three practical skill areas that can help you use movement and gestures powerfully in the courtroom:

1. Movement. When most people think about the physical nature of their presentations, they tend to focus on the question, "What in the world do I do with my *hands*?," or other aspects of gesturing while speaking. But aside from gestures, the courtroom offers one of the few venues where the lawyer can use the more powerful tool of *movement* effectively.

Public speakers are often confined behind a lectern, a situation that applies to some courtrooms as well. When you aren't confined in this way, however, you have a marvelous palette at your disposal: *all of the space in the trial area in which you are able to move.* A moment's reflection should remind you that this represents a true opportunity, exactly like the actor's "center stage" on which you can dramatically present your client's case. And that means movement as well as speaking!

Even in those venues where you must remain behind a lectern, you can use movement at strategic times: to approach an exhibit, to show a witness something with the court's permission, to "re-check" your notes at counsel's table. The point is, once you are comfortable moving around the trial area, you can take the further (dramatic) step of making movement part of your arsenal of persuasion, in opening statement, testimony, closing argument, and even voir dire. Using movement effectively just might make your opponent look stiff and flat-footed.

2. Gestures. Gestures are another invaluable tool for dramatizing your case's presentation. Imagine speaking to someone you care about, concerning something you're passionately interested in, while keeping your hands at your side and staying as

still as a cigar-store Indian. You wouldn't be half as convincing as you would be if you gestured effectively, would you? Gestures clarify your ideas, support your assertions, give vitality and emphasis to your words, and in general make you look human and highly committed to your client.

Yet gesturing is an area guaranteed to tie many a trial lawyer's confidence up in knots. The answer to this dilemma is that in order to be effective, you can basically *forget completely* about gestures, except for three simple rules. Here they are:

a). Create the conditions for gesturing, not the gesture. That's what Toastmasters International advises, and it's wise advice. Otherwise, you may be tempted to practice the gestures beforehand and they'll look artificial as a result. Believe in your client and your case: *that's* the condition that will allow you to gesture naturally and spontaneously.

b). Use any gesture that (as Hamlet said) is suited to what you're saying, and yet doesn't call attention to itself. In a sense, gestures should be invisible, since they reinforce the words you're saying, and it's the thought that stays in the listener's mind. Keep your ears open if a colleague alerts you to a gesture that you use so often, jurors are apt to be waiting for it to appear again instead of listening to what you're saying.

c). Get in the habit of gesturing only concerning *important points* in your arguments. Those gestures will then be strong, they'll occur at natural times, and as a result you'll look all the more human and convincing to the jury.

3. Countenance. The often forgotten member of our threesome of "words in action" is countenance, which is just another word for facial expression. Here (unlike with gestures), I would advise you to use a mirror or a video camera to watch yourself as you speak. Learn how you use your face when you talk: facial expressions are a more persuasive tool than many of us realize. Discover if you must the hard lesson, for instance, that your face isn't expressive enough, so that you're undermining your advocacy by not *looking* like you believe your own words! Don't try to "assume" sincere expressions, though. Like an actor, believe in what you're saying, and you'll surely LOOK like you believe it. And don't forget eye contact!

Now, then: look, move, and gesture like you're a zealous advocate for your client. What thinking and feeling jury member could ever resist such an exciting courtroom performer?

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