

The ABCs of tutoring your jury

Do your jurors have a good grasp of science and numbers? Do they read well? If you assume they all do, you may have already lost your case. Learn how to present complex ideas to jurors without talking down to them.

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Your trial starts Monday morning, and you've done everything you can to prepare:

- You have the site inspection reports—or the patient's chart entries, or the studies testing the new drug—lined up. When the jurors read those in order, they'll see that the defendants missed the critical fact.

- You have a venerable scientific expert ready to explain the underlying principles in detail. When the jurors hear his explanation, they'll see how egregious the defendant's mistake was.

- You have a first-class financial expert with colorful charts setting out the plaintiff's losses. When the jurors do the math, they'll conclude your client deserves a significant damages award.

- You have developed a memorable theme for your opening, powerful strategies for cross, and a foolproof analogy to use in closing. You can picture the jury nodding and taking notes, fully engaged.

But you forgot something: You forgot that some jurors won't understand you—at all.

Most lawyers don't realize how high the chances are that some jurors won't be able to easily interpret written exhibits, understand basic scientific con-

cepts, or perform simple mathematical calculations. This does not mean that laypeople can't be made to understand your case and resolve it fairly, but it does mean that you have to start at their level and build their knowledge throughout trial.

When you're aware of the realstate of language literacy, numeracy (the ability to work with numbers in everyday life), and science literacy in America, you will have a better understanding of potential jurors' abilities and limits and be able to more confidently communicate with all of them.

Reading proficiency

An article that appeared in a legal journal earlier this year described how some trial lawyers hire handwriting analysts to help them during voir dire.¹ No doubt, the article set off spirited discussions among jury consultants and lawyers about whether handwriting analysis has any value in jury selection.

Whether it does or doesn't, writing samples can at least show how well prospective jurors can read and write. If your case needs jurors who can read easily, written questionnaires may be your only clue that a prospective juror has literacy problems.

Fourteen percent of American adults can perform only the simplest reading tasks, according to the National Assessment of Adult Literacy.² An international study by the Organisation for Economic Co-operation and Development (OECD) puts the number at 20 percent.³ Many of these people are articulate in conversation—but put a document in front of them, and they can do no more than find “a single piece of information which is identical to or synonymous with the information given in the question.”⁴

The OECD defines five levels of reading proficiency—the ability to read a “single piece of information” is Level 1. Not until you get to Level 4 do you see the kind of task we routinely require of jurors in a complex case:

These tasks require respondents to perform multiple-feature matches and to integrate or synthesize information from complex or lengthy passages. More complex inferences are needed to perform successfully. Conditional information is

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frequently present in tasks at this level and must be taken into consideration by the respondent.⁵

Fewer than 13 percent of Americans operate at this level.⁶ You'll find that they'll be the exception, not the rule, on your jury.

Doing the math on math

Disturbing as the statistics on reading are, your jurors will probably be better at reading than they are at math. The OECD study's statistics on numeracy are stark:

■ Roughly a quarter (26.8 percent) of American adults can perform only "simple, one-step operations such as counting, sorting dates, performing simple arithmetic operations, or understanding common and simple percents such as 50 percent."⁷

■ Nearly one-third (31.8 percent) are limited to "one-step or two-step processes and estimations involving whole numbers, benchmark percents and fractions, interpreting simple graphical or spatial representations, and performing simple measurements."⁸

Let's use a little numeracy of our own. Picture the jury box. Pretend it is full of people who perfectly represent the population. (It never is, but that's another article.) Divide the box in half: front row, back row. Every person sitting in the front row, and probably one in the back row too, will have functional math skills falling somewhere between basic and nonexistent.

If you watch mock trials, you see math errors tainting verdicts all the time. More than once, I have watched an entire jury reach a damages number that they clearly didn't intend, even using a calculator, because nobody knew how to figure out a royalty percentage or a profit margin.

Of the many lessons here for lawyers, one was highlighted by a study released last spring that showed it matters—a lot—how you present numerical concepts to jurors.⁹ In the study, University of Oregon students had to make decisions based on numbers.

Each decision was presented in one of two ways. Investigators told students

that a psychiatric patient was to be released into the community; they told one group that similar patients had a 10 percent chance of committing violence, and they told the second group that for every 100 similar patients, 10 would commit violence.

The second explanation made a much bigger impression, as one of the study's authors explained:

Low-numerate people didn't see as much risk for Mr. Jones' potential for violence if told only that there is a 10 percent chance. We found that when low-numerate people

To overcome jurors' literacy and numeracy limitations, you have to start at their level and build their knowledge throughout trial.

were told instead that there was a 10-in-100 chance, they could picture 10 people running around going crazy and realized that Mr. Jones may be one of them.¹⁰

The researchers got the same results over and over, whether they presented the numbers in different words or on different charts. Students made different decisions depending on how the same data was presented to them. They responded when words and pictures made the numbers real.

Don't know much about a science book

Finally, there's science. If you're getting ready for a trial in which you need to explain scientific or engineering concepts, one of two things is true. You're either an expert by longtime experience and training—you concentrate your practice in asbestosis or electronic patents, say—or you're an expert because you've been scrambling for months to become one.

Either way, you have the "curse of knowledge," as Chip and Dan Heath call it in their recent book *Made to Stick: Why Some Ideas Survive and Others Die*. "Once we know something, we find it hard to imagine what it was like not to know it," they write. "The knowledge has 'cursed' us. And it becomes difficult for us to share our knowledge with others, be-

cause we can't easily re-create our listeners' state of mind."¹¹

It's the same with a trial. You had to learn all the science in your case, but you keep forgetting that other people don't know what you know. When you talk about your case, it's likely that no one understands you.

The federal government provides regular reminders of what potential jurors know (and don't know) about science. Every two years, the National Science Foundation writes a report for Congress called *Science and Engineering Indicators*,

a compilation of research, including a literature review. Chapter 7 of the 2006 report highlights "Science and Technology: Public Attitudes and Understanding." (The 2006¹² and 2004¹³ versions overlap considerably, and the following details are from both.)

As you get ready to explain why the jury should believe that it was a drug that killed your client and not her cancer, or that the fire in your client's apartment was caused by a defective appliance, consider:

■ Most Americans know that the earth travels around the sun¹⁴ and that light travels faster than sound—but few could give you the simple definition of a molecule.¹⁵

■ "NSF surveys have asked respondents to explain in their own words what it means to study something scientifically. Based on their answers, it is possible to conclude that most Americans (two-thirds in 2001) do not have a firm grasp of what is meant by the scientific process."¹⁶

■ Americans "have little conception of how science, technology, and engineering are related to one another, and they do not clearly understand what engineers do and how engineers and scientists work together to create technology."¹⁷

■ Fewer than one-fifth of Americans

“meet a minimal standard of civic scientific literacy.”¹⁸

Teaching tips

How do you talk to jurors with limited language literacy, numeracy, or science literacy, without seeming condescending to jurors who have more education? Here are some thoughts.

Start where they’re starting. Of course, you try to lay the groundwork. If one of the key elements in your client’s patent is “carbonate to inhibit cyclization and discoloration” (to pick a federal patent case at random), you know you can’t jump in at that point.¹⁹ Unless you provide enough context that someone

able jurors to be patient while you explain these details to the rest, they’ll be flattered rather than bored.

Know your “juror experts.” When one juror knows the subject well (or believes he or she does) and the others do not, the group will look to the “juror expert” to answer their questions. The more I watch mock juries, the more I believe the juror expert is one of the most powerful forces in any courtroom.

Who is a juror expert? The person who knows the most about a topic in your case, regardless of whether he or she could remotely qualify as an expert in the legal sense. You may have the world’s most complicated electronic

addition to simply saying what they think. That makes sense, but what I think many lawyers don’t expect is how frequent this kind of discussion is. According to the study, up to 61 percent of the exchanges in which jurors were seeking information were inference exchanges.²³

The point: You have mini-experts in the box, and the others will look to them for guidance on how to interpret everything from whether a faxed contract is valid to how long it takes a burn injury to heal. If your trial is about lawn mowers and one juror repairs lawn mowers at the hardware store, you’re unlikely to win without that juror’s support. If your trial is about safety in a restaurant and one juror owns a restaurant, you’ll need his or her support.

The goal is to aim your presentation at least in part to the juror expert, occasionally using terminology and concepts that he or she is familiar with, so that this juror can answer knowledgeably when fellow jurors turn to him or her for advice. Let the juror’s support help you win over the others.

Do the math yourself. Where math is important—and in most trials it is—you need a single exhibit that lays out the calculations as you think they should be performed, step by step, and the results of those calculations. With this guidance, the jurors can adopt your math instead of doing their own. It helps if the exhibit is on paper or a board instead of a presentation slide, so jurors can have it with them in the jury room.

Help jurors make inferences. When jurors need to make inferences from documents, do as much of the work for them as you can. Read aloud, circle, underline, and make charts—lots of charts. Create a timeline to put the key quotes or omissions in chronological order, a “that was then, this is now” chart to highlight inconsistencies, whatever you need to demonstrate the exact inferences you’re suggesting. It’s not a waste of time; you’ll communicate better with all the jurors, not just those who struggle with literacy.²⁴

A study published this year found that when people read a story, their brains were most active at the precise points where they later, consciously, drew di-

Invite knowledgeable jurors to be patient while you explain details to the rest, and they’ll be flattered rather than bored.

who can’t describe a molecule can follow you, you’re likely to lose the group.

So how do you do this? Research has confirmed what you may already suspect: People learn most easily when they are given information in narrative form and when it is presented with visual aids. The latter fact is especially interesting because other studies have found that lawyers tend to prefer learning new things in nonvisual ways—in other words, almost the exact opposite of how your jury wants to learn.

A recent study compared how attorneys learn with how jurors learn. Among the findings: “[O]nly 18 percent of the nonattorney population learns best by hearing information, as compared to nearly 29 percent of attorneys. Further, 61 percent of the general population prefers to learn from visual information, while fewer than half of attorneys prefer to communicate with visual information.”²⁰ Keep those statistics in mind when deciding how best to get your major concepts across.

But what about jurors who are more knowledgeable? How do you keep their interest while going over material they’re already familiar with? If you can gracefully invite your more knowledge-

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viding lines between events. Their brains were working to divide the story into “event” segments, even when they weren’t asked to do that.²⁵

An “event” is any change in characters, place, or time—but also in the characters’ goals or in the objects they are using (in the study, the changes involved a boy playing with a ball, then reading a book, for instance). When we hit an event “boundary,” our brains go to work.

Trial lawyers already know it’s best to present information as a narrative, so what does this research add? Two things.

First, when you’re presenting narrative, you can go with jurors’ flow, using clear transitions to break the information into the same segments they will. Use topic sentences to identify the switch. For instance, when you’re describing how your client was injured using a particular machine, start with a topic sentence about a routine safety check and show how he performed it; then, using another topic sentence, describe how he started to use the machine.

If you break the story where jurors don’t, and don’t where they do, they’ll be working to reorganize it. The study doesn’t say so, but it seems logical to conclude that if you save them that work, they’ll hear more of what you say.

Second, you can’t always present information at trial in narrative form—the plaintiff’s story is usually told in several parts, by several witnesses. And some information will have to be conveyed via lists, charts, or other visual aids. When you can’t just tell the story from beginning to end, research suggests you’d be wise to communicate with extra clarity the organizational structure that best works, since the listeners’ brains won’t provide it naturally.

When you’re listing several ways a defendant was negligent, for instance, use a chart showing the main categories of negligence. This will help jurors organize what you’re saying.

Consider a teacher as an expert witness. Expert witnesses can come from all backgrounds. But especially where the subject is science or math, it can be helpful to have a skilled teacher on the stand—partly because teachers have learned how to teach others, but also be-

cause their work teaches *them* every day to remember where their students are starting.

Teachers know the hands-on demonstrations that get the point across, the analogies to daily life that clarify the lesson. And you probably won’t have to tell a teacher to slow down; instead, the good ones will probably tell *you* when you need to do this.

Teachers also have experience using visual aids—and usually on a budget. They will know how to break a complicated issue down into manageable narrative segments that the jury can digest more easily.²⁶ And most jurors will probably trust a teacher more than they’d

trust other kinds of expert witnesses.

After months of refining your case, it’s easy to assume that your jurors will absorb without difficulty the written, numerical, and scientific information you’ll present. But don’t fall victim to the curse of your own knowledge. Spend some time considering the actual abilities of many jurors in these areas. Doing so can help ensure that your preparation time was well spent and that jurors truly will understand what you’re saying. ■

Notes

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15. *Science and Engineering Indicators 2004*, *supra* n. 13, ch. 7.

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17. *Id.* (citing *Technically Speaking: Why All*

Where the subject is science or math, put a teacher on the stand. Teachers know how to break complicated issues down into manageable segments.

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