



Using closing argument to support your “plaintiff jurors” in deliberation

YOUR BEST CHANCE TO WIN IS TO EMPOWER THE JURORS WHO ARE ALREADY WITH YOU TO PERSUADE THE REST OF THE JURY THAT YOUR ARGUMENT HAS MERIT

“What’s happening in that jury room? Who is saying what? Are my plaintiff jurors stepping up to the plate?” These are normal thoughts when the jury is out and they point to the main event, which is the group dynamic and work being done in the jury room.

When we talk to a jury about their deliberation process or watch focus groups deliberate after a mock trial, we learn that many jurors’ opinions, though seemingly set after opening statements, are not unchangeable during deliberations. Maybe the first vote, which can happen near the beginning of deliberations, is 7-5 or 8-4. How do they get to a verdict? The process of talking with and listening to one another, and frankly of peer pressure, leads people to change their minds.

I’m not the only person who holds this view. Jury consultant Harry Plotkin wrote, “Research studies (and my own mock jury research data) have found that 85-90 percent of jurors make up their minds in trial by the end of opening statements. And while it is true that 85-90 percent of jurors, when asked to guess a likely verdict after hearing only opening statements, give an identical verdict at the end of the case or the mock trial, the phenomenon can be a little misleading ... actual and mock jurors *routinely change their minds* and their verdict during deliberations. So to turn a complex story into a simple one, nothing the lawyers or witnesses say will change most jurors’ minds, but other jurors seem to have no trouble persuading each other.”

What, then, can you *do* in closing that will *help* in deliberations? To answer, we have to ask “who are we trying to help?” The answer is, our plaintiff’s jurors.

In a juror’s shoes

Imagine the jury at the beginning of closing argument. Put yourself in their

shoes – those twelve people sitting there looking at you. Pick one and imagine she is a plaintiff juror, and reverse roles.

You are Juror Number 7. You received a jury summons and your life was turned upside down. You showed up, hoping that you could plead your own case about why you can’t possibly sit as a juror. Your boss doesn’t pay for jury duty and you have to pick up the kids at the end of the day. Then, all of a sudden, way too fast, you are on the jury.

“How did I get here? Why is this going more slowly than the Arctic ice is melting? Three weeks later, and we are doing what? Closing argument the judge called it? Now I have to listen to the lawyers talk again? For how long? Why can’t we just get to the work? Why can’t we just get sent into the jury room and finally do our jobs? Wait, what, exactly, are our jobs and how am I going to deal with the other jurors once we get to work?”

Stop here and answer these questions – what would you *appreciate* hearing from the plaintiff’s lawyer? How could she *actually help you* right now? And how can she keep helping you in the jury room?

How do you feel when I, as the plaintiff’s lawyer, tell you that I can help answer those questions? Or when I say I will explain it to you and we will work through the process together, so you are prepared for what’s going to happen next? Better? I know it would feel better to hear those things if I were you, Juror Number 7.

Shall we begin then?

A closing script that supports your juror

“This has been a long trial. You have sacrificed and you have already worked hard, listening, paying attention and being patient. We thank you for your incredibly important work up

to this point and for the work you are going to do together in the jury room.

“Now it’s time for me to help you prepare for the work, so you understand what comes next, which is to agree on what is called a verdict. When you begin your deliberations, you will have the documents from the case with you, you will have the verdict form with the questions you have to answer, you will have your recollection of the testimony, and you will have each other.

“Let’s take a look at the verdict form. [Show the verdict form blown up.] This is the actual form you will have in the jury room and these are the actual questions you have to answer together. You will see that the verdict form has questions that center around what happened, what harm occurred, what is full compensation for the harm, and the last question – did the company do these things maliciously, in disregard for Ms. Doe’s rights or fraudulently?

“You will work together to answer each of the questions on the verdict form, which I will go over with you. As I talk about these questions, I am going to talk to you about concerns that may come up during your discussions, and about things to remind others about if these concerns come up. Because it’s your job in deliberations to get to a final answer on each question on the verdict form.

“To have a final answer to each question, nine of you have to agree. The same nine do not have to agree to each question – any nine will do.

“So your goal is to get at least nine of you, in any combination, to agree to the answer to each question on the verdict form. And, to agree, you only have to agree that it is more likely than not [insert your case here]. You don’t have to agree that it for sure happened this way,

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just that it's more likely that it did, than not. [Use your favorite demonstration here, like barely tipping your outstretched arms in one direction.] We believe the evidence is more like this [big tip of arms] in [plaintiff's] favor, but you get my point – it only needs to be this [back to little tip of arms] for you to tell each other that [plaintiff] wins on each question on your verdict form.

“Any combination of nine of you can agree and you can change that combination of nine from question to question. This means that even if one juror voted no on the previous or other questions, he or she can join for a yes vote on any question. Once you have answered all the questions on the verdict form, you are done.

“We are going to talk about each one of these questions, along with the rules and the evidence. So let's get to work.

I'm not suggesting that you follow this script – rather, it's just one approach to consider in your own preparation for closing argument. However, I do ask that you use the heart and mind of your new identity, as Juror No. 7, to understand how it feels to have the plaintiff's lawyer begin to teach you about the process of the job you are about to do. As Juror No. 7, it helps to be oriented to your task, right? The tasks and framework for the job help you receive the information needed to do your job. Just like in school.

Arm the plaintiff jurors

Now that you, as the trial lawyer, have explained the framework for the jury's job, here's where you shine – be a passionate leader. Explain each question on the verdict form and intertwine the charts, timelines, testimony and documents that support the correct answer to each question, one by one. Reference the supporting exhibits on each demonstrative, timeline and blowup so the jury sees the reference material cited.

Point out and debunk the defense counter-arguments one by one. You can address issues this way: “When you are talking about this question, someone may say (defense theme or argument). If they say that, you remind them, (plaintiff's

theme or argument).” As the plaintiff's attorney, it is your job to arm your good jurors so they can fight for the plaintiff's verdict.

As reinforced by Harry Plotkin, “Your only chance to win the case is to prepare the jurors who are already with you to persuade the rest of the jury, because they have a much better chance than you do to change minds ... don't be afraid to be an unapologetic advocate for your case throughout your closing. The entire point of your closing argument should be to arm your jurors, emotionally and factually, to argue with the jurors who are against you.”

As you proceed through the verdict form, answer each question on the form. Then explain. Then reiterate the answer.

Dealing with circumstantial evidence

In employment cases, we are often proving intent using circumstantial evidence. We usually have far more evidence than can or should be used in closing. The evidence has to be culled to present the most persuasive presentation. Timelines, performance evaluations, emails, texts and testimony are crucial. You will need to explain certain concepts carefully, by reference to certain jury instructions, like substantial motivating reason (CACI 2507), and the affirmative defenses, and you will need to debunk them.

Here's another example, this one on substantial motivating reason.

“Ladies and gentlemen, when you talk about whether [plaintiff's] reporting of harassment was a substantial motivating reason for her termination, you focus on this – did that reporting play a real part in the decision to fire [plaintiff]. Another juror may say, ‘well, it wasn't the only reason.’ And you tell them, that's not the rule. The rule is that it only has to play a real part in the decision to terminate, and that it has to be more likely that it did than didn't. For [plaintiff] to win on this question, it's not that difficult – given what you have seen and heard in this trial, does it seem more likely that her reporting played a real part in causing her termination? Let's talk about the evidence that shows it's really clear that

her reporting was a substantial motivating reason behind her termination....”

As with all components of the case, we have to find the underlying truths, the reasons why the case is righteous and passionately advocate for the jury to do the right thing, to right the wrong. Employment cases offer terrific opportunities to talk about civil rights, the dignity of work, the reasons why our fair employment laws are important, and to inspire the jury to save the day. These truths offer great themes for employment cases and they resonate with jurors.

Conclusion

Again, from Harry Plotkin, “[m]ake sure your closing arms your jurors with more than the facts – give them general principles, trial themes, and larger-than-this-case reasons to fight for your client. I've often advised plaintiff lawyers to tell the jury that a large verdict ‘might be the only way to help these defendants and companies like them to be more careful and more responsible.’”

Some of the power we have as plaintiffs' lawyers resides in our passion. It also comes from being real and engaging in straight talk with the jury. Treat that jury the way you would want to be treated – as an important person who is smart enough to understand what the lawyer is saying, and just needs to know how to do her job. Personally, as Juror No. 7, I would thank you for that approach.

Genie Harrison is the principal of the Genie Harrison Law Firm, where she focuses on plaintiff's employment, civil rights and wage and hour matters. Ms. Harrison is one of only two women in the state of California named by the Daily Journal as a Top Labor & Employment Lawyer for five years in a row. She has been recognized by Best Lawyers in America for Plaintiff's Employment Litigation and been named by the Daily Journal as one of the Top 100 and Top 75 Women Litigators in California. In 2014 she was elected as a Fellow of the College of Labor & Employment Lawyers. In 2013 Ms. Harrison received CAALA's Presidential Award.

