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PERSUASION: MOVING THE HEARTS AND MINDS OF JURORS

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I. INTRODUCTION

Persuading juries and communicating your client's story is just as much art as it is science. Over the course of more than forty years of practicing law, and often using trial and error, I have found a combination of strategies and techniques to be most effective. My intent is to share some of these strategies and techniques with you and perhaps to spur you to consider new ways to persuade your target audience and to communicate your clients' stories.

II. USING FOCUS GROUPS

A. Why Use Focus Groups?

Focus groups allow the trial attorney to: (1) "road test" messages and themes to determine whether they are persuasive and understandable; (2) gauge potential juror reactions to arguments and evidence; (3) craft more persuasive arguments; (4) translate legal terminology and concepts into terminology and concepts more easily understood by lay-persons; (5) identify information needed by the jury to understand a client's story; (6) test jurors' reactions to opposition arguments; (7) gauge jurors' reactions to particular witnesses; (8) determine optimum sequencing and emphasis for presentation of evidence; (9) identify weaknesses and determine how to handle them; (10) determine jurors' reactions to the trial attorney; (11) determine jurors' reactions to particular pieces of demonstrative evidence; (12) determine ranges of probability of prevailing on liability issues; and (13) determine ranges of damages likely to be awarded by jurors. See Ball, *Theater Tips and Strategies for Jury Trials*, 196-98 (NITA 1997); Barnett, "Letting Focus Groups Work for You," *Trial* (April 1999); Komyatte, "Simplify Complex Cases With Focus Groups," *Trial* (April 2001); Twiggs, "Focus on Settlement," *Trial* (June 2003). In addition, with enough data, the trial attorney can evaluate and analyze patterns regarding the characteristics most desirable in a juror.

B. Selecting Case Themes

A case theme is a short, concise statement of the essence of a case. The theme in a medical malpractice failure to diagnose case, for example, might be "predictable, obvious and preventable." Another theme in an appropriate case might be, "people should be more important than profits." According to trial consultant Doug Keene, effective messages need to resemble the kinds of things a juror might say. See Keene and Handrick, "The Winning Equation: Message – Resistance = Persuasion," (2004) (unpublished paper at www.keenetrial.com). Themes give jurors frameworks in which to categorize and organize evidence. Selecting an effective theme is therefore of paramount importance.

Many times, focus group jurors provide attorneys with themes when the jurors choose language in attempting to persuade fellow jurors during deliberations. In addition, the effectiveness of themes selected by the trial attorney can be gauged by the frequency that focus group jurors repeat the themes in discussing the case and/or in attempting to persuade other jurors. Most trial attorneys have had first-hand experience of this phenomenon when jurors repeated a theme back to the attorney when explaining their verdict after the trial by saying something to the effect of, "It was just like you said: this was predictable, obvious and preventable." (Needless to say, you do *not* want to be hearing from the jurors after the trial that, "It was just like the *other* attorney said"). Comments such as these indicate that an effective theme struck home with most jurors, and that the theme was used by those jurors to persuade other jurors who might have been sitting

on the fence at the start of deliberations.

C. Narrowing Issues and Theories of Liability

Complex cases generally have numerous issues and multiple theories of liability. Focus groups can allow the trial attorney to separate important issues from unimportant issues, and to determine the most persuasive theories of liability. In this era of computer-savvy, soundbite-oriented jurors, it is more important than ever to get to the point and stay on the point, without long detours for extraneous, irrelevant matters.

D. Testing Jurors' Reactions to Your Opponent's Case

Inevitably, the trial attorney on the case loses objectivity about the opponent's arguments. The acid test of how effective opposing arguments will be is how potential jurors will react to those arguments. If the plaintiff acknowledges *some* error or fault, will the jury be more likely to return a verdict in the plaintiff's favor? If the defendant acknowledges error, and chooses to contest only damages issues, will the jury be kinder to the defendant? Will the defendant be able to avoid punitive damages with such a strategy? Will the jury be offended when your opponent criticizes your client or questions your client's credibility? Focus groups can help the attorney answer these questions.

E. Testing Jurors' Reactions to Types of Cases and Particular Fact Patterns

How will jurors view a corporation that manufactures a particular type of component part? In a case in which a clinic fails to correctly report the plaintiff's medical test result, will the jurors blame the plaintiff for not getting a second test at another clinic? What role will the suspension or revocation of the defendant's driver's (or nursing or medical) license play in the jurors' deliberations? How will the fact that the defendant had a prior criminal conviction influence the jurors? If there are particularly sensitive issues in the case, what is the least offensive way of handling them? Questions such as these can be answered by focus groups.

F. Testing Jurors' Reactions to Parties and Witnesses

How will the jurors view the plaintiff? How much (and what type of) testimony from the plaintiff and the treating doctors and other damages witnesses will be necessary to make the jurors "feel the plaintiff's pain" without causing the jurors to believe that the plaintiff is shamelessly appealing to their sympathy? Will the unrepentant defendant be perceived to be arrogant or principled? Will inconsistencies in a witness' testimony be forgiven? Will the key witness with a thick, out-of-state accent be embraced by the jury or ignored? Will the jurors be offended by the amount of the expert witness fees in the case? Will the training and experience of the witness be persuasive to the jury? Questions such as these can be answered by focus groups.

G. Determining Sequencing and Emphasis for Presentation of Evidence

Due to the potency of primacy and recency points in the minds of jurors, commentators generally advocate starting and ending with your strongest points, and sandwiching any weaknesses that must be addressed, in between the strong points. See R. Herman, *Courtroom Persuasion* 265 (1997) ("I often look upon disclosure as a Strong-Weak-Strong structure ... Give a strength, disclose a weakness and end with a strength."); S. Lubet, *Modern Trial Advocacy* 430 (2d ed. 1997) ("...negative information should not be mentioned until you have laid out all of the positive facts about the witness. If you believe that you must defuse a ticking bomb, do it quickly and without fanfare."). Nevertheless, within these general parameters, there is a great deal of potential leeway. In a given case, what evidence should be introduced first? Should

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