

The Importance of Faith in Your Trial Strategy

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A jury trial can be a scary proposition for attorneys and clients. It requires both to place a tremendous amount of trust in a group of strangers they have never met and know very little about. The feedback loops are so poor that even the most experienced attorneys often lack accurate or complete information about why they were successful or unsuccessful in a case. The extraordinary leap of faith that is required by attorneys can leave them desperate for any clues as to what is important to the jury or how they might perceive the case.

The problem is that this sense of desperation can often become a distraction, and distractions can be deadly. One of the fundamental keys to success in any argument or persuasive act is to keep the discussion on your ground. Distractions put you where you are exposed and vulnerable.

It's not exactly profound to suggest that it is important for attorneys to avoid distractions during trial. As a general principle, every attorney knows this. Yet, distractions are inevitable. The key is to know which ones are harmless and which ones are threats to your success. This article focuses on two particular sources of distraction that can undermine an effective trial strategy. One involves jurors and the other involves the opposing counsel.

The first source of distraction is jurors. Attorneys know very little about the jurors and how they might perceive the issues in the case. This can lead to desperate attempts to assign meaning to jurors' behavior. We've had an attorney change the entire cross-examination strategy mid-examination simply because he thought he was getting a bad look from a couple of jurors. We've also had attorneys back off of important issues in closing because the jurors were not smiling.

At first glance, this may seem like not a problem at all. After all, a successful communicator adapts to the audience, right? While this is certainly true, our point is a little bit different. The problem is not the decision to adapt. Instead, the problem is the interpretation of jurors' behavior. I was in a trial last year where a juror smiled and nodded favorably to our trial team on just about every argument made in the closing argument. Everyone seemed fairly certain that this juror was going to be a great advocate. After the verdict came in, we had the opportunity to interview the juror and it turns out he was one of the most vocal advocates against our side during deliberations. It was a head-scratcher. All of his nonverbal behavior indicated otherwise. While this an exceptional anecdote, we have had so many situations where an attorney or paralegal reported back to us on how trial was going and told us with certainty that the jurors were reacting negatively or positively to a particular issue, only to be proven wrong in the post-trial juror interviews.

The problem is that the "cues" attorneys rely on are, in fact, unreliable. A juror may appear to be making an unfriendly or friendly face, but the explanations for it are infinite. Maybe the juror got in an argument with his or her spouse that morning and is still thinking



about it. Maybe the juror realized he or she forgot to turn something off before they left the house that day. Maybe the juror is too cold or too warm. Maybe he or she has gas. Maybe he or she is trying to be nice so they smile, but really think you're going down in flames. We could go on and on. It is important for attorneys to read into jurors' behavior with caution. Voir dire is one thing because jurors have the opportunity to explain their reactions. Trial is totally different. By the time trial rolls around, an attorney should have a strategy that he or she is confident in and should not let some random face made by a juror call into question any aspects of that strategy. The obvious caveat is the obvious group reactions. If most of your panel gasps, squirms, cries, frowns, nods enthusiastically, that is probably a safe sign you should not ignore.

The other source of distraction is the tactics deployed by the other side. The best strategy in any case is an affirmative theory that puts the other side on the defense. The key is to control the ground and language upon which the argument takes place. Success is often the result of getting your opponent to debate you on your own ground. It's like having home-field advantage. While attorneys obviously have to respond to key arguments made by the other side, these key arguments should be anticipated in advance so that that you can figure out how to package your response within your affirmative framework so as not cede ground by engaging the opposing party on their own ground.

Additionally, attorneys should think carefully about the bigger picture impact of a random comment made by opposing counsel. A while back, we were assisting an attorney with jury selection. On the first day, the plaintiff's attorney mentioned how much he was going to ask the jury to award. During a break, the defense attorney expressed deep concern about the fact that the big number was thrown out there. She wanted to know how to respond because she felt it could not go unaddressed. However, it needed no response – at least not in voir dire. Instead, a response would only cut into the limited, valuable time we had in voir dire to identify and remove our own high-risk jurors, which is the only thing we actually had control over. A response would have been a distraction that took us away from the task at hand.

We will close with the story of a client who recently gave one of the most effective closing arguments we have seen. The primary reason for its effectiveness was its total freedom from distraction. The case was an employment case where the plaintiff made serious claims about his departure and peppered these claims with innumerable anecdotes, connected only in their effort to make the defendant look bad. There were many opportunities for our client to get distracted. The pull to respond to these attacks instead of sticking with an affirmative story was significant. But, he resisted the urge. He stood up and showed ten slides. Seven of the slides contained key exhibits that told the entire affirmative non-defensive, defense-story of the case. The other three addressed jury instructions and the verdict form. The closing was less than thirty minutes. He could have gotten himself wrapped up in all of the anecdotes. He could have spent a lot of time playing defense on a variety of the plaintiff's theories. Instead, he just stood up and gave his short and simple affirmative theory of the case and used seven exhibits to prove it. This was an extremely bold move, but it paid off. The jury came back quickly with a



unanimous defense verdict. It is one of the best examples of avoiding distraction that we have seen.

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