

Post-Mortem Talks With Jury Enlighten Judge

AS AN appellate judge, I see only the shadows of jury trials: transcripts, objections, instructions, verdicts. How do criminal juries really operate? Do they follow the instructions? Is voir dire effective? Does good (or bad) lawyering make a difference? Do jurors remember facts and follow complex arguments?

To look for answers to these questions, I sit as a trial judge in criminal cases from time to time. After the verdict is in, I invite the jurors to discuss the case with me and my staff (and sometimes the lawyers). I learn something new and useful every time. Here is a grab-bag of observations from my unscientific study. I make no warranties of fitness for use; proceed at your client's risk.

1. Jury voir dire can be effective. The first time I picked a jury, I looked at the long list of intricate questions submitted by the lawyers and thought no one would answer them honestly. I was half right. Questions that are too long, too detailed or too abstract tend to pass right over the jurors' heads. But a handful of well-tailored questions—asked by the judge with proper emphasis and eye contact—can yield amazing results.

I have had jurors come right out and

tell me that they are unfit or unable to serve on the case because they suffered a vaguely similar crime; they do not believe the conduct in question should be criminal; they are the same nationality as the defendant; they feel racial animus; they do not trust the government; they have difficulty hearing or seeing. In fact, there are few human foibles to which I have not heard jurors confess on voir dire.

Are they just faking to avoid service? I don't think so, because I let them know they don't need an excuse if they want out. My feeling is that if they'd rather not be there, they have no business deciding the defendant's fate. And, of course, as soon as a juror disqualifies himself, I heap him with praise:

"Thank you so much, Mr. Arbogast, for sharing with us that you're a neo-Nazi dipsomaniac. We need more people like you who are not embarrassed to let us know what's on their minds." After this I can usually count on two or three others to speak up.

2. Jurors can be patient, but they do not suffer fools gladly. I ask jurors how they feel they have been treated and by and large they accept the rigors of the job, such as long waits and cramped quarters, with equanimity. The most frequent complaints: The lawyers asked too many useless questions or went on too long in summation. My biggest complaints, too.

3. Jurors take instructions seriously.

When I discuss the case with the jury, I generally ask them to explain how they applied a particularly difficult instruction, and they seldom get it wrong. When there has been an instruction to disregard testimony, I ask them if they managed to put it out of their minds. "No problem," they tell me. "You told us to disregard it; it was like it never happened." Are they lying? I don't think so; the answer is almost always given promptly and without hedging.

A Sharp Bunch of People

4. Jurors recall the evidence surprisingly well. I let jurors take notes and provide pen and paper for that purpose. I then ask them how they resolved conflicts in the evidence, and they articulate cogent reasons for believing one witness over another. Often they remember small details and inconsistencies that neither I nor anyone on my staff had noticed. Not every juror remembers everything, but very little passes by the jury as a whole.

5. Jurors sometimes intimidate to reach unanimity. On almost every jury there is at least one member who is not as sure of the verdict as the others. "Were you persuaded or did you just go along?" I ask but seldom get a clear answer. One jury had two holdouts. The deliberations got heated and one of the holdouts found an excuse to quit; 10 minutes later, the jury returned a verdict. I talked to the juror later and she

said she had felt intimidated.

6. Jurors understand the burden of proof. Perhaps the best example of this was a case in which a defendant by the name of Ramirez had set up a drug deal. Mr. Ramirez claimed entrapment and the question was whether he had called the undercover agent or vice versa. The agent testified that Mr. Ramirez had called; Mr. Ramirez testified that the agent had initiated the call. The jury acquitted, and I was interested in how they had resolved this conflict between the testimony of an accused criminal and a government agent.

"We realized the defendant has every reason to lie while the agent probably had much less reason to commit perjury," the jurors said. "We believed the agent."

"So why did you acquit?" I asked.

"We believed the agent," they answered, "but not beyond a reasonable doubt." ■■

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► Civil rights law fails to protect us from protectors.

► ABA is focusing on issues nonessential to its mission.

The author says he is a judge on the federal circuit court formerly known as the 9th. The regular Mens Rea columnist, Michael E. Tigar, is on leave.