



10 Tips for Trial Attorneys

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1. Speak Simply

The number one mistake I see repeated by truly gifted attorneys is that they use too much legalese, technical terminology and other "lawyer talk." After a trial, a juror actually asked an attorney *Why did you keep telling us you wanted your client to "recover?" He's dead.*

Don't Say...	... When You Can Say
Prior	Before
Find	Decide
Subsequent	After
Action	Lawsuit
Dermal	Skin
Cardiac	Heart

Besides not understanding you, jurors do not like lawyers who use obscure words. Jurors will not be receptive to you, your client or your themes if they think you are arrogant. Practice talking to a very intelligent 14-year old and test what he can remember. Although the average juror's thinking skills are more developed, this is a good benchmark by which to decide what to say.

2. Explain, Explain, Explain Verdict Form Legalese that Defies Common Sense

Even if you explain the legal definition of "substantial," jurors will revert to their common understanding. Jurors do not share an attorney's definition of words such as "significant", "malice" and

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Visit [JuriSense.com](#) for free streaming CLE webcasts, trial advocacy news and [Train to Win](#) workshop updates. These 1-day mock trials reveal juror responses to *Reptile* and *Rules of the Road* methods and are endorsed by David Ball.

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-- Tom Girardi

“defective.” The common sense definition of a “substantial” factor is “a lot,” not “more than a remote or trivial factor.”

This was clearly demonstrated during Harris Martin’s December 2007 benzene litigation conference when not a single juror corrected the group’s misunderstanding of the term “substantial” during deliberations, despite the fact that the judge just read the jury instructions. I have also asked ex-jurors if they think “substantial” means “a little” or “a lot” and the answer is typically “a lot.” In order to override the common sense definition of a word, it takes more than substantial repetition.

To override a common sense definition, you should first ask the rhetorical question *What does the word “substantial” mean to you?* Once you have activated this memory in the jurors’ brains, you then link the new legal meaning with those neurons, preferably with a memorable statement, such as a self-deprecating joke. For example, *Unfortunately, legal terms often defy common sense. Maybe lawyers try to justify their outrageous law school tuition with all of their \$25 words. Maybe it’s a form of job security, that if we redefine ordinary words to mean something totally the opposite of what everybody else thinks, then no one else can do our job.* If you are uncomfortable with this, then just explain that it means “of substance,” something that’s real and not imaginary, which is memorable since “substance” sounds like “substantial”, so it will more easily connect with the common sense definition.

Use visual aids and repetition. Write legal terms on a flip chart and tell the jurors that this will be on their verdict form and they will need to understand the legal definition for their deliberations. Many of your jurors will write this down in their notebook, if permitted in your jurisdiction; writing it down will further cement the new definition into their minds. You should also emphasize the linguistic distinction throughout the trial, with each witness and in your closing. Important testimony should first be stated in plain English and repeated in more technical legal terms.

3. Teach Jurors to Apply the Facts to the Verdict Form

At the June 2008 American Society of Trial Consultants’ annual meeting, the keynote speaker, Dr. Shari Diamond, said that the biggest challenge facing juries is that they do not understand the verdict form and jury instructions. Juries are actually more confused *after* the judge reads the verdict form than before.

This almost always hurts the plaintiff more than the defense, in part, because frustrated jurors, who may have been deliberating for days, choose easy justice over real justice. When jurors know that a “no” answer to question 4 saves them from slugging through questions 5 through 17, some will switch to a “no” vote to get on with their lives. Also, friendlier jurors, who tend to favor the plaintiff, cave faster than the

tough-minded jurors when prolonged deliberations cause tension¹ within the group.

In addition to not understanding legalese and the law, jurors do not know how to apply the facts to the law. Attorneys must walk the jurors through, step-by-step, listing evidence that supports their contentions, and explaining how to answer the questions on the verdict form depending on what evidence the juror believes. This requires more than just showing jurors which boxes to check to arrive at a defense or plaintiff's verdict, but also educating and arming favorable jurors so they can explain how the evidence supports a given answer on the verdict form.

4. Explain the Law Early in Your Case

During deliberations, jurors will correct each other when discussing the facts of the case, usually arriving at a correct answer, but they often come to an incorrect consensus regarding the law. When jurors are trying to understand legal standards, they will mistakenly apply their innate sense of justice, not because they are intentionally ignoring the law but because they do not understand it.²

Jurors consider “beyond a reasonable doubt” and “preponderance of the evidence” to be nearly *identical* standards. Researchers asked jurors, who had *completed* service on a civil trial, to rate on a scale from 1 to 10 how much evidence is required to prove something “beyond a reasonable doubt” and by a “preponderance of the evidence.” Their ratings were 7.9 and 7.7, respectively.³

Most jurors are uncomfortable finding that a defendant is at fault unless they are fairly certain of their verdict. To replace this innate sense of justice with the legal standard, David Ball suggests that you work the words “more likely than not” into your direct examination questions.⁴ For example:

Q: Doctor, is it your conclusion that more likely than not, the benzene in the solvent caused Mr. Williams' non-Hodgkin's lymphoma?

A: Yes, more likely than not.

Q: Beyond that, is that your conclusion to a reasonable degree of medical certainty?

¹ Tension is an understatement. Outright hostility and bullying are more typical in prolonged deliberations.

² Shari Seidman Diamond, Truth, justice, and the jury, *Harvard Journal of Law & Public Policy*, V. 26, issue 1 pp 143-165 (2003).

³ Krauss, E., & Bonora, B. (2007). *Jurywork, systematic techniques*, 2nd ed. [St. Paul, Minn.]: West Group citing Simon and Mahan, Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom, 5 Law and Society Rev. 319 (1971). Although this study was conducted 40 years ago, I frequently see jurors confuse these standards and say “guilty” when they mean “liable.”

⁴ Ball, David, *David Ball on Damages*3 (NITA, 2011).

A: Yes.

Q: And by “reasonable degree of medical certainty,” you mean certainty based on reason?

A: Yes.

Q: And beyond that, how sure are you?

A: Absolutely certain.

When most jurors hear the phrase “reasonable degree of certainty” they think “maybe.” If you want jurors to believe your expert’s testimony, he must state his level of certainty in plain English, without calling it his *opinion*, but his *conclusion*.

5. Plan *Voir Dire*, Themes and Trial Strategy with the Verdict Form in Mind

You must start framing issues early in trial, with the same words that will be on the verdict form.⁵ Although it is usually improper to specifically reference the jury instructions during opening statements, two of the most important functions are to focus the jury on your issues and to frame them favorably. According to James E. DeFranco, the author of *Opening Statements* in the DRI’s Trial Tactics Defense Litigation Manual, “the trial attorney can only properly frame those issues with reference to the jury instructions that the judge will give at the end of the case.”⁶ The plaintiff, in particular, must tailor her case to the wording of each element for each of the claims that will be on the verdict form. The defense will probably pick a few weaknesses in the jury instructions and develop themes based on those issues.

For example, Illinois jury instructions on pre-existing conditions only discuss part of the “egg-shell” doctrine, that jurors cannot reduce the plaintiff’s compensation simply because he was unusually susceptible. The law on pre-existing conditions that would result in injury-- regardless of the defendant’s claimed negligence--is found in the proximate cause instruction. If you remember struggling with the definition of “proximate cause” in law school, it should be no surprise that jurors do not understand this word; they think it means “approximate.” You will have to educate jurors early with the language that will be in your jury instructions.

You should also test jurors’ receptivity to plaintiff and defense themes during *voir dire*. For example, the plaintiff in a benzene cancer case should ask each juror *What responsibilities, if any, does a business owe to society?* When a juror says none, that a corporation’s only responsibility is to make a profit, nod encouragingly, thank the juror for his candor, then cheerfully ask the rest of the panel who else agrees with him, by a

⁵ DeFranco, James, *Opening Statements: A Starting Point – Jury Instructions*, Trial Tactics Defense Litigation Manual, (DRI, 2006).

⁶ *Id.*

show of hands (while raising your own hand). Give jurors at least five seconds to think about this to give them enough time to decide. They might not raise their hand until they have thought of what they might say if called upon.

Talk with anyone who raises their hand, starts to raise their hand or even twitches.⁷ Assess how strongly they actually feel, how long they have held this belief and how well they have thought it through, all the while encouraging their honest candor. This is not the time to argue or get defensive. For attorneys who lack a poker face, mentally thank God that this juror just exposed his bias and smile to yourself knowing that you caught him--he will not be on your jury, and neither will other biased jurors who you identified by strategically getting them to admit to their preconceived notions that would harm your client.

6. Open with the Rule, then Frame a Compelling Story

With tort reform and modern cynicism, jurors do not trust lawyers, especially plaintiff lawyers. You cannot start your opening statements with unsupported assertions such as *This is a case about a doctor who read a chart too quickly*. You lose credibility. Instead, offer jurors rules and facts to guide jurors to reach their own conclusions. By doing this, you'll need less evidence to persuade your jurors because people are less critical of their own ideas and they tend to defend them more vigorously. Trials are rarely won in the opening.⁸ Jurors may not believe the facts of your story, but they will believe that the case is generally about the story you tell.

Jurors think a case is about whatever issues that get the most time and attention. A plaintiff wants jurors to think the case is about harm and damages while the defense wants jurors to think the case is about liability. One third of the plaintiff's opening must be about harm and damages. Explain that you're not going after sympathy but that the jurors need this information to do their job.

You should describe your client's physical damage, the consequences of this harm (including disabilities), tasks that your client can no longer do, the safety consequences of these harms (e.g., disabled people are less able to protect themselves from dangers or even to investigate such threats to assure themselves that they are okay) and the nature, extent and duration of their pain and suffering.

⁷ For more on jury selection and reading body language, see Tammy's blog and Jury Selection paper at www.jurisense.com.

⁸ There have been trials that were presumably won during opening when the opposing side's own admissions, documents and incompatible defense were explained.

Explain that this is the greatest harm, and the only way to compensate your client for the human loss. The damage of not being a full person must be balanced with money because that is the only remedy available under the law. Everything else goes to other or to compensate for lost wages, things that the client would have kept in a normal, healthy life.

You should also compare the before and after scenarios of what the client's life was like before the injury and how it has changed. Focus on how to fix the harms that can be fixed (e.g., medical bills, lost wages), how to help what can be helped (e.g., minimum life care plans) and how to make up for the harms that cannot be fixed or helped (e.g., pain and suffering, lost mobility).

Framing defines what is and is not important in a juror's mind. Jurors will disregard facts that do not fit into their frame because people can only consider a limited amount of information. For example, if a person believes fuel economy is the most important factor in buying a car they will downplay safety ratings, depreciation and maintenance costs because most people cannot juggle all of this information. Jurors will likewise filter out most of your expert testimony and focus only on what they deem important, that which fits into their personal story of the case.⁹ We are all constantly making these mental short-cuts in everyday decisions.

Similarly, people also cannot remember a deluge of unrelated facts. Stories provide the framework with which people organize facts, and they will disregard extraneous information. The defendant must be the main character of the story, viewed as having control over the outcome. Once the rule has been explained, begin your story with the defendant's action(s) that led to the harm. Jurors will anticipate the bad outcome and blame the defendant for causing the foreseeable harm.

Use storytelling techniques so that jurors experience the events, instead of just hearing a set of facts. Use short sentences, with sensory details that step the jurors through time. Speak in the present tense, using action verbs so that jurors can see, hear and feel what happened. Pause. You may have to exclude some information, but you will more than make up for some lost facts in creating a *lasting memory* of facts that support your compelling story. You should refer to your client with pronouns and passive verbs, thereby minimizing their perceived role in causing the harms.

7. Answer Jurors' Questions

Explain who you are suing and why. If you do not discuss the employer or other conspicuously missing defendants, jurors will assume you went after the deep pockets.

⁹ This narrative can change throughout trial, as several stories can run at once.

Jurors fill in missing blanks, fabricating facts when their story demands it. So you must discuss “irrelevant” facts, like the client’s medical history, past smoking history, past drug use (if they look like a drug user) and whatever else your focus group research tells you is important in order to keep jurors from filling in the blanks themselves and building unfavorable stories.

Jurors decide cases by their own sense of right and wrong, which often include factors that are not legally relevant. By the time they are deliberating and trying to apply the facts to the law, they are simply rationalizing the decisions they have already made. For example, in defective products cases, the manufacturers’ greater *knowledge* and *control* of the product is critically important to jurors when they are considering what party is most at fault, even in strict liability cases.¹⁰

8. My Humble Expert Beats Your Credentialed Expert

Jurors often decide who to believe when the defense does its first cross-examination of a witness who testifies about a key issue. If your witness holds up, you look credible. If not, they will listen with suspicion to the rest of your case. This is why it is important to sequence strong evidence first, while jurors are more open to persuasion. Once initial impressions are formed, it takes more evidence to change jurors’ minds.

Your expert must not be arrogant, but humble, likeable, credible and professional. *Unfortunately, the most important thing in selecting an expert today is the expert’s demeanor – and not his credentials.*¹¹ Research shows that a likeable witness can persuade people simply by smiling confidently and talking eloquently about a topic, regardless of the substance of a message.¹² Test experts for persuasiveness, likeability, credibility and clarity in focus groups. More credentialed is not necessarily more persuasive, especially when jurors hear about their fees and if they work full-time as a hired gun.

Instruct your expert not to aggressively confront the opposing attorney unless the attorney has been so obviously heavy-handed that the expert can presume the jury has given him permission to hit back. Otherwise, some jurors will construe aggressive behavior as defensiveness and a lack of confidence.

¹⁰ Please read Tammy’s papers and blog pages at JuriSense.com for more in-depth discussion and analysis.

¹¹ Garrett, Scott, *Direct Examination of Expert Witnesses: Selection of the Expert*, Trial Tactics Defense Litigation Manual, (DRI, 2006) citing Couric, Emily, *The Trial lawyers, The Nation’s Top Litigators Tell How They Win*, New York, St. Martin’s Press, 1988, pg 17 (quoting Fred H. Bartlit, Jr., who was described by *The National Law Journal* as “... personally one of the most successful corporate defense litigators ever, with a long history of big wins.”)

¹² Michael Norton, a Harvard Business School professor, presented his research at the 2011 American Society of Trial Consultants annual meeting. For more on this talk, go to Tammy’s blog post [The Art of Dodging Questions](#).

9. Minimum Life Care Plans¹³

Life Care Plans are often seen as a ceiling, a gift to the plaintiff. Spend a lot of time going over each item, explaining why it is *necessary* to make the plaintiff whole, to equalize the scales of justice. Remove anything that looks like padding. Choose the cheapest options and call it a *minimum* life care plan, which makes it a floor, then argue for a better plan. You gain credibility and at the same time, defense jurors are less able to cut it in half during deliberations, which is common.¹⁴ This also arms your jurors to fight for the minimum life care plan.

Don't let the defense get a discount--justice on sale. Explain that the law says it is their responsibility, and that trial delays further hurt the plaintiff, who suffered more and that this unnecessary delay should also be compensated.

10. Closings: Arm Favorable Jurors

By closing, jurors have made up their minds. They will change them during deliberations, but not from your closing. Your goal in closing is to arm your favorable jurors so they will argue for you. Do not rehash the evidence. Walk your jurors through the verdict form, using visual aids for every important phrase of every instruction. It is worth repeating that it almost always hurts the plaintiffs if jurors do not understand the verdict form. Once again, use concrete examples to memorably explain legal terms with different meanings than common usage.

Spend half of your closing explaining exactly how to calculate economic and noneconomic damages. If thrown in as an afterthought, jurors will consider it as such and return a much lower verdict, or a defense verdict. Make sure to point out that the judge will reduce the verdict by the percent fault. Otherwise, jurors may reduce the amount themselves, so it is reduced twice.

Visually demonstrate the “more likely than not” standard of proof with your outstretched arms. And define compensation in the same way, while explaining that “pend” means to “hang”, that “com” means “with,” and that compensation means balancing the harms on one side with money on the other. Compare it to compensation from work. You get money, not *thanks*, not excuses like *you really don't need the money or you seem to be getting along fine with less*. The law requires that you get money. This takes time to explain. Take the time. Do not use the word “award,” which sounds undeserved.¹⁵

¹³ This concept is thoroughly discussed in David Ball's *David Ball on Damages3* (NITA, 2011). I strongly suggest that all attorneys read this book—several times.

¹⁴ One bad defense juror can wipe out a large verdict.

¹⁵ This is also more thoroughly fleshed out in David Ball's book.

If your law permits rebuttal closing to cover new topics, save this for last. List all the arguments defense jurors made in your mock trials and focus groups.¹⁶ Tell your jurors that *during deliberations, if another juror says x, you can tell them y*. Give your jurors short answers, talking points with just 5 or 6 words, to rebut the expected arguments. Say it slowly, so they write it down. (If no one is writing, try to settle the case.)

There is always more to learn in an attorney's constant quest to perfect her craft, but these 10 tips should give you plenty to work on for a while. For more information, please visit Tammy's website at www.jurisense.com.

¹⁶ You really must conduct pre-trial research, even if you do it on your own. I recommend David Ball's *How to Do Your Own Focus Group: A Guide For Trial Attorneys* (NITA, 2001). Call (800) 225-6482 to order, product ID 1-55681-695-2. This is an excellent introductory guide. *The Focus Group Kit*, by David L Morgan and Richard A. Krueger (1997) is a more advanced guide. Book 6, *Analyzing and Reporting Focus Group Results* is a good complement to David Ball's book.