



The Economics of Practicing Law:
Doing Good While Doing Well

Chapter 15

Lessons Learned from a Jury Foreman

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In trial, things can go right and things can go wrong. Sometimes without you ever knowing it. I recently finished the jury trial of an auto sales fraud case with a nice result (more on that at the end) and, as usual, some lessons learned in the process, many after the jury foreman called me up a few days later.

The defendant car dealer (part of a large chain) attorney (a pain in the neck) had 25 years trial experience; the dealer's General Manager (a named defendant in the case for his own lies to the consumer) had an attorney (nice guy) with 28 years trial experience. I've got 29 years too, so we all knew what we were doing and one can assume that all tactics and strategies were carefully planned out by all concerned (they certainly were by me), or at least they should have been.

The trial (which turned out to be a bitter fight from start to finish) started on a Monday and included one full day of argument over jury instructions and motions, with closings on the following Tuesday and a verdict at 830 pm that evening. 8 days.

Lots of things happened in the trial that were remarkable and well worth noting. I had started on this article once, but before I could finish it, the Jury Foreman called and spent an hour on the phone talking, about 80% on the *way* the case was presented by everyone (attorneys *and* judge) and what the Jury observed happening and thought about that, and maybe 20% on the actual evidence and witnesses and deliberations. Turned out he was a teacher and that may explain why he was so open to talk about the trial now.

He said that during the trial the jury wasn't allowed to discuss the evidence or testimony so they spent most of the trial out-of-courtroom time talking about the "style" of what was happening (ie, the parties, witnesses, attorneys, examinations, cross, exhibit handling, etc) and didn't talk about the actual content (ie, specific evidence and testimony, who do you believe, etc) until they

started deliberating.

In essence, most of what he told me about was what the jury discussed and observed during the trial itself and their reactions to it, while they were carefully avoiding talking about what they thought about the truth or falsity of what evidence was coming in. Boy, were they attentive to the details of everything that happened.

The Jury is watching you: The biggest surprise was that during most of the trial the jury was watching the parties and the attorneys and the judge intently. I always try to keep an eye on the jury to get a feel for how they are reacting to testimony and evidence, but it's admittedly hard to do (that's one advantage of having someone sit "second chair"). What the foreman told me was that by the end of the second day the jurors spent their break time talking about the human foibles and habits they were observing in the trial participants.

During the trial they noticed the anger in the plaintiff-husband's demeanor as he told what happened to him at the car dealership. They noted the nervous eye twitching of the dealership's comptroller during his testimony. They noticed the judge's intense attentiveness throughout the trial (and contrasted that with other judge's they had seen in other cases before). They noticed (and appreciated) the grease stain on the t-shirt of the body shop manager who testified as an independent expert witness. They noticed the discomfort that the dealer's attorney had when he fumbled with trying to use the courtroom "elmo" device and projector (and contrasted it with the ease that other's dealt with it). **Moral: know how to use the technology or don't use it at all.**



They noticed the appearance of files and papers on the attorneys' tables and how one side look less organized. **Moral: a disorganized trial table can make the jury think that your case is disorganized too.** They saw thru the smoothness of the General Manager's testimony to be that of a consummate salesman (the foreman said, "that guy could sell anything to anybody"). They

contrasted one attorney's stiletto questioning style with another's rambling questioning style. **Moral: how you ask questions can be as important as what you ask.** They noticed a nervous habit of the dealer's attorney that I had noticed but not paid any attention to in all my years of dealing with him. They also talked about the nervous habit they expected me to have that they did not see happen. **Moral: the Jury is *always* watching.**

They notice what you wear, how you act, what you do, the inflection of your voice, they even notice if you wear a different watch (one attorney did) to court than you did the day before. They notice all of that about every witness too. And your client. And the defendant. And the judge. Everybody. Never forget it. And don't let your client forget it. In every way possible, be confident and in charge of everything that happens, or at least look like you are. This foreman left me more convinced than ever that a Jury can sense it when the attorney doubts his own witness, argument, or his own case. **Moral: don't go to trial with a case that you have doubts about.**

Facts of the case: The dealer's General Manager has a van he wants to sell so he has the prep people give it a "fluff and buff" and slap the usual dealership used car stickers on it, gives it a stock number and puts it out on the lot with the other used cars, but does not put ownership (title) into the dealer's name. Consumer-client sees it, test drives, leaves and returns next day. The salesman turns him over to the General Manager and they start talking price. The General Manager tells him "well my wife had a minor deer accident, no big deal, it was fixed" and client says "well I don't think I'm really interested then" and leaves. Client finds out there are no other used Toyota Sienna vans in town so he goes back to Dealer and buys the van, with all the usual dealer documents in the deal, sales contract, odometer statement, etc.

Post-sale facts: 8 months later client has deer accident of his own (deer are very unlucky around here) and the local garage says "well, it'll cost you \$5,500 to fix your deer damage but we can't do that until you first agree to pay an extra \$5,400 to fix the damage that's left over from the last accident." It hits the fan. By then the General Manager is no longer working for the Dealership so now the Dealer says it was a private sale and "you knew that because the General Manager told you he was just using the Dealer documents as a convenience for your benefit." Later, during discovery, the uncollectible and now-deadbeat General Manager chimes in with the same tune "I told you that when we made the deal...it was my van and had nothing to do with the Dealer" and a multi-year litigation process unfolds, during which the Dealer's \$25,000 insurance policy pays it all out in one year to insurance defense attorney to fight the case and he then

withdraws and kicks the case back to the Dealer's hired attorney, who then fights it for 4 more years before the jury is seated, in the course of which it is discovered that the General Manager had 2 \$10,000 accidents and a 3rd \$500 accident in this van while he owned it.

Key issue in the case: was the dealer the seller or was the dealership general manager the seller (individually)? Was the repaired damage to the van (from the General Manager's accidents) improperly repaired?

Claims in the case: 1. State Unfair and Deceptive Acts (Udap) statute, 2. Breach of Contract, 3. Motor Vehicle Sales Rule (sort of Ohio's specific Udap for Car Dealers), and 4. Fraud. All claims were against both defendants, the Dlr and the General Manager.

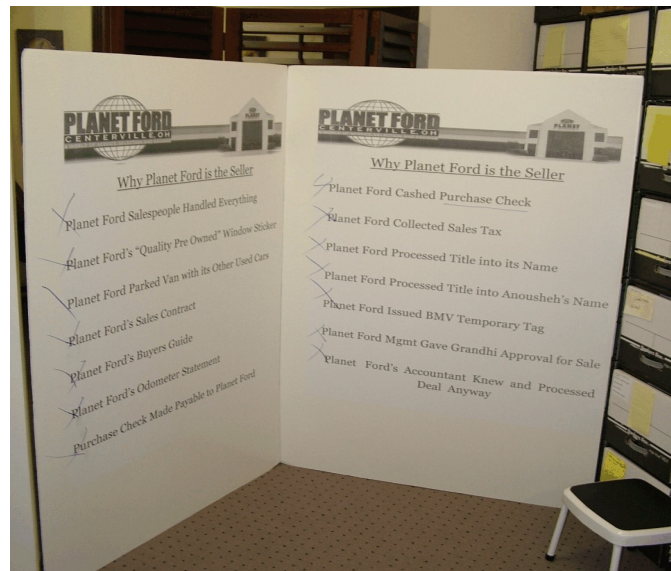
Voir Dire: They noticed how my questions included things targeted at areas they later realized were disputed facts in the case while the Dealer attorney didn't hone in on that. **Moral: cover the basics but focus on what your evidence is going to be and how the panel feels about the concepts or critical facts that'll be involved.**

For instance, I had jurors talk about their experiences in buying cars at dealerships (the paperwork and people involved) to highlight how everyone's experience was the same (i.e., lots of dealer documents and several dealership people being dealt with, never saw the actual title, got it in the mail later, dealer collected sales tax, etc). Then other jurors talked about their experiences in buying cars from private people (highlighting how it was a simple pay the money to the seller and get the title process, contrasting the obvious differences since whether or not it was a dealer sale or a private sale was a core issue in the case). I was just doing what I always do and what I thought I needed to do, and never really noticed much of this until the Foreman pointed out how, in retrospect, he realized we were setting it up from the start.

Another example, the Dealer attorney asked the usual rote questions about being impartial, etc, but never really asked questions that allowed him to interact with the panel and let them get to know him or the case. The questions were mostly boring, the answers obvious, and little conversation occurred. **Moral: tell them something about the case to pique their interest and ask questions that relate to where your case is going** and get them talking with you to establish a friendly relationship.

Opening Statement: I had a chart blown up that told the jury the 14 key facts that I was going to prove. I didn't put on the chart how the law worked or any legal argument at all ... just (ala Joe Friday) the facts. Not to be missed and not to be hard to read, it was about 8 ft wide and 5 ft tall and opened up like a book down the middle with 7 bullet points on the left and 7 bullet points on the right. Kinko's standard "foam board" is 4x5 so I just typed up the bullet points and had them enlarge it and stick it on the foam board and then ran a piece of clear packing tape down the middle to make a taped hinge that would open like a book and stand up by itself on the floor. **Moral: high technology isn't always needed.**

I knew the evidence was indisputable on all the bullet points but in my Opening Statement I made a big deal of the fact that we were going to prove it, point by point, and told the jury that proving those points, in light of the judge's instructions on the law that they would get at the end of the case, meant we would win the case.



The jury foreman said that right then it was clear as a bell to everyone what we were setting out to prove and that if we did, then apparently we should win. He also said that it wasn't clear what the defense was going to prove, just that they thought they ought to win. That's because the defense attorneys just simply said what their version of the facts would be but didn't explain why those facts mattered to who would win and who should lose. **Moral: don't unmindfully throw your words around in opening statement. Use a planned, systematic approach.** In the midst of telling the jury what the case is about, tell them what you'll prove (and make sure you prove it later), and try to make it sound like just proving it means you should win. And stay away from talking about the law because in Opening Statement the Jury just wants to know the story.

Demonstrative aids: Even though the courtroom was electronic, and I used it from time to time, what the jury remembered most was the big blowup chart, the foreman said. He said that it got to the point where every time the chart came

out they knew somebody was going to admit to something that was on the chart. During the defense's closing argument later, the defense attorney had his own blow up made of what he thought were his key bullet points, but it was only about 1.5 ft x 3ft and he had a full line of text on each one of his bullet points so the text had to be printed smaller to fit. Our big blowup used short words and was overblown. **1st Moral: Use a big easy to read chart** or blow up when it helps you, but make sure it's plenty big. There's nothing worse than having the jury squint their eyes, trying to read something that's 20 feet away while, at the same time, listening to what's going on; the net effect is they can't read it and they don't listen either. Whoever does that, loses points. **2nd Moral: don't copy the other attorney's demonstrative aid** unless you can substantially outdo him/her. No one likes a copycat.

Witnesses Called on Cross: The foreman said the jurors thought that it was very interesting that the first two witnesses were from "the other side" and that the first thing that happened was that (between them) they admitted to almost every one of the key things that were on my blowup that I said I was going to prove in the case. The foreman said that during later deliberations several jurors remarked that they figured the case was basically practically over with at that point since I had already done most of what I said we were going to do and they figured that meant we were "in the right" and the defendants had to be in the wrong. **Moral: don't underestimate the value of calling a defense witness on cross, at the start of your case**, and pinning down key points that you know they have to admit. Done with certainty and confidence, it can make it look like you are winning from the very start. It's a bit like a horse race; when the leader races out of the gate from the start, everyone else has to play catch up.

For instance, I opened up the blowup chart at the outset and went right down the list of points and got each witness to agree with as many of the points as I knew he had to, skipping those that the witness wasn't going to know. **Moral: Repetition works.** Say it, prove it, say it again.

Your Witnesses on Direct: When the consumer plaintiff and his wife testified, they told their story in a straight forward fashion, direct to the jury, talking to the jurors when they told their story, with passion and frankness. The foreman said that everyone agreed that the clients clearly believed "to their bones" that they had been taken advantage of. **Moral: let your client be passionate in telling their story**, but *don't* let them go overboard.

For instance, the husband talked about buying the car for his wife and kids (a “manly” thing, the foreman said, that the male jurors understood and the female jurors reacted positively to) and the wife testified about how the emotional side of what fighting over all this, pre suit and post suit, meant and did to the family’s daily lives. They told their story in a simple, down to earth, “let me tell you what happened to me” sort of fashion and that resonated with the jury. That contrasted sharply with how the dealer’s witnesses testified. **Moral: your clients aren’t “testifying,” they are telling their story.**

Be extra friendly and cooperative with 3rd party witnesses: Two of the key witnesses in the case turned out to be non-party witnesses who were also experts on mechanical and body shop issues. One of them (a rusty but wonderful old cantankerous parts shop manager with body shop experience) didn’t want to be there and wasn’t feeling well either. The dealer’s attorney and I talked with him in the hallway at a break and he said that to both of us. I only wanted to use him to identify a page out of a Toyota manual as true and accurate so our hired expert could explain it. I asked the dealer’s attorney to stipulate to it and we’d let the parts shop manager go, but he wouldn’t so the poor guy had to sit in the hall for an hour waiting to be called.

We took a break just before he was to testify and I apologized and explained to the witness that I had tried to get the dealer’s attorney to just stipulate to the document but he wouldn’t and I was really sorry for having to keep him there. **Moral: make everything that goes wrong, the fault of your opponent, in every way you can.**

The witness turned hostile toward the dealer’s attorney in a heartbeat and said that if he had to “get up there” then he was going to tell the whole truth, including that he had seen the pictures of the repair job a long time ago and told the dealer’s people that it was bad work and they should never have sold the van that way (something I didn’t even know had happened). Sure enough, he did, using choice, blunt words that left no room for doubt. When the defense attorney tried to cross examine the witness, the old guy just lit into the dealer’s attorney. I have never seen an attorney lose total control of a witness before but he did, and the jury foreman told me that everyone in the jury loved it. They thought the old guy was great. That exchange, all by itself, was priceless.

The dealer attorney’s ego just wouldn’t let it go, as he tried to get the best of the old guy every which way he could and just couldn’t do it.



The old guy held his ground and daringly verbally jabbed right back at the lawyer, saying “Can’t you see that picture?” “What’s wrong with you?” “You just don’t want to admit it” “What you’re talking about isn’t the point here” etc. It was remarkable. **The moral: if you can’t control the witness, give up and stop.** If you’ve never seen an attorney get chewed up by a witness, that video is one to watch.

Defense Witnesses Cross Examination: During the direct exam of the defense witnesses, most of them locked eyes with their attorney, and only one tried to make eye contact with the jury, a point I reminded the jury of in closing argument. The direct exam questions were relatively pointed and allowed for brief answers. For the most part, they didn’t invite open-ended answers and the defense attorneys probably spent as much time asking a question as their witnesses usually did giving an answer. **Moral: you aren’t the witness;** get your witness to talk to the jury. It can hurt your case if you have more to say in the question than the witness does in the answer.

Objections: If the defense attorney is asking a leading question (and they did it a lot here), don’t object unless it’s very important. You are better off not being viewed by the jury as the obstructionist, especially if the other side is doing lots of objecting. After awhile, the objecting attorney begins to look like he’s trying to hide the evidence from the jury or just trying to disrupt things and jurors don’t like that. **Moral: don’t object unless it’s important.**

The foreman said that after a couple of times, the jury noticed that my cross of defense witnesses consistently was the same approach (he said one of the juror’s called it a two step dance; I’m not sure where that came from but she was right). First I went after anything the defense witness said that was damaging and challenged it (actually I didn’t always do that, just on points that I thought mattered) and then, second, I pulled out my blowup chart again and, each time, I got every one of their witnesses to agree with something on the chart (that was deliberate). I figured that if their witness was going to say something that hurt my case, then I would also get him to say something that would help my case. **Moral: Use a template approach to trying your case,** not just a theme, i.e., the repetitive effect of it drives your point home again and again and is remembered much better by the jury. As good as having a theme is, implementing it with a template is dramatically much more effective. A two step dance can be a lot better than waltzing all around the room.

Let them make “the stupid argument”: throughout the case the dealer was taking the position that it didn’t sell the car to my client, even though the title was transferred from the general manager’s name into the name of the dealership and then into the name of my clients after that. I always thought the argument was so stupid that no one would believe it. Letting the dealer make the argument in front of the jury, and showing the title chain on the projector repeatedly to the dealer’s witnesses, kept driving home the point that the dealer and the dealer’s lawyer were trying to pull one over on the jury.

The foreman said that as far as the jury was concerned, the title chain was the answer and when the dealer refused to admit what the titles obviously showed, the whole jury followed along with the idea that the dealer and its witnesses and, ultimately, the defense attorneys, just couldn’t be trusted. If the judge had ruled as a matter of law that the dealer was the seller (which he could have if it had been asked for), the defendant would have had to come up with some other defensive argument. As it was, they didn’t. **Moral: if your opponent wants to take a stupid position, let them.** If they want to make a stupid argument, you are almost always better off to let them, and then slam it right in their face. Professionally and respectfully, of course.

Always say “Thank You, Your Honor” after every Bench conference: the foreman said the jury talked about the fact that after every bench conference during the trial I always walked away from the bench and said “thank you your honor” to the judge. He said they all concluded that my client was winning the arguments so the law must have supported our side of the case. Of course, we didn’t win all the arguments at all, but it sounded and looked that way to the jury. **Moral: always respectfully thank the judge**, no matter if he overrules or sustains any objection made by anyone at all. It can give the jury the sense that the judge is on your side too and the jury *starts* the trial with a respect and belief that the judge knows all the law and is going to be applying it fairly and properly. The lawyers are the ones the jury doesn’t trust, so do everything you can to psychologically align yourself with the judge in front of the jury.

Closing Argument: I went back to the blow up again, but with a difference. The entire trial whenever a witness would prove one of the bullet points I would check it off during the question with a single slash mark. By the end of the case, every item had a slash mark on the bullet list. Now, in closing, the very first thing I did (after the perfunctory “thank you”, etc) was get out my marker again and check off each bullet point with a reversed slash, forming an “X” as I went down the list and reminded the jury of what witnesses had admitted each of the points on the list, one by one by one. **Moral: say it, prove it, say you proved it.**

Throw it back in their face in Closing: It was a video taped trial (this court doesn't use court reporters) so each day I got a dvd of that day's testimony. The night before closing argument, we edited together a string of short clips of the most damning testimony by two dealership witnesses (one said he told the General Manager it was okay to sell his car thru the dealership but "it better never come back on us"; the other was the guy in charge of the General Manager who said he saw what the General Manager did and he advised his boss of it and "they never did anything about it" to chastise the General Manager or to reverse the titles to unwind the deal, etc), along with a clip of one body shop expert who testified "you see work like that and you wonder why people do work like that on a car". My closing was built around the chart and the playing of the video clips. **Moral: try to use the defense witness' own testimony to prove your case**, every part of your client's story (or your case) that you can, even a part that doesn't matter.

In almost 30 years, this was long expected to be the hardest trial I ever had and it turned out to be difficult, sure, but it was the most fun too. The resulting verdict was a modest amount of actual damages and a six figure multiple of punitive damages. The foreman said the jury would've given the plaintiffs more but since they paid cash out of their Investment Fund bank account to buy the van (there was a cancelled check) and they lived in a rich area of town, the jury figured the plaintiffs didn't really need the money.