

# BOYD TRIAL CONSULTING

## Keeping Your Case Above Water

### JURORS AS EXPERT WITNESSES

When was the last time you had a trial where an expert witness went back to the jury room to deliberate with the jurors? The answer may surprise you.

During trial, we send mixed messages to the jury about how they are to apply their life experiences to the issues in the case. On the one hand, they are told they are to use their everyday experiences to make judgments about what they see and hear in the courtroom on matters such as the credibility of witnesses. On the other hand, they are told to decide the case based on the evidence presented within the four walls of the courtroom ("You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence. . ." *Wash. Pattern Jury Instr., Civ., 6.02*). It is as if we are asking them to bring their wisdom with them, but to leave their knowledge behind. We shouldn't be surprised when they don't, but are you giving that reality its due when exercising your challenges in voir dire?

One of the great advantages of observing a properly run focus group is that you get to see the dynamics of deliberations. In conducting hundreds of focus groups over the years, I have learned that the more technical the issue presented at trial, the more likely it is that a juror with personal knowledge or experience with that issue will go beyond just contributing to the discussion and actually function as an expert witness.

Where the issue is one with which most jurors have some familiarity, the impact of any one juror's beliefs are limited. For example, everyone thinks they know how cars operate in heavy rain. If that is an issue in your case, many jurors will contribute their ideas on the subject, and the different opinions of the jurors will usually balance out.

However, in cases that involve specific knowledge that only one or two jurors have experience with, such as procedures to be followed in a manufacturing process, or technical medical issues, the jurors with knowledge in that area will actually perform in the role of an expert witness.

For example, in a recent focus group for a case involving standards for the safe operation of a motorcycle through a tight turn, the panel turned to the one juror with extensive motorcycle experience and questioned her extensively about the most important issues in the case: How fast should a bike be driven in a turn like this? What path should a good rider take? How well can you see the road ahead as you approach a turn like this? What is the best way for riders traveling together to drive through a turn?

As the juror continued to respond, it was clear that she wasn't just talking about



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- Interactive Focus Groups
- Mock Trials
- Evaluation of liability, damages, defenses, exhibits, demonstrative

her experiences, she was functioning as the most important expert witness in the case. And from the standpoint of the jurors, why not? Her credibility, as co-juror, was better than that of the paid (and therefore biased) experts called by each side. The jurors were free to ask her questions that weren't asked in the courtroom, with the advantage of the exhibits and jury instructions in front of them. While the panel discussed what the other witnesses said, that juror's opinions carried the day.

We all expect jurors to talk about their personal experiences. But this goes far beyond that. This may be fine if the witness supports your position, but it can be devastating if their experiences and beliefs are contrary to your evidence.

What can you do? The good news is that such people are easy to identify in voir dire. Ask potential jurors if they are familiar with a particular subject that is an issue in the case. That will seem like a fair question and one that seems reasonable to ask. After that, just get out of the way and let them talk. Who doesn't like to talk about things they are good at? Whatever they say, don't shut them down. Whatever they believe, you are not going to change their minds in voir dire. If their experience is good for you, keep them. If it is bad, they have to go. Unfortunately, an admission that they know things relevant to the case will rarely rise to a challenge for cause, so you will have to use a precious preemptory. But you have to do it, or they will sink your case.

In conclusion, the influence of a juror with specialized knowledge is much stronger than you probably realize. Deal with it straight on, or suffer the consequences.

Jeffrey D. Boyd, Esq.

...ence, exhibits, demonstrative evidence, and witnesses/parties (live or videotaped)

- Developing Themes
- Witness Preparation
- Development of Voir Dire techniques
- Assistance with jury selection, in person, at trial
- Development of Supplemental Jury Questionnaires

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