Judge Norman Perry Tarle
LOS ANGELES SUPERIOR COURT

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2019 Issue

The art of judging

CREATING THE COURTROOM ENVIRONMENT THAT ENCOURAGES JURORS TO ACTIVELY LISTEN FOR FACTS IS THE JOB OF THE TRIAL JUDGE

When I began trial work as a young lawyer, in a past so distant that it seems as though it is someone else's life, I prosecuted five cases in front of retired Justice Norman Epstein when he sat as a Los Angeles Municipal Court Judge, in what is now the Mosk Civil Courthouse. I lost all five jury trials to a meticulous, skilled and experienced defense attorney. Before I walked dejectedly out of his courtroom, Judge Epstein observed that I had failed to watch out for the details in each case, which is necessary because "trials are won by inches."

Making sure that you have presented those "inches" or facts, as a trial attorney, will not be enough though, if the courtroom environment does not encourage jurors to actively listen for those facts. Creating that environment is the job of the trial judge.

Over the years since taking the bench, I have learned that there are many ways in which to structure a courtroom environment so that the lawyers may best communicate the facts and their arguments to the jury. Whatever method the court uses though, appears to fall into two broad categories: means and motivation. Means, refers to the tools provided or allowed by the court, such as permitting jurors to take notes. Not all jurisdictions in the United States have permitted notetaking by jurors. (See e.g., Valerie P. Hans, "Empowering the Active Jury: A Genuine Tort Reform," at 50-54 (2008) http://works.bepress.com/valerie_hans/39/). Motivation refers to creating an atmosphere where jurors want to focus and listen to the details of the case.

Means and Motivation are only limited by the imagination and experience of the judge. This article will present a suggested illustration in each category. I base my comments on my observations and experience, rather than scientific studies.

Means: Juror questions

The adversary system of jury trial both presumes and reinforces juror passivity. Jurors are told to refrain from speaking with one another about the evidence and from reaching any conclusions about the evidence during the trial. They are typically not permitted to ask questions; that practice is the exclusive province of the adversary attorneys. Even notetaking may be prohibited. Jurors must wait until the two sides present all of their evidence, and the presiding judge has given legal instructions at the end of the trial, before they may discuss the case with fellow jurors to arrive at a verdict. This passivity is supposedly essential to maintaining neutrality, and characterizes jury decision-making under an adversary system, at least in theory. (*Id.* at 45-46.)

It doesn't take much imagination to understand how this atmosphere may affect the average juror. Begin with the understanding that many jurors are reluctant to serve and are resentful at being required to sit through a trial. Most of us don't realize how much we have going on in our lives until we are told not to do it. In addition, jurors are treated like young children. They are told when to sit, when to stand, when to go to the bathroom, when to speak, when to remain silent and when to eat. They are generally made to believe that their concerns about their personal lives are less important than those of the litigants. This lingering resentment is then coupled with an attention span that probably diminishes as the court drones on with opening jury instructions in what seems to be an alien language, and attorneys who, rather than watching the jury, may focus on presenting information in a slow, repetitive and agonizingly detailed manner, for the purpose of having the jurors decide answers to questions they will only see on a verdict form at the end of the case. Is it any wonder that jurors have little interest in the details of the controversy?

Valid studies regarding attention span are difficult to find, but myth relies on a mantra that attention flags after about 10 to 15 minutes. Even where research exists though, its validity is highly questionable.

> As scientists and physiologists, we are called on to provide evidence for our research and data backing up our assertions. Yet when it comes to attention span, an unsubstantiated mantra of 15 min is chanted, with no support other than "That's what I've been told." With the current educational trends of "lifelong learning" and "evidence-based teaching," if we insist on dogmatically applying a 10- to 15-min limit on lectures, we are implying that we really don't care about evidence.

(Neil A Bradbury, *Attention span during lectures: 8 seconds, 10 minutes, or more?* 40 Adv. Physiol. Educ. 509-513 (2016).)

The conclusion of the research paper just quoted, surveyed articles and books concerning student attention span and found that the accuracy of the evidentiary data was questionable. Even so, one would assume that students come to class with the motivation to gather information, if for no other reason than to get good grades. We know that for many jurors, motivation is lacking. (See e.g., Debra Cassens Weiss, *Sleeping jurors dismissed in two recent federal cases; are attention spans shorter?* ABA Journal (December 11, 2017) (http://www.abajournal.com/authors/4/)).

One of the means of engaging jurors and maintaining their focus is by allowing them to become active participants in the case. They can do this by asking questions. This practice has been approved by the California Supreme Court and encouraged currently by the California Rules of Court.

> [T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions. Although the issue has rarely arisen in California, the Court of Appeal has concluded that

See Tarle, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2019 Issue

> questions by jurors may be asked by the court. In *People v. McAlister* (1985) 167 Cal.App.3d 633, 644, the court addressed, and disapproved, a procedure of direct questioning by jurors, but recognized that submitting written questions for consideration by the court and counsel before submission to the jury is proper. (See *People v. Gates* (1979) 97 Cal.App.3d Supp.) We agree with the Court of Appeal. . . .

(*People v. Cummings*, (1993) 4 Cal.4th 1233, 1305.)

> A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury.

(CRC rule 2.1033.)

Initially, jurors in my court are admonished to maintain their neutrality as the judges of the facts whenever they submit written questions. Once a witness is examined by the attorneys, the court asks the jurors whether they have any questions. The questions must be in writing. The judicial assistant collects those papers, and I review the questions with the attorneys on the record in chambers where objections may be raised. I will then ask the questions of the witness in open court. The attorneys are allowed to follow up with their own questions, after which the witness is released.

The pros and cons of allowing jurors to ask questions is not the point of this article. Instead, it would be more useful to note some consistent observations I have made over the years that indicate jurors who ask questions may be more focused and engaged in the trial. I list these observations here in no particular order, with the caveat that not all of them are applicable to every case.

Requests for read back

Since beginning the practice of allowing jurors to ask questions, there are very few requests for read back. While reviewing questions in chambers with the attorneys, I will sustain any valid objection, with the exception of 'asked and answered.' Clearly, if a juror asks for the repetition of testimony, they have missed the information. I also suspect that filling in testimony before the end of the case provides the juror with a greater understanding of the testimony that follows.

Jurors' knowledge based on personal expertise

The jury is instructed at the end of the case pursuant to CACI 5009 that they may use their 'common sense and experience' in evaluating the testimony, but may not rely on any 'special training or unique personal experiences.' The distinction, though, between the proper use of experience and the application of personal experiences based on some type of accumulated knowledge, is elusive. The California Supreme Court has acknowledged this difficulty.

> '[I]t is an impossible standard to require ... [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] 'It is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." '[Citation.] A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. 'Jurors are not automatons. They are imbued with human frailties as well as virtues.' [Citation.]"

(*People v. Allen & Johnson* (2011) 53 Cal.4th 60, 77.)

In the West District of the Los Angeles County Superior Court where I sit, this issue is particularly problematic. Anyone familiar with this area understands that medical professionals and researchers associated with UCLA and St. John's Hospital so dominate the landscape that it is unusual to have a jury without one or more of them sitting in judgment.

Allowing jurors to ask questions, though, often obviates the issue. Areas of concern or disagreement often find their way into the juror's questions. The evidence, therefore, incorporates the juror's expertise, and its reference is proper in the jury's deliberations. For example, in a recent case, a juror who was a researcher at UCLA asked an accident reconstruction expert about errors that occur in statistical analysis. "Based on statistics, would you agree/disagree that calculations using a median are prone to errors (following the idea of confidence intervals, etc.) more so than those using extremes…?" The expert on the witness stand was able to answer the question in a manner that was understandable to the other jurors. The significance of this exchange with a juror who has specialized knowledge, is that the juror is now demonstrating close attention to details in the testimony, rather than concentrating exclusively on their dormant research or unattended patients.

As an additional side note, it is not unusual for jurors to reveal areas of expertise that did not become apparent during voir dire. That surprise can often be addressed by the attorneys as the trial progresses.

"Conversations" with jurors during trial rather than after trial

It is common for attorneys to speak with jurors after trial to learn how the jury viewed the evidence. Written questions submitted by jurors, though, during the trial often provide an ongoing comment on trial developments. If they are attentive, trial counsel may be able to pick up clues regarding how the evidence is being received. Oftentimes, these clues are not subtle. Presumably, because of the need to submit the questions quickly once the initial testimony is completed, a juror's reaction to the testimony is apparent in the wording of that question. Occasionally, ridicule or disbelief is

See Tarle, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2019 Issue

apparent. Sometimes this is not in the form of a question but simply a statement. Often, if one juror is confused about the presentation by a witness, the court will receive similar questions from other jurors who are likewise confused. Additionally, while there is no precise correlation, it appears that when a witness's credibility is in doubt, the court receives many more questions from the jury. Again, demonstrating the jurors' engagement in trial details.

Direct communication with the court

It is not unusual for jurors to use the written question method simply to communicate with the court or attorneys. Sometimes the juror will simply ask a question that is nominally directed to the witness, but is really directed to counsel. In one case, after the testimony of an expert, a juror simply wrote, "What is the significance of stating the charge or cost of the expert's [sic]?" Again, a competent attorney will adjust the presentation or final argument to address the issues that concern jurors. Of greater value may be the fact that the juror is demonstrating close attention to details and is attempting to understand the relationship of the testimony with the issues he or she will have to resolve.

Questions not asked

Not only do I read the questions to the attorneys in chambers, but also allow them to look at the pages themselves because each mark, bracket or cross out may have significance. There are jurors who list multiple questions on the piece of paper submitted. Sometimes, questions are crossed out. Not only do these crossed out questions provide a clue to what the juror was thinking or found significant, but they also indicate that the juror is fully immersed in, and is tracking, the testimony.

The relationship between jurors who ask questions and foreperson

Invariably, not all jurors on a panel will ask questions. But it also appears to be true, that the juror who emerges as the foreperson, is among those who submit questions. It would be interesting to study the degree to which jurors who actually ask questions dominate the deliberations.

Relationship of motions and juror questions

The relationship between mid-trial motions and juror questions is not often apparent. But occasionally, the same testimony which draws the motion will trigger an issue in the mind of one or more jurors. Recently, in a case involving personal injury and medical bills, an attorney questioning one of the witnesses asked a question about medical treatment at a Kaiser Hospital. Opposing counsel, believing that this was an impermissible oblique reference to medical insurance, asked to be heard on the issue outside the presence of the jury. The major part of the argument addressed the issue of whether the jurors made the connection to insurance. After resuming the trial and completing the witness's testimony, questions were submitted by the jurors. For the first time in the trial, there were questions related to medical insurance. The motion was reargued. It would seem that jurors who ask questions may be more attuned to nuances in the case.

Having watched this process in innumerable cases, I find that jurors are more focused and engaged with the proceedings if they are active participants in the trial, rather than remaining a passive audience until ordered to begin deliberations. One juror wrote me a letter many years ago stating, "We also really appreciated your empowering us by being able to ask questions ourselves."

Motivation: Truth and peace

Each year I have had the privilege of participating as a faculty member in the week-long New Judge Orientation for the California Judiciary in San Francisco. Watchwords and phrases such as Integrity, Honesty, Truth, Courage, Humility, Mindfulness and Rule of Law are explored in the context of actual practice. These words have meaning and substance for those of us on the bench, although some court attendees would find them outdated, pointless and laughable. High ideals are not outdated, although they may be denigrated by an embarrassed cynicism. One may certainly question whether the 'truth' is discernible in any particular situation, but as Elie Wiesel wrote, "It may not be within man's power to find truth, but it is up to him to reject lies, hypocrisy and cheating." If this is all jurors can do, it is enough.

I have found that when the court talks about such issues, jurors take them seriously. After all, how many people are actually required to seek the truth or do justice in the ebb and flow of daily life? For a short period, jurors get to experience what it means, many for the first time, to ennoble one's life in a process that searches for truth. This purpose-driven focus that combines justice and truth, gains immediacy in a trial where tragedy, unfairness, reckless behavior, fraud or an unresolvable neighborhood dispute touches the lives of people in a juror's own community.

"The criminal courts can only tell us the way some of our sisters and brothers steal or kill or die. But the civil courts tell us the way all of us live." — **Murray Kempton**

The ancient common-law jury system is so ingrained as a democratic habit that we take it for granted. It is helpful to remind jurors that we live in a country where, if we are involved in a dispute with a shopkeeper, client, customer, construction worker, automobile driver or any other citizen or business in the community, we do not call friends and relatives to bring bats and guns in order to resolve the issue in the street. We can ask a group of citizens, who are uninvolved in the dispute, to decide who is right. Juries thereby keep the peace in the place the jurors live.

The judge's duty

The duty of the judge has been variously described by statutes, Code of Judicial Ethics and case law as follows.

> It shall be the duty of the judge to control all proceedings during the

See Tarle, Next Page

> trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

(Cal. Penal Code § 1044 (West 2019).)

> A judge shall dispose of all judicial matters fairly, promptly and efficiently.

(Code of Judicial Ethics: Canon 3B (8).)

> In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action.

(Cal. Gov. Code § 68607 (West 2019).)

> Judges are faced with opposing responsibilities…. On the one hand, they are mandated by the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.) to actively assume and maintain control over the pace of litigation. On the other hand, they must abide by the guiding principle of deciding cases on their merits rather than on procedural deficiencies.

(*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085.)

> Such decisions must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency.

(*Bahl v. Bank of Am.* (2001) 89 Cal.App.4th 389, 398, as modified on denial of reh'g (June 20, 2001).)

It may also be valid to describe the judge's duty in a civil trial, where all parties are represented by competent, skilled and experienced attorneys, as setting the parameters of courtroom procedure, ruling on objections and getting out of the way.

All of these descriptions are certainly true. But a judge's duty requires more than the competent application of the nuts and bolts of court management. There is an indefinable art to the skillful administration of justice by experienced judges. It includes the ability to empower and motivate jurors so that trial attorneys are provided the opportunity to fully explore their side of any controversy… inch by inch.

Judge Tarle was appointed to the Los Angeles Superior Court in 2001.