

Are You Speaking The Same Language As The Jury?

Law360, New York (September 02, 2010) -- Attorneys are well-educated and trained to use precise language; it's a hallmark of a skillful debater. But, debating the law with colleagues or making arguments to the bench is a very different proposition than communicating with a jury. In conversation among lawyers and judges, each has similar educational backgrounds and training and likely shares a similar passion for the law and its nuances.

Yet, for jurors, these legal concepts may be completely foreign and at best may lead to juror confusion, or at worst may sound like someone trying to avoid responsibility by spouting legalese or business jargon.

Seasoned litigators recognize that the people sitting in the jury box are not likely to have the same vocabulary they might and, in particular, are much less likely to use legal or other terms of art in their day to day lives. Yet, in our experience observing attorneys in the midst of describing their case to jurors, we often find even the most experienced litigator can inadvertently use terms that interfere with jurors' comprehension of the case.

Using language that interferes with jurors' comprehension, instead of facilitating it, means that jurors will either tune out and/or be distracted from the key messages they need to receive and believe to reach a favorable decision.

For example, we recently worked on a case involving allegations of professional negligence in a complex financial services field. The case presented numerous challenges for the jurors to understand the nature of the financial calculations that were made and whether the parties acted appropriately. While the attorneys on both sides did a very nice job of explaining the complexities of the analyses that were at the heart of the dispute, it was their choice of words for more routine matters that sometimes interfered with jurors' comprehension of the intended point.

Early in the case one of the trial lawyers introduced a "redacted" document but never explained what the term "redacted" means. As a result, jurors were left focusing on what they should infer the term to mean rather than focusing on the content of the document which the lawyer was showcasing.

In fact, shadow jurors, who were observing the proceedings from the gallery and being debriefed each night about their perceptions, told us days later that they "still didn't know what redacted meant" when it was referenced again by another attorney that afternoon. As a result, those jurors wasted valuable time wondering what "redacted" meant rather than

focusing on the important information contained in the rest of the document that the attorney wanted the jury to focus on.

In the same case, defense counsel had a habit of using the phrase “Plaintiff cannot recover” to illustrate the weaknesses of the plaintiff’s case which claimed that his client’s actions had somehow contributed to the plaintiff company’s failure and ultimate bankruptcy.

“Recovery” is a common legal term lawyers might use to discuss what damages may be owed, but for most nonlawyers — i.e., jurors — when they hear that someone “can’t recover” it sounds like that person (or company) must be ill and dying, NOT that they are not entitled to compensation. By using this phrase, defense counsel was inadvertently running the risk of sending jurors the message that the plaintiff company was sick and would not survive — a theme that could have been helpful to the plaintiff and directly conflicted with the message the defense was trying to convey.

Even using the term “damages” can be confusing to many jurors. Most people outside the legal profession think of ‘damage’ as a physical injury, not a financial injury. So, when you add the term “recover” to a discussion of “damages” without including clarifying language, jurors are even more likely to become confused, or at a minimum distracted.

Lawyers have a way of communicating that is perfectly clear to other lawyers. For example, when a lawyer says “the witness came ‘before you’ and admitted he was wrong,” any other lawyer would find it easy to understand that the witnesses testified in front of that jury.

But, to a typical juror, “before you” is not a phrase they would use to say ‘testified in front of you’, it’s a phrase they would use to say that something happened prior to when you did it. Using atypical meanings can also distract jurors from the focal point of the argument being made. Instead of saying “the witness came before you and admitted he was wrong,” a lawyer who wants to be sure to speak the same language as the jurors will say “the witness sat on that witness stand and admitted he was wrong”. Doing so insures the jurors will focus on the witness’ admission and not on the unfamiliar sentence construction used by the attorney.

Similarly, lawyers have to be careful to avoid business jargon if they want to keep the jurors focused on what is important to their case and not on distracting words or phrases. In a recent trial involving mountains of business records, one of the attorneys routinely asked a corporate witness if he or she had prepared a particular document “in the normal course” -- used as a shorthand without the words “of business” --- a concept very familiar to business lawyers. While this may have been perfectly clear to the witness and the legal counsel present, it’s not likely the jurors would know what that means, without an explanation. To most jurors, it’s not even an important issue, but if the attorney is going to

bother asking the question, it should be a question that the jurors can understand without having to give it extra thought. The more time the jurors spend on deciphering your question, the less time they are spending on the issues that you need them to understand to find for your client.

Keeping the jurors' perspective in mind is important when talking about legal concepts and business concepts, but it is also important with more routine phrases too. It's not unusual at all for us to hear a lawyer say "pursuant to" or "moreover" when explaining how something happened, but what are the odds a juror would speak that way or even think that way — not very good.

As these examples showcase, using legal and business jargon, even in the most routine aspects of a case, can limit jurors' comprehension in two ways. First, jurors may miss a key argument being presented because they are focused on deciphering the jargon or unfamiliar terms being used. The distraction caused by unfamiliar language can send a juror off on a tangent that means they completely miss the point being communicated.

Second, jurors may misconstrue the intended meaning of what should be a routine aspect of the case (like damages and whether the plaintiff is entitled to recover them) and therefore misunderstand what is being communicated.

In speaking to a jury, it is important to keep the jurors' attitudes and experiences in mind, not just by explaining the complex issues of the case in a simple way, but also by thinking through whether issues and terms routine to you the lawyer can be easily understood by the jurors therefore allowing them to focus on the most important arguments and issues. By always keeping the jurors' perspective in mind, you can truly be sure you are speaking the same language.

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