

# WHAT JURIES REALLY THINK: PRACTICAL GUIDANCE FOR TRIAL LAWYERS

*Honorable Amy J. St. Eve† & Gretchen Scavo††*

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## INTRODUCTION

What do juries really think about lawyers? What makes jurors tick? What do lawyers do that irritates jurors? What can lawyers do better in the courtroom from the jury's perspective? These are the questions at the heart of this article, which provides useful insight gleaned from more than

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† United States District Judge, United States District Court for the Northern District of Illinois; Adjunct Professor, Northwestern Law School.

†† Learning & Development Lead - Disputes, Winston & Strawn LLP. Ms. Scavo previously clerked for Judge St. Eve and was formerly a Partner at Winston & Strawn LLP.

500 jurors who served in federal district court trials in Chicago, Illinois from 2011 to 2017. Below, we present our analysis of questionnaire responses from those jurors, as well as their verbatim commentary, and distill both into practical guidance for trial attorneys looking to improve their trial skills.

#### BACKGROUND AND METHODOLOGY

Juries—charged with making critical decisions that have real-life implications for parties—are fascinating. At the conclusion of trials, I typically meet with jurors to thank them for their service and to discuss their experience. In my fifteen years as a judge, I have found that jurors are eager to talk about the trial and especially about the lawyers after returning their verdict. Realizing the value their insight would provide to the trial bar, I decided to design and conduct an informal study to capture that information and then package it in a practical and useful format for attorneys. The goal was to capture, in the jurors' own words, what they like and do not like about attorneys' behavior and performance during trial. My hope is that the more insight the trial bar has into jurors and what they find important, the better everyone's trial experience will be.<sup>1</sup>

From 2011 until 2017, jurors who served almost exclusively in cases over which I presided were asked to complete a voluntary, anonymous survey at the conclusion of their service. I informed them of the following: (1) the purpose of the questionnaire was to gather information that I planned to use to write an article; (2) their questionnaire responses and comments would remain anonymous; and (3) participation was completely voluntary. Jurors in both civil and criminal trials participated.<sup>2</sup> We gathered questionnaires from more than 500 jurors over the relevant period, representing

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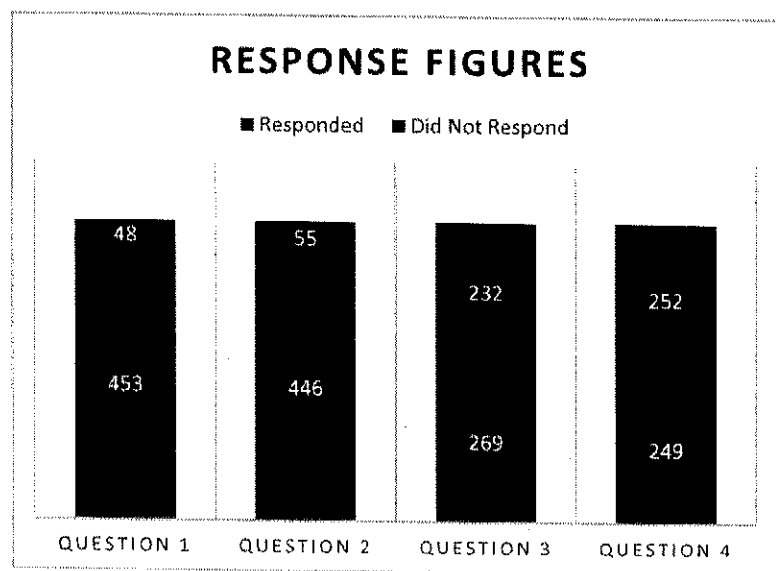
<sup>1</sup> This article and the juror questionnaires underlying its findings are not intended to measure or draw any conclusions about how attorneys' performance and behavior during trial result in specific outcomes for their clients. That said, studies in this area have found a positive correlation between juror perception of certain aspects of attorney performance/behavior and ultimate success at trial. See, e.g., Mitchell J. Frank & Osvaldo F. Morera, *Trial Jurors and Variables Influencing Why They Return the Verdicts They Do—A Guide for Practicing and Future Trial Attorneys*, 65 BAYLOR L. REV. 74, 97–107 (2013); Steve M. Wood, Lorie L. Sicafuse, Monica K. Miller & Julianna C. Chomos, *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, JURY EXPERT, Jan. 2011, at 23, 29, <http://www.thejuryexpert.com/2011/01/the-influence-of-jurors-perceptions-of-attorneys-and-their-performance-on-verdict/> [<http://perma.cc/R6M8-PEMT>].

<sup>2</sup> Typically, there are eight jurors in a civil case and twelve in a criminal case.

approximately fifty trials. The questionnaire consisted of five open-ended questions, the following four of which are relevant to this article:<sup>3</sup>

1. Please list three things that the lawyers did during trial that you liked, in the order that you liked them.
2. Please list three things that the lawyers did during trial that you did not like, in the order that you did not like them.
3. What would you have liked to see the lawyers do differently, or better?
4. Any other comments about the trial.<sup>4</sup>

Response rates were high. Although a handful of jurors declined to participate, the vast majority completed at least a portion of the questionnaire. The highest rates of response were for the first and second questions (approximately 90% and 89%, respectively). Response rates for the third and fourth question above were around 54% and 50%, respectively.



<sup>3</sup> The other question was designed to gather information about jurors' social media use and is the subject of two previous articles. See Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1 (2012); Amy J. St. Eve, Charles P. Burns & Michael A. Zuckerman, *More From the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64 (2014).

<sup>4</sup> This was the fifth and last question in the questionnaire but is discussed as Question 4 here for ease of reference. Question 4 on the questionnaire focused on social media. See *supra* note 3.

The choice to use open-ended questions was purposeful; the goal was to elicit unfiltered feedback from the jurors and determine what themes emerged unprompted from the responses. Some jurors answered all the questions, while others answered only a few or gave partial answers.<sup>5</sup> The jurors were free to comment on whatever they wished. Although the survey questions did not suggest themes or specific items on which to comment other than general likes and dislikes, several common themes quickly emerged in the survey responses and persisted throughout the remainder of the relevant time frame, as discussed below.

## FINDINGS AND ANALYSIS

### I

#### OVERVIEW OF FINDINGS

By design, jurors come from all walks of life and bring with them varying backgrounds and personal experiences that shape their views and decision-making processes. Lawyers bring different styles and present unique factual cases to jurors. Yet, based on the results of the study, despite their different experiences and backgrounds, jurors appear to hold common beliefs about what they expect to see and hear from attorneys in the courtroom.

Reviewing the juror questionnaires was both fascinating and enlightening. Perhaps due in part to the medium in which jurors answered the questions (i.e., anonymous written versus oral), they did not hold back in providing both praise and criticism. Overall, the responses can be grouped into four primary categories, some of which overlap:

- **Organization, Preparation, and Efficiency.** Jurors pay attention and can tell when attorneys are “winging it” versus when they are prepared. Jurors expect attorneys to have a plan, know where the relevant materials are, organize evidence with opposing counsel, and proceed efficiently.
- **Style and Delivery.** Jurors expect attorneys to excel at basic presentation skills, including appropriate eye contact and speaking loudly and

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<sup>5</sup> Of the jurors who responded to Question 1, which asked them to list three things the lawyers did that they liked (in the order they liked them), 94 (21%) listed one item, 118 (26%) listed two items, and 241 (53%) listed three items. Of those who responded to Question 2, which asked them to list three things the lawyers did that they did not like (in the order they did not like them), 123 (28%) listed one item, 137 (31%) listed two items, and 186 (42%) listed three items.

slowly enough for the jury to hear and understand. They appreciate when attorneys are personable, and they do not like courtroom drama and theatrical presentations.

- **Attorney Behavior and Other Professionalism Indicators.** Jurors frequently commented on the level of respect the attorneys showed to individuals in the courtroom, whether to opposing counsel, witnesses, the judge, courtroom staff, or to their own colleagues at counsel's table. Professionalism extends not just to behavior but also to appearance.
- **Evidence Presentation.** How attorneys elicit testimony and present other evidence, and the order in which they introduce it, matters to jurors. Jurors prefer when attorneys use technology during trial to organize and present evidence. They also like when attorneys use timelines and make other efforts to marshal the evidence in a meaningful way. Last, but certainly not least, jurors despise—and are even insulted—when attorneys excessively repeat questions and concepts.

Within some of these primary categories emerged narrower themes, which are discussed in more detail below.

The following table shows the top five themes across all questions, by mention alone (whether noted as a like or dislike).

**Top Five Themes Across All Questions (Whether Positive or Negative)**

<i>Theme</i>	<i>Number of Responses</i>	<i>% of Jurors</i>
<b>Organization/Preparation/Efficiency</b>	224	44.7%
<b>Delivery or Style of Presentation</b>	181	36.1%
<b>Repetition</b>	169	33.7%
<b>Good Behavior Toward Opposing Counsel, Witnesses, and Jury</b>	157	31.3%
<b>Other Professionalism Indicators</b>	147	29.3%

The following table shows the themes to which the highest number of the *most positive* juror responses related.<sup>6</sup>

<b>What did the attorneys do during trial that jurors liked the most?</b>		
<i>Theme</i>	<i>Number of Responses</i>	<i>% of Q1 Responses</i>
<b>Organization/Preparation/ Efficiency</b>	102	22.5%
<b>Delivery or Style of Presentation</b>	69	15.2%
<b>Good Behavior Toward Opposing Counsel, Witnesses, and/or Jury</b>	40	8.8%

In contrast, the table below shows the themes to which the highest number of the *most negative* responses related.<sup>7</sup>

<b>What did the attorneys do during trial that jurors disliked the most?</b>		
<i>Theme</i>	<i>Number of Responses</i>	<i>% of Q2 Responses</i>
<b>Too Much Repetition</b>	90	20.2%
<b>Unprofessional Conduct</b>	43	9.6%
<b>Bad Behavior Toward Opposing Counsel, Witnesses, and/or Jury<sup>8</sup></b>	43	9.6%

Finally, the table below shows the top three areas in which the jurors surveyed would have liked to see the lawyers do things differently, or better.<sup>9</sup>

<sup>6</sup> As measured by themes jurors listed as their "most positive" comment in response to the first question on the survey, "Please list three things that the lawyers did during trial that you liked, in the order that you liked them."

<sup>7</sup> As measured by themes jurors listed as their "most negative" comment in response to the second question on the survey, "Please list three things that the lawyers did during trial that you did not like, in the order that you did not like them."

<sup>8</sup> As discussed in more detail below, we tracked behavior toward opposing counsel, witnesses, and/or the jury separately from other more general comments on attorney professionalism. See discussion *infra* Part II.C.

<sup>9</sup> As measured by the responses to the third question on the survey, "What would you have liked to see the lawyers do differently, or better?"

What could lawyers do differently, or better, during trial?		
Theme	Number of Responses	% of Q3 Responses
<b>Organization/Preparation/ Efficiency</b>	52	19.4%
<b>Present More and/or Better Evidence<sup>10</sup></b>	44	16.4%%
<b>Improve Presentation Delivery or Style</b>	27	10.0%

## II

### COMMON THEMES

#### A. Organization, Preparation, and Efficiency

As mentioned above, the most common theme across all responses (both negative and positive) was attorney organization, preparation, and efficiency. This theme was mentioned in almost 45% of jurors' responses, with 102 jurors listing it as their most positive comment and 40 listing it as their most negative comment. Interestingly, 23 jurors listed it as both their most positive *and* most negative comment (meaning they noticed when one side was prepared while the other was not).

Jurors' attention to the degree to which attorneys are prepared, organized, and efficient during trial makes logical sense in light of what jurors must do—apply the law to the facts and decide the case that is presented to them—and given that jury service takes jurors away from their other commitments. It is undoubtedly much easier (and more pleasant) for jurors to sort through complicated evidence, argument, and legal theories when the attorneys neatly package and present it in an organized and efficient way.<sup>11</sup> Additionally, the more organized and prepared—and therefore

<sup>10</sup> Some might argue that there is little an attorney can do to present “more” or “better” evidence during a trial because the attorney is stuck with the facts of her or his case, but given the prevalence of this comment, we thought the finding is nonetheless useful.

<sup>11</sup> Leonard B. Sand, *From the Bench: Getting Through to Jurors*, 17 LITIGATION 2, Winter 1991, at 3 (“Think about jury comprehension as you decide the identity and number of your witnesses, the sequence of proof, and other details of presentation at trial. . . . Remember, a jury overwhelmed by the volume of evidence or the length of the trial is more apt to go astray than a jury directed to key issues and exhibits.”).

efficient—attorneys are during the trial, the quicker the case will progress and the sooner the matter can be resolved. In short: do not waste the jury's time. On this point, the jurors commented that they:

- liked that attorneys were “very organized” and “did the trial in a timely manner”
- wished the attorneys would have “prepare[d] more thoroughly so that their evidence isn't missing or that they can't think of the next question without long pauses”
- would like to see the attorneys “get to the point quicker with clearer details,” and another wanted to see “better preparation, more to the point questioning with much less fluff,” and yet another wanted to see attorneys “be more direct and get to the point”
- did not like the attorneys' “lack of preparedness—[they] seemed to wing it,” and suggested that they have a “better plan” and a “better execution of plan”
- wanted to see attorneys “be more concise,” and noted that “brevity and clarity are so important”

Jurors' comments ranged from very general (along the lines of the above examples) to very specific. Multiple jurors, for example, commented that they wished attorneys would stipulate to more facts to streamline and focus the trial. While that may not be possible in all cases, it is something to consider seriously, particularly where the evidence is voluminous or where the parties have already further refined or otherwise narrowed factual disputes through summary judgment or via preparation of the pretrial order.<sup>12</sup> Another repeated suggestion was to limit the use of sidebars, which jurors viewed as a waste of time, as well as a sign of being unprepared and unorganized.<sup>13</sup> One juror, for example, disliked that attorneys asked for a sidebar shortly after a break—suggesting that the juror believed the attorneys should have worked out the issue with the judge during the break.

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<sup>12</sup> For example, Northern District of Illinois Local Rule 16.1.6(a) (1995) requires, as part of the pretrial order preparation process, “[c]ounsel for all parties . . . to meet in order to (1) reach agreement on any possible stipulations narrowing the issues of law and fact . . . .”

<sup>13</sup> See Sand, *supra* note 11, at 52 (“Avoid sidebars and—worse—colloquy between court and counsel in front of the jury. Juries resent them. They disrupt and confuse.”).



### B. Delivery of Presentation

Jurors' second most common theme across all questions, including both positive and negative responses, relates to the delivery and style of the attorneys' presentations at trial. This theme encompasses comments related to the non-substantive aspects of the attorney's presentation—including volume of speech, eye contact, clarity of speech, and tone. In fact, 181 jurors—or 36%—commented on this topic. Sixty-nine jurors (over 15% of jurors who responded to Question 1) listed it as their most positive comment, while 38 jurors (over 8% of jurors who responded to Question 2) listed it as their most negative comment. Seven jurors listed it as both their most positive comment and their most negative comment.

There are several useful takeaways from the jurors' responses, none of which are particularly groundbreaking, but all of which provide good reminders. First, attorneys should attempt to make a connection with the jury and should not overlook the positive impact of basic manners in doing so. Introducing yourself at the outset of the case, speaking to the jury directly, and making appropriate eye contact with the jury will go a long way toward establishing a connection with the jurors.<sup>14</sup> One juror, for example, called out the defense attorneys for failing to introduce themselves to the jury in opening statements. It is quite remarkable that even after the trial and jury deliberations, this particular juror remembered the attorneys' failure to introduce themselves at the *very outset* of the case. Several jurors commented on the effectiveness of making eye contact with (but not staring at) the jury, being personable with the jury, and otherwise being cognizant of interactions (or of failure to interact, as the case may be) with the jury. Further comments illustrate this point:

- the attorneys' "eye contact and an attempt to tell a coherent story to the jury was effective"
- "liked the direct eye contact"
- did not like that the attorneys "stare[d] down" the jury
- would have liked the attorneys to "talk a little more to the jury" and "be a little more personable to the jury"
- suggested that attorneys "speak to the jury like [they] are speaking face to face with one person"

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<sup>14</sup> See *id.* at 53 (advising attorneys to try their case to the jury, rather than "to [their] client, the court, or [their] adversary").

- “the defense attorneys, in general, came across as smug, arrogant and presumptuous. . . . Negative behaviors included: staring, raising eyebrows with arms crossed, not trying to make a connection with jury (no smiles). In general, the defense had arms crossed way too much!”

Second, attorneys should not underestimate the importance of speaking slowly and loudly enough to be heard and understood. Jurors indicated repeatedly that they liked when attorneys spoke “loud” and “clearly” and did not like when they talked too softly or too fast. This may seem quite elementary, but it was a frequent (and important) comment in the questionnaires. In fact, one juror commented that the most negative thing the lawyers did during trial was “talk softly,” while the same juror believed the most positive thing was using the “microphone on closing.” As another example, one juror wrote that she was not “able to hear one of the plaintiff’s attorneys most of the time.”

The importance of the jury being able to hear and understand what attorneys are saying during trial cannot be overstated. An attorney could have stellar evidence and a winning argument, but if the jury cannot hear or understand the presentation, it is all for naught. As one author aptly noted, “[a] perfect opening statement or closing argument is essentially a failure if jurors cannot hear properly. Nothing makes jurors more angry.”<sup>15</sup> The same advice applies to witnesses, who counsel should advise to speak up and to speak slowly—particularly because they may be nervous and uncomfortable on the stand.

Since every courtroom carries sound differently, spending a short time in the courtroom before trial (outside of the pretrial proceedings, of course) testing acoustics with a colleague in the jury box would be time well spent. While speaking loud enough for the jury to hear is critical, attorneys should not yell or use the volume or tone of their voice to intimidate or distract the jury. For example, one juror did not like the attorney’s “loud booming voice” and another did not like that the attorneys “raised their voice[s]” and “[spoke] in a low tone of voice.” This line of comments overlaps with the professionalism theme and is discussed further below.

The third takeaway is that despite what television programs and movies depict, attorneys should refrain from extravagant and dramatic displays during trial. Jurors

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<sup>15</sup> 72 AM. JUR. *Trials* 137, § 17 (1999).

frequently commented about this conduct. While showing sincere passion and belief in a client's case is expected and appreciated, crossing the line into theatrics is disfavored. It makes jurors uncomfortable, and it may also have the unintended result of jurors believing that the attorney had to resort to drama because the substantive case is weak.<sup>16</sup> Some of the jurors' responses on this point included:

- "don't put on a show" and "just present evidence"
- did not like that the attorneys were "overly dramatic"
- would have liked to see the attorneys "calm down and not let emotions get in the way"
- liked that the attorneys "did not get overly emotional"
- liked that the attorneys were "not overly dramatic/theatrical"

### C. Attorney Behavior and Other Professionalism Indicators

Attorney behavior and professionalism also ranked among the top themes in the responses. The key takeaway is this: jurors do not like unprofessional lawyers, and they pay close attention to how lawyers treat opposing counsel, witnesses (including parties), the judge, courtroom staff, members of the jury, and even their own co-counsel.

For purposes of tracking survey responses, we separated juror comments regarding attorneys' behavior toward jurors, opposing counsel, and witnesses from comments relating to other aspects of professionalism. We did this because we noticed a high volume of juror comments specifically addressing the way attorneys treat opposing counsel, witnesses, and the jury, and we believe calling out those responses separately provides useful information for attorneys. That said, both categories had a relatively high number of responses, with 157 jurors—or 31.3%—commenting either positively or negatively about attorneys' behavior toward opposing counsel, witnesses, and/or the jury. Forty of those jurors—or 8.8% of those who responded to Question 1—listed this topic as their number one "like," while 43 jurors—or 9.6% of those who responded to Question 2—listed this topic as their number one "dislike." Notably, over half of the 157 jurors who

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<sup>16</sup> See Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 *IND. L.J.* 1297, 1298 (1993) ("The use of drama might cause juries to think that dramatics are necessary because the case is weak. Drama can hurt the attorney's case if jurors do not like the theatrical presentation.").

commented on this topic addressed attorneys' behavior toward witnesses specifically, as discussed more fully below.

Additionally, 147 jurors—or 29.3%—commented about other aspects of attorney professionalism, including refraining from displaying generally undesirable behaviors or attitudes during trial, showing respect to the presiding judge, not interrupting, and working cooperatively as a team. Twenty-seven jurors—or 5.9% of those who responded to Question 1—listed this topic as their number one “like,” while 43 jurors—or 9.6%—listed it as their number one “dislike.”

1. *Behavior Toward Opposing Counsel, Witnesses, and Jury*

Jurors like when opposing counsel get along and treat each other with respect during trial.<sup>17</sup> Bickering and other displays of disrespect between opposing counsel distracts from the substance of the case and makes the trial personal to the attorneys rather than to the parties. As one juror put it, attorneys' negative “attitudes toward each other, while entertaining, took away from the case.”

Jurors pay attention to not only verbal exchanges between counsel but also nonverbal communications, including facial expressions, eye rolling, and body language. One juror, for example, did not like that opposing counsel “kept giving the defense lawyer dirty looks while he was making points” and would have liked to see the attorneys “not give dirty looks or roll their eyes when the others are talking—it makes them look bad.” Another juror did not like the “rolling of eyes” or “facial expressions of [the] lawyers.” Yet another juror would have liked to see “less interrupting of each other,” and another gave the simple, yet poignant suggestion to “be civil to each other.” Not all of the jurors' comments on this topic were negative, to be sure—many commented that the most positive thing the attorneys did during trial was to cooperatively interact with opposing counsel. Following are examples of specific comments along those lines:

- several liked that the attorneys were “respectful of [and to] each other”
- “both sides were very kind and open to one another—not . . . bad[-]mouthing towards one another”

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<sup>17</sup> See Roger G. Oatley, *The Persuasive Power of Identification: People Prefer to Say Yes to Those They Like*, in 1 ANN.2001 ATLA-CLE CONTENTS 1205, 5 (2001) (observing that “behaving politely toward your opponent” is an example of the “kind of fair-minded behavior that promotes liking and identification”).

- liked that the attorneys “respected each other and were willing to help each other out (example, computer charger)”
- “collegiality between the defense and plaintiff was evident—that was positive”
- liked that the attorneys were “courteous to each other”
- liked that “both sides worked together”
- liked that the attorneys “were respectful to the opposing team”

Jurors also pay close attention to how attorneys treat witnesses, and again—despite what is commonly shown on television—they do not like when attorneys disrespect or behave unkindly to witnesses, including parties, and the translators for those witnesses. Jurors are empathetic to witnesses, and they do not like when attorneys verbally attack witnesses or ask clearly irrelevant questions designed only to embarrass. Jurors see through these tactics. Specifically, jurors commented that they did not like when attorneys:

- “belittled witnesses”
- attacked “the character of a defendant in a respectable office”
- “g[ot] personal; just need the facts”
- “picked on witnesses that were not pivotal and then took it too far”
- “went too far on questions—attacked the witnesses”
- asked “personal (i.e., salary or wealth) questions of peripheral witnesses”
- acted “too aggressive with a female witness, asking about having a child at home that would impair her ability to do her job” (This juror specifically noted that it was a female attorney who questioned the witness.)
- mispronounced and/or did not know witness names
- “us[ed] a tone of voice and an approach to intimidate witnesses”
- used “offending language to witnesses” and were “rude to witnesses”
- “used personal attacks against witnesses”
- employed “argumentative/aggressive crosses of witnesses”
- made “cynical remarks” about the defendant

- made “rude remarks on cross [that are] below the belt, it makes them look really ugly”
- were “very sarcastic and rude/acting like the witnesses were stupid”
- “spoke disrespectfully to a witness . . . [the young male attorney] spoke to him as if he was of low intelligence”
- “interrupted the witness” (This juror specifically noted their dislike when defense attorneys interrupted the witness.)<sup>18</sup>

It should come as no surprise that jurors expect attorneys to be respectful to the jury, too, and they are put off by attorneys who fail to do so. One way to show that respect is to be on time. Jurors also took note of when attorneys addressed them with respect, including introducing themselves, talking directly to the jury, and making eye contact. For example, one juror liked when the attorneys talked “to” the jury rather than “at” the jury, and another liked that the attorneys “addressed the jury in opening/closing statements” and “[d]id not treat the jury like kids.” Conversely, jurors did not like when the attorneys “seemed to talk down to [us],” including by prefacing comments with “I know you’re not lawyers . . . .” Another juror did not like the attorneys “being derogatory” and wished they would have “treated [jurors] like we have a brain.”

While jurors appeared to interpret eye contact as a welcome sign of respect, many jurors commented that some attorneys, including those at counsel’s table, at times took it too far. For example, one juror “didn’t like the lawyer who sat in the front row and kept staring at the jury.” Another did not like when the attorneys “stared us down,” and one suggested that attorneys sitting at counsel’s table should not “face the jury.”<sup>19</sup>

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<sup>18</sup> Not only is interrupting a witness impolite, jurors may perceive the interrupting attorney as less intelligent and less confident than one who allows the witness to finish. See, e.g., William M. O’Barr & John M. Conley, *Subtleties of Speech Can Tilt the Scales of Justice. . . When a Juror Watches a Lawyer*, BARRISTER, 1976, at 8, 11 (“When the lawyer persists [in speaking when the witness is trying to speak at the same time], he is viewed not only as less fair to the witness but also as less intelligent than in the situation where the witness continues [speaking]. The lawyer who stops in order to allow the witness to speak is perceived as allowing the witness significantly more opportunity to present his testimony in full.”).

<sup>19</sup> See also Randy Wilson, *From My Side of the Bench: Jury Notes*, ADVOCATE, Fall 2013, at 90, 90–91 (“Trial lawyers often watch jurors to see how the jury is reacting. Lawyers naturally want to see whether the jury is buying the case. What lawyers don’t realize, however, is that constantly watching the jury makes the jury uncomfortable.”) (discussing Christina M. Habas, *What Is Going on in*

A final word on this topic: not only should attorneys show respect to opposing counsel, witnesses, and the jury, they should instruct their clients to do the same. Several jurors criticized parties sitting at counsel's table who acted disinterested (for example, sleeping, snoring, or using cell phones) or were otherwise disrespectful to the trial participants, the judge, and the trial process. Attorneys should remind anyone participating in the trial—and especially those sitting at counsel's table—to always behave as if the jurors are watching them—because they are.

## 2. *Other Professionalism Indicators*

The responses indicate that jurors pay attention to other facets of attorney professionalism as well. For one, the jurors indicated that they like when attorneys showed respect to the judge, including by cooperating with the judge, not interrupting, and standing up to address the judge and make objections (hint: judges like this, too!).<sup>20</sup> Attorneys' respect should also extend to their own co-counsel. One juror liked that the defense attorneys "worked as a team." Conversely, other jurors did not like when attorneys "showed frustration w[ith] their own team when things didn't go exactly as planned" and wished the attorneys would "work together better" because "[t]hey are on the same team."

Another common sentiment was a strong dislike of certain attorneys' childish behavior, including name-calling, arrogance, sarcasm, and what appeared to be sharing inside jokes. One juror called out a defense attorney for being "very cocky," and another expressed dislike for "the name calling by the lawyer," as well as "all the talking and laughing that the lawyer[s] did among themselves." Other jurors commented negatively on attorneys' "excessive joking," the "banter between the defense attorneys," when attorneys "laugh[ed] at each other" during examination, and when attorneys "laugh[ed] and snicker[ed] while other lawyers talked." While

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*Their Minds? A Look into Jury Notes*, VOIR DIRE, Fall/Winter 2012, at 26).

<sup>20</sup> Although not as common as other themes, it is worth noting that several jurors commented on the attorneys' conduct as it related to objections during trial. Some complained about attorneys making too many, some believed the attorneys were too slow to object (presumably causing delays and/or distractions), and still others took issue with attorneys' repeated and unsuccessful efforts to "get around" objections, thus soliciting even more objections. These comments are consistent with other jury research suggesting that "[i]f a lawyer continually makes frivolous objections that are routinely overruled by the trial judge, jurors take note, even to the point of keeping score." See *id.* at 90 (discussing Habas, *supra* note 19, at 26).

displaying a sense of humor can go a long way with a jury, attorneys should be careful not to take it too far. As one author has cautioned, "be very careful with [humor]. It should never make fun of anyone in the courtroom unless it is you. It should never be sarcastic or mean spirited."<sup>21</sup>

Several jurors also commented negatively on non-verbal displays of unprofessionalism. One juror did not like that the attorney "smirked and would shake his head after certain remarks or questions from the defendant," and another suggested that attorneys remember that jurors "can read lips." Still others disliked when attorneys "consistently ma[de] faces at their clients in response to testimony" and "rolled their eyes" during witness examination.

The responses made clear that jurors view the courtroom as a formal setting, and attorneys should take care not to appear too relaxed or casual. One juror, for example, did not like the defense lawyer looking too relaxed and "leaning back with [his] arm up on [the] chair."<sup>22</sup> Jurors like to watch attorneys who are engaged and passionate about their case but who are also respectful of everyone in the room. One of the responses summarized it well when complimenting an attorney who "appeared honest, sincere, concerned, [and had a] pleasant attitude [and an] occasional smile."

A final note on professionalism: a small percentage of jurors (around 4%) commented specifically—and mostly negatively—about attorney appearance. Below are some of the juror comments:

- did not like that one of the attorneys had a hole in the seam of his jacket
- did not like that the attorneys "made me pay attention to their personal ties instead of just information"
- commented that the "defense did not seem as well put together (shirts wrinkled, hole in the back of his jacket)"
- liked that the attorneys "dressed nicely, looked professional," but disliked that "one lawyer seemed sloppy"

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<sup>21</sup> See Oatley, *supra* note 17, at 7.

<sup>22</sup> See 72 AM. JUR. *Trials* 137, § 16 (1999) ("Leaning back or rocking in a chair (instead of sitting up straight and still) tells jurors that the lawyer's movement and gestures are too casual in the courtroom. Jurors think lawyers do not have the proper respect in the courtroom if they move casually, because jurors believe the courtroom is a formal situation.").



- did not like attorneys' "hair in their face" and noted that one attorney "needs a haircut and looked a little disheveled"
- found one attorney's "bright green nail polish" distracting and "not professional"

Significantly, jurors' comments about attorney appearance were not gender-specific. The takeaway from these comments is that jurors expect attorneys to check their appearance before entering the courtroom. Jurors want to see that attorneys care enough about their case and their client to look professional (i.e., a clean, ironed suit) and to avoid distractions.<sup>23</sup>

#### D. Evidence Presentation

This is a broad category that includes several subtopics, as discussed below. This category covers juror comments about the approaches that attorneys used, or failed to use, in presenting evidence during trial. For example, the comments covered the order of the evidence presented, clarity (or lack thereof, in some instances) of the evidence, and the type of evidence presented (e.g., deposition designations versus live testimony).

##### 1. *Avoid Unnecessary Repetition*

A prevalent theme was jurors' disdain for repetition: they vehemently dislike when attorneys repeat questions and/or concepts *ad nauseam*. One hundred and sixty-nine jurors—or 33.7%—commented (almost exclusively negatively) on this theme, making it the third most common response topic. Significantly, it was the number one most negative juror response. The following juror comments are illustrative:

- "At multiple points during the trial the questioning seemed to bog down on repeatedly covering the same basic issue with a witness. If we do not get the point the first or second time, then we are unlikely to ever get it. All that is accomplished by excessive

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<sup>23</sup> It is not only jurors who notice these things. The Honorable Daniel A. Procaccini, Associate Justice of the Rhode Island Superior Court, wrote an article in 2010 titled *First (and Lasting) Impressions*, in which he lamented the appearance and demeanor of a young attorney who had recently appeared in his courtroom: "He was slouched in his chair facing sideways (in relation to my bench) with both legs stretched out straight in front of him. His shirt collar was open, and his tie was knotted well below his collar. This combination of posture and appearance, which was reminiscent of someone lounging at the beach, caught me by surprise." See Daniel A. Procaccini, *First (and Lasting) Impressions*, R.I.B.J., Sept./Oct. 2010, at 15.

repetition is the annoyance of the jurors.”<sup>24</sup>

- did not like when attorneys “kept going over same facts—once is enough”
- did not like that “the plaintiff attorney kept repeating the same points over and over—we’ve got it!”
- did not like that the lawyers were “sometimes very redundant, implying we couldn’t understand”
- “repetition of certain things; made it seem like we as the jury didn’t understand”
- would like to see attorneys “question the witness without repeat[ing] the same question three different ways and then summarizing”
- liked that the attorneys “did not beat a dead horse on any subject”
- “sometimes things were too repetitive. Many questions asked different ways but essentially meaning the same thing”
- did not like “repeating of same question” and thought “certain areas were a little too detailed. Get to the point quicker.”
- did not like the attorneys “asking the same questions over and over to same people”
- “the defense lawyers seemed more organized and did not ‘drill’ a point to death”

It is natural for attorneys to believe it is necessary to repeat questions and/or concepts again and again at trial—perhaps they believe that the jury is not paying attention and will miss important information if it is not repeated multiple times. Perhaps the attorney is not sufficiently organized or prepared and therefore lingers on questions or concepts while deciding where to go next. Whatever the reason, jurors deplore repetition. Based on the responses, their reasons are twofold. First, jurors perceive repetition as inefficient and a waste of their time. Second, they interpret repetition as an insult to their intelligence.<sup>25</sup> While some repetition may be necessary to

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<sup>24</sup> See also Sand, *supra* note 11, at 4 (“There may be a thin line between fostering comprehension on the one hand and boring the jury on the other. If jurors hear a concept in the opening statement, during the testimony, and again in closings, they develop a familiarity with the concept. If the same concept is repeated too often during trial, however, the jury will become bored and resentful. If the jury does not understand a concept the first few times, mere repetition will not help.”).

<sup>25</sup> Other judges have reached the same conclusion: “The most oft-cited complaint by jurors is needless repetition. Jurors hate repetition. They feel it

drive a very important or complex point home, excessive repetition is a surefire way to annoy the jury.

## 2. *Ask Clear and Relevant Questions*

Fifty-seven jurors—or 11.4%—commented about the clarity and effectiveness (or lack thereof) of the attorneys' questions. Lengthy, compound, and convoluted questions are—for obvious reasons—disfavored. Jurors like short, clear, easy to understand questions targeted at eliciting relevant information, as reflected in the following comments:

- “when rephrasing a question for a clear[er] understanding, do not use the same word that is unclear”
- did not like when attorneys got “mixed up with their line of questions”
- “questions were not direct enough”
- “questions weren't clear”
- did not like when attorneys confused witnesses on the stand
- liked the “non-redundant questioning” and the “pointed and specific questions”
- “liked when the lawyers questioned the witnesses in a straightforward way so that it is clear how the questions are relevant”
- liked that “questions were clear and relevant”
- liked that the attorneys “asked questions that I was thinking (in tune with the jury/witness responses)”

## 3. *Focus on Relevant Facts and Avoid Confusing the Jury*

Seventy-two jurors—or 14.4%—commented on whether attorneys focused on relevant facts and juror perceptions that the attorneys were intentionally aiming to confuse the jury. Twenty-eight jurors listed this topic as their most negative comment. Jurors' responses, at times, overlapped with their perception that the attorney asked what the juror believed to be off base questions that were not only embarrassing to the witness but also irrelevant to the issues at trial and, accordingly, a waste of time. For example, one juror commented that “[g]oing after [a witness] on an affair was a bad move. That was inappropriate, irrelevant, and swung me against the defense.” While some attorneys believe tactics like

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insults their intelligence and unnecessarily prolongs their jury service.” Wilson, *supra* note 19, at 90 (discussing Habas, *supra* note 19, at 26).

that will curry favor with the jury because they will presumably tarnish the witness's character in the jury's eyes, in reality those tactics risk the opposite effect. Even if the irrelevant questions are not perceived as disrespectful to the witness, jurors nevertheless dislike them because they are a waste of time.<sup>26</sup> To further illustrate the point, jurors did not like when attorneys:

- “took testimonies and mixed [witnesses'] words to make it sound like they were saying something they weren't”
- “use[d] circular reasoning when questioning witnesses”
- “ask[ed] the same question in a trick[y] manner”
- “twist and nitpick unimportant facts”
- “appeared to be trying to confuse us”
- “kept raising points not pertinent to the case”
- “repeatedly ask questions which they know will be objected to—just so they can say it aloud”
- “talking about specific people a lot but not using it to help the case” and spending too much time on “topics not as important to the case”
- “showed way too much that was not necessary for the case”

The lesson here, as one juror suggested, is: “Don't try to fool the jury. Just stay with the facts.”

#### 4. *Closing Arguments*

Closing arguments matter to juries significantly more than opening statements, according to the responses. Sixty-two jurors (12.3%) mentioned closing arguments, most often in a positive way, compared to around 4% of jurors who commented about opening statements. This could be due, in part, to what is known as the recency effect—the theory that people best remember information that is presented last.<sup>27</sup>

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<sup>26</sup> See Mitchell J. Frank & Osvaldo F. Morera, *Professionalism and Advocacy at Trial—Real Jurors Speak in Detail About the Performance of Their Advocates*, 64 BAYLOR L. REV. 1, 17 (2012) (“Jurors, like most people, do not like having their time wasted. . . . For these reasons, attorneys who too often ask questions that jurors do not find important—which includes questions that they do not find relevant—risk alienating their jury.”).

<sup>27</sup> See, e.g., Kristi A. Costabile & Stanley B. Klein, *Finishing Strong: Recency Effects in Juror Judgments*, 27 BASIC & APPLIED SOC. PSYCHOL. 47, 47–57 (2005) (study of effects of evidence order on juror verdicts suggests that evidence presented late in a trial was more likely to be remembered by jurors and thus

Eighteen jurors listed closing arguments as their most positive comment, while only five listed it as their most negative comment.

Juries want and expect attorneys to use closing statements to tie all of the evidence presented during the trial together in a meaningful way. Closings are an optimal time to present a timeline and connect the evidence with the legal theories, as discussed above. Make sure the evidence you are summarizing has been introduced. Jurors do not like when attorneys present new arguments or concepts for the first time during closing argument (one juror disliked that “the defense brought up an idea in the closing arguments that had not been previously discussed at all”).

Jurors also appear to prefer an organic, yet focused, approach to closing arguments rather than a rote, scripted argument. One juror, for example, did not like that attorneys “read opening and closing arguments from paper,” while another did not like that the attorneys “wandered during closing.”

##### 5. *Effective Use of Technology and Visual Aids*

Another common topic throughout the responses (96 jurors, or 19.1%) related to attorneys’ use of technology and/or visual aids during the trial. Thirty-five jurors listed attorneys’ effective use of technology or visual aids as their most positive comment, while twelve listed the lack of use (or ineffective use) of technology or visual aids as their most negative comment.

Just as technology has become a mainstay in almost every area of modern American life, it has also become a mainstay in the courtroom. Jurors expect attorneys to use technology to aid their trial presentation. This is no surprise, given the ever-increasing prevalence of technology as a learning tool both in classrooms and in the workplace.<sup>28</sup> Many jurors are accustomed to learning through technology, and technologically enhanced presentations present an ideal

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more likely to have influenced their verdicts); Adrian Furnham *The Robustness of the Recency Effect: Studies Using Legal Evidence*, 113 J. GEN. PSYCHOL., 351, 356 (1986) (“The importance of the recency effect therefore implies that the summing up of evidence, as well as the power and importance of evidence presented last (just before a judgment) is most salient in forming the final impression.”).

<sup>28</sup> See, e.g., *Technology Moves to the Head of the 21st Century Classroom*, MIT TECH. REV. (Sept. 1, 2017), <https://www.technologyreview.com/s/608774/technology-moves-to-the-head-of-the-21st-century-classroom/> [http://perma.cc/A4X8-36VW]; *Use of Technology in Teaching and Learning*, U.S. DEPT EDUC., <https://www.ed.gov/oii-news/use-technology-teaching-and-learning> [http://perma.cc/7T4S-DDP2].

platform to summarize and connect the dots between the evidence presented at trial and the applicable law in a way that is especially useful for visual learners.

An important point that bears mentioning here: not only do jurors expect attorneys to incorporate technology into their trial presentations, they also expect them to know how to use that technology *effectively* and *efficiently*. This relates back to preparation and organization—jurors do not want to sit through technological snafus. At best, it wastes their time. At worst, it takes away from the substance of the presentation.

The following comments are illustrative:

- “why couldn’t the defense use laptops to present evidence like the prosecutors[?]”
- would have liked to see the “defense have their things on [a computer] better to view”
- liked the “defense[’s] use of the technical equipment”
- liked that attorneys “used [a] TV monitor to see pic[tures] easily”
- liked that attorneys “put visuals on the screen”
- “the summary visuals were helpful”
- did not like “technology problems, power plugs, evidence tapes” and would like to see attorneys “make sure [to] have technology ready”
- “would have liked to see [the attorneys] operate computers better”
- “learn how to use equipment in advance”
- liked “the photos being shown on the TV in front of me” and “witnesses being able to use . . . computer screens”
- wished attorneys would “learn how to use the computer” and the “computer cut off sentences”

The lesson here is not to forego substance for the sake of technology, but rather to find ways to incorporate technology into the trial that helps, rather than hinders, the efficiency and effectiveness of your presentation. And, of course, take the time to learn about and practice with the courtroom’s technology so that the trial is not a dress rehearsal.

#### 6. *Order and Organization of Evidence*

Over 5% of jurors commented specifically on the order and/or organization of the evidence presentation, indicating their preference that evidence be presented as chronologically as possible, with timelines and summaries connecting key

evidence to relevant dates.<sup>29</sup> The reasoning is obvious: jurors need to comprehend and retain the information present at trial in such a way that they can later piece all of the information together and recall it in a meaningful way during deliberations.<sup>30</sup> The following are some examples of juror comments on this point:

- “have a better timeline of all that happened”
- it was “hard to keep track of dates [of] events that occurred”
- the attorneys “did not put all the pieces of the puzzle together very well. We had to do too much ‘thinking’ putting all the evidence together, in my opinion.”
- liked that “witnesses were brought in a way that we as jurors were able to keep track of [the] case”
- liked that attorneys presented witnesses and other evidence sequentially
- liked that attorneys “summarized important . . . evidence of the trial”
- “I would have preferred that the evidence be better laid out chronologically. Much of our deliberation was spent determining timeline.”
- liked that attorneys “hooked time and dates together”
- would have liked to see attorneys “give a better sequence of events”
- liked that attorneys “summarized important . . . evidence of the trial in logical sequence”
- suggested that attorneys “present a timeline”
- would have liked to see attorneys “present witnesses in the order of the timeline” and “illustrate the timeline”

### 7. Other Suggestions

According to the responses, there are other ways attorneys can make the jury’s job easier and more interesting. For one, spend the time necessary to carefully curate witness testimony

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<sup>29</sup> See also Sand, *supra* note 11, at 52–53 (“Complicated trials can sometimes be simplified by submitting issues to a jury sequentially rather than all at once.”).

<sup>30</sup> See Jeffrey R. Boyll, *Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts*, 15 LAW & PSYCHOL. REV. 163, 176 (1991) (“A critical aspect of the juror decision-making process involves the capacity to comprehend and retain information presented at trial.”).

that will be introduced through deposition designations, and avoid whenever possible introducing lengthy testimony through designations. Jurors are bored by such testimony, and several found that the designated testimony was not essential to the case. One juror, for example, commented that the “deposition of the surgeon lasted forever and gave little bearing to the case.”

Another suggestion was to be sure to draw attention to the important parts of exhibits and spend ample time on them, but do not belabor unimportant details. In this respect, jurors commented that “some exhibits were too brief or unclear,” and they would have liked to see attorneys “present . . . clear evidence, spend less time on detail.” When introducing evidence, be sure the jury knows why that evidence is important to the case. One juror commented that attorneys “admit[ted] evidence (photos) and [did] not say why.” Another juror complimented the attorneys on giving “clear exhibits” and making sure the jury saw examples. If the case is complicated, consider one juror’s suggestion to “assign the complexities of the case a friendly or familiar name to things.” This can help the jurors retain (and later recall) important information. Also, do not overlook the importance of making sure the entire jury can see documentary and physical evidence and that the evidence is shown for a sufficient amount of time for all to read and digest the importance of the evidence before moving on.

#### E. Jurors Feel a Sense of Pride in Serving

Although the juror questionnaire focused on attorney conduct during trial, another key theme emerged from the juror responses. Ninety-seven jurors—nearly one in five (19.2%)—reported feeling a sense of pride and/or enjoyment in serving on a federal jury, as well as a respect for the American judicial system. What is especially significant about these comments is that jurors made them completely unprompted. None of the questions in the questionnaire asked jurors to comment on their personal feelings about serving on a jury.

The responses indicate that jurors recognize that jury duty in the United States is both a privilege and a civic duty.<sup>31</sup> As one juror noted, “It was an experience that everyone should have as an American citizen. It has changed my view of how

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<sup>31</sup> “It is . . . the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.” 28 U.S.C. § 1861 (2012).



our justice [system] works in the most positive way.” Despite the colloquial and often cynical commentary from many about the inconvenience and annoyance of having to serve jury duty, the juror comments tell a different story. Jurors take their role seriously, enjoy their experience, and feel a sense of pride in serving on a jury, as reflected in the following comments:

- “it was a great experience”
- “the whole experience was interesting—and informative”
- “I was pleasantly surprised on how interesting the trial was. It was unexpected and refreshing.”
- “it was a pleasure to see how the system actually works vs. TV”
- “this was a great learning experience—seeing how our court system works”
- “it was my first time selected to a jury, so it was all new and interesting, and [it] makes me feel good to be a citizen of the U.S.”
- “good experience of my tax dollars in action”
- “Fascinating experience. It was really interesting and challenging”
- “Jury duty is one of the most interesting experiences I’ve had. It can be stressful, but in the end, I feel better for it.”
- “I appreciate the opportunity to have been able to serve on this jury. . . . I enjoyed working and deliberating” with my fellow jurors
- “a positive experience”
- “the trial was exciting and interesting”
- “Learned a lot! Interesting experience; glad I did it.”
- “very informative, interesting and enriching experience”
- “I learned a lot. Deliberation was complex and emotional at times. Thanks for the opportunity.”

The comments also reflect that jurors take pride in the system and in being an American:

- “Great American experience and privilege!”
- “This experience confirmed my understanding of the Federal Judicial System and was a great experience.”
- “Made me feel like I’m doing something good.”
- “So proud to be one of the juror[s], great experience.”

- “It was a great experience. I initially had a problem with it, but later found I was participating in something great and necessary.”

Jurors take their role seriously. Given the importance of their role in our judicial system, it is gratifying that they walk away with a sense of pride.

#### CONCLUSION

Jurors play a critical role in our legal system. Gaining insight into their likes and dislikes can help trial attorneys in their attempts to connect with jurors. At their core, the juror responses reveal that they expect attorneys to act professional and respectful to everyone in the courtroom and to present clear, organized, and relevant evidence and arguments without dramatics or aggression. Jurors do not like having their time wasted, so preparation is tantamount. Effective use of technology helps, as does organizing evidence into a cohesive timeline or other easy-to-follow summary. Notably, jurors take their role seriously, and they are proud to fulfill their civic duty.