



“Mea Culpa” in the Courtroom: Apology as a Trial Strategy

By Kevin Bouilly Ph.D.

In April of 2006, notable media mogul Hugh Hefner apologized to Jessica Alba for the unauthorized use of her photo, prompting the actress to halt pending legal action against Playboy magazine. Just a few years earlier a woman paralyzed in an accident associated with faulty tires on a well-known SUV settled her case for about one third of the \$100 million she originally sought. The shift occurred after defense attorneys offered the woman a bedside apology. Similar examples in legal as well as popular news abound, and the legal community has taken notice. Yet, many remain skeptical of apology's utility, partly because anecdotal evidence like the two stories above has been more available than sound research and evidence supporting apology's effectiveness, particularly its effectiveness in trial. Can apology really improve trial outcomes?

Listening to mock jurors as well as actual jurors confirms that jurors are familiar with apology and are highly attuned to its many forms. This should come as no surprise. Apologies occur constantly in everyday life, often in the simple form, “I’m sorry.” Recent media attention and empirical research also confirm that apology has a significant role in the legal system and litigators are right to pay attention. A proven strategy for preventing litigation, legal scholars also argue for apology's increased use in mediation, alternative dispute resolution, and settlement negotiations—and the attention continues to grow.¹

Apology's benefits can extend to trial as well. Defendants, and especially defendants with demonstrable overt responsibility, may benefit from apologizing at trial for the very same reasons apology prevents litigation in the first place. Apologetic communication can assuage hurt feelings, disarm anger

¹ Cohen, J.R. (1999). Advising clients to apologize. *Southern California Law Review*, 72, 1009-1069.

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and resentment, and lead to more positive evaluations by third party jurors.² Failure to achieve these effects can equate to real consequences for parties in litigation. However, the questions remain: Is apology a viable option in your next case? Is its impact beneficial more often than it is damaging? How can it be successfully incorporated into an effective trial message?

Strategic Communication Choices

A defendant alleged to have engaged in illegal behavior can employ innumerable strategic communication alternatives during the course of litigation. With regard to the expression of remorse, however, the effective choices are simple.

1. make no mention of apology or remorse
2. express a partial apology
3. express a full apology
4. express a lack of remorse

Most common are trial communication strategies lacking any mention of remorse or apology, in favor of an assertive defense. Indeed, most cases don't call for apologetic communication in any form. However, the strategic decision to apologize is becoming a more central part of litigation and may be more nuanced than once believed, particularly with regard to the distinction between a partial and full apology.

Social science research clearly defines the components comprising complete or "full" apologies in comparison to less complete "partial" apologies.³ A partial apology generally contains a single element, an expression of remorse, and commonly takes the form of "We're sorry..." An effective partial apology confines remarks to expressions of remorse rather than any expressions of blame, unlike alternative forms which often include excuses or deflective communication that can reduce sincerity by taking the form of "We're sorry, but..." Not surprisingly, jurors are keen to the differences.

A full apology incorporates the first and most critical element, an expression of remorse, accompanied by three additional elements. The second is an admission of responsibility for the relevant action. The third is an offer to repair any damage caused by the action, and fourth, a promise of reform to correct the behavior and prevent similar damage in the future. Research confirms that each of the four elements provides an independent and additive effect, proving the value of a full apology lies in its completeness.⁴ Consider the following shortcut to understanding the components of a full apology.

Jurors appreciate a full apology because it expresses a defendant's willingness to acknowledge wrongdoing and cede power to a victim or third party in exchange

A FULL APOLOGY: THE FOUR 'R's	
ELEMENT	EXEMPLARY STATEMENT
Remorse	The people of Acme Corporation want Mr. and Mrs. Jones to know they are extremely sorry, and you'll hear them express their remorse in this trial.
Responsibility	Acme Corporation takes full responsibility for what happened.
Repair	We want Mr. and Mrs. Jones to know we are willing to make this situation right and do whatever we can to remedy the damage they have experienced in this case.
Reform	Acme Corporation has already begun to implement changes in its policies, the supervision of its employees, and its procedures in order to prevent a similar outcome from happening in the future.

² See generally, Scher, S.J., & Darley, J.M. (1997). How effective are the things people say to apologize? Effects of the realization of the apology speech act. *Journal of Psycholinguistic Research*, 26, 127-140.

³ *Id.*

⁴ *Id.*

for vulnerability. The full apology empowers the victim and/or jurors delegated to sit in judgment. A full apology also responds to the critical relationship among severity of harm, responsibility and apology. As the severity of harm and the amount of responsibility increase, so does the requirement for an elaborate, sincere, and complete apology.

A handful of incomplete apology options are not included as effective litigation alternatives. The classic example of Exxon's "botched" apology is one example of an ineffective apology that jurors easily identify and harshly criticize.⁵ This failed apology expressed remorse but deflected any responsibility for the consequences that ensued. Such a failed apology has many cousins, all of which communicate the message that while your client is saying they are sorry for what happened, they don't believe it was their fault, they aren't interested in repairing

the damage, they aren't truly interested in fixing the problem, and by the way, they aren't really sorry. This communication is fundamentally different from partial

and full apologies because it adds the deflective or excusatory communication that fuels rather than reduces juror anger. Unfortunately, examples of companies and defendants offering these inept apologies are numerous and memorable, highlighting the critical importance of understanding the impact of apology and its effective forms.

The Impact of Apology

Empirical research and experience establish apologetic communication's effects across many social situations. Research proves apology leads to more positive judgments of transgressors and reduced anger and punishment levied against them.⁶ It works primarily because apology alters the social dynamics and influences how

victims and third parties evaluate transgressors and their identities.

However, litigators are most interested in whether or not apology recipients, and jurors in particular, perceive the differences in the various apology forms and how those forms can be maximized for a client's benefit. Jurors do perceive the differences between a trial argument offering an apology and one that does not, and make differing attributions based on the number and nature of components included in apologetic communication.⁷ Recent research finds that compared to defendants offering no apology at all, mock jurors perceive defendants offering a full apology as more sincere, more apologetic, more willing to compensate the plaintiff, more accepting of responsibility, and more willing to correct the situation.⁸

The expression of remorse included in a partial apology may be the most critical component, making partial apology a useful option in the right circumstances.

Third party mock jurors perceive defendants offering a full apology as having higher moral character, being more regretful, and taking greater care in the future, and have been

found to experience reduced anger, greater forgiveness and offer greater sympathy to the defendant.⁹ Full apologies can also lead to greater acceptance of settlement offers.¹⁰

The news isn't all in favor of a full apology, however. Jurors are also more likely to attribute greater responsibility to a defendant offering a full apology, supporting litigators' primary fear that apology increases liability.

Clearly, apology influences jurors' perceptions of a defendant. However, despite the perception that partial apologies have fewer benefits and a greater risk of backfire, a simple "We're sorry" without accepting responsibility, promising forbearance, or offering repair is not necessarily an ineffective alternative for defendants. Full apologies lead to greater perceptions of

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⁵ Lazare, A. (1995). Go ahead, say you're sorry. *Psychology Today*, 45.

⁶ Darby, B.W., & Schlenker, B.R. (1982). Children's reactions to transgressions: Effects of the actor's apology, reputation and remorse. *British Journal of Social Psychology*, 28, 353-364.

⁷ See generally, Scher, S.J., & Darley, J.M. (1997). How effective are the things people say to apologize? Effects of the realization of the apology speech act. *Journal of Psycholinguistic Research*, 26, 127-140.

⁸ Bouilly, K.R. (2005). "Mea Culpa" in the courtroom: Juror perceptions of defendant apology at trial. Unpublished dissertation. The University of Kansas.

⁹ Robbenolt, J.K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review*, 102(3).

¹⁰ *Id.*

defendant responsibility and partial apologies are generally no worse than offering no apology at all.^{11,12} There is very little support for the conclusion that a partial apology negatively impacts a defendant. Instead, the expression of remorse included in a partial apology may be the most critical component, making partial apology a useful option in the right circumstances.

However, while anecdotes persist there remains little empirical support that apology in any form affects a defendant's bottom line at trial, at least in the form of damage awards. While empirical evidence shows apology can increase perceptions of responsibility and liability, only theory and anecdotal experience support the view that apology can mitigate damages. In one study of corporate negligence, different forms of apology didn't impact any trial outcomes, including attributions of comparative negligence, economic damages, non-economic damages and punitive damages.¹³ Litigators should find this less as a reason to ignore apology and more a reason to consider the effective and strategic use of its specific forms.

Apologizing Is Not a Concession of Liability

Litigators often fear apologizing and admitting any responsibility is tantamount to giving up on liability in exchange for a hopeful break at the damages phase. Jury research and practical experience demonstrate jurors don't see it that way. Jurors are willing to more positively evaluate parties that take appropriate responsibility for actions related to the dispute—even if the scope of those actions is narrower than the behavior directly to legal liability. For instance, once a party has explained how it met its responsibilities in a multi-party contract, jurors are often pleasantly surprised to hear the same party admit responsibility or express remorse for less critical behavior and choices that could have been handled differently.

There is overwhelming evidence that refusing to apologize can lead to negative outcomes in the public sphere and in litigation.

When narrowed to the appropriate scope, admitting safe responsibility or expressing remorse can occur without admitting liability and pointing out what distinguishes responsibility from liability can be an effective way of gaining credibility without capitulating. It is clear that parties can benefit from owning their behavior and apology is one way of communicating remorse and responsibility, making it a useful communication alternative to consider when evaluating your trial strategy options.

Your Trial Message

Apologetic communication is nuanced and highly dependent on specific human circumstances. While there have been significant strides in the research, there are no hard and fast rules defining exactly how and when litigators should incorporate apology in the course of trial. However, there is overwhelming evidence that refusing to apologize can lead to negative outcomes in the public sphere and in litigation, and that an appropriate apology can lead to some powerful and positive results. Victims desire apologies and jurors are attuned

to the various forms apologies take, including the idiosyncrasies of insincere, poorly timed, or "botched" apologies. Confidently advise your clients that apology can be an effective strategy by knowing

the circumstances that cause victims and jurors to clamor for a particular response, and being mindful of the best possible time to provide that response.

Timing Is Critical

First, consider the critical importance of a well-timed apology. In some circumstances, apology at trial may be too late to affect a defendant's trial outcome. There is no doubt that timeliness is directly related to an apology's sincerity and jurors may perceive the decision to apologize on the eve of trial as "a settlement tactic, not

¹¹ Bouilly, K.R. (2005). "Mea Culpa" in the courtroom: Juror perceptions of defendant apology at trial. Unpublished dissertation. The University of Kansas.

¹² Robbennolt, J.K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review*, 102 (3).

¹³ Bouilly, K.R. (2005). "Mea Culpa" in the courtroom: Juror perceptions of defendant apology at trial. Unpublished dissertation. The University of Kansas.

a sincere expression of regret.¹⁴ An early and immediate apology can often defuse anger and prevent litigation, a positive benefit of reacting sincerely and immediately in the wake of a transgression. However, there is also some research suggesting an early apology combined with a trial apology can increase damage awards against apologetic defendants in medical malpractice suits.¹⁵

Jurors' perceptions of defendant behavior are critical. A pattern of repeated apologetic communication for a single incident may give jurors greater certainty of the defendant's overt responsibility and legal liability. A lack of specific apologetic communication leading up to trial may make jurors certain an apology at trial is nothing more than a manipulative strategy. Clearly, timing is critical. Organizations that engage in ongoing public communication find that timely, efficient and strategic apology can provide restored social status, public forgiveness, and a return to levels of social acceptance enjoyed before the transgression.¹⁶ It represents an opportunity for the organization to communicate its core values, demonstrate them to the jury-eligible public and manage lasting impressions. In other instances, a specific case may clearly warrant apology as a communication strategy at trial. In those instances, your message depends on additional factors like those discussed below that influence the impact of your apology options in front of a jury.

Utilize Your Options

Consider your potential apology options when the following evidentiary and injury conditions are present.¹⁷

1. A Partial Apology—Maximize its utility when the strength of the evidence is ambiguous and the injury severity is minor. Mock jurors' and actual jurors' comments confirm the belief that victims and jurors generally require a less complete apology when the injury is less severe.

An expression of remorse should not increase attributions of responsibility when injuries are minor and can often serve to influence perceptions of the defendant and improve identity evaluations. Your opening statement or closing argument should incorporate simple language expressing remorse.

2. A Full Apology—Maximize its utility when the strength of the evidence is clear and the injury severity is major. The risk of increasing perceived responsibility with a full apology is reduced because the evidence of responsibility is already strong. Instead, this situation allows you to put the benefits of apology in play without significantly increasing the risks. Recent juror interviews confirm the value of a full and sincere apology in such circumstances. After the wrongful death of a young man, jurors wanted to hear corporate witnesses express remorse and prove they were serious about preventing similar accidents in the future. Victims and jurors want acknowledgement in this scenario, and will likely perceive a partial apology or failed attempt at a full apology as evasive and incomplete.

*There is no doubt that
timeliness is directly related to
an apology's sincerity.*

3. An Assertive Defense

Without Apology—Clearly, there are many instances where this approach is warranted. Generally speaking, apology as part of an attorney's trial message remains somewhat rare. Avoiding apology may be critically important when the strength of evidence is ambiguous and the injury severity is major. Substantial damages exposure due to serious harm coupled with an apology that may increase liability is likely to be a scenario you want to avoid.



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¹⁴ Shuman, D.W. (2000). The role of apology in tort law. *Judicature*, 83(4), p.185.

¹⁵ Bornstein, B.H., Rung, L.M., & Miller, M.K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral Sciences and the Law*, 20, 393-409.

¹⁶ Benoit, W. (1995). Sears' repair of its auto service image: Image restoration discourse in the corporate sector, *Communication Studies*, 46(1-2), 89-105.

¹⁷ Robbenolt, J.K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review*, 102(3).

Maintaining Witness Gains: Bridging the Time Gap Between Witness Preparation and Testimony

By Carol Jaenicke, J.D., Ph.D.
and David Gordon, Ph. D.

For many potential witnesses, the idea of giving testimony evokes severe emotional states such as depression, anxiety and anger that can interfere with the ability to listen, process questions and respond effectively.¹ In addition, the unfamiliar court environment and being challenged by an adversarial attorney contribute to witnesses' struggling to communicate in a clear, consistent and confident manner.

In an ideal situation, the consultant's preparatory work with the witness would be conducted shortly before providing actual testimony, enabling him to more easily consolidate, recall and implement gains. In reality, due to factors such as court scheduling, the need to work with several witnesses, witness schedules, continuations, and other case constraints, there often is a gap between the time of preparing a witness and his testimony. Consequently, once the consultant has assisted the witness in identifying emotional factors and learning some basic techniques to feel more empowered and focused during testimony, it may be up to the attorney to reinforce these techniques. What can attorneys do to assure that progress made by the witness as a result of the consultant's work is maintained?

Generally, the goal of the consultant is to assure that the attorney understands how psychological issues impact a witness and his testimony and how tools the witness acquires during preparation can facilitate effective testimony. It is important that the consultant takes time to help the attorney to understand how different

aspects of a case may trigger intense feelings for a witness and impair effective communication. An attorney often responds to a witness with reassurances that if he is adequately prepared on the facts, he will "do fine" in court. While sincere, such reassurances often fail to reduce a witness' fears.

Turning to a severely anxious witness, it may be important to recognize when she associates her anxiety with the irrational belief of approaching catastrophe. For example, an individual who has never testified before may exhibit such behaviors as:

- lack of eye contact;
- shallow, rapid breathing;
- heart palpitations;
- sweating; and
- difficulty staying focused and recalling information.

The anxious individual typically may ruminate about aspects of the case where she feels less confident and irrationally make the assumption

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¹ Jaenicke, C. and Gordon, D., (2006). "Hitting the Wall: Witnesses with Psychological Barriers: *The Jury Expert*, 18 (4), April.

that she will fall apart and “fail” during testimony. It is the consultant’s goal to clarify this dynamic with the witness and attorney during preparation.

Preparation of the depressed witness poses similar challenges for the consultant and attorney. Depressed individuals typically are characterized by low energy, sadness, poor concentration and memory, cognitive confusion, and a sense of helplessness and hopelessness about themselves, their lives and the future. They tend to present “black and white thinking” whereby they believe everything they say or do will result in failure, rejection and loss. Frequently, attorneys recognize depression in their clients when the former begin to experience similar symptoms when they meet with the witness or think about the case. Consequently, attorneys often initially feel sympathy towards these witnesses, but then begin to feel increasingly frustrated, despite their reassurances, due to the witness’ entrenched pessimism. An important role for the consultant during preparation is to assess the severity and chronicity of depression. The consultant will then try to help the witness to focus on a more realistic picture of the case (“their story”). In addition, the consultant may help to challenge the depressive belief that the witness will “fail”, enabling him to accept the support and guidance provided by the attorney.

Finally, an angry witness can also create considerable difficulty for an attorney. Witnesses may be angry for a variety of reasons:

- indignation at the idea of having their authority and/or behavior challenged;
- resentment that their time and money are being wasted;
- beliefs that they have been wrongfully accused; and
- vulnerability because of potential loss and exposure.

Regardless of the cause, such individuals frequently lash out impulsively without fully listening to questions or suggestions.

During preparation, the consultant can assess and acknowledge factors contributing to the witness’ anger. A first step is to help the witness to recognize how angry reactions such as not listening fully to questions before responding (arguing with the attorney, cutting the attorney off) may negatively impact the testimony. The consultant can help the witness to channel his anger more constructively. Some strategies for countering angry feelings include:

- taking time to slow down when the witness recognizes he is angry;
- asking for a question to be repeated or clarified; and
- reminding the witness not to get provoked.

The consultant should help the attorney to understand how different aspects of a case may trigger intense feelings for a witness and impair effective communication.

Occasionally, an angry witness’ personality may clash with his attorney’s to the point where their relationship begins to suffer. At such times,

consultants should clarify the roles of the attorney and witness, and identify common goals to reestablish trust and a more collaborative working relationship.

Turning to the period of time between preparation and testimony, generally the primary goal of the attorney is to assist the witness to use the tools learned during preparation effectively. For many witnesses, preparation affords the opportunity to express feelings associated with the case more fully. Psychologically, this facilitates more focused attention, increased memory, energy and cooperation.

Between the time of witness preparation with the consultant and actual testifying, there are specific steps that an attorney may take to reinforce the witness’ gains. For any witness, these include the following “Three Rs”: Review, Reinforce and Remind.

- Review with them videotapes of the witness preparation session(s);

- Reinforce the use of tools such as relaxation and breathing techniques, useful visual imagery or appropriate metaphors, which help the witness to remain focused and attentive, and reduce the intensity of angry or anxious feelings (e.g., imagining oneself holding a beloved pet, breathing fresh mountain air);
- Remind a witness of agreed to common goals and shared interests;
- Remind a witness of anxious, idiosyncratic behaviors affecting credibility (e.g., poor eye contact, covering mouth with hand, finger tapping);
- Remind the witness that she has considerable control over the process of testifying (e.g. taking time before responding, asking for clarification or repetition of questions).

For many witnesses, preparation affords the opportunity to express feelings associated with the case more fully.

Specifically with anxious, depressed or angry witnesses, attorneys may employ the following strategies:

- For both anxious and depressed witnesses, attorneys can refocus on the irrational or negative beliefs elicited during preparation and reinforce more realistic expectations.
- With severely anxious or depressed witnesses, attorneys may want to suggest outside therapeutic referrals.
- With anxious and depressed witnesses, attorneys can review positive aspects of their witness' communication identified during preparation.
- With those witnesses with a history of trauma predating the litigation (or related to it), the attorney can acknowledge the feelings of panic or helplessness and then remind them of strengths, knowledge and skills.
- With angry witnesses, the attorney may remind them that they are working together towards a common goal.

Finally, it may be helpful to arrange for additional meetings with the consultant just prior to the date of testimony to reinforce skills and respond to any last minute concerns. By building on the information from the initial preparation sessions with the consultant and employing the above strategies, attorneys can effectively bridge the gap between preparation and testimony.

Jaenicke & Gordon is a litigation consulting firm offering a range of services based upon principles and methods from the social sciences. They develop techniques and strategies for trial preparation, settlement negotiations, and effective communication. Information about Jaenicke & Gordon is available at www.jaenickeandgordon.com, and they may be reached at (310) 820-6969. Carol Jaenicke may be reached via e-mail at cqj70@aol.com, and David Gordon may be reached at dqlosangeles@aol.com.

Article Ideas?

Is there a topic you would like to see covered in *The Jury Expert*? Please feel free to contact me at the e-mail address below with article ideas.

Thanks for reading *The Jury Expert*!



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Judges have assumed gruesome evidence can influence jury verdicts, but how is the influence manifested?¹

Ever since photographic and recorded evidence have become part of attorneys' trial notebooks, there has been the strong assumption, on the part of judges, that these materials can influence juries. What this article focuses on is what kind of influence do emotional, volatile or gruesome photographic or recorded pieces of evidence manifest? The article specifically offers the findings of a 2 x 3 study involving mock jurors experiencing various levels of gruesome and emotional photographic and verbal evidence.

Findings:

1. Gruesome and/or highly emotional verbal evidence did not influence mock juror emotional states, and had no impact on the outcome of cases. Recorded verbal evidence did not have a significant impact on jury influence.
2. Mock jurors who saw gruesome or disturbing photographs, compared to those who saw no photographs, reported significantly more intense emotional responses, including greater anger at the wrongful party.
3. Mean ratings of the weight of a party's evidence was significantly higher when a party presented photographic evidence, disturbing or not, compared to parties that did not offer any photographic evidence.

This article suggests that a party can enhance their case with a jury if they supply photographic evidence. The more disturbing the photographic evidence, the greater the possible influence.

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¹ Based on: Brights and Goodman-Delohunty (2006). "Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making." *Law and Human Behavior*, 30(2), April.

² Based on: Horowitz and Bordens (2002). "The Effects of Size, Evidence Complexity, and Note-taking on Jury Process and Performance in a Civil Trial." *Journal of Applied Psychology*, 87(1), February.

What effect do size, evidence complexity and note-taking have on the jury process and performance in a civil trial?²

A total of 567 jury-eligible people were assigned to six or twelve person juries. They viewed a videotaped trial that contained one plaintiff or four plaintiffs. Half of the juries were instructed to take notes. The other half were instructed to not take notes.

Findings:

1. Six person juries instructed not to take notes awarded multiple plaintiffs the highest compensation awards and gave the highest punitive damages compared to other juries.
2. Comparatively, the punitive awards of the six person juries were the most variable compared to the twelve person juries. In addition, there was more unpredictability of jury punitive awards in cases involving multiple plaintiffs, regardless of jury size.
3. Twelve person juries deliberated longer, recalled more probative information, and relied less on evaluate statements and nonprobative evidence than six person juries did.

In summary, the number of jurors and plaintiffs, the complexity of evidence and whether note-taking is allowed have true effects on jurors and resultant outcomes and size of compensation and punitive awards.

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The Shocking Case of the Jurors Who Compromised

By Anne Reed, J.D.

The jurors found zero dollars in lost sales and lost good will, but they decided to award attorney fees. To calculate attorney fees, they each estimated what they thought the plaintiffs had spent based on their own experience, and they averaged the number to reach a verdict of \$19,250,000.

So sayeth the three jurors who filed affidavits after a big verdict for Procter & Gamble against Amway distributors who spread a rumor that Procter & Gamble's logo was a satanic symbol.

Jury misconduct?

The jurors' affidavits are attached to the defendants' brief asking for an "immediate inquiry into possible jury misconduct." The jurors shouldn't have awarded attorney fees, the defendants argue, and they shouldn't have averaged their individual damage figures—an impermissible "quotient verdict"—for any purpose. Law.com picked up the story, including the defendants' allegation (unsupported by the jurors' affidavits so far as I can tell) that the jurors had counted the lawyers at the counsel table in calculating fees.

Since it came out, I've heard skilled lawyers talking about the case as an example of the jury system gone wrong. To me it's a better example of how thoroughly lawyers forget how our brains used to work before we were lawyers.

Quotient verdicts happen

If you've seen ten mock juries deliberate, you've probably seen some form of a quotient or compromise verdict. Why do they do it? Why wouldn't they?

Think about it. Outside the courtroom, we use quotient verdicts every day. When you split the difference with the used car salesman to reach a price, you've averaged your two positions to get a fair result: a quotient verdict. Every "split the difference" settlement agreement is a quotient verdict. When your kid wants to stay up 20 more minutes, you start at five, and you end up at 12

and a half, you've reached a quotient verdict. We've been taught since childhood that finding a midpoint among different positions is a fair and honorable way to reach agreement.

When the Procter & Gamble jurors got to court, nobody told them the rules had changed. The jury instructions in the case contain the following familiar (to us) substantive information on how to reach a verdict:

The verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a

**Quick
Courtroom
Tips**

**By
Bob Gerchen**

Think Starting Point

Some stories are best told in chronological order. Some are best told from the point of crisis, followed by exposition, such as the movie *21 Grams*. The film *House of Sand and Fog* began with denouement (the aftermath) and then proceeded to exposition and conflict. The movie *Memento* was told backward. It was a cool film, but it's probably not a great trial technique.

When creating your case story, ask yourself: If this were a movie, how would it open? What is Act I? Where is the best place to first engage the jurors—who know nothing about this case—into my story?

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view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors for the mere purpose of returning a unanimous verdict.

You and I read that instruction as prohibiting averaging, majority votes, and so on. But it doesn't say that. A smart, honest juror could easily decide that a time-honored consensus tool like averaging is a fair way to get unanimous agreement "without violence to individual judgment."

Attorney fees are "out of pocket costs," aren't they?

The same is true with attorney fees as damages.

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Trial lawyers know how many clients, even sophisticated business clients, think there must be a rule that the winning party in a trial gets its fees paid. Why wouldn't jurors believe that too? The Procter & Gamble jurors got two instructions telling them how to calculate damages, of which the entire substantive portion is:

Damages means the amount of money which will reasonably and fairly compensate Procter & Gamble for any losses you find were caused by the Defendants' false message. You should consider the following:

1. The loss of Procter & Gamble's goodwill, including injury to its general business reputation;
2. The lost profits that Procter & Gamble would have earned if the Defendants had not sent the false message. Lost profits are determined by estimating the amount of product sales that were lost and subtracting the amount of money that would have been spent making and selling the product;
3. The expenses of attempting to prevent customers from being deceived;
4. The cost of advertising or communications to consumers to correct confusion caused by the false representations;
5. The amount of its out-of-pocket expenses incurred to correct the Defendants' false statements; and
6. Any other factors that bear on Procter & Gamble's actual damages.

* * * *

Any damages you award must have a reasonable basis in the evidence. In determining damages, the difficulty or uncertainty in ascertaining or measuring the precise amount of any damages does not preclude recovery, and the jury should use its best judgment in determining the amount of such damages, if any, based upon the evidence. You may not, however, determine damages by speculation or conjecture.

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That doesn't say they can't award attorney fees; in fact, it specifically tells them to award the "out-of-pocket expenses incurred to correct the Defendants' false statements." And as for relying on their own experience to gauge hourly rates, the instructions said:

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from the facts you find have been proved, such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Take it to the street

If you don't believe me, try it yourself. Read those instructions, without emphasis, to any ten smart nonlawyers. Tell them Proctor & Gamble didn't prove lost sales, but that the defendants did spread the rumor and Proctor & Gamble had been litigating this case for more than a decade in its claimed effort to set the record straight.

Give your jurors copies of the instructions, and if they have questions, tell them they need to look at the instructions again. (If you want to add extra realism, wait a couple of hours before you tell them.) I'm guessing you'll find at least three who think they can award attorney fees, rely on their own experience to do it, and average their views on what a fair award should be.

There was a curse in the Utah Procter/Amway case, and it wasn't satanic; it was the Curse of Knowledge. That's the name given by authors Chip and Dan Heath, in their book *Made To Stick*,¹ to the way a knowledgeable speaker overestimates how well he is communicating to a listener who doesn't share her knowledge. To lawyers and judges, it's obvious that attorney fees aren't usually part of damages, that jurors' own experiences with attorney charges aren't evidence, and that jurors aren't supposed to average verdicts. It's so obvious that we forget to tell the jury.



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¹ Heath, C. and D. (2007). *Made To Stick*. New York: Random House.

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