

Communicating with Your Jury —

DWI Jury Selection as a Two-Way Street

By Steven Epstein

The type of communication essential to the jury selection process is interpersonal communication: the process by which people exchange information, feelings, and meaning through verbal and non-verbal messages. Simply put, it is face-to-face communication.



Communication is considered effective if it achieves the desired result, response, or reaction. We communicate with one another by sending and receiving both verbal and non-verbal messages. The process is not static. The process is not one directional. The process is interactive and for it to achieve its goal, feedback is essential. Feedback occurs when the receiver returns a message and allows the sender to measure how accurately the message has been received along with the receiver's reaction. In essence, monitoring feedback allows the sender to improve the communication process.

Feedback does not occur freely during a trial. It certainly would be unusual and not permitted for a juror during the examination of a witness to exclaim "you have to be kidding me" or something more subtle such as "I am sorry, but I do not understand what the witness just said," yet no one would doubt that allowing such feedback would improve the communication process. Likewise, no one would dispute that as lawyers we should strive to be better communicators. In most of the trial, the jury (the receiver of our message) must remain verbally static and mute, leaving only non-verbal communication for the sender of the message to interpret. It is only during the jury selection process that we are given the opportunity to encourage the jury to utilize verbal feedback to improve communication. Therefore, "*jury selection is the only moment in a trial when a lawyer effectively communicates with the jury.*" Encouraging and measur-

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ing feedback during the jury selection process can help us effectively communicate with jurors in a DWI case. This requires an examination of what topics the lawyer wishes to communicate with the jury about.

Before commencing jury selection in a DWI case it is important to recognize that the emotional reactions to DWI are powerful and long lasting. It was not until I selected my first jury in a DWI case that I realized my role as counsel for a defendant charged with DWI was to *overcome the presumption of guilt*. You can feel the reaction in the courtroom from jurors when the judge tells the jury for the first time that this is a criminal trial and the defendant is charged with DWI. You can sense an immediate change in the atmosphere. This, after all, is a natural reaction when you consider that the jury consists of members of your community and your community is constantly exposed to messages such as “Stop DWI” and “Drink. Drive. Go to Jail.” This emotional programming conditions jurors to presume guilt, not innocence.

Jury selection should be used as an opportunity to listen to jurors’ beliefs, concerns and emotional responses to the issues that are particular to DWI trials. We as lawyers are not ourselves programmed to listen, but in order to effectively encourage and measure feedback, listening is what we must aim to do. Counsel should strive to raise issues particular to DWI trials during jury selection and invite feedback from potential jurors.

You must acknowledge the DWI scare. Before you have a chance to say a meaningful word, the Judge and the

prosecutor have spoken to your potential jurors and have continued programming them for guilt. The next time you try a DWI case, count the number of times DWI, drunk driving or some other version of the phrase is used before you even address the jury. Some Judges may even say “this is a drunk driving case.” Each time these words are used they conjure up emotional reactions. You must allow the jurors to acknowledge that they are personally against drunk driving, as we all are. By allowing them to express those feelings you can

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then invite them to draw a distinction between their emotional reaction to the war against drunk driving and their role as a juror if selected in this trial. If they cannot express that distinction you do not want them as a juror.

You and the police officers disagree. If jurors are programmed to presume guilt, they will start by thinking you are the bad guy. You must acknowledge that you do not oppose the war on DWI; after all you are part of their community as well. Since you have already discussed with them that this trial is not about the war on DWI, you must next get them talking about what the dispute is truly about, a difference of opinion. DWI is a crime of opinion. The police have the opinion your client was intoxicated and you dis-

agree with that opinion. Invite the jurors to express the difference between the role of police in forming opinions of probable cause for an arrest and the role of a jury in determining proof beyond a reasonable doubt. Once again, if they cannot express that distinction you do not want them as a juror.

There is only one presumption and that is innocence. The reality that jurors will start by presuming your client is guilty may aggravate you.

It may fly in the face of all you were taught in law school, but jurors are programmed to think this by the barrage of public service announcements such as “drink, drive, go to jail.” The Judge will instruct the jury that the law requires them to presume innocence but such an instruction means nothing unless they can feel the emotional need to presume innocence in this case. Ask them why the presumption is so important. Perhaps more importantly ask them if the presumption is equally important when a person is accused of DWI. You may want to inquire of them whether, if they had to render a verdict now, what that verdict must be. Since no evidence was presented it must of course be not guilty. Does it matter that the charge is DWI?

Can they doubt a machine? It is important that during jury selection you address the prosecutor’s strongest evidence against your client. In many of your DWI trials the strongest evidence the prosecution has to offer is a breath or blood test demonstrating your client’s blood alcohol concentration. The jury will be instructed by the Judge that the device they used to test your client’s breath or blood is “a generally accepted instrument for determining blood

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alcohol content.” If they follow the law you are unlikely to get them to doubt the general reliability of the device. Since you cannot change the law, how you frame the question is important. First, remind them that there is only one presumption in a criminal trial and that is innocence. Therefore there is no presumption that the machine worked correctly when they tested your client. If there was we would not need juries. The same jury instruction we dread about the device being “generally accepted” further provides the jury “may” consider the results and that in doing so they “must” consider whether the device used was in good working order and whether the test was properly given. You must focus them on this case and this case alone and why the result is not reliable in this case. If you challenge the system you will lose. They are programmed to believe the system works and, even worse, the law instructs them that it does. You do not have to attack the entire system, just one case.

In those situations that you find yourself trying a case where your client refused the breath test, acknowledge that your client made the choice not to take the test. Do not refer to it as a refusal. The police told your client that the law allows a choice to be made. Find out if the jury can move past that issue since your client is not charged with the crime of refusing a test (though the prosecutor can charge it as a separate infraction they rarely do). Although the defendant has no obligation to put on a case, the jury instructions suggest it is helpful for the defendant to have an innocent explanation for the refusal; find one and start talking about it in jury selection. For example, if your client asked, but was unable to speak to counsel, ask them how they feel about the right to counsel and when in their

lives they have wanted to speak to an attorney. Why is that important to them?

Police witness testimony. The most common tool that is required in virtually every DWI case is the need to address the generalization that police testimony is credible. Ask the jury to talk about why generalizations are often wrong; equate treating police officers’ testimony as assumptively credible as a generalization. It is particularly important to get the potential jurors who have acknowledged a close relationship to those in law enforcement to discuss their feelings on this topic.

There are many other topics that must be considered during jury selection in a DWI trial and they are driven by the facts of your particular case. That is why there is no cookie cutter version of DWI jury selection notes. These include specific issues in breath testing, standardized field sobriety testing, how to handle an accident, blood testing, and expert witness testimony, just to name a few. Regardless of the topic, jury selection is not the time for leading questions or cross examination. Strive to stimulate feedback from jurors on these key issues and then most importantly listen to their responses. Jury selection is the only moment in a trial when a lawyer effectively communicates with the jury. Don’t miss the opportunity. **A**

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