

Intro:

This is Michael Cowen and welcome to Trial Lawyer Nation. You are the leader in the courtroom and you want the jury to be looking to you for the answers. When you figure out your theory, never deviate. You want the facts to be consistent, complete, and credible. The defense has no problem running out the clock. Delay is the friend of the defense. It's tough to grow a firm by trying to hold on and micromanage. You've got to front-load a simple structure for jurors to be able to hold onto. What types of creative things can we do as lawyers, even though we don't have a trial setting? Whatever you've got to do to make it real you've got to do to make it real, but the person who needs convincing is you. Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. And now, here's your host, noteworthy author, sought-after speaker, and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation, we have Jessica Brylo. Jessica Brylo is an attorney and a trial jury consultant out of Colorado.

Michael Cowen:

Jessica, how are you doing today?

Jessica Brylo:

Good. How are you, Michael?

Michael Cowen:

I'm doing great. Tell me a little bit about yourself. It's always interesting to hear how people got into the jury study side of this business.

Jessica Brylo:

Yeah. So I went to law school at Duke and they do a one-day thing on jury selection, which to me now is insane that it's a one-day class. But in that, they mentioned that there were people who helped with formulating cases, helping with jury selection, and that these people were called jury or trial consultants. I was fortunate enough that the one who was local to me when I was at Duke was David Ball.

Jessica Brylo:

I thought that I would get a JD and an MBA and that I would go into marketing and focus groups for products, and when I heard of this career path, I called David up on the phone and said, "You don't know who I am but I think I'm interested in what you do. Can we go to lunch?" Fortunately, he liked me enough at the lunch that he let me shadow him for three and a half years while I was there. I switched from an MBA then to a Master's in psychology to fit better with this career path.

Jessica Brylo:

So that's how I got into it and that's why I do only plaintiff's work. I do criminal defense. I'll do either side on a contract dispute or something. But that's how I landed in it and ended up studying while I was in law school, everybody's doing moot court or law journal, and I would be sitting at David's house helping

edit opening statements or coming to watch focus groups. He'd say, "Write up what you think about this and then let's meet with the client."

Jessica Brylo:

That's how I spent my law school time. I did my papers on juror decision-making. I watched jurors deliberate in the Arizona Jury Project, which was 1996 they allowed video into actual deliberation rooms of actual juries. So I got to watch a bunch of that, which only a handful of people in the nation have access to. That's how I got started.

Michael Cowen:

What a double blessing. First of all, to just start to luck into, "Well, let me just work with David Ball for a few years and watch all these focus group deliberations and watch how they tailor things." But then, the Arizona Jury Project, I didn't even know that existed. It's fascinating. So tell me a little bit more about that. What kind of cases? What did you learn?

Jessica Brylo:

All sorts of cases. A lot of typical rear-end collision type cases.

Jessica Brylo:

I think the original intent of it was to find out, we do mock juries and things like that, but how accurate are they? So to compare what the focus group jurors look like to what the actual jurors look like, you wouldn't be able to tell the difference, honestly. It is extremely similar. That gives you a good idea for how good the research is.

Jessica Brylo:

Some people were concerned that a camera in there might alter the research, but really the jurors never really mentioned it. Within the first five minutes they might mention the camera or give a hello to it and then they went about their way and forgot all about it. You know because sometimes they would say not nice things about the attorneys in the case or things that if they recognized that they were really being watched, they probably wouldn't have said. Yeah, so it was really interesting to watch all that and read the transcripts and be a part of it.

Michael Cowen:

I bet. What are some of the things you learned that are useful for our cases from watching all that video and all the other stuff you've done? It's a broad question, I know.

Jessica Brylo:

Yeah. Sometimes you want to yell at the screen, which happens with mock juries too, and get them back on track. But juries as a whole do a really good job. You see that people really do want to do their duty. It's rare to have somebody in there who is really not trying to do their best job. They often arrive at a logical conclusion, but the way they get there is sometimes a little serpentine.

Jessica Brylo:

So you learn that their decision making doesn't always follow the way that you think. When you're portraying the case and you think you set out A, B, and C, and this is how the jurors are going to follow

the path, they don't, because they're not attorneys and they're not thinking about it the same way that you are. You hear a lot of discussion about their own experiences and past things that have happened to them and how that relates to the case and you see how all of that unconscious part of that forms their decision making process.

Jessica Brylo:

You see when you're in court and you think, oh, here's the law, and we're going to give the jurors the law and then as long as I explain it then they're going to follow it. They're going to fit the facts right in there. But you forget that they're not blank slates, which courts and judges like to think that they are, but they're just not. So the way that they're processing the facts as you're going through the case is changing the way that they are going to then see the case and then apply it to those laws. If they even understand the law to begin with, which is sometimes a big problem too.

Jessica Brylo:

So you get to see a lot of how that process unfolds.

Michael Cowen:

Yeah. I've learned I cannot watch live focus group deliberations. I have to let someone else watch it. I can watch it once I know what the result is, but because of all the meandering and rabbit trails they go down, it just drives me nuts and I can't take it. So I'll do what I need to do and then I'll leave and then I'll go watch the next day or I'll wait for the debriefing and see if I even need to watch.

Michael Cowen:

I'd be a better person. It's just like talking to jurors after a verdict. If I don't do that well, I have trouble talking to them. I just don't want to.

Jessica Brylo:

Right.

Michael Cowen:

I just don't want to. I know it's wrong, but I just don't have it in me. I need someone else to do that for me because I'm just not that self actualized of a person that I can separate the hurt I just felt from going and trying to make the learning experience.

Jessica Brylo:

Yeah. Yeah. It's hard when you're in it.

Michael Cowen:

So one thing you said, you've looked at a lot of just the regular rear end collisions. No big corporation, no big bad guy, no catastrophic injury. Are there things that plaintiffs can do to get a decent result in those cases from what you've seen in all this jury decision making?

Jessica Brylo:

Yeah. I mean, it always depends on the facts, and every case is different, even though you might think that they're very similar. Every plaintiff is different, and that matters too. How likable your client is and the specific facts of the case.

Jessica Brylo:

But some of the things that help are even just the words that you use. I hear all the time attorneys use the word accident. An accident to people is something that happens without anybody at fault. Accidents happen every day. You spill your milk on the counter, that's an accident. If you have kids, they're always saying it was an accident. "Mom, I didn't mean to. It was an accident." So moving from that to a wreck or a collision. You don't want to say wreck if it's really smaller speeds, but even collision, something like that that portrays that somebody had a part in it.

Michael Cowen:

Yeah.

Jessica Brylo:

You never want to say a low speed collision or a low speed accident. You want to portray it as not a lot of visible property damage. Because we all know you can't judge a book by its cover and so you can talk to jurors about that in voir dire, and sometimes when there's not a lot of damage to the vehicle, that means that all that force went straight over to your plaintiff, right?

Michael Cowen:

Yeah.

Jessica Brylo:

So I think even just being careful with the words that we use can make a big difference in those types of cases.

Michael Cowen:

Absolutely. Yeah, we have a swear jar type thing. We're not allowed to say accident. We're not allowed to call the defendant by their name unless we have to. Definitely not by their first name. Just different ways we word things, we try to do that too.

Michael Cowen:

Now, one thing, now, you sent me some notes to get ready and so I want to just ask you some questions about them. You said you've learned that jury decision making is mostly unconscious?

Jessica Brylo:

Correct. So when people hear a fact, they don't just hear the fact in isolation. In everyday life, even. Not even in court cases, when you're just living your everyday life, you hear a fact and it gets brought into your brain and filtered through all of your life experiences as to how you feel about that fact or what you even remember about it or how you remember it. So often you'll see jurors deliberating and they all heard the same facts and they have completely different memories of what the facts are or how they put all the pieces together. That's because of their life experiences.

Jessica Brylo:

So unconsciously, the jurors are filtering all that information as it comes in. If the story that you're trying to tell fits with something that they can get on board with based on their beliefs and is consistent with that, then they will accept in that fact and fit it into that framework. But if it's something that goes against their current beliefs, they will either change the fact in their minds and remember it a different way that makes it consistent, or they will throw it out and forget about it all together and focus on the things that do fit into that framework.

Jessica Brylo:

So you have to come up with a story that resonates with jurors based on what their attitudes and beliefs are. What you have to realize about that, too, is each fact that comes in, the earlier facts are important because it sets up what that framework is for them. So if you aren't winning out of the gate, if you mess up on your voir dire and Your opening and think, "Oh well, I'll catch up later," it doesn't work that way because the facts that come in are already filtered by the previous facts.

Jessica Brylo:

So if they're starting to be on your side in voir dire and opening, then facts that come in that are against you, they'll start to throw them out or alter them. But if they're already leaning against you, then the facts that are good for you they're going to do that to. So you have to be really careful to set yourself up right from the beginning, because it's really hard to turn it around when you get further into the case.

Michael Cowen:

Yeah, that's something I've struggled with. Let's say jury selection. I know how to get a bunch of people off for cause. You ask the right questions, people say they don't want to give money for pain suffering, that they don't like the burden of proof. Maybe if there's punitive advantage allegations, they don't like punitives.

Michael Cowen:

But sometimes when you do that, the discussion gets to the point where it becomes like, "Well, yeah, your case is a real piece of crap, no wonder you need it," you don't have enough positive in there and then they start viewing everything else as a negative. So even though you got people off for cause, the people that are left are already feeling yucky about your case. Are there things we can do that can both get people off for cause and keep it more positive?

Jessica Brylo:

Yeah. So voir dire and many openings are really tricky in that way. Right? Because you don't want to set yourself up where jurors think that the case is horrible. But you also don't want to make your case too strong because then you end up giving jurors food to feed back to you to get off for cause that are you're good jurors. You know? So you want to find those bad ones. You don't want to pump up your case too much.

Jessica Brylo:

I think there's a balance between asking useful questions. I hate when attorneys, they go in there and they just want to ask leading questions that the jurors can see through it. Right? They know that you are trying to push your propaganda onto them like a trial attorney. So you can't do that because you lose

your credibility with them very early on and it's not doing you any good because you're trying to push your case in a way that they're going to disbelieve it anyway because they don't like the way you're doing it. So you have to set up for the bad facts, but asking in a way that says that there's more coming. You know?

Jessica Brylo:

"So if you heard this really bad fact about my client, how many of you feel like regardless of what the rest of the evidence, facts, or the law say, that case is closed, we should just go home?" So you're setting them up to think, "Okay, well I guess he's hinting at the fact that there's more information that applies to this than what they're asking me about right now."

Jessica Brylo:

You can set up themes. So you can ask people, if it's a rules type of case, and you can ask them in voir dire about what rules do you follow in your home or in your work and why do you have those? So hinting at it in useful ways I think is okay. Otherwise, I think you do have to expect that jurors are going to wait. They will wait for your opening for most of your facts. You just have to set them up for the fact that everything you're talking about in voir dire is out of context. That there's things that are going to be put in context once they get the facts, but we're not at that point in trial where I can give you those facts yet.

Michael Cowen:

You said that facts and the story have to resonate with the jurors' preexisting attitudes and beliefs because everything gets filtered through that. How do we figure out what the key attitudes and beliefs that they have in the limited amount of time for voir dire and how do we figure out how to use that?

Jessica Brylo:

It depends sort of on the value of the case. That's where focus groups and mock trials come in really handy, of course, because you can find out what beliefs jurors are generally filtering the facts through. Some things are decently obvious in specific cases in terms of jurors hate insurance companies in general, jurors like doctors and trust them. There's beliefs that are not across the board, there are some jurors who don't like doctors, and so you can ask about those and you know that those are going to come up.

Jessica Brylo:

Sometimes it takes a trained eye to see what those issues are going to be in the case, but oftentimes you can look at it and even talk to people. If you can't do a normal focus group, go talk to some neighbors and find out where they seem to get hung up on it. Then you have to craft questions for voir dire that deal with that so you can find out where they stand.

Michael Cowen:

Yeah. I think one that really hurt me in my last trial, and I don't know what I could have done about it, but 80% of the jurors had been in a crash. All of them who had been in a crash had been in a worse crash than the one we were there and not one of them had been injured. They all said they could keep an open mind, but I think that may have had some bearing into how bad they thought the injuries were.

Michael Cowen:

I don't know how much... I mean, how much can you say, like, well someone's had a back injury before, they're going to be better or worse? I mean, some people say, well, they're better because they understand it. Some people say they're worse because they didn't get any money for it. Is there any way to predict that stuff?

Jessica Brylo:

Well, there's no real way to predict it other than you can ask them how they feel about it. But sometimes jurors don't really know how they feel and so they'll give you an answer and it's not always trustworthy. Not because they're trying to lie to you, it's just they don't know how they're going to feel and people don't know their own biases.

Jessica Brylo:

So I think on the whole, I tend to strike jurors who have similar experiences in part because I guess they feel like, "I didn't get any money for it," but also because they live with it every day and so that becomes normal to them. "I've got back pain every day. I get on with my life. It's normal to me." Whereas somebody who has never experienced really any pain might think, "Oh, that's horrible. I don't know what I would do with that."

Jessica Brylo:

So you could get somebody who has the same thing who could be a great juror for you, but it's a risk. So if that's a more of a leadership type of person, persuasive, nice, outgoing, usually you don't want to risk it on that type of person.

Michael Cowen:

Uh-huh. What do you do to try to see who's going to be the potential leaders and who are more valuable if they're on your side, but more dangerous if they're not, versus who are the go along, follower type people?

Jessica Brylo:

Yeah. I think some of it you can tell by how they act injury selection. You can watch them as they're walking in. Does somebody hold open the door for other people? Do they wait until others are seated before they sit down? Are they watching and monitoring the room even though they're not in charge of it? You can tell by their confidence and when they speak.

Jessica Brylo:

But there's a difference between somebody who speaks a lot and somebody who's a leader. So we see all the time in mock trials that there are people who are speaking a lot, but are more obnoxious and have opinions that most people don't follow, and jurors usually just toss them to the side. So you don't want to think that anybody who talks a lot is necessarily a leader.

Jessica Brylo:

But if they seem like they are friendly and likable and outgoing and smart or have a specific link to your case, if they have background that makes them an expertise in your case, they can become the leader.

Just even if they're not more outgoing, jurors will turn to them to ask their opinions on the facts of the case.

Jessica Brylo:

So those are the things that you usually want to look for. Just don't get swayed by somebody who's necessarily a big talker.

Michael Cowen:

We talked before this podcast some and one thing you brought up was case framing. What is case framing?

Jessica Brylo:

Yeah. So it's the way in which you want to portray the case. There's different ways you can tell a story and it depends on who you want to start with and where does the story evolve to? What are you focused on within that story? When does your plaintiff get introduced into the story? What rules do we want to focus on? What facts do we need to bring up, but when do we bring them up?

Jessica Brylo:

So if you tell a story and you start with my client got in the car and she was just minding her own business and driving to work. That same story, even though the collision is the same, told from the perspective of the defendant gets in the car, it's at this time in the morning, the roads are wet, wherever the focus is at first is what jurors can pay attention to.

Jessica Brylo:

So the facts that you give them is all they have to pay attention to. If your client is up front and you're telling the story of your client, then jurors are focused on your client and they're already thinking, "Did she take a path that she didn't know? Was she drinking coffee while she was driving? Was she texting while she was there?" All these things that aren't even in the evidence is what they're focused on.

Jessica Brylo:

So part of it is figuring out how to tell the story and part of it is figuring out what the story even is. For things like a med mal case, they like to focus on the bad health of your client. So you obviously have to deal with any preexisting conditions and things like that, but when do you bring that up? If you do it early, then that's what jurors focus on and all the other facts get filtered through, well, she was already in bad shape.

Michael Cowen:

Yeah.

Jessica Brylo:

Whereas if you focus on doctors are here to help people, there's no sign on the door that says, "If you are overweight and a smoker, we can't treat you." They're there often for people who are having trouble with something or have a lot of preexisting conditions and then have compounding issues causing more issues. That's why we have doctors. If everyone was in perfect health, we don't need

them. So to frame it that way first and then say, "Okay, so she had all these other things and here's why that doesn't matter. Let me put those things into context for you."

Jessica Brylo:

Same with a police misconduct case, right? They like to blame the criminal. The police had to do what they did because there was a criminal here and they're a bad person. Yes, but there are protocols in place because police act within normal society. If they are shooting at somebody through a car, there are pedestrians on the other side of that car. It doesn't matter that there's a criminal in there, they have certain rules that they follow because there is a criminal in there.

Jessica Brylo:

So framing is just figuring out how to tell the most persuasive story, what facts you want to focus on, and what order you need to tell them in.

Cowen Rodriguez Peacock promo:

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Announcer:

Now, back to the show.

Michael Cowen:

You talked some about when your telling a story, don't focus on the plaintiff. Are you talking about the order or are you talking about more than that?

Jessica Brylo:

Somewhat more than that. So the order definitely matters in terms of when you tell the story, but it used to be, maybe 20 something years ago at this point, before all the tort reform stuff hit you could go into the courtroom and say, "Here's my client. She was really injured. She's a really good person. Please compensate her for what she's gone through and what's been taken from her." That doesn't work as well anymore. It used to work okay. I'm sure it still would've been better to present it this other way, but it worked okay. But now you walk into a room where jurors are very skeptical of your claims. You're exaggerating everything you ask for. The client might be lying about their injuries. So even if you have a likable client, it's not helpful to focus the case on your client. If you have an unlikable client, you definitely don't want the case to be about your client.

Jessica Brylo:

So the framing needs to be centered around what the defendant did wrong, and if possible, even what the whole industry is doing wrong. You want to get it as big as possible so that the danger and the problems that are created from this action is systemic. That way, jurors see themselves being targets of it at some point.

Jessica Brylo:

So when you focus on that and your client is just one of many possible people who got injured by this, then jurors are a lot more likely to buy into it and give you a lot more money because they see that it applies to them. If it just applies to your client, then you need people who are very giving people. But everybody's going to give more when it protects them. Whether they're liberals or conservatives or giving people or not, if someone's coming at you with a gun, you're saving yourself before you save everybody else, right?

Michael Cowen:

Right.

Jessica Brylo:

So the case is stronger when you can focus on other things rather than just your client.

Michael Cowen:

Let's say you're in an ordinary car wreck case, some of our trucking cases, we're able to get into that. Because you have companies that are systematically putting drivers on the road for too many hours, looking the other way or even telling them how to fudge the electronic logs. You'll see them go to sleep in one city and suddenly they wake up supposed eight hours away with all the logging devices have been disconnected. But on a regular car wreck, we used to have the 75 year old lady that maybe shouldn't be driving anymore but she just hit the back of someone's car at a stop sign because she just didn't notice them or didn't hit the brake quick enough. Is there a way to make those cases about the jury?

Jessica Brylo:

Yeah. So then you focus on the extent of what the injuries could have been. So if your client has disc issues from it, you don't want to vilify the 75 year old woman who's driving. It's not about her, it's about the fact that every time we get on the road, we are implicitly making a contract with other drivers on the road to be safe and to take care of each other while we're out there and do what we're supposed to do. So whether she meant to do it or not, obviously she didn't mean to do it, but nevertheless she's caused this harm.

Jessica Brylo:

So the harm could have been, rather than just the injuries to your client, it could have been that she ran over a child. It could be that she hit a different pedestrian. So this isn't about punishing her, this is about the fact that this was something dangerous and we don't want to have community standards that this is okay. So it's hard to give up driving if you're older, but what's the alternative? Do we want to allow people to do this and then say, "Well, I'm sorry, it was a mistake and an accident." Well, what do we do with the people that are hurt?

Jessica Brylo:

So you take a softer approach, but you have to show that the danger is more than just, oh, a fender bender, that this is really a problem.

Michael Cowen:

One other thing that when we talked before to prepare for it is something that's one of my pet peeves. We'll be in litigation for two, three years sometimes, and the defense has come up with all these

ridiculous offensive, to us, defenses and theories, and then the lawyers that I've worked with, especially some of our co-counsels, they want to make the case about how bad the defendant is for coming up with these things and how their defenses are all wrong. I've always thought, no, we need to play in our field and not their field. I think I noticed you said we should focus on why our version of the facts are true, not playing the defendant's game. Why is that? Can you tell us a little more about that?

Jessica Brylo:

So I think if it's outrageous and the jurors get to know a lot of the background information about how the defense has been stringing you along or lying about things, then I do think you can focus on it because then you're focusing on their lies, which means that anything they present is not trustworthy. So I think that's a different category.

Jessica Brylo:

But in general, they want to throw everything up against the wall to see what sticks. So you can't spend your whole time batting down every single one of those things that comes at you. Then your whole case becomes defensive. So I think you have to focus on the actual facts of your case.

Jessica Brylo:

So if you have a insurance bad faith case, for example, often they want to focus on what happened in the accident and who got hurt and why they got hurt and why the insurance got involved. But none of that is relevant. At the point that the insurance got involved, let's focus on whether they followed their policies and their procedures and whether they put the interest of their client above their own. That's where we need to focus.

Jessica Brylo:

So we can talk about what happened in the wreck, and we need to talk about that, but let's not focus on that. Every time they bring it up, it's just a red herring. They're putting things out of context, and so let's always bring things back into context. This is what we're focused on. So you can't play a defensive game all the time. You need to focus on your best facts, focus on where you need the jurors to be. Don't ignore what they're saying, but keep reminding the jurors that, okay, let's address that point, and let's also remind you that it's irrelevant. They're playing games with you.

Michael Cowen:

I think a lot has to do with the order of it. I mean, I think we need to tell our story first and then get into, by the way, they're coming up with these things and this is why they're ridiculous. Or this is why we looked at this and this is why you don't have to, why it doesn't get in the way.

Jessica Brylo:

Yeah. Keith Mitnick, he's got to thing about in context versus out of context. So if you pick up any of Keith's stuff, it's phenomenal because he tells jurors early on, "You're going to hear a lot of things from the defense, but I'm going to put them in context for you. It's the same as taking a photograph and zooming in on one little thing. When you zoom back out and you can see what the actual whole picture is, it's very different. So this is what they're going to tell you, but I'm going to put all this in context for you." I think that's really helpful in those cases.

Michael Cowen:

Absolutely. Let's talk a little bit more about jury selection. I've heard so many. There's different kinds. I've heard exclusionary, tribe building, inclusionary, I've heard all these different things. What do you think the main purpose is of jury selection?

Jessica Brylo:

Yeah, so people do, and all these are great trial attorneys who have different theories on it. So I'm not going to say any one of them is wrong, but I think different things work for different people. If you're Nick Raleigh, I think it works great to form a relationship with the jurors as your primary purpose. My primary purpose in general for people is to figure out who the jurors are that we want off. Secondary to that is both forming a connection with the jurors and pushing the themes of your case to the degree that it's reasonable and helps you to do so. I probably put the themes last in that. I think you need to really form a connection with the jurors and you need to find out who you need to get off.

Michael Cowen:

So how do we find out who we need to get off?

Jessica Brylo:

Some of it is asking the right questions. Often I go into jury selection with attorneys and the questions that they're going to ask are not helpful. You have to have questions that will elicit honest answers, get people to open up, to really talk. You have to be good at listening. You have to be good at moderating a group. This person thought about that and who else agrees with that? Miss X, do you disagree with that in any way? Sort of get a discussion going. I think without that, you don't learn a whole lot.

Jessica Brylo:

A lot of follow up. Tell me more about that. Explain to me your thinking on that.

Jessica Brylo:

I think being really honest and upfront with the facts of your case. I think a lot of attorneys are really scared going into voir dire to really put their worst facts out there because they think that it will sort of taint the case. But when do you want it to come up? You can't have it come up for the first time in trial when you've already selected the jury. This is your time to talk about those things and get those people off and then have jurors left that are okay with those facts. So you have to just be really honest about it going in order to get honest and helpful answers from them.

Michael Cowen:

The second purpose is, you said, forming a connection. What can we do to help form a connection with jurors?

Jessica Brylo:

Yeah. Listening to them. Talking less. I see all the time attorneys will walk up there and as the jurors talking they're taking notes or they're turning around to walk back toward a podium. Somebody turns their back on you while you're talking, you know that they're not really paying attention to you and valuing what you're saying.

Jessica Brylo:

Thanking them for their bad responses, their responses that you don't like so much that we need to know. Respecting that they have those opinions. I really respect that you have that opinion. I appreciate that you've brought it forth and been so honest with me.

Jessica Brylo:

Not treating them differently if you feel like they're a bad juror for you versus if they're a good juror for you. They're all people, they're all humans, they just might not be right for this particular case and they might need to be serving on a different case somewhere. They might be a great juror for you on a different case.

Jessica Brylo:

So I think just being respectful of them and being conscious of how you're interacting and listening to them is what you need to do to form a connection.

Michael Cowen:

What are some mistakes you see lawyers make when they're doing jury selection?

Jessica Brylo:

So talking too much. Talking about themselves. I think often attorneys get up and they want to tell a story about themselves. They do it in the context of trying to be helpful. They're trying to say I'm going to set you up for this question by giving you my background on it, or they're trying to ingratiate themselves to somebody. "Oh, I was in the army too and I served."

Jessica Brylo:

But jurors, they are watching their clocks. They miss their kids. They're wondering when they're going to get out. They're worried about their work. So they don't care about you right now. Every moment that you try to make it about you, they're just sort of angry that you're making the process take longer. So stick to what is helpful for the case and getting to know them and being conscious of that for them.

Jessica Brylo:

Then I think a lot of attorneys will ask questions like, would you have a problem with this, or do you have a problem with that? I don't like asking if you have a problem with something. Because problem, it ends up feeling like you are saying something negative about the juror themselves, that they're being unreasonable that they would have this problem with something. It's just got this really negative connotation to it. So instead, say things like how many of you feel this, or would it be harder for you to do X, Y, or Z, to follow this law or to hear these facts and be neutral in the decision?

Jessica Brylo:

So I think using words like neutral. A lot of people, trying to lock down cause challenges, can you be fair and unbiased, or do you feel like that's going to be hard? Well, every juror, even if they have biases, feel like they can put them aside and be fair and unbiased. So asking that actually hurts your cause challenge. You've got to go about a different way of are we starting out a little bit behind? Would I have to catch up in the race? Is this a really strong feeling for you that would be hard for you to set aside and

therefore you wouldn't want to be in the position of my client if we had you as a juror and you were in my client's position?

Michael Cowen:

Yeah.

Jessica Brylo:

You have to get about it a different way. Because as soon as you say, "Well, you can't be fair." "Oh, no, I can be fair." So I think those are things that often attorneys do that they're trying to do the right thing, but it's just not the right phrasing and words to do it.

Michael Cowen:

Yeah. I think the problem is I remember before I started law school, I was brought to dinner with a man, I had a very different outlook on life back then, with one of the founders of a group called Citizens Against Wall Street Abuse, one of the very first tort reform organizations. He thought he was being very fair and he didn't feel like he was biased at all. This is the way he saw the world. But I certainly wouldn't want them on a jury. Very pleasant man to have dinner with, but I would not want them on my jury.

Jessica Brylo:

Exactly. I mean, everyone thinks they're fair, right? I mean, we have this political divide in the country. Do you think one side thinks that they're unfair? I mean, of course not. Everyone thinks that they're doing what's right and what's fair. That's just what they believe.

Michael Cowen:

Yeah, I think that's so important, too, to go in there with that mindset. Because I think I see too many people when they hear certain things, you could see the lawyer pushing the juror as an other, as an I don't like you, and I don't think you ever want to be on that side of that divide and have the jurors have to pick sides between you and the fellow juror.

Michael Cowen:

I mean, I've had a lot of debate with other lawyers about this. People that want to talk about something in their jury selection trying to identify good or bad jurors, talking about something political, like Trump or COVID response. What's your thought on that?

Jessica Brylo:

I stay away from those. I mean, what you want to do is unify this group. You don't want people bickering. If you're the defense, you might want to do it to get people to be against each other. But you need a group of people who is going to respect each other and work together to get to either a unanimous verdict or a verdict that's at least three quarters or whatever the rule is in your state. So you don't want people starting out disliking each other based on things like that.

Michael Cowen:

Another thing, you've done a lot of focus group work, but you actually wrote something on how to do focus groups yourself, isn't that right?

Jessica Brylo:

Correct. I have. It's a free ebook basically about how to do your own focus groups. I had a lot of people coming to me wanting help and they would say, "I ran some focus groups and can you help me with this?" Because a lot of people don't have the budget to hire a consultant to do that part of it. So they're trying to all do it themselves, which is wonderful, I think. The more attorneys do their own focus groups the better, but you have to do it in the right way. Otherwise, it ends up being misleading for you.

Jessica Brylo:

So when I look at how they've been doing it or how the jurors were recruited or how they presented the evidence, then I have to say we can't really rely on this because it could be useful, but I don't know, it could be something that it's going to throw us way off track so I can't rely on that research. So I'm trying to get people to at least if they're going to do their own research to do it in a way that's not going to compromise the validity of the results.

Jessica Brylo:

So I wrote this ebook as a good, quick read, and it's a reference guide for how to recruit, how to choose the type of focus group you want, how to write the scripts, things to watch out for to set yourself up for success.

Michael Cowen:

If somebody wanted to get a copy of that book, how would they be able to go about doing that, and who is allowed to get a copy of that book, too?

Jessica Brylo:

Yeah. So it's out in the market, so it could get to anybody, but I'm handing it out to plaintiff's attorneys. You can send me an email if you want to get a copy of it. You're free to share it on trial attorney listservs with other trial attorneys like that on the plaintiff's side. As long as you're sharing the whole book. I don't want segments out of it. Not for my own benefit, but it can be misleading if you don't have the whole book together.

Jessica Brylo:

So you can email me. My email is jessica@trialdynamics.net.

Michael Cowen:

That'll be in the show notes as well, jessica@trialdynamics.net. Just go hit her up with an email if you want to try to get a copy of it. I have it, it's very useful. We've been doing our own for quite a while. We also bring in, on bigger cases that can support it, we bring someone else in, because frankly you all are professionals for a reason and you've done it more than we have. It's hard.

Jessica Brylo:

Right.

Michael Cowen:

It's hard to keep the neutral frame of mind when you're talking to somebody about your own case. Recruiting is hard and getting harder now that people don't answer their phones. It's harder to get people to respond to stuff. But for those that are trying to do it themselves or trying to decide whether I want to do it myself or get a consultant, what are some of the things that, let's start with recruiting, that you've seen where people get it wrong in the focus group recruiting?

Jessica Brylo:

Yeah. Recruiting is hard. I mean, professional recruiters charge a decent amount per juror for a reason. I used to do my own recruiting and doing it right is not easy. You need to get a good cross section of the community. It needs to be in the trial venue. Or if you have a really small venue and you can't try it there, then a comparable venue to that.

Jessica Brylo:

If you're calling up Robert Half Legal, that's not going to be representative of your jury pool. When Craigslist was big, which now it's not as active because of all the Facebook stuff, recruiting off of Craigslist got a lot of stay at home moms, college students. That's not your jury pool either.

Jessica Brylo:

So doing recruiting right requires getting into a lot of different spaces to pull people from. Posting in church areas or coffee shops, posting on Facebook, buy-sell trade groups, and doing it in a way that your post doesn't get deleted, which sometimes it does. So it's tough, but you've got to get people that aren't just in one area or another. You have to get a good cross section of the community.

Michael Cowen:

Yeah. One thing I like about Facebook is you can really target your ads. Maybe, if you pay and promote them to people in your county with the demographics. The only thing, I think it's not as good as it was just because there is starting to get aged. People my age, everyone uses Facebook. No one my son's age uses Facebook. He's 17. So I think with some of the younger jurors, Facebook, they don't want to be on Facebook because they don't want their mom and dad seeing all their stuff and bothering them.

Jessica Brylo:

Yeah. Yeah, then you have to figure out TikTok and all this other stuff, which I'm definitely not up to speed on all of those.

Michael Cowen:

I'm not either. I'm actually looking for somebody to help get me up to speed on that stuff. We're looking for a social media person at the firm just because I have to admit I'm an old white guy in my fifties and a man's got to know his limitations. Accurate thinking is very important.

Jessica Brylo:

Yeah.

Michael Cowen:

So, yeah. So you need to get, like you said, a good representative sample demographically, geographically, the same types of attitudes and people you're going to actually get showing up for jury

duty. They used to, and now they've gotten more into jury privacy, we used to be able to just get the list of the people that had been called for jury duty in the three months before and then recruit whoever from that group that wasn't on a similar trial. But now most of the court clerks won't give up that info anymore. That made it easier.

Jessica Brylo:

Yeah, those are super helpful if you can get them, but they're hard to get.

Michael Cowen:

How about actually doing the focus groups? What are some of the things that people do that skew the results?

Jessica Brylo:

Yeah. Even through the recruiting and where they show up, you have to make sure that they don't know who you are, your name, your firm name. Because yours will Google that and then immediately they know which side is putting on the presentation and then they alter their views and what they'll tell you based on that.

Jessica Brylo:

Pushing your side stuff too much. You really want to lose the focus group and find all the bad facts, which is hard to do. Like you said, when it's your case and you're invested in it, it's hard to do that. But you really have to push the defense side harder than normal and tone yours down a little bit so that you can see what the problems are in the case.

Jessica Brylo:

The way you ask questions and follow up on questions can reveal some of that too. When we run full day mock trials where it's a deliberation group, jurors send in questions, and I have the attorneys write out the answers for me. I'm the one running the group, so I go in and give the answers. But often I have to talk with the attorneys because they'll write down the answer from their point of view, right? From the plaintiff's point of view. But we need to have the answer from the defense point of view too. You can't just go in and bat down every juror question with things that are helpful to you.

Jessica Brylo:

So it's little things like that you don't even think that you're doing that end up becoming a problem.

Michael Cowen:

So what do we do with this negative information we get? So we do a focus group, we find out the problems in our case, what do we do with them?

Jessica Brylo:

So there's a couple of different options. One is you look through the case information yourself, see what the jurors said, and then try to reframe it and retry it again and see if you get different results. Often attorneys want to go in and ask the jurors afterwards, "If I presented this fact instead of that, how would that have changed your viewpoint?" So you can ask people that, but because they're humans, they'll give you an answer. I mean, if you ask me a question, I'm going to give you an answer, but I don't know

what my actual answer would've been had you presented that fact in sequence when you actually did the presentation because that's how the framework of the case gets set.

Jessica Brylo:

So if you change the order of the facts, you're changing the framing of the case, so people don't know how they would react if you change that framing. So you can't really rely on their answers for that. You really do have to retest it.

Jessica Brylo:

So sometimes a good middle ground is for you to do the running of the focus group. Say, "Listen, I did it based on this book, which told me how to do it so that it's at least more reliable. Here's what my video is. Can you review the video for me?" Go to the consultant and say, "Can you review the video for me and tell me what you see in this and what you take out of it?"

Jessica Brylo:

Because sometimes it takes a trained eye to see what are the jurors really saying, why are they actually getting stuck on things, and then how do we either reframe this for trial based off of that or what do we want to then test next in the next round of focus groups?

Michael Cowen:

So besides focus groups, what are some of the things you do to help make attorneys better or to help us improve?

Jessica Brylo:

Yeah. So I do a lot of drafting of opening statements. Opening statement development and strategy, how to frame the case, what order you want things to come out in, what words you're going to use for it. A lot of drafting of voir dire questions and strategizing for that. What do we need to ask about? How do we ask it? What order do we ask it in?

Jessica Brylo:

Some of those also all bleed together with general case analysis and framing, right? Because all of that, when you're doing case framing, then it's like, okay, well, the way we frame that is through doing this in the opening statement or asking this question in voir dire. So all of those sort of bleed together for me.

Jessica Brylo:

Then if you want me to come and help select the jury, I come to jury selection and help to do that as well. I do some witness prep work if that's needed. Then being sort of the sidebar, the background in terms of focus group work if you need the help on the back end.

Michael Cowen:

Yeah. I do really encourage people, I mean you learn so much more about your case, partially from the wisdom of the consultant, partially from being forced to spend large amounts of uninterrupted time working on your case.

Jessica Brylo:

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Yes.

Michael Cowen:

Respectfully, I mean, I said you guys add a lot of value and I'm a believer in always want learn from other people, always wanting to, especially on a big case, getting as much information as I can. But I also think that whenever I work with you or another consultant, it forces me to block off the time and to do these things early and to turn off the email and turn off the ringer on the phone so that I can just focus on that one case, and I think that's super important too.

Jessica Brylo:

Right. Correct.

Michael Cowen:

So I know your email, you we've said before and it's in the show notes. You also have a website?

Jessica Brylo:

I do. It's trialdynamics.net. T-R-I-A-L-D-Y-N-A-M-I-C-S.net.

Michael Cowen:

I encourage everyone to go to Jessica's website and check it out.

Michael Cowen:

Jessica, I look forward to working with you. We're working on finding the right case and I think it's going to be a lot of fun. Anyone else has a case out there and want to give her a shot or just want to learn how to do your own focus groups, send her an email and she'll be happy to send that to you.

Michael Cowen:

Thank you so much for joining us on Trial Lawyer Nation. I know I've learned, hopefully all the listeners have too. I've enjoyed having you on and I hope you have a great day.

Outro:

Thank you for joining us on Trial Lawyer Nation. I hope you enjoyed our show. If you'd like to receive updates, insider information and more from Trial Lawyer Nation, sign up for our mailing list at triallawyernation.com. You could also visit our episodes page on the website for show notes and direct links to any resources in this or any past episode. To help more attorneys find our podcast, please like share and subscribe to our podcast on any of our social media outlets. If you'd like access to exclusive plaintiff lawyer only content in live monthly discussions with me, send a request to join the Trial Lawyer Nation Insider Circle Facebook Group. Thanks again for tuning in. I look forward to having you with us next time on Trial Lawyer Nation.

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