Susan Macpherson on Damages in Commercial Cases

Interview
by David Ball

Susan J. Macpherson is vice president of the National Jury Project/Midwest, a full service trial consulting firm. She specializes in research on jury decision-making in commercial, intellectual property, and complex commercial cases.

Ball: What kinds of cases can we group under the heading of commercial cases?

Macpherson: Cases in which the claim is a wrongful loss in the course of a business relationship — everything from simple contract and construction disputes to anti-trust and intellectual property cases.

Ball: Is there a single major difference in how jurors relate to these cases as opposed to, say, personal injury cases?

Macpherson: In commercial cases, jurors are less likely to assume they know the story. In a homicide case, even if jurors don't know manslaughter from murder, the character of the defendant triggers a stereotype that starts the story rolling.

"I had a bad outcome in surgery" or "I was terminated unfairly by my employer" is enough for jurors to start a rough outline of the story, and some will begin filling in the details for themselves. Few jurors can do that in commercial cases. In a construction dispute, although jurors get the idea that something was built and something went wrong, they cannot as easily imagine what the story is about — in part because stereotypes for the main characters are not as readily available.

It's not just a matter of what happened, but also who was involved and what the rules and expectations were. In tort cases, jurors come in with stereotypes in mind for the key players — the elderly doctor, the timid patient, the young male driver. They come in familiar with the kinds of relationships that exist between the players. And they come in familiar with the expectations and general rules that determine when a player has done right or wrong.

In commercial cases, few jurors have any basis for filling in the roles of the players, the nature of their relationships, or the rules or the expectations of those relationships.

When jurors hear that someone's leg was broken in a car accident, they understand from their own experience that someone probably did something wrong. But when jurors hear, "We built this building and it cost ten times more than it was supposed to," jurors do not automatically assume that someone did something wrong. They know from their own experience that cost overruns often happen without anyone alleging any wrongdoing.

That is why in most commercial cases, it is often more difficult to get jurors to see that there was wrongdoing than to see that the money being claimed is a reasonable amount.

In commercial cases, when it comes to damages, the hurdles are different. In a personal injury case, jurors are often reluctant to "make the plaintiff rich." In commercial cases, they do not care so much about that. They are more concerned with whether or not there is really a need for compensation: Did someone do something that he should pay money for having done? Was there really harm? Or was this one of those times when a combination of factors came together in an unexpected way and made something cost more, or created a loss?

A lawyer will tell me, "I'm worried because we're asking for several hundred million dollars in damages; that much money is a hard sell." But in my experience, big numbers do not worry jurors in these cases. Jurors expect the numbers to be large. People are saturated with large numbers in the daily news about business. Jurors are used to hearing about quarterly gains or losses, and even fines levied by the government, which involve hundreds of millions of dollars. The bond issue for the schools in your neighborhood is for many millions of dollars.

Even if jurors don't follow business news, they hear these large figures every

day. That is why jurors do not come into commercial cases with an arbitrary ceiling, like they often do in personal injury cases where you will often hear a juror say, "No matter what happened, I could never award more than a million dollars." A juror who would never consider giving more than a million in a tort case could award a hundred million in a commercial suit without batting an eye.

That does not mean it is easy to get big verdicts in commercial cases; it means the hurdles are different.

Ball: In tort cases, jurors often come in with a general suspicion of plaintiffs. Is there similar suspicion in commercial cases?

Macpherson: There is suspicion, but not of plaintiffs per se. Plaintiffs in commercial cases are usually powerful or accomplished parties. When, in trial, they profess to be the "innocent victim" of another powerful and accomplished party, and that's hard for many jurors to swallow. It's hard for jurors to believe that anyone engaged in a business relationship at this level could have been victimized without his or her own participation.

So when the plaintiff says, "We got cheated and couldn't possibly have known about it until too late," the jurors say, "Maybe you didn't know, but you could have and should have known, so it's at least partially your own fault." The result is that jurors in commercial cases can be more skeptical about whether the loss was really caused by wrongdoing. They do not want to reward what may have been simply incompetence.

Ball: So what do you do about it?

Macpherson: You have to show that your client was active, involved, made demands. Do not claim your client was naive. Do not let jurors think your client just stood by. Too often, attorneys let the case boil down to the plaintiff saying, "He never told me." The easy and often unspoken defense is, "You never asked." When the case boils down to that, you will have trouble getting damages. Jurors assume that the problem would not have happened if your client had ever asked.

Jurors assume that commercial clients are smart enough and have enough experience to have seen the problem coming. In these cases, the hindsight bias often works against the plaintiff; we hear jurors say, "I don't know anything about that industry, but even I could have figured out that they should not have gone ahead with this deal." You have to offset that hindsight by showing that your client was not a passive participant. That is as important as showing the defendant's wrongdoing.

Ball: In many personal injury cases, even jurors convinced of the wrongdoing can have many reasons for awarding less than an appropriate amount of money. Does that happen in commercial cases? Or does the money flow automatically if the jury decides there was harm caused by wrongdoing?

Macpherson: In some of these cases, jurors feel less confident about their ability to pick apart the numbers, because the parties themselves spend very little time battling over the numbers. But in cases where damages are a major battleground, the jurors are less reluctant to do their own math.

A common problem arises when one side floats three damages models, and the attorney claims that all three are reliable, accurate, and relevant. But presenting three models makes some jurors think: "Wait a minute! This can't be the real loss. If it were real, we would just have one figure to work with." After all, that's generally been their own "real-life" experience. One set of projections is hard enough for jurors to accept. When they have to work with three models, it's even harder.

Even a single damages model can be hard for jurors to accept, because it requires jurors to accept projections such as, "What would the project have cost to build if things had gone the way they were supposed to go?" Or "What would the profit have been if the transactions had been properly handled?" Or in an anti-trust case, "What would the price have been if there hadn't been any price fixing?"

Ball: Then why present more than one model for damages?

Macpherson: Whenever you make an estimate, there are different assumptions that can be plugged in, and different assumptions lead to different results.

Attorneys tell the jurors, "Okay, we have to project something that didn't happen, so here's the high estimate, here's the medium estimate, and here's the low estimate. They're all reasonable, but we're leaving it to you to pick the one that you think is the most reasonable." Attorneys usually expect jurors to go for the middle figure. And that can happen. But just as often, using three models creates a thicket of projections and assumptions that makes the jurors more skeptical. And when each side brings in multiple models, the thicket can become a swamp.

The word "model" itself makes some jurors take the estimates less seriously. It's the correct term for economists, but the lay understanding of "model" is "building a model airplane," or "touring a model home." The "model" is not real. It's an artificial, oversimplified construction of reality. Those connotations can invite jurors to disregard the models altogether.

Ball: When they're faced with multiple and competing models, how do jurors work their way through them?

Macpherson: Sometimes the jurors wade into the model-making business for themselves and start adjusting the numbers based on their own assumptions. Other times, jurors will grab onto something tangible.

To determine value, they might use anecdotal evidence provided by a fact witness, such as an earlier offer to buy the property or license the technology. Jurors can view that as "real evidence" that proves value because they know somebody really offered to pay that amount. Then they work in their own anecdotal factors, such as what they think about interest and inflation — and now the jurors are doing their own math. By the time they are done, their own model may be way off. But it is more real to them than what they heard from experts in trial.

Ball: So how do you handle it?

Macpherson: To provide a sufficient legal basis on which damages can be awarded, you usually have to have a qualified expert show that he plugged in the right data. But it's helpful if you also have testimony that serves as a reality check on those projections. That makes jurors less likely to disregard your numbers as being artificial.

Ball: For example?

Macpherson: We worked on a complicated business contract claims case in which each side presented figures that were projected out to wildly different conclusions. The jurors needed a way to decide. So they used the figures the parties had not disputed in prior dealings. Those figures were not the primary component of either party's projections. But the jurors viewed that anecdotal information as more reliable than either party's projections.

Anecdotal figures may lack the kind of weight, credibility, validity, or independent verification that experts usually require for components of a damage model. But for jurors, projections based on things that really did happen, regardless of the particulars, can make the projected figure more valid.

An expert does computer runs. In testimony he shows a big stack of papers. He says, "See, this is real, because we did hundreds of hours of work, put in millions of pieces of data, did a regression analysis and 16 computer runs to make adjustments for 55 things, and it all comes down to this number." That may sound fine to a lawyer, but jurors say, "Who knows? I have no way to test that, and the other side says it's hogwash." The jurors need something they can hold onto. And it can be anything, you never know.

For example, in one case an expert was on the stand projecting figures out over a 20-year span. He gave a fancy-schmancy and technically correct explanation. The lawyers had figured it would go right over the jurors' heads, but that that would be okay as long as the expert got them to the right number.

The expert finishes. The jurors' heads turn in unison to a juror in the back row. The juror in the back row nods.

Turns out the juror in the back row is an engineer with a calculator on his wristwatch. He's been doing the math along with the expert. He has verified for the other jurors that what the expert was doing was right. And that's what made it true for the jurors — not the expert's credentials or multiple computer runs or the stacks of paper; the jurors had no way to judge any of that. Instead, they relied on the nod of the juror in the back row. Even though they had no way to know exactly what the juror in the back row was doing to verify the numbers, his efforts served as their reality check.

You cannot count on having an "independent" expert in the jury box, so you have to find other ways to make the models real for jurors — not merely accurate ways, but ways that are connected to real life experience as described by the fact witnesses or shared by the jurors.

Ball: Tell me about jury voir dire in commercial cases. What special considerations are there when it comes to damages?

Macpherson: Several. For example, many attorneys are afraid to bring up how much money is involved. They say, "I don't want to tell the jurors up front how much money is involved." But as I said earlier, most jurors expect these cases to involve substantial sums of money.

Ball: Even in venues where lawyers say, "You can never get that kind of money here"?

Macpherson: These kinds of cases are not about one person saying, "I need a million bucks." It's a company, or an organization — some type of business enterprise that inherently involves large numbers.

So you should bring your figures out in voir dire — but for different reasons than in tort cases. In tort cases, the worry is that some jurors will start out with arbitrary limits or a motive to punish plaintiffs. You have to talk about damages to uncover those predispositions.

In commercial cases, jurors may tell you that they really prefer not to have to deal with complex calculations, or that they avoid doing their own taxes or even balancing their checkbooks, because they do not like dealing with financial matters.

Your client's position in the case will dictate whether you want to remove this juror. If you want to keep the juror, you may say to her, "We don't assume that anyone has the expertise to do these calculations on their own. We lawyers don't; that's why we bring in experts who have the training and technology to do it. So if you will agree to just work with us, and use your common sense to evaluate what the experts will tell you, we're sure you can do the job."

Or you may think, "This person is asking me to exercise a strike because he thinks he can't handle this. And I can replace him with another juror who can do a better job at taking apart the other side's damage model."

Either way, you cannot evaluate how jurors are going to approach damages without talking about the amount of money involved.

Ball: How do you talk about money during jury voir dire?

Macpherson: "This case involves a claim of several hundred millions of dollars in losses. Your task will be to evaluate the validity of that claim. Now, none of us have experience dealing with claims like that in our day-to-day life. This is new for everybody. So I'm wondering, Mrs. Juror, how you feel about the prospect of listening to two different economic experts battle over damages in the range of hundreds of millions of dollars?"

That gives you a starting place. Mrs. Juror might say, "Well, I don't know. I've

never had to do anything like that before." And you might follow up with, "Well, are you the kind of person who enjoys or avoids reading the business page? Tell me about that." Or "How do you make long-term financial decisions at home? How do you approach financial planning for retirement? Do you rely on someone else to make those projections for you? Do you usually have them walk you through their projections?"

Asking such questions gets prospective jurors thinking about how they respond in daily life to financial projections. That helps them think about — and talk about — how they are likely to respond to that kind of testimony at trial.

Both sides may be concerned with prospective jurors who fancy themselves experts in dealing with complex financial transactions. One might say to you, "Yeah, I know all about this, because one time I worked on a project, and I had to do the calculations for a number of variables projected over a period of time." You need to be sure you are comfortable with that kind of person, because that person is quite likely to dig into your expert's numbers.

Ball: What other factors influence jurors?

Macpherson: One typical assumption does not hold true: that in deciding which expert is right, jurors will be influenced by the expert's credentials. My experience is that jurors assume that the expert would not be asked or allowed to testify if he did not have the necessary expertise. So when the expert gives a long list of articles, and delineates his long, involved training and where he's been employed, it often has little or no effect on the jurors' decisions about damages.

Ball: What does help?

Macpherson: Well, for example, it helps if your expert has some hands-on, real-world experience — and uses it in showing how he gets to his conclusion.

Remember that the jurors who will be sufficiently impressed by the expert's academic credentials are often not the jurors you need to play to. Jurors who are impressed by credentials are more likely to trust the expert's methodology and accept his projections. The jurors you need to play to are those who are more impressed by real-world, hands-on experience with the subject at hand.

For example, in a construction dispute, an expert who has been involved in making or reviewing financial projections for similar kinds of construction projects could be viewed as more knowledgeable than the expert with a Harvard MBA and a Stanford Ph.D. Jurors who want the expert to have real world experience see a wide gulf between theory and reality. Such jurors are likely to reject a damage model that is based only on theory because the underlying assumption — what should have happened if everything had gone right — doesn't fit with their experience.

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Ball: What should experts try to do in testimony?

Macpherson: No matter how complicated the damages calculations might be, the expert should describe the basic assumptions in simple, everyday language. At the National Jury Project, we often test juror comprehension of expert testimony. We typically find that experts start out with simple concepts, but their language quickly slips into jargon. Defining a term one time does not guarantee it will be understood, especially when jurors are being hit with many new terms at the same time.

Once you get the basic assumptions of the calculations down to lay language, consider putting those assumptions into your opening. For example, in opening you might say, "We all know $50 million is a lot of money. We'll show you that the $50 million figure is based on three things: A, B, and C." That helps jurors break down the large number into smaller, labeled categories. And in the liability testimony, look for other ways to integrate brief references to those assumptions. Too often there is an artificial distinction maintained between liability and damages in case presentation.

Some attorneys simply assume the jurors will not be able to follow the economic testimony. And yes, jurors may not expect to follow all the calculations. But they do expect someone to tell them what the calculations are based on: What are the assumptions and where does the data come from?

Lawyers have told me, "This case isn't about damages, it's about liability. If the jurors find liability, they have to award X amount, because that's what we're entitled to." But jurors do not generally accept damages at face value. They assume that whatever you request is probably more than your client is actually entitled to. That's why many cases where jurors are presented with substantially uncontroverted damages result in lower figures. No one bothered to make sure the jurors really understand that the figures were reliable or accurate, because the figures were not really in dispute. In most jurors' minds, the figures are always in dispute.

Ball: What kind of jurors do you want?

Macpherson: Here there are similarities to tort cases. When we are working with the plaintiff, our main concern is spotting the prospective jurors who will refuse to give anything — people who know that the way to hurt you most on damages is by finding no liability. Just as you would in a tort case, look for people who are unhappy, bitter, or angry. If they have been cheated in their lives, these are generally high-risk jurors — not because they will reduce your damages, but more likely because they will find a way to decide against you on liability.

Also, pay attention to jurors with no experience in the for-profit business world. They are more likely than others to assume that plaintiffs who claim to have been cheated should have asked more questions and should have done more to protect themselves.

For example, as a consumer, you know you cannot rely on what any company is telling you, because the name of the game is for the company to persuade you that things are better than they are: "Our product does things that our competitor's doesn't do." As a consumer, you know you have to check the fine print. Your job as a consumer is always to check, to question, to ask, to compare, to monitor, to test. So the juror who is unfamiliar with the for-profit business world assumes, "Well, if it's my job as a consumer to do these things, then it was the plaintiff's job, too. The plaintiff is more powerful and sophisticated than I am, and has more resources than I do — yet he's telling me they trusted the other company? Well, get out of here!"

On the other hand, people with more experience in the for-profit business world tend to approach business relationships with the assumption that the contract defines each party's rights and responsibilities. To determine what the rules are in this particular relationship, they look to the contract. They may agree that the plaintiff should have asked more questions, but they can also accept that the contract gave the plaintiff the right to rely on the information coming from the defense.

Ball: Regarding damages, what should be covered in opening statement?

Macpherson: Some attorneys think it is better in opening to make a very brief reference to damages, so the jurors have an idea of what's at stake. If you don't, jurors are likely to be distracted by wondering, "What kind of money are we talking about here?"

But don't just leave a big number hanging out there unsupported. If you do, some jurors may think, "They just decided to go for the jackpot." It is safer to take the time to at least define the criteria on which it's based. Show that your calculations are based on specific factors. That is more likely to meet the juror's test of common sense.

Yet lawyers tend to be nervous about discussing damages in opening. They think that until the jurors know everything that went wrong, a big number will sound like too much money. But in my experience, once people hear the scope of the damages, they are more likely to think, "Well, if there's so much money at stake here, this is a very serious case — that's why everybody's pouring all these resources into it, and that's why we have to listen to six weeks of testimony."

In opening, you should also tell jurors that it is your job to put everything in a shape and form they can work with. The message to get across is, "Nobody's going to try to snow you with a lot of technical information and say, 'Just take our word for it: we're right.' "

Make sure they know why they should find for you before you try to get them to understand the industry.

But before you explain everything to them that they need to know, you have to give them reason to want to know, or they will not listen. When an attorney says to me, "The jurors will have to learn a lot about this industry before they can understand our position," I say, "They may not be that motivated." Make sure they know why they should find for you before you try to get them to understand the industry. It is easy to get so wrapped up in conveying what you want to teach jurors about the industry or the business that you can forget to show how your client's position boils down to common sense.

Consider whether you need to show jurors that a different outcome could have occurred — not just should have, but could have. For example, the costs of every large construction project are inevitably overrun. This is a hindsight problem: when something has gone haywire, people have a hard time remembering and imagining that it could have gone right. The bad outcome can seem like a foregone conclusion — and that makes jurors think that everyone involved should have been able to see it coming.

It is important to establish the viability of an alternative outcome. This is because when you talk only about the wrongdoing or the harm, you can make it seem that there was no other possible outcome — or that the only other possible outcome was perfection, which is unreasonable to expect.

Remember that this may not be about good guys and bad guys. Jurors do not expect business people to focus on morals and ethics in making all of their decisions. Most jurors know that competitive business people take any advantage they can. Attorneys often think they have to make their client the guy in the white hat. But it's usually more important to convey your version of the events and show that your client's conduct or expectations were consistent with how things really work in the business world.

At the end of your opening, if you are the plaintiff, be sure the jurors know what each party's rights and responsibilities were — the division of labor or the ground rules. The contract might be four volumes thick, but it can be boiled down to, "We do this, you do that; we get this, you get that"

— so the jurors clearly understand the parameters and assumptions operating in this particular relationship.

Ball: What kind of witness preparation do you do with experts?

Macpherson: The key task is to help them present their assumptions in a way that jurors can understand, retain, and repeat in deliberations.

Some experts who spend a lot of time testifying already know the basics: how to talk in lay language, and how to break things up and chunk the information into manageable amounts the jury can absorb.

But experts may still need feedback to develop the most effective sequence of information and visuals for their testimony. It is always challenging to create effective visual aids, and this is especially true when there is an enormous amount of data. The temptation is great to "put it all on a couple charts." However, that rarely works. A visual aid must tell the viewer something without anybody having to explain it. That's what makes it an aid. The juror should be able to look at it on his own and reach the intended conclusion without needing a tutorial to get there. If a chart needs explanation, there's probably a better way to design it.

You have to recognize that some perfectly valid concepts that are used to calculate damages are hard for jurors to swallow. One example is the concept of lost opportunity dollars ("If we hadn't invested $400 million in retrofitting this construction project that went awry, we would have had that $400 million to use or invest elsewhere, and our return on that money would have been $XXX.") This involves so many levels of abstraction that it is hard for jurors to accept it as a "real" loss.

And jurors often resist giving lost opportunity dollars because the underlying assumption is that if the plaintiff had the money to invest, he would have done everything right with that investment. That assumption stands in stark contrast to the fact that the plaintiff is here in court because he was involved in a big mess that he claims he could not control or foresee. So jurors tend to be skeptical when the expert says, "The plaintiff lost the opportunity to pick the investment with the highest return over the last 15 years."

Ball: What do you do about it?

Macpherson: First, make the concept less abstract. If your money has to be used to fix a problem caused by someone else's wrongdoing, you have lost the right to make some financial decisions. Part of your money is essentially locked up. "Lost opportunity" sounds like you wished things had worked out better. Losing access to your money has an entirely different ring to it.

Whenever possible, make the "opportunity" more tangible by labeling it with the use that would have been made: "the R&D budget," "the equipment upgrade," "the training program" or "the debt reduction."

Second, acknowledge that things never go perfectly. There are always unexpected downturns, so show that was factored into your calculations.

Ball: How can fact witnesses be used for damages?

Macpherson: In many cases, liability witnesses can contribute important information on damages. In a construction case, for example, the retrofit witnesses have to persuade the jury that not only was the retrofit necessary, but also it was done in a cost-effective way. The people who were literally on the ground doing the work can often provide the most interesting and dramatic testimony about what it took to solve the problem. They may not be polished or credentialed, but they have a tremendous ability to make the damages real.

It's just as true with, say, trade secrets. To demonstrate the value you are claiming for the trade secret, you might need to show how the trade secret was developed, how much time and effort and thinking it took to get it right, and why the theft was a huge loss on that investment. In those cases, the most persuasive damages witnesses are often the people who were actually involved in the development or testing.

Ball: How about making things such as financial projections real?

Macpherson: There is always the problem of economic illiteracy. Few students are taught how to think critically about economic issues. That's true for college graduates as well as for jurors who have their GED.

In popular news sources, we get our information about economics in the form of conclusions. How anyone got to those conclusions is something mysterious that happens in Washington and often doesn't pan out as projected. Relatively few people know how to figure out if there is any validity to what they are being told, so they are suspicious or cynical about whether there is any truth to economic projections and forecasts. And that obviously can affect how they respond as jurors to your economic projections at trial.

Ball: How dqo you win the battle of economic experts?

Macpherson: First of all, the best experts in the world will not be able to persuade a jury to award damages if the facts do not support it. The motivation for jurors to accept and use the expert's opinion depends a great deal on the evidence that came or did not come before him. But it is also true that an expert who does not come across well can undercut the value of a good liability case.

The experts who fare poorly on the stand are those who go overboard in defending their number without acknowledging what the jurors know to be true: that these things cannot be precisely predicted. Everyone knows that these are just estimates, and that means there is a range.

And instead of presenting the estimates as separate "models," it is better to say, "The range of future interest rates and inflation rates gives us different estimates."

Ball: Let's move to the other end of the trial: closing argument. How do you wrap up harm and damages in closing?

Macpherson: It's important to review the basic assumptions you gave the jurors to calculate the damages. You need to give your most favorable jurors a strong grip on those assumptions, so they can effectively argue for a high number for the plaintiff — or if you're the defendant, so they have the tools to argue for the lower numbers.

In closing, lawyers often make the mistake of speeding through the whole set of visuals that were used during expert testimony about damages. But there's usually so much information on those slides that a quick review may do more harm than good. It may create confusion.

Sometimes lawyers think, "If we go through the charts again, the jurors will remember how much work and effort and expertise went into getting the final number, and they will just accept it." If that was going to happen, it already happened during testimony. If it did not happen in testimony, it is not going to happen in closing.

So go back and consider your primary purpose in closing: What are you trying to do? Why are you talking about money at this point? In some cases, it is crucial to make sure that jurors understand that there are distinct categories of damages, so they will not get confused when the bargaining begins in deliberations.

Go back to the principle that less is more. Show only the visuals that define the assumptions behind each category of money to help your favorable jurors argue more effectively for each category. That will keep the balance of the compromise going in your favor. If you have done pretrial jury research and it has given you reason to anticipate that the jurors will attempt to do their own calculations, walk the jurors through the math. Make sure they have access to the numbers they need to make their calculations as accurate as possible. Prepare your best jurors to be better advocates. That probably will not happen if you inundate them with a high-speed review of everything your expert said.

Ball: What else should you do in closing?

Macpherson: You're better off with a "What does it all boil down to?" strategy for 20 minutes than you are with four hours of repeating everything the jurors have been hearing for the past four weeks. You have to assume that the saturation level has been reached. So at that point, if you can score any more points, it is in boiling it all down and in reviving the jurors' motivation to care about the outcome.

For example, give three reasons why the parties do or do not have the right to expect certain kinds of conduct from others. Given the rules that governed the relationship here, were their expectations and the assumptions the damages are based on reasonable?

Then prepare the jurors to work with the verdict form. Commercial cases usually have special verdict forms. Jurors often need a lot of help tying the evidence to the interrogatories on the verdict form. They have been constructing a narrative and it may well have nothing to do with the linear framework imposed by the questions on the verdict form.

In addition, the framework of the verdict form is based on the law that they have not yet heard (or that they have just heard, in jurisdictions where instructions precede the closing arguments). Spend a good part of closing helping jurors get comfortable with this new decision-making framework. ■