

Stevens & Kuss S.C.

Attorneys at Law

Questioning a Jury

By Daniel W. Stevens

Ron Ziolkowski married Julie in 1986, two years after he was diagnosed with Multiple Sclerosis. She accepted his MS and he embraced her three children from a previous marriage. Ron, an ex-marine, was a fighter and he wasn't going to allow MS to keep him from enjoying life. A Wisconsin outdoorsman, he hunted, fished and camped with a passion. Over the years his MS progressed to where he needed a cane, then a regular wheel chair and finally a powered wheel chair. Ron took all of this in stride without complaint and when his grandson Jacob came of age Ron began teaching him to love and appreciate the outdoors.

Over the years the Ziolkowski family began to look to attorney Lynne Layber for help and legal advice. Lynne graduated from law school in her mid-thirties and immediately opened her own small shop doing mostly personal injury, Social Security Disability and Workers Compensation. Without a secretary or assistant and no advertising she built a practice on a network of referrals from friends and relatives.

In 2009, when Ron was 51, he crashed his van into a tree and broke his right femur. Ron's van was handicapped equipped with his wheelchair secured to the floor by an electronic locking device. The device opened when he accidentally hit the release button forcing him to let go of the hand controls and grab the steering wheel for dear life. Because of the trust Lynne had earned with the family, Ron turned to her for help. Lynne sued the manufacturer of the device as well as the installer. They lawyered up and soon she was facing as many as eight defense lawyers from around the country.

They began burying her with paperwork, filing voluminous discovery demands and repetitious motions. Even without a secretary Lynne fought back matching their motions and discovery demands with motions and discovery demands of her own. The case dragged out with repeated adjournments along with the manufacturer being released. Meanwhile Ron's condition deteriorated. The hardware installed in his broken leg became infected with MRSA. Soon he was bedridden developing large ulcers the size of a fist in areas where his skin was stretched by the MS contracted muscles. His contractions became so bad he couldn't unbend his hands, arms or legs. Massive dosages of opiates no longer controlled his pain. The trial was finally scheduled for December of 2015 but Ron couldn't hold out any longer and mercifully passed away in October.

Two weeks before the trial Lynne asked me if I would help her try the case. She had only tried a hand full of cases and none within the last 8 years. She heard many stories of my experiences with TLC. My first trip to the Ranch was 5 years ago, just after Lynne and I filed for divorce. I told her I would be happy to help and began reading the 1000's of pages of medical records, interrogatories and deposition transcripts. We split the case up where I did the voire dire, the medical experts and lay witnesses. Lynne did the opening, the engineers and we split the closing.

Following Gerry's practice I began typing out everything on my computer; first the story itself (this one wasn't hard to find), the voire dire questions and all the questions on both direct and cross. If you type out nothing else, type out your cross examination questions, as they need to be short and precise. We interviewed the widow Julie, his step daughter Carolyn, and the psychiatrist at the VA who offered his

Stevens & Kuss S.C.

Attorneys at Law

time for free because of his anger at what the insurance company had put the family through over 5 years. His grandson Jacob was also a key witness as he quit work and spent the last five years caring for his grandfather.

Ron's sister Carol began shining around the family during Ron's last days. She tried to convince Ron to draw up a will leaving assets to her daughters; he refused and told her not to come around when she was intoxicated. After he died, she contacted the defense and offered to testify that Ron's injuries and death were not related to the accident but merely a normal progression of his MS. This initiated a fierce battle with the judge ultimately barring her testimony.

The trial was scheduled for nine days in Milwaukee with over 300 exhibits. The defense flew in high priced experts from around the country including a top neurologist from the University of Chicago. Their lead counsel Frank was a slick New York trial lawyer working with experienced local counsel. Frank would later be referred to by the jury as "Mr. New York." We drew a smart and fair judge who knew how to protect the record. Voire dire took all of the first day. Few judges in Wisconsin would allow that much time.

TLC techniques played a large role throughout the trial but a key was the voire dire. With the wrong jury it is hard to win any case and even harder to get good damages. In Milwaukee we are usually required to question 35 or more jurors at the same time. What I did was break them into three groups of 12 based upon their seating. Then I broke each group of 12 into two groups of six. I don't like talking to more than six at a time as I want to observe their facial expressions and body language as I ask questions. I look for raised eyebrows, smirks, folded arms, hesitancy to raise an arm to a question, squinting or even curious looks. I follow up any unusual gesture or expression with a question to that juror. "You looked a little hesitant when raising your hand to the last question. Do you have some reservations about...?"

TLC teaches us to focus on the biases or prejudices we are most concerned about and get the jurors to engage in a discussion regarding these issues by creating a friendly, welcoming atmosphere where they feel comfortable talking their feelings. I break biases down into three categories, philosophical, technical and personal experiences. Philosophical biases relate to feelings regarding race, culture, gender, age, lawsuits, lawyers, burden of proof and money for pain and suffering. Technical biases relate to specialized knowledge in areas like medicine, science or engineering. Personal experience biases are based on a juror have a similar or close experience similar to the participants in the lawsuit. I like to touch on all three. Here I needed to know if jurors were reluctant to award money for pain and suffering, award money to an estate if the plaintiff was deceased or award money for family members who provided nursing care at no charge. I needed to know if there were jurors who had technical knowledge about car wiring, wheelchair mechanics, MS or health care services. I also needed to know if jurors had a personal experience caring for a disabled person especially one with MS or if they or their family members were disabled.

Because of time factors, the areas I went into in depth were money for pain and suffering, money for an estate and money for family members who provided healthcare free of charge. I wanted to make sure there were no reservations with regard to large damages. Following TLC methods I asked, "One of the claims in this case is money for pain and suffering. Many people are hesitant to award money for pain and suffering because it is intangible. While some believe awarding money for wage loss and medical

Stevens & Kuss S.C.

Attorneys at Law

bills is ok they have a problem with awarding money for pain and suffering. It is so hard to put a dollar amount on pain and suffering. I know that if I were a juror this would be hard for me. Does anyone feel a little bit like me? Does any feel uncomfortable assigning a dollar amount to pain and suffering, if so please raise your hand?" Remember I am only talking to six jurors at a time this question.

I looked for any unusual expression or body language. When I sensed some issues I called on the person saying. "Mr. Smith, I sense that you have some reservations on this issue. Can you share some of your feelings with us?" One juror (a former Paralegal) indicated she would require a significant amount of proof prior to finding for the plaintiff's; others agreed. We went into a discussion with several jurors sharing their feelings, and then talked about the civil burden of proof as opposed to the criminal burden. We discussed the difficulty of awarding money for pain and suffer and coming up with a number. After having several jurors voice their opinions, I concluded with "How many people feel that they could follow the law as the judge reads it to them with regard to awarding damages for pain and suffering?" Everyone raised their hand.

I followed this practice with the main issues I was concerned with which included money for pain and suffering, money for an estate even though the plaintiff died and money for nursing services provided by various family members. I wanted the jury going into deliberations with the understanding that whether to award money in these areas wasn't the issue, it was only about amount. The other issues like burden of proof, technical knowledge, medical knowledge and personal experiences I covered with basic survey questions. My main goal here was get jurors to talk. The more jurors talk and the more each one says the more they reveal about themselves. The best voire dires I have done were all cases where jurors talked a lot.

We plaintiff's lawyers generally prefer fellow liberals on our juries. We mistakenly believe liberals are more compassionate than conservatives but that isn't true. I have many compassionate conservative friends. Liberals however are more open minded and receptive to new ideas. Conservatives tend to be more rigid thinkers. It is difficult to change the mind of a conservative but not so a liberal (read the Republican Brain by Chris Mooney). What this means is that if you have even a couple of rigid conservative jurors who have some issue with your case, they can influence a larger number of open minded liberals. As a matter of fact even one close minded, opinionated juror can ruin your case or at least keep the damages down. "The best lack all conviction, while the worst are full of passionate intensity" (William Butler Yeats, "The Second Coming")

Beware of the sleeper juror. This is the juror who sits there stone faced and never raises his or her hand. This is the juror who wants to be on the jury. This is the juror who will kill you and your client in the jury room. We had one on this panel. I couldn't get him to say anything more than a couple words. Lynne had a gut feeling he was bad and she usually has good instincts. We struck him from the panel. The defense made a huge tactical mistake and left a young man who said his job was to do OSHA type inspections. I assumed he would be safety conscious and hyper critical of dangerous situations so I chose not to ask him any more questions about anything. The more a juror talks the greater the likelihood one side will strike him or her. He turned out to be the foremen. Conversely if I find a juror I don't like right off the bat I will chat with him or her all the time about everything. This increases the likelihood he or she will say something the defense doesn't like and use up one of their strikes. That happened in this

Stevens & Kuss S.C.

Attorneys at Law

case with a juror who seemed suspicious of our claims when questioned about her experience regarding the natural progression of MS.

Also be a little cautious about demographics. Blue color workers who were once considered to be solid plaintiff's jurors now support Donald Trump. If your client is white don't assume that blacks and other minorities will be sympathetic to a white plaintiff. We had an elderly black woman on the jury who initially dissented with the majority. Many minority jurors have been mistreated by whites over the years. Esquire magazine just did a recent poll on how angry voters are right now. They found that women are angrier than men mostly based upon mistreatment of others meaning they are more empathetic to the pain and suffering of people besides themselves. Nine of twelve jurors on our panel were women.

One of the biggest mistakes lawyers make is to expose the favorable juror like I mentioned previously with the OSHA inspector. Ron was a veteran and a marine. The worst question I could have asked is whether there were any marines or veterans on the jury panel. I knew this was a potential gold mine of positive feelings I could work into the case. I did this in closing by praising Dr. Sepaphana, our medical expert, for his love and concern for our veterans. I revered him for coming to the aid of a veteran in need and how he dedicated his life to helping those who served our country. If I glorified Ron in my closing about being a veteran it would have come off as pandering. The defense was alert enough to bring this issue up in their *voire dire*. They managed to get two jurors struck for cause but paid the price in having the panel listen to two jurors talk about how much they loved and respected veterans.

The trial dragged on taking its toll on all of us, especially Lynne and Julie. Neither was sleeping at night. The waiting for trial along with reliving the events of the past five years was just too much. Lynne is very empathetic and truly feels her client's pain. The size of the case was overwhelming. Both their faces soon acquired a blank affect with little or no expression. I was hoping that both of them could just hold on for a few more days.

The defense used the time honored technique of sabotaging a personal injury case by reading excerpts from pre-accident medical records going back 10 years. The goal is always to show preexisting problems, proving the accident was not the cause of the injuries. Local defense counsel spent four hours with plaintiff's medical expert reading every past entry that mentioned, pain, spasm, medications or disability taking them out of context. We elected not to call Julie as part of our case and put her through more torture. Not so the defense as they called her as their first witness. Using the same technique they used with our doctor they spent three hours going through the same medical records taking statements out of context asking her if she recalled each of the past episodes from years earlier, when Ron was in pain, had a spasm, needed medications or had trouble with certain activities. It was brutal to watch.

Prior to trial the top offer from the Insurance Company offered was forty thousand. During jury deliberations Frank approached me with a high/low offer of \$200,000 guaranteed but a cap of \$1,000,000 no matter what the jury did. He told me he had spoken with the alternate juror who was excused from duty and the alternate said the jury was siding with the defense. By this time Lynne and the defense were not on speaking terms so I served as a liaison between the two. I presented the offer to Lynne, Julie and Carolyn. None of them had the resources to refuse such an offer. Lynne alone stuck about \$50,000 of her own money into this case that she was in danger of losing. Selflessly Lynne didn't

Stevens & Kuss S.C.

Attorneys at Law

recommend the offer. Julie asked Carolyn what she thought Ron would do. Carolyn replied, "Dad would tell them to shove it up their ass." I told Mr. New York that we declined their offer.

I wrote out my closing but presented it without notes. During trials I frequently ask myself what Gerry would do if he were in this situation? In my closing, I got a little sidetracked and carried away when I spontaneously said, "No dog should have to go through what Ron went through these last five years. He would have been better off living in an Iranian snake pit prison being tortured by terrorists. If he were a dog and I saw him suffering like this I would have shot him in the head. That may sound harsh but I would have pulled the trigger myself."

Again the defense did in closing what they usually do and that was an attempted character assassination of the plaintiffs. They lifted Ron's and Julie's statements from the medical records and the police report comparing them to trial testimony to try to portray Ron and Julie as liars. As in all cases, medical personal quickly scribbling comments from patients frequently get some of the facts wrong. Patients never get to review or correct what is being written down in their charts. The defense rehashed endlessly the same tired references to pre-accident spasms, pain and medications. They argued that Ron never hooked his chair up to the locking device on the floor when he left home. They made a mistake and didn't address the amounts of money I asked for during my initial closing argument. This allowed me in rebuttal to point an accusatory finger at them stating, "They know they are at fault. This is what we call a damages control case. They don't dispute the numbers I gave you or they would have said so in their argument."

The jury was out for two and a half hours. I couldn't look up when they returned as I had suffered some recent losses and had lost much of my confidence. The judge read the verdict question by question. My anticipated "no's" to the liability questions were instead "yes's" except to the question on contributory negligence by the plaintiff. Then he began reading the answers to the damages questions. The amounts read were close to the numbers I argued for in my closing. The jury totally rejected everything the defense put forward. I looked over at Lynne and she started to cry. I saw several jurors smile quietly her way. Carolyn also started crying. Julie, totally exhausted and wiped out just sat there stunned.

As much as we would like to pretend otherwise our big victories are too few and far between. We have little control over who our judge is, how our witnesses present themselves, how our experts stand up on cross examination, how good the defense lawyers are and who shows up for jury duty the day of the trial. We take too much credit for our wins and accept too much blame for our losses. Sometimes we think if we just try hard enough we can be like Gerry and win all our cases. Sadly that isn't the case. We need to be like a quarterback who is intercepted; put it in the past and keep firing into tight coverage. We need to be like the pro golfer who missed his last putt or shanked his last drive into the woods; forget it and move on. We need to forget our losses, get up off the mat, put our helmet on and go back into battle. To do this we need each other for support and encouragement. We need those around us, family, friends and office staff to keep our spirits up. We need God to bless us with enough victories so that we don't lose hope. Stay in touch.

Stevens & Kuss S.C.
Attorneys at Law