

“Anticipate Jurors’ Questions About Inadmissible Evidence During Your Direct Examination”

HELP THEM UNDERSTAND WHY THEY CAN’T SEE SOME OF THE EVIDENCE

By Elliott Wilcox

“Ladies and gentlemen of the jury, thank you for your attention to this matter. At this time you may retire to the jury room to begin your deliberations.” And with that final comment from the judge, the jurors rose from their seats and filed out the back of the courtroom.

Two minutes later, we heard a knock at the door.

Did they have a verdict already? We hoped not. After spending three days in trial, a verdict this quickly didn't appeal to either party. Fortunately, we quickly learned that they didn't have a verdict yet. It was worse...

They had a question.

In fact, it was the first of **several** questions they would ask that day. And that's when my stomach started tying itself in knots. Whenever a jury starts asking questions, I start worrying about the verdict, because it usually means I've forgotten to address something they were concerned about.

As the trial lawyer, it's our job to anticipate any questions that the jury might have. If we've done our job exceptionally well, they shouldn't have **any** questions during their deliberations, because we should have answered them all during our presentation of evidence and closing arguments.

That was certainly true in my case. Not only **should** I have anticipated the jury's first question, I **had** anticipated their first question. But unfortunately, I couldn't think of how to address their concern during my case. Why? Because they wanted to know something that the law prohibited them from knowing.

They'd asked us a question that we couldn't answer.

Here's a little background about the case. An off-duty police officer heard a radio B.O.L.O. (“Be On the Look Out”) call. The police officer saw a car matching the description and followed in hot pursuit. Over the next 20 minutes, the chase shifted from a high speed car chase to a foot pursuit. Before the night was over, both the police officer and the defendant tried to fire their guns at each other.

Now, back to the jury's question. What they wanted to know about was the B.O.L.O. They wanted to know why the police officer was chasing the man in the white car. Of course they did.

The reason the police officer was chasing the guy in the white car was because the B.O.L.O. he'd heard said that the man had just threatened several people by pointing a gun at them.

It was great information, but unfortunately, we couldn't tell the jurors about it. The victims of that assault were unwilling to cooperate, and they wouldn't testify at trial. We couldn't get the assault into evidence. According to our rules of evidence, the B.O.L.O. call was inadmissible hearsay, and there was no exception we could use to make it admissible.

But that didn't mean that the jury didn't want to hear about it. In fact, since they **couldn't** hear about, they were probably even **more** curious to learn why the police officer was chasing the white car. But since it wasn't admissible, there wasn't any way for me to address it.

Or was there?



“Rather than letting the jury's curiosity overwhelm them, help them understand why they won't be able to see the evidence.”

Rather than letting the jury's curiosity overwhelm them, I should have given them a reason why they couldn't hear what they wanted to hear. If they knew why the information on the B.O.L.O. call was inadmissible, their curiosity might have been satisfied.

After the trial, I came up with few ways for you to handle the situation when your jury wants to learn about information that they're not allowed to know. Hopefully this will help you out if you find yourself in a similar predicament:

1. Address the issue during jury selection. Let the jurors know that, unlike a regular conversation, we'll be constrained by the rules of evidence during the trial. Let them know that although they might be curious about certain background information, relationships, or what other people said, the rules of evidence will prohibit us from talking about them during trial. "For example, let's say that one of the witnesses spoke with Bill Smith about the case, and Bill Smith said something interesting and important about the case. In a regular conversation, you'd want to know what Bill Smith said, wouldn't you? But in a courtroom, we can't rely on Hearsay evidence to prove a case, because it prevents the other party from cross-examining the person who made the statement. For all we know, Bill Smith could be making the whole thing up. So the rules of evidence say only certain types of evidence are admissible. Both myself and Ms. Keeling may only present evidence that is admissible according to the rules of evidence. In a situation like the telephone call, you'd only hear that the witness spoke with Bill Smith. You wouldn't be able to hear what Bill Smith said." Then you could ask the jurors questions about that limitation, and if they would promise not to guess at what Smith would have said, etc.

2. Address the issue during direct examination. This is where I should have handled the situation in my case. In our jurisdiction, you can mention that a suspect matches

the description in the call, but you can't discuss the nature of the call. So, I could have asked something like this: "Officer, I'm going to ask you about the radio call you received. Now, according to the rules of evidence, we can't discuss the nature of that call, because that's Hearsay. Please don't mention the call details, but just tell us, did the car you saw match the description of the car in that call?" Hopefully, that would be enough to satisfy the jury's curiosity about why the police officer was chasing the white car, and give them a reason why they weren't allowed to hear any more details.

3. Talk about it during opening statement or closing argument. You could also mention the issue during your presentations to the jury. Address the issue directly by telling them, "We didn't talk about the nature of the call, because that's hearsay, and the rules of evidence prevent hearsay evidence from being introduced. Although you're curious about *why* the police officer was chasing the white car, that's not one of the issues in the case. I'm asking you to follow the law, and not speculate or guess about the B.O.L.O. call during your deliberations."

Unfortunately, none of these options are a perfect solution. Ideally, you'd like to tell the jury about your inadmissible evidence, but you can't do that. You can't completely eliminate their curiosity, but hopefully, these workaround solutions will help you limit their curiosity. Help them focus on the essential issues in the case, rather than extraneous issues they shouldn't discuss, and your jury shouldn't ask you any questions you can't answer. ■

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