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Understanding and Harnessing The Power of Juror Bias

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Few attorneys need convincing that understanding juror behavior can be frustrating. Understanding juror psychology, and the psychology of decision-making, is necessary to anticipate juror bias and understand how jurors are likely to respond to your case. Too often, attorneys make the mistake of expecting jurors to follow their instructions to the letter, even when those expectations are contrary to the ways in which individuals interpret information and make decisions. Despite the judge's instructions to regard opening statements as non-evidentiary, to keep an open mind throughout trial, to withhold decisions until the end of trial, and to base their decisions on the evidence alone, it is impossible for jurors to follow any of these instructions, despite their best efforts.

When do jurors make decisions in trial?

Never assume that a juror will keep an open mind about your case during the entire course of the trial. Your window of opportunity to persuade jurors is shorter than you may think; a recent study of mock juror decision-making at Cornell University showed that 85% of prospective jurors showed "pre-decisional bias" in their decision-making, and mock trial results at my firm have shown that 87% of mock jurors not change their verdict decision between the end of opening statements and the conclusion of the trial. This is not to say that jurors realize that their minds are made up, but rather that they have made crucial (and subconscious) decisions about credibility and likelihoods that determine how they interpret the ensuing evidence and ultimately how they make verdict decisions.

In absorbing the opening statements, persuasive arguments, and evidence presented to them in trial, the mind of the juror goes through two distinct phases. The first phase is framing the case. During the framing of the case, the mind of the juror is actively wondering "what is this case about?" and, during this phase, is open to persuasive techniques. As the juror collects information about the case and starts to make sense of what the case boils down to (which is different for each juror), the mind of the juror rapidly builds a framework with which to conceptualize the case. The framework contains strong opinions on which litigants and attorneys are trustworthy and who are not, what likely happened and what seems farfetched, and what the motivations and relevance of each party and issue are.

As soon as this framework is solidified, which is generally during the defense's opening statement, the framing phase is over and the juror's mind becomes essentially closed to external persuasion. Once the juror has built a reliable framework, the mind of the juror begins the second phase of scrutinizing the case. For most jurors, the entire presentation of evidence, witnesses, experts, and closing arguments occurs during their scrutinizing phase. In this closed-minded phase, the mind of the juror is actively comparing the evidence to their framework and determining whether or not the information is believable based solely on whether or not the information fits their framework. Rarely will a compelling piece of evidence or testimony override that framework and persuade a juror to change their mind; in determining whether a piece of evidence is credible or not, jurors consider the source as the primary indicator of reliability, and the credibility of the source (the litigant and attorney) is the main ingredient of the framework of the case.

What can a savvy trial attorney learn from the two phases of cognitive juror decision-making? First, focus your persuasive efforts heavily on your opening statements; once the window to persuade your jurors is closed, it is nearly impossible to rehabilitate a juror. Never save a persuasive piece of evidence for the latter stages of trial. Second, rather than trying to persuade your audience or rehabilitate jurors during your evidence presentation, focus your strategy on arming your supportive jurors with strong arguments with which to argue your case during deliberations. When a jury is split going into deliberations, the side whose jurors have the most ammunition and memorized evidence generally win out.

How do jurors make decisions in trial?

One of the most common (and fatal) miscalculations made in trial strategy is relying heavily on the persuasive power of evidence and underestimating the power of juror bias and cognitive decision-making during their "framing phase" in the first moments of trial.

Never assume that jurors make informed decisions on the basis of the evidence. In reality, juror attitudes and verdicts are shaped much more by the biases they bring into the courtroom that predispose them to choose one side's case over the other.

Trial is ultimately about jurors making choices between the versions of reality offered by the plaintiff and the defense. Although the justice system demands that jurors make these choices based solely on an objective view of the evidence presented, cognitive psychology understands that this is impossible; in interpreting information and making judgments and decision, jurors are forced to rely on their cognitive framing of the case to make these choices, and the jurors' framework of the case colors their interpretation of the evidence to fit their preconceived ideas.

For example, if a juror goes into trial believing that doctors are honest, benevolent, highly trained and competent, this juror will almost certainly justify plaintiff's evidence of malpractice in a manner favorable for the doctor. To this juror, it is more likely that the evidence was manufactured, taken out of context, has a reasonable explanation, or is the result of an honest mistake than convincing evidence of malpractice.

Because the presentation of evidence comes long after the jurors have heard what the case is about and who is involved, the jurors build the framework that determines how they view the evidence based largely on biases and predispositions. As illogical as it may seem, jurors determine what happened on the basis of what they believe is more likely to have happened in a given situation rather than waiting for the evidence to speak for itself.

Take the example of an insurance bad faith case. Logically speaking, everyone would agree that there are some situations in which insurance companies mistreat policy holders and some situations in which policy holders mistreat their insurer. Anyone would agree that the best way to determine who is at fault in any given case would be to examine the evidence: the insurance policy, the claims, and evidence of damage and how both parties interacted. In practice, jurors never evaluate the evidence objectively; having formed impressions of credibility and what is more likely to have happened before they view the evidence, jurors use their predispositions to make the evidence fit their framework.

In insurance bad faith cases, some jurors are predisposed to trust insurance companies and mistrust plaintiffs. These jurors may have positive experiences with insurance companies, may work for an insurance company, may have negative attitudes toward plaintiffs, view lawsuits as "frivolous," or may belong to a personality type known as "authoritarian" that blindly trusts institutions. If asked prior to trial, these jurors would tell you that it is far more likely for a claims holder to exaggerate claims and defraud an insurance company than for an insurance company to refuse to pay claims they are obligated to pay. Another group of jurors will be predisposed to distrust the insurance company; they have likely had negative experiences with insurance companies and negative attitudes toward large corporations in general. These jurors likely view corporations as greedy, unethical, and profit-driven, and will find it much more likely for an insurance company to defraud its policy holders than vice versa. These pre-trial attitudes will be far more influential in shaping verdict than the evidence itself. These prior experiences and deep-seated beliefs determine what a juror will readily believe. Once predisposed, a juror is very difficult—if not impossible—to rehabilitate and to persuade to believe something that does not fit their view of the world.

In your next trial, think about your case not in terms of the evidence, but instead in terms of the arguments involved, and think about the type of experiences and attitudes that would predispose a person to find your account of what happened a more likely scenario than that of opposing counsel.

Can deep-seated juror biases be overcome?

Rehabilitating jurors is extraordinarily difficult, if not impossible, during trial. Jurors enter the courtroom with an array of experiences, opinions, and biases about people and situations that predispose them to trust some litigants and distrust others. By the same token, many jurors enter the courtroom with negative feelings toward the civil justice system, which is a huge disadvantage for the plaintiff. These are the jurors who may view every case as frivolous, every plaintiff as greedy and dishonest, bring up the McDonalds coffee case, and assume that our civil justice system is fundamentally flawed. Unfortunately for the plaintiff's side, once these jurors develop a distrust of the plaintiff and the lawsuit, they are nearly impossible to rehabilitate. Their prior beliefs are simply too strong to overcome, and once the juror has framed the plaintiff as greedy or dishonest in their mind, this view will color their interpretation of the ensuing evidence and the case and influence their verdict.

While I would rarely recommend trying to rehabilitate a juror with strong biases during voir dire, there are times when appropriate. Perhaps there are simply too many biased jurors on the panel to strike them all. Perhaps you intend to persuade the rest of the jurors in the room by making an example of the one difficult juror, but intend to strike that juror anyway. Perhaps you have such great confidence in your persuasiveness that you believe you could turn the CEO of an insurance company into a bleeding-heart plaintiff juror.

In any case, your best shot to rehabilitate a juror biased against the civil justice system is to force that juror to identify with your client and internalize what your client is going through. Jurors who lack sympathy for the plaintiff generally become so because they are unable to imagine themselves in a similar situation. Simple techniques such as putting the juror through a hypothetical situation in which they have been harmed force that juror to put themselves in the shoes and mindset of a plaintiff. Ask the juror what they would do if a car ran a red light, slammed into them, totaled their car, and put them in the hospital. Would they want that driver to pay for their car? Their medical bills? Their lost earnings? What would they do if that driver refused to pay?

Forcing your cynical jurors to identify with your client is the only effective method to gain their sympathy; lacking sympathy, these jurors will only find for someone if they feel a personal stake in the case by envisioning themselves as potential plaintiffs.

Once the jury has been seated, if you feel that too many of the jurors seem predisposed to distrust your client, implicitly trust the opposing litigant, or choose the opposing side's explanation or interpretation of the case as more likely than yours, your best shot at overcoming your jurors' biases is to quickly and clearly acknowledge their expectations and explain to them why this situation is different from those expectations.

If you feel that the jurors are likely to distrust your disabled, unemployed client, acknowledge that there are many frivolous lawsuits and exaggerating plaintiffs and tell them why this one is different. If you feel that the jurors are likely to blindly trust the surgeon defendant, acknowledge that most surgeons are honest, miracle-workers and tell them why this one is different. If you expect your jurors to believe that the failure of a product is more likely to be the result of misuse than a design flaw, acknowledge that most products are designed and tested to a high standard of care and tell them why this particular product (and manufacturer) is different. Only by clearly and directly acknowledging your jurors' expectations can you challenge them to keep an open eye out for an unexpected situation, and an open mind.

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