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Pre-decisional Bias: Why trials are won and lost by opening statements

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Take note, savvy trial attorneys: recent research suggests that not all ingredients of a successful case presentation—jury selection, opening statements, evidence presentation, witness and expert testimony—may not be created equal in the eyes of a jury. Although most jurors actively try to remain open-minded during trial and until all of the evidence has been presented, psychological processes at work make objectivity nearly impossible for decision-makers. In reality, jurors do make decisions early on in trial and, once made, these decisions are very difficult to change.

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. That is, their interpretations of incoming evidence were biased to support the party they favored early on in the case. Further, the more confident a juror was in their early judgment of which party should prevail, the more bias they showed in interpreting subsequent evidence. General pro-plaintiff or pro-defense attitudes were also predictive of initial verdict leanings, despite the fact that they were instructed not let their prior beliefs color their interpretations of evidence. Empirical evidence supports this finding; in our experience conducting mock trials over the past 26 months since the formation of Isosceles Consulting, we have found that only 12.4% of jurors change their verdicts between the conclusion of opening statements and the end of trial.

These are startling statistics. What they tell us is not necessarily that jurors make up their minds quickly about who should win a case, but rather that jurors make up their minds quickly about who is credible and who is suspect. One of the basic tenets of jury psychology is that impressions of credibility and juror biases color jurors’ assessment of incoming trial information; once a juror has decided that someone is not credible, they tend to disregard even the most compelling evidence that person presents. However, these statistics highlight that principle more than most would realize, and should command any savvy attorney to focus even more heavily on jury selection, opening statements, and creating positive first impressions of themselves and their clients in the courtroom. It is largely these three arenas in which trial is won; if

nearly 85-88% of jurors aren't likely to change sides, what follows opening statements is largely due diligence.

It has been said that the opening statement is the attorney's opportunity build an outline of the case that they intend to prove. In light of these statistics, however, opening statements are a must-win proposition because they provide the framework for the credibility of your litigant and your story. A compelling opening statement should not only create a positive first impression for the jury by appearing professional, comprehensive, persuasive, and clearly-communicated but should also highlight all the major evidence and arguments that will make your ensuing case presentation compelling. It would be a mistake for an attorney to withhold compelling evidence and smoking guns until the middle of trial for dramatic effect; by this point, jurors are heavily biased and will base what they believe almost solely on who they believe. All strong evidence that enhances the credibility of your client and your case should be presented in some form during opening statements. If you have particularly compelling evidence, especially visual demonstratives such as a timeline, animation or reconstruction, or document blowup, do more than allude to it during your opening; show it to the jury so they get a sense of what is to come. Don't worry about glossing over your case too much; jurors don't expect detail or lengthy explanation during opening statements. The goal is to prove to the jury that you have a compelling, thorough case and to make promises to the jury that you can deliver on during the body of the trial.

Jurors develop first impressions rapidly and judgmentally. Because they do not have the luxury of getting to know the attorneys, litigants, and witnesses, they rely on situational cues such as appearance, mood, and demeanor to develop an impression of the key figures in the courtroom. Unconscious decision-making processes predispose individuals to believe the first information learned about a concept or person and to doubt subsequent information that contradicts that initial exposure. If a testifying expert is dressed less than impeccably, the jurors will assume him/her to be sloppy and unprofessional, not only in dress but in work-product. If a defendant is hostile or irritated during cross-examination, the jurors will assume him/her to be mean-spirited and mal-intentioned. If a plaintiff is well-spoken and emotional in the right context, the jurors will assume him/her to be likeable and genuine. These impressions vitally influence the jurors' views on the credibility and motivations of the parties involved in trial, and may have a more powerful impact on their assessment of the evidence than how compelling the evidence is itself.

The art of creating a positive first impression of an attorney, litigant, or witness depends largely on understanding the expectations the jurors have of their demeanor. In the eyes of a juror, credibility is determined by how closely an individual conforms to the juror's expectations of how that individual should look, act, and feel in the courtroom based on the situation that has brought them to trial. Jurors expect honest attorneys to be well-spoken, friendly, professional in dress and demeanor, and somewhat emotional in an emotional trial. Jurors expect dishonest attorneys to be slickly dressed, condescending, and callous, and incompetent attorneys to appear sloppy in dress, organization, and

demeanor. Not surprisingly, jurors place the litigants under the strongest microscope. After hearing what happened to the plaintiff, jurors develop a mental picture of how the victim should act, look, and feel in response to his unfortunate situation. If the plaintiff does not fit that mental image perfectly, the jurors will assume that the description of the plaintiff's claims was exaggerated, damaging his/her credibility. For example, if a grieving mother laughs or smiles in the courtroom, no matter how briefly or in what context, the jurors' mental image is compromised. The same can be said for an injured plaintiff walking gracefully, or a cognitively impaired plaintiff conversing smoothly, or a financially ruined plaintiff wearing an expensive suit. By the same token, the jury will likely feel manipulated and react negatively if a plaintiff appears worse than expected (think wheelchair or cervical collar). The savvy attorney should have a well-considered plan for creating positive first impressions, and these plans should be based on how a juror would expect an honest individual to look and feel given their unique situation.

A final point to keep in mind is the increased importance of a successful jury selection in an environment of strong pre-decisional bias. As much as our legal system would like to champion objectivity in the jury box, jurors are anything but clean slates, and cases are by and large determined just as much by the backgrounds and biases that jurors bring with them into the courtroom as by the proceedings that take place in that courtroom. Based on the experiences jurors have had, their knowledge of the issues central to the case, their interactions with the people, entities, and issues involved in the case (such as insurance companies, auto accidents, doctors, contracts, etc.), and the types of people they find credible, jurors are in large part predisposed to favoring one side or the other toward the start of trial. Although these predispositions may be overcome by an overwhelmingly compelling case, winning over jurors biased against your side of the case can be an enormous uphill battle; when research suggests that the success rate for changing minds is in the range of 12-15%, the more successful strategy would be to select sympathetic jurors and cultivate positive first impressions at the earliest opportunity.

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