

March Jury Tip: “The two ways jurors decide trials”

Without realizing it, any experienced litigator has engaged their jury in both normative and informational processing and at some point asked jurors to make intellectual and judgmental decisions. Have you ever tried a criminal case, argued for economic damages, or argued against causation of damages in a civil suit? If so, you've asked your jurors to make intellectual decisions: fact-driven conclusions that have right and wrong answers, and depend mostly on what your jurors believe happened. Have you ever asked a jury to apply standards of care or good faith, to judge the intent of a litigant, or argued for or against punitive or non-economic damages? If so, you've also asked your jurors to make judgmental decisions: value-driven conclusions that depend entirely on what jurors believe SHOULD happen.

When humans are asked to solve intellectual (solvable) problems that have right and wrong answers, especially in groups, they utilize informational processing—sharing facts and information with one another in an effort to find a solution. The facts themselves are much more persuasive than the opinions or persuasive efforts of group members in shaping decision-making. On the other hand, when humans are asked to solve judgmental (subjective) problems that involve ethical or value-laden judgments about what should be done, they use normative processing—the influence of social pressure, public opinion, and conformity to shape decisions. In normative processing, logic and analysis takes a backseat to personal values and, in groups, peer pressure.

The same decision-making principles apply to individual and group decision-making processes involving jurors. Some trials involve primarily intellectual issues—whether a criminal defendant actually committed a crime, or whether a building has construction-related defects, for example. Some trials involve primarily judgmental issues—whether admitted conduct by a defendant in a business case should be interpreted as fraud, negligence, or the breach of a contract, for example. Many trials involve both types of issues—for example, jurors in a personal injury case may be asked to render both intellectual (economic) damages and judgmental (non-economic and perhaps punitive) damages.

Admittedly, none of this is particularly groundbreaking or complicated. And yet, being aware of what you will be asking your jurors to do at the end of trial is critically important to guiding you through jury selection and your opening and closing statement.

Undoubtedly, most attorneys focus primarily on intellectual arguments. After all, the law and the jury instructions are very clear that trials should be judged on evidence and facts alone. In trials that involve intellectual issues, the jurors do focus on the facts, or at least try to. If the key controversies in your trial involve questions of what happened—who did what, who caused the harm, what was damaged and to what extent—your jurors will focus on the facts, and you need to focus on how receptive your jurors will be to YOUR

facts during jury selection. As I've stressed so many times before, not all jurors are equally receptive to the same set of facts; based on their own experiences and view of the world, some jurors will be predisposed to be skeptical or even doubtful of your version of the facts. As I said in a jury tip long ago, 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. In an intellective-driven case, search for jurors whose experiences and whose beliefs about how the world usually works match your version of the case. More importantly, identify and strike any jurors whose experiences and worldview tell them otherwise. Jurors who have battled with contractors in home remodels are much more likely to believe the facts a plaintiff presents in a construction defect trial. Jurors who have seen co-workers exaggerate injuries to get paid medical leave, disability, or worker's compensation are much more likely to be skeptical of a plaintiff's facts in a personal injury or employment trial.

On the other hand, trials that involve judgmental issues are decided far less on the facts than you may think. In a study at Northern Illinois University, researchers found that mock jurors spent well over 60% of their deliberation time discussing values instead of facts or evidence when they were asked to determine punitive damages in a civil case. In the second half of these deliberations--once the jurors began to realize that consensus would require some persuasion--the percentage of value-based arguments soared well beyond 60%. Not all trials involve judgmental issues, but those that do are usually decided by your jurors' values rather than their receptiveness to the facts.

Punitive and non-economic damages are highly judgmental issues; there are no right and wrong answers in determining how much damages are appropriate to punish wrongdoing, address physical pain, or measure the value of injured feelings. Trials that require jurors to interpret intent (was the defendant's negligence accidental or malicious?), pass judgment (was the medical treatment below the standard of care?), or assign responsibility (was a failure to disclose information in a sale of property fraud by the seller or lack of due diligence by the buyer?) are decided more by values than facts and information.

When selecting a jury in a judgmental-focused trial, search for jurors whose values and beliefs about how the world SHOULD work match the values that your case is based upon. More importantly, identify and strike jurors whose values are in conflict with yours, especially those whose values might get in the way of being able to support every verdict option. Jurors who have concerns about awarding damages to plaintiffs that have no practical purpose or specific use are far less likely to award punitive or non-economic damages. Jurors who value personal responsibility and self-reliance tend to shift far more responsibility and blame onto plaintiffs who fail to take pro-active action in any type of case.

Before your next trial, prepare for jury selection by thinking about more than just how your jurors will view your case at the beginning. Think about the questions you will be asking your jurors to answer at the end of trial, long after they've made their minds up about who and what they believe. I suspect that most of you haven't given much thought, if any, to the psychological methods your jurors rely upon to process information and make decisions, but the type of judgments you ask your jurors to make play a large role in determining the pool of biases they will draw from when making those judgments.

Harry Plotkin is a jury consultant in Los Angeles. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements. He can be reached at 626-975-4457 and at harry@ournextjury.com.