

October Jury Tip: “The Two Phases of Juror Decision-Making”

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; 85-90% of jurors do 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.

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