

January Jury Tip: “Why Biases Outweigh Evidence”

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 entitled 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.

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