

The Hidden Forces at Work Behind Jury Decision-Making

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The jury is often referred to as “the black box,” highlighting the vast unknown often associated with it. Reliable feedback can be hard to obtain. Many attorneys do not talk to the jury after their verdict and even those who do have difficulty knowing if the jurors are being totally forthcoming or if they are simply trying to say what they think the attorney wants to hear. As a consequence, many attorneys are left guessing which aspects of his or her strategy were effective and which were ineffective.

Over the last fifteen years, we have had the opportunity to watch hundreds of mock jury and shadow jury deliberations. The opportunity to watch a deliberation from start to finish is very revealing. Rather than rely on self-censored interviews with jurors, mock and shadow jury deliberations let us see the process, the influential social dynamics that are created between jurors, the many ways in which momentum for a party is gained and lost, and the interesting ways in which jurors from diverse backgrounds come together and make sense of complex cases and confusing jury instructions.

This article focuses on the three most common “hidden forces” at work in jury deliberations. Cases vary, but these are forces that we see in intellectual property and medical malpractice cases alike. If you understand these three forces, you are well on your way to effective trial strategy development.

Motivated reasoning. Motivated reasoning is at the heart of all human decision-making. Faced with vast amounts of information, our brains must find ways to filter the information in order to move forward. The most common process is one that leads us to embrace information that reinforces what we already believe. It is why conservatives listen to folks like Glenn Beck and Bill O'Reilly and liberals listen to Rachel Maddow. People's natural tendencies are to embrace and make more salient the information that supports what they believe while discounting, ignoring, or rejecting that which challenges those beliefs.

When juries render a verdict, they are embracing a value statement about what is right and what is wrong. Every case has different focal points, which means that every case also has a variety of value statements that can be made with different verdicts. Consequently, the most effective strategies are those that focus the case on something the jurors want to believe. Maybe jurors believe that not enough large companies take responsibility for ensuring the safety of consumers who use their products. Maybe they believe that too many individuals (like the plaintiff) refuse to accept responsibility for their poor choices. As the attorney, it is



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your job to find out what jurors want to believe about your case and organize the entire case presentation around that central value statement.

Experiential fidelity. The easiest facts for jurors to embrace are those that are consistent with their own personal experiences. It is astounding how much people rely on their own personal experiences as a guide for what may or may not be true. There are a variety of mock jury studies that show that up to 50% of the content discussed by jurors during deliberations consists of the jurors' own personal experiences. These experiences are used to fill in information gaps and to determine the testimony that is and is not true regarding what happened. We have seen many situations where jurors have outright rejected uncontested facts because those facts were inconsistent with their own personal experiences. Consequently, attorneys need to make sure their case theory resonates with the common experiences of those in the trial venue. This may sound easier said than done, but every case has such an opportunity. It's merely a matter of focus. Jurors may dislike large corporations, which is bad for a corporate defendant, but a lot of jurors also dislike individuals who engage in a pattern of poor decision-making and refuse to accept accountability for their own actions, which can be bad for the plaintiff in that same case against the corporate defendant.

Expectation discounting. In academia, there is a theory called the Persuasion Knowledge Model. This theory suggests that people put up more resistance to persuasion when they are aware that someone is trying to persuade them, even if the content of the message is something they agree with. At first glance, this may seem to conflict with the prior two forces that we addressed. After all, if jurors want to believe what you are saying and your facts are consistent with their own personal experiences, there shouldn't be any resistance, right? Expectation discounting is a little different. It refers to what is essentially a distrust of all attorneys and figureheads. For example, jurors expect a corporate representative to say things that are favorable for the corporate defendant. Consequently, they will discount that testimony as less reliable or helpful. The same happens with attorneys, particularly in opening statements when jurors are skeptical of the promises being made. This is why the best openings start right off with three to five key facts that are not disputed or can be quickly and efficiently substantiated. This earns immediate credibility with jurors because it means they don't "have to take your word for it." There is a difference between presenting a fact to jurors and telling jurors what you think the fact means. The former gains credibility, but the latter still requires jurors to trust you. Consequently, stick more to the former. After you've presented a few uncontested or easily-proven facts, then you can tell jurors what you think those facts mean.



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