Juries 101: Three Core Factors in Jury Decision-Making

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A lot has been written about jury decision-making and the potential factors that influence it. Whether it's primacy and recency, or a debate over the extent to which our brains are similar to those of reptiles, there is a lot to get lost in, making it difficult to separate the important from the trivial, or the helpful from the detrimental. The goal of this article is to highlight three factors that get to the core principles of jury decision-making. We discuss the implications of each and provide practical guidance for how to effectively manage them. In sum, these three factors represent the foundation for understanding how to develop an effective case theory and presentation.

Limited focus and retention. A well-known 3M study showed that, after three days, people remember only about 10% of what they were told. Other studies have shown similar findings, which means that jury deliberations encompass only a fraction of the evidence and testimony presented during trial. While jurors have access to some resources (i.e., exhibits) that might help with recall, they do not always utilize these resources. As an example, two years ago, we were involved in four-week trial that produced around one-thousand exhibits. When we interviewed jurors at the conclusion of the trial, they told us that they looked at *only eight* of the exhibits over the three-day deliberation.

Since jurors are only going to remember and use a limited amount of information during deliberations, it is critical that attorneys develop strategies for cementing the most favorable evidence and testimony in jurors' minds. One strategy for accomplishing this is *central fact selection*. This is the selection of three to five central facts about the case to which everything else is subordinate, and upon which much of the case hinges. These should consist of basic facts that are quick and easy to prove and provide a firm foundation upon which to build your overall case theory. They should not include facts that require long explanation or have debatable interpretations. Three to five facts are not that many, but if everything is important, nothing is important and selecting more than this waters down the value of your best and most salient facts. While the decisions are difficult, the result will be simplicity and clarity in the case presentation, which increases the likelihood of successful persuasion. In most cases, three to five facts can tell jurors everything they need to know about the case. In other words, the central facts take on symbolic value. They tell the jurors a lot more about the case than just what the fact implies at face value.

In summary, central fact selection is critical for three reasons: 1) strategically-chosen central facts of the case tell your jurors much about what they need to know about the case while organically tapping into psychologically-satisfying principles that drive the way they make sense of your case; 2) central facts validate the core thematic framework of the case and what a juror wants to believe about the case; 3) these facts establish credibility by proving something to jurors (rather than asking them to take your word for it).

Motivated reasoning. Motivated reasoning is the academic label used to describe the process in which people decide what they want to believe first, and then seek out information that reinforces that belief while rejecting, discounting, or explaining away any information that contradicts it. This means case strategy development is not an exercise in what the evidence and testimony actually proves, but instead an attempt to identify what jurors want to believe about the case and identifying the central facts that reinforce that desired belief.

A 2004 study at Emory University led by Drew Westen examined this issue and found that our brains may actually be wired this way. Participants were divided by political affiliation, placed in fMRI machines (which measure brain activity), and asked to watch video clips of their preferred presidential candidate making contradictory statements. The results showed that, when exposed to these contradictions, the participants' brains essentially went haywire; however, as soon as the participants were able to "explain away" the contradiction made by their preferred candidate, the brain released a burst of dopamine, which is the brain's "pleasure drug." The researchers described it as participants essentially giving themselves a "neurological pat on the back" for finding a way to explain away information that threatened what they preferred to believe about their candidate.

Practically, this means attorneys need to develop a central thematic framework that taps into core principles that are important to jurors. This establishes a personal connection and gives them something to fight for. Attorneys should develop what screenwriting guru Robert McKee calls the "controlling idea." The controlling idea is one clear, coherent sentence that expresses the case's core meaning. It provides a simple and compelling framework that helps jurors determine what is important and what is unimportant. It also serves to shape aesthetic choices related to the case presentation. The goal is to shape the case presentation around one clear and persuasive statement that is easy for jurors to digest. In the words of one retired judge we worked with, "If you cannot explain your theory of the case in a single sentence, it means that you don't have one."

Small Group Dynamics. Trial presentations are not just about persuasion. Persuasion is only one part of the process. The more important element is that the persuaded need to be motivated and armed to effectively persuade others in the group during deliberations. This requires an understanding of how individuals function within a small group environment. If trial is thought of as a great debate, the common misconception is that the great debate is what takes place in the courtroom between the opposing attorneys. The reality is that the more important debate is the one that takes place in a small-group environment - deliberations. This means that attorneys are more like debate coaches than debaters. This is an important distinction because doing and coaching someone else to do it are two entirely different skillsets.

When attorneys look at themselves from the coach perspective, two strategic questions arise. The first question is, *are my arguments easy to rearticulate?* Since jurors are rarely in complete agreement at the start of deliberations, they must argue with one another to achieve consensus. Consequently, attorneys need jurors who are not just persuaded by the arguments, but also able to effectively rearticulate those arguments during deliberations.

To accomplish this, each key argument in the case needs to be reduced to a clear and simple statement, much like the controlling idea. Second, each argument needs a fact or two that represent that argument. These facts should be rather straightforward and require as little explanation as possible. This allows the advocates on the jury to easily support their position. Third, the attorney should be as repetitive as possible with the clear and simple statement and representative facts. Repetition is the most rudimentary form of persuasion. Repetitive exposure is critical. After all, trial, in many ways, is a battle for saliency. As coaches, the battle is over who will control what jurors talk about most in deliberations and how they talk about it.

The second strategic question that arises when attorneys view themselves as coaches of the jurors is, *what does each issue accomplish for my advocate in deliberations?* Jurors have limited motivation and stamina. The key is not to waste it. This means that attorneys need to think carefully about what they are asking their advocates to argue in deliberations and whether or not it truly moves the group forward to a favorable outcome. For example, most cases have some interesting, but peripheral fact that is hard to let go. Perhaps the party has some sordid, but irrelevant or unrelated background issue. Perhaps the party lied about something meaningless and unrelated at deposition. In an adversarial setting, it can be difficult to let go of fun facts such as these. However, the best way to look at is to consider that every argument that you ask your advocates on the jury to advance brings with it a risk of that advocate losing the argument and shifting the momentum in

deliberations to the other side. Consequently, attorneys need to carefully consider how important an issue is to the overall outcome. If it does not clearly move things forward in favor of your party, it is probably time to consider dropping it from the case.

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