An Alternative View of Deliberations and Jury Persuasion

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There is an important discussion that rarely occurs in the jury persuasion literature, which explains the common gap between persuasive case presentations and effective case presentations. Such a distinction may seem silly, but it turns out to be a critical one. Specifically, the literature lacks discussion of the actual moment-to-moment interactions in jury deliberations and the give-and-takes that constitute the process that ultimately allows a group of overwhelmed and likely confused strangers to take the evidence, testimony, jury instructions, and verdict form and render a verdict. The purpose of this article is to highlight those milestones and discuss how attorneys can influence them.

Conceptualizing an attorney's task as merely persuasion fails to capture the reality of most jury deliberations. The reality is not as simple as jurors being persuaded or not. Instead, the common dynamic is where some jurors are persuaded, some are not, and some are unsure. This creates a unique environment in deliberations that most advice on persuasive technique does not address. Diversity of leanings in deliberations creates a power struggle. This means that your advocates on the jury need to be more than just persuaded: they need to be motivated and sufficiently armed to wage a battle and exert control over deliberations to drive a verdict in favor of your client.

In order to train jurors to win deliberations, it is important to understand what actually happens within deliberations. Let's take a look at the actual process and interactions that play out in deliberations. Here are ten critical moments in the deliberation process as well as a few tips for how an attorney can influence each moment.

1. *A foreperson is chosen*. One older study showed the foreperson accounts for 25% of all speaking acts in deliberations.[1] This can translate to significant influence. Attorneys should pay close attention in voir dire and try to identify venire members with leadership traits that make them more likely than others to be elected foreperson. The most consistent indicator is prior jury experience. Beyond that, look for people in management positions who oversee groups of individuals as well as those who are comfortable and confident articulating their opinions in front of others.

[1] Strodtbeck, F. L., & Lipinski, R. M. (1985). Becoming first among equals: Moral considerations in jury foreman selection. *Journal of Personality and Social Psychology*, 49, 927-936.

2. *Initial credibility is established*. Once the foreperson is chosen, the group usually engages in some sort of initial turn-taking where everyone goes around and gives their opinion. What each jurors says plays an important role in establishing his or her initial credibility with the group. This influences who other members of the jury want to align themselves with or defer to during tough debates. A juror who offers a simple and competent overall opinion that ties directly to the key questions on the verdict form and highlights a few key pieces of evidence to support that opinion can establish immediate credibility. Conversely, a juror who is inarticulate, does not seem to understand the issues well, or misstates a central issue may lose immediate credibility. Repetition and reinforcement of key issues using simple and memorable language is critical to priming your advocates to begin the discussion with credible commentary on the case.

3. *A process for deliberations is proposed*. Where jurors begin their discussion and how it progresses is critical. A verdict is ultimately the product of what jurors choose to talk about and focus is zero-sum. If they are talking about one thing, they are not talking about something else. I have seen mock trials where the primary difference between groups that returned favorable verdicts and those that returned unfavorable verdicts was where their deliberations began. In cases with strong emotional components, it is usually favorable for the plaintiff if the jurors start by spending time on a general discussion of the case where everyone can voice their opinions and frustrations. Conversely, it is usually favorable for a defendant in these cases if, rather than engage in a long-winded and open-ended discussion of general issues, the jurors look at the verdict form and the jury instructions and use those to guide their discussions from the start. One way to influence this is to propose a process for deliberations in closing argument and model the structure and order of closing argument after that proposed process.

4. *Opinion leaders emerge.* After the honeymoon period, opinion leaders start to emerge. In most instances, one or two vocal advocates for the plaintiff duel with one or two advocates for the defense while the rest of the jurors move to the background. The job of the opinion leader is a difficult one. He or she must maintain the stamina and clarity to endure the grueling process of principled disagreement in deliberations. In other words, your advocates must be motivated to step into that role of opinion leader. This motivation derives from the core values of the case theory that the juror relates to and believes in. In this respect, when the juror advocates, he or she is defending something about him or herself. Consequently, attorneys need to develop case theories that tap into core human values and identify opportunities to present and reinforce this

framework throughout trial, not only in opening and closing, but also in the cross examination of key, adverse witnesses.

5. *Values emerge.* Once a juror is sufficiently motivated to take on the role of opinion leader, he or she is positioned to package the case within those core values as the debate ensues. This is where momentum develops as other members of the jury pick from the competing values that dominate the rhetorical environment of deliberations. Momentum is critical. Once it is established, it is difficult to overcome. Attorneys need their strongest case values to emerge in deliberations. Every case has multiple values at play in the various facts, evidence, and testimony. The presentation of the case at trial needs to focus on a central value that can easily arise out any corner of the case discussion. It needs to be simple, but powerful.

6. *Arguments are re-articulated.* The difference between a persuasive and an effective argument boils down to a juror's ability to rearticulate it. If a juror cannot re-articulate an argument, he or she will remain quiet in deliberations, which provides little value to your client. Even worse, the juror may speak up and fail to re-articulate the argument, instead coming across as confused or incompetent. This can undermine his or her credibility and thus eliminate his or her potential influence. It can even have a spillover effect where the credibility of the argument or position is undermined simply because your advocate failed to competently re-articulate it. Attorneys should examine the logical structure of their key arguments. It may seem silly, but consider diagraming it out on paper. The goal is to present arguments that have as few logical steps as possible. In order to achieve this, the underlying structure of the argument should be closely scrutinized. It needs to be as simple as "A+B=C," not "A+B+C+D+E+F=G."

7. *Evidence and testimony is identified.* Your advocate needs to know which evidence and testimony is most important and applicable to the issue at hand. This may seem obvious to the attorney because he or she has lived and breathed the case for months or years. It is not so obvious to the jurors. They have been bombarded with information and are easily confused. Jurors frequently try to use the evidence for one argument to support an entirely different argument. I have seen evidence on damages get mistakenly used for liability and vice versa. This can undermine the credibility of the juror and the argument being advanced. A simple way to reduce the likelihood of this problem is to engage in more sign-posting. Provide an ongoing roadmap for what is being discussed at any given moment. Attorneys do not sign-post enough at trial. It should be incorporated

in the minute-to-minute discussions that occur in direct or cross examination. It can be as simple as a transition to a set of cross examination questions along the lines of, "You have alleged that my client was negligent in this case and one of the key issues the jurors must consider on this claim is whether or not a person in a same or similar situation would have acted the same way, so I want to ask you some questions about that."

8. *Jurors are alienated.* Some jurors are alienated during deliberations. This happens when the group looks at one juror and concludes that he or she has stopped adding value to the discussion. A common cause is the juror's repetitive use of a shallow issue. In other words, the advocate is motivated, but cannot evolve the discussion beyond the repetition of some simple refrain. In this respect, arguments need to be dynamic. They need to have depth that allows jurors to talk about them for long periods of time and still feel like the discussion is progressing. One strategy is to focus on patterns of behavior by the other side. If the central trial theme is personal responsibility, look for every opportunity to highlight the pattern of the other side's failure to take personal responsibility. This packages several issues within one central theme that provides your advocates the tools to drive a rich discussion that evolves in deliberations.

9. *A majority is formed.* At some point during the discussion, a majority will start to form. This is a pivotal moment because it creates the final momentum towards a verdict. It is not impossible to overcome an adverse majority, but it is very difficult. Once the majority is formed, the orientation of the group focuses on how the majority can persuade enough members of the minority to reach the decision rule. It is critical to consider how various issues contribute or detract from the momentum of deliberations. In short, attorneys need to decide what is important and eliminate the rest. For example, sometimes an attorney has an argument or evidence he or she is excited about that does not necessarily get back to one of the central issues in the case. Maybe a key adverse witness lied about something peripheral to the claims. Maybe the other party sent a perplexing email on a tangential issue. These things may have psychological appeal, but they also create opportunities for micro-losses for your advocates in deliberations. In other words, every argument advanced by your advocate also includes the opportunity to lose the debate in deliberations on that argument. Momentum is stalled or created for the other side when these losses occur. Consequently, attorneys need to provide as few opportunities for losses in deliberations as possible. Even losses on small, tangential issues can change the momentum of deliberations.

10. *Concessions to reach the decision rule.* In a last ditch effort, the remaining hold-outs will negotiate concessions. In other words, they know they cannot change the fact that the final verdict will go against their case leaning, but they want to at least achieve some sort of win. This is when they start negotiating. They will make statements like, "I'm willing to vote that the defendant was negligent, but I'm not assigning the defendant more than 50% fault." Motivation is critical here, which is why attorneys need to find a strong, basic value or principle to package their case presentation within and then reinforce that value at every opportunity throughout the course of trial.

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