

WINNING YOUR CASE: EXTRA-EVIDENTIARY FACTORS

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Following prosecution arguments, an attorney begins his defense of a policeman accused of rape by viciously slapping him across the face. Apparently, he felt jurors would take pity on the accused. The verdict ended in an acquittal. Was the tactic successful?

Research suggests that decisions reached by individual jurors evolve from a complex interaction of both evidential and non-evidential aspects of the case presented. To what extent do theatrics, dramatizations, personalities and other extra-evidentiary factors enter into play? Certainly the popular media, from Perry Mason to L.A. Law, has portrayed to the masses that trials are dramatic, emotional, and full of surprises. In reality, many jurors will report they were often bored during the course of the proceedings.

It has been noted that it is very difficult to accurately measure the exact impact of extra-evidentiary factors. Researchers have attempted quantitative estimates of the various importance of each. For example, evidentiary factors were assessed to account for 77% of the decision-making factors, with 33% non-evidentiary in a study by Foley, et al., 1979.¹ Generally, it is accepted that as the strength of the evidence increases, the relative impact of non-legal or emotional factors decreases. In truth, so many factors are combined in juror decision-making that to ferret out a single variable or dramatic act, though often attempted, is impossible. For example, the Phoenix attorney later credited his risky move as the "turning point" in the trial. However, post-trial interviews with the jurors suggested there was "little effect."

The relative importance of various extra-legal factors in the courtroom will continue to be debated. Few, however, would discount these factors. To do so would assume an unrealistic view of human beings as mechanical, computer-like thinkers. As an example, it has been noted that the judge's instructions to "strike the previous statement" or "disregard counsel's remarks" often serves to reinforce the importance of the message, exactly the opposite of the intended effect. Jurors are routinely instructed to reserve judgment until "all the facts are presented." This simply is not consistent with human thought-processing.

The scope of this article is to review briefly the primary non-evidentiary factors research has documented to influence jurors, beginning with pre-trial influences, through the trial itself, and finally during deliberations.

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more of what is presented visually. Additionally, visuals are more effective than verbalizations for inducing emotions. In many cases, a picture is "worth a thousand words."

Primacy and Recency: What is heard *first* and *last* has the greatest impact and is retained longer. Several research projects have found that between 65-70% of jurors have formulated beliefs about the case following *voir dire*, and 80% following opening statements. In structuring their case, attorneys should present their key arguments and witnesses first.

Attorney/Witness/Litigant Characteristics: Everyone involved in the case is essentially an actor in the courtroom drama. Even a defendant who does not testify impacts the jury with appearance, demeanor, voice, and so forth. In fact, studies indicate the mere act of the defendant *not* testifying is often perceived by jurors as an admission of guilt. Some of the more salient interpersonal characteristics found to impact juror decision-making are: credibility, trustworthiness, likeability, expertise, competence, and dynamism.

Appearance Factors: Research indicates that we form enduring perceptions about people based on their appearance. And, indeed, people in general appear in the manner they wish to be perceived. Businessmen wear suits, short hair, etc. to appear "professional." California surfers wear long shorts and start each sentence with "Hi, Dude." Neo-Nazi "Skinheads" differ from Hari-Krishnas by about 1/8 inch of hair, though their doctrines are miles apart.

Jurors formulate judgments about the participants in the courtroom drama utilizing perceptual factors. In fact, communication specialists estimate that the typical message between the sender and receiver is 7% (content), 38% vocal (pitch, tone, etc.), and 44% posture (body language, behavior, etc.) Thus, attorneys and litigants must be aware of the impact of their own appearance and demeanor, as well as that of witnesses and other litigants.

Of particular importance to attorneys is the juror's perception of the defendant's remorse, a victim's suffering, etc. Devastating to the persuasiveness of an argument is incongruency, e.g., a defendant smiling while expressing great remorse. In sum, attorneys, witnesses, and litigants are expected to look, act, and speak in a manner congruent with juror's perceptions.

DELIBERATIONS

"... the jury must achieve the requisite consensus from the preferences of its members, even though these preferences may be quite disparate at the onset of the deliberation."⁶

Following an attorney's best presentation and persuasive arguments.

with perhaps months or years of preparation, the final verdict rests on the decision-making of a *group*. As implied in the quote above, the attorney may have fully convinced some, failed miserably with others, and left some undecided. At this point in the trial, the psychology of *group* processes comes into play. Research into jury deliberations, which is generally experimentally simulated since actual monitoring is strictly prohibited, suggests the following:

Juror Participation/Leadership: Some jury members will speak far more and be more domineering than others. These jurors often successfully persuade undecided jurors. They will tend to be more verbally aggressive and usually hold higher positions of status in society. Consequently, trial attorneys may find that during voir dire, the failure to de-select one negative juror with leadership skills can outweigh the effectiveness of several favorable ones.

Acquiescence: Studies into group processes and conformity indicate that jurors may change their initial verdict for various reasons. Generally, these are classified either as informational influence, i.e., learning new information, or normative or conformative influence, i.e., complying with the expectations of others.

CONCLUSION

It has been shown that the facts and the evidence are the important components jurors use in making a verdict. However, in ambiguous and complex cases, where evidence is convincingly provided by both sides, extra-evidentiary factors become increasingly important. In such cases, a different mix of jurors, different evidentiary presentations, and different attorneys or strategies may lead to a different verdict. Extra-legal factors occurring from pre-trial influences and during deliberations can be controlled through careful voir dire and case preparation. Factors such as juror attitudes, intellectual capabilities, decision-making style, and leadership capacity should be considered. Once the jury is selected, utilization of persuasive techniques, emotional appeals, visual displays, etc., is essential. Attorneys who fully address these factors will significantly enhance the prospect of winning their cases.

¹ Foley, Chamblin, & Fortenberry. "The Effect of Race, Socioeconomic Status, and Personality Variables on Jury Decisions." Paper presented to the APA, N.Y., Sept. 1979.

² Kaplan, "Cognitive Processes in the Individual Juror." Chapter in *The Psychology of the Courtroom*, edited by Norbert Kerr and Robert Bray, The Academic Press, Inc. p. 201 (1982).

³ Vinson, "Jury Trials, *The Psychology of Winning Strategy*," The Michie Company, Charlottesville, Virginia (1986).

⁴ *Ibid.*, p. 16.

⁵ *Id.*, at 174.

⁶ Stassen, Kerr & Bray. "The Social Psychology of Jury Deliberations: Structure, Process, and Product." Chapter in *The Psychology of the Courtroom*, edited by Norbert Kerr and Robert Bray, The Academic Press, Inc. (1982).