



Understanding some
common behaviors that
jurors exhibit will help you
plan your case strategy
well before trial.

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Identifying 5 Juror Types

After conducting hundreds of interactive focus groups where I show people the facts and evidence from an actual case and ask them to discuss their opinions, certain behavioral or decisional “types” seem to emerge every time. It has been possible to predict that these five behavioral types will appear among at least some jurors at some point during trial. Of course, these types are fluid, and jurors seem to drift from one to another at various points in the trial. Some jurors may drift through all five types, and other jurors may drift through none. Still, experience has shown that it is wise to prepare for all five types because they are so common.

Acknowledging these common behavior types will help you not only frame your case for trial but also tailor your discovery to focus on evidence that supports your theories in a way that addresses each type of juror’s needs.



Prepare your case and plan your voir dire with an eye toward meeting the needs of these five most common types of juror behavior.

1 **The Film Buff** **(‘Don’t Make Me Think’)**

These jurors assume a video exists in every case—and they want to see it. People like videos because they often treat videos as a shortcut for doing their own thinking. The root problem is that thinking about the case and making a decision is tough. These jurors (most jurors, actually) make decisions they feel are safest *for them* and with which they feel most comfortable.

But videos are often not clear enough, and they rarely show the place where

an injury occurred or a hazard existed. Instead, most videos raise more questions than they answer, potentially misleading jurors.

What to look for. Use voir dire to inquire about what jurors want to see. What do jurors expect to see in the video? What questions do they expect the video to answer?

What to do. Make your case simple, clear, and interesting. Engage the jurors, and keep them entertained. Use graphics, photos, diagrams, and objects such as skeletons, surgical hardware, and defective devices. Jurors believe that videos help them understand the look, sound, and feel of key evidence. Don’t use words to describe something when photos or other visual tools will



do it better. Instead of describing what an intersection looked like, show jurors a diagram. Instead of telling the jurors about your client's activity level before an injury, show them photos of your client engaging in physical activities.

If video exists, view it with a critical eye. Does it answer all the questions a juror might have? Is it confusing or misleading? Some lawyers like to use animations or simulations, but these can confuse jurors and lead them to the wrong conclusions. Jurors don't always see what we think they see in animations or simulations and sometimes get confused by the fact that they are not actual depictions of the event at issue. Test them with your focus group to learn what people think about what they see.

Be prepared to try your case without the animations or simulations you commissioned if the focus group jurors tell you that they are harmful or confusing. The same is true for demonstrative exhibits you may have created.

If the defendant destroyed a video or if no video exists when you would expect there to be one, jurors may take this error or omission as proof that the defendant did something wrong and is trying to cover it up. If this is the case, take a 30(b)(6) corporate designee deposition. Commit the defendant's representative to admissions about the defendant's ability to videotape, its standard operating procedure of taking and maintaining videotape footage, and its failure to videotape or preserve a video in your case.¹

2 **Doubting Thomas** **(The Criminal Juror)**

Most jurors don't understand the difference between the criminal standard of proof and the civil one. They believe their job is to find the defendant "guilty," and they think there is a higher standard for civil cases than there is—and that it's the same as for criminal ones. That alone should give you pause. The following are actual quotes from jurors in interactive focus groups *after* reading the jury instructions and receiving several hours of evidence:

- "I saw the witness testify, but I need *evidence*."
- "I think the defendant is at fault, but I don't know if they are negligent."

- “I don’t think the defendant *intended* to harm the plaintiff, and I don’t want to punish them—none of us is perfect.”

What drives this behavior? We’ve often heard “each case needs a good villain.” Jurors need a “villain” because the civil standard of proof makes them uncomfortable about how they would fare if they were on trial. This is especially true because jurors routinely identify with the plaintiff—it is too frightening to believe that we live in a world where people could be minding their own business and behaving safely when a horrific tragedy befalls them. Some jurors are also extremely suspicious and, quite frankly, the concept of “guilt” is much easier to understand and accept than “more probable than not.”

What to look for. Listen to the language jurors use. How do they talk about the court system? If they have served on a jury before, how do they talk about that experience? Pay special attention to jurors who have served on civil juries and talk about “finding the defendant guilty.”

What to do. Explain early and often what your standard of proof is and what it means. Use analogies. Talk about it using plain, everyday language—not legalese. Explain to the jurors what “evidence” is and that it includes the testimony of all witnesses, including the plaintiff. Explain all of this clearly, and then repeat, repeat, repeat.

3 Lost at Sea (They Need an ‘Anchor’)

When you learn something new, do you try to compare it to what you already know? Jurors do this too, especially in the damages portion of your case, although you will see it on liability issues too.

Most jurors don’t know it is the jury’s duty to decide damages. They think the judge does it or that they give



an “advisory” verdict the judge then accepts or rejects.

What to look for. Ask how they would decide damages. Some comments you may hear include:

- “What do other cases go for?”
- “I would expect to see a table of what these cases are worth.”
- “I don’t know, and I wouldn’t want to award anything outlandish.”

What to do. Assure the jurors that you will give them the tools to make this important decision.² Give them an “anchor”—an actual number of what you think the case is worth and explain why you are asking for this number.³ Provide a breakdown of what the number includes and where it came from. Explain where the money will go, and always explain “what good the money will do.” Jurors want to know the plaintiff is “deserving.” It isn’t enough that the plaintiff was injured and suffered losses as the result of the defendant’s negligence. You must explain why your client is deserving of the money.

4 The (Not So) Lonely Wanderer (‘I’m Lost, but I Won’t Tell You’)

Quite simply, jurors lose focus, they get confused, and they get frustrated. They fade in and out of consciousness and miss key evidence in your trial or don’t understand it. This is the type of behavior that befalls most jurors.

Fortunately, it usually doesn’t exist for the entire trial, but you should assume all jurors will experience it at some point.

When a juror misses or does not understand key pieces of evidence, he or she will make things up to fill in the gaps or just give up and stop participating. I’ve seen jurors in focus groups hang their heads and sigh when presented with evidence. One even whispered, “I’m confused; I give up.”

What to look for. Unfortunately, there isn’t anything special to look for here because nearly all jurors get lost at some point, and when they do, they look and sound just like every other juror on your panel. They won’t tell you in voir dire that they are likely to get confused and when they do become confused, they won’t let you know either. You must assume that it will happen.

What to do. Explain everything, and look for ways to use visual tools to aid the jurors’ understanding—this is about making things relatable and easy to grasp. Do not assume that jurors have knowledge about the components of your case, such as human anatomy.

For example, we conducted an interactive focus group about failure to diagnose colon cancer. After a 20-minute discussion about the basic facts in the case, we asked the jurors if they had any questions. A 30-year-old man raised his hand and said, “What’s a colon?” A way to avoid confusion in that case would be to use an illustration that shows a colon and then explain what it does and why it is important. Give the jurors the tools they need to feel smart, not confused.

Practice telling nonlawyers (not your staff or family members) what your case is about in 25 words or less. Have them explain the case back to you. What don’t they understand? Always explain a new concept at the beginning. Don’t use a term repeatedly and wait to explain it later. During your first mention of the

term, define it in a way that laypeople can understand.

5 The ‘Expert Witness’ (The Juror With Some Personal Knowledge)

The “expert witness” juror is the most potentially dangerous juror for both sides. This is a juror who has *some* familiarity with key concepts in your case, regardless of how remote or thin his or her experience is. Examples are people who have worked in the medical or construction field if your case involves medical issues or construction site injuries, someone who has ever ridden a motorcycle if your client was injured on one, or bicyclists if your case involves a cycling injury.

Unlike lawyers, jurors generally want to avoid conflict, especially conflict at close range. They aren’t bothered by disagreements with plaintiffs or their lawyers, but they are uncomfortable disagreeing with other jurors and members of their own community such as family members, coworkers, and friends. As a result, they seek to reach a consensus. After all, there is safety in numbers. If you go along with the crowd, the crowd is to blame, not one person.

Jurors also look for shortcuts. Is there a way to go along with the crowd to avoid making an individual decision and possibly being ridiculed for it? Relying

on another juror with some knowledge is an easy shortcut and avoids conflict in the jury room.

The only person who has credibility in the jury room is a fellow juror who has some experience with the subject matter. Even a juror who has thirdhand knowledge (“this happened to my aunt”) may be considered an “expert” by other jurors or may even consider himself or herself an expert. This most often happens when the subject matter is unique and not something most people have experience with. The juror’s knowledge and information doesn’t have to be recent or even accurate—and it usually isn’t.

A juror can become an expert by affirmatively imposing his or her experience on other jurors or by just mentioning it, leading other jurors to rely on it. We’ve seen even meek jurors become experts because they happened to mention personal experience with the subject matter and then other jurors rely on it.


What to look for. These jurors are often the easiest to spot in voir dire. After explaining the facts of your case, ask if anyone on the jury or their friends, family members, or those close to them have experience with this subject matter. Listen carefully to what they say and follow up on it, asking other jurors if they share this experience or these views. Be careful not to disregard experience that is thirdhand, remote in time, or incorrect.

What to do. First, strike the jurors who have personal knowledge. If you can’t strike all of them, strike the most vocal jurors: the ones with current jobs or activities in these areas and the ones who have engaged in litigation in these areas.

Second, make sure your experts are understandable and likeable. Work closely with them, and ensure they stay on message and “teach” the concepts rather than opine about things that aren’t essential to your case.

Third, make your case simple and visual. Make it easier for jurors without prior experience with your case’s subject matter to understand your case. Arm them with knowledge so they can engage fully in deliberations and discuss the issues with expert witness jurors.

Fourth, use the Rules of the Road™ or “systems failures” to show what the defendant *should* have done and how its failure to do so harmed your client.⁴ Focus on the defendant’s behavior and show how it was an outlier or departed from the norm. This keeps the focus off the plaintiff and deals with the common defense that the defendant was faced with a “surprise” or “emergency” that limited the defendant’s options (i.e., “We did the best we could with the unexpected situation we faced”). Frame your case to show the defendant made *choices* that created a situation in which someone would inevitably be harmed.⁵

Understanding these typical juror behaviors will help you see how people think, discuss cases, and try to solve problems—and help you plan your case to appeal to jurors long before your client’s day in court. 



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NOTES

1. See Mark Kosieradzki, *Deposing Corporations, Organizations & the Government* (2017).
2. See David Ball, *David Ball on Damages 3* (3d ed. 2011).
3. See, e.g., Kathleen Flynn Peterson, Brandon Thompson & Lindsey Lee, *Dropping the Anchor*, Trial 34 (April 2017); see also Gregory S. Cusimano, *By the Numbers*, Trial 22 (Sept. 2016).
4. See Rick Friedman & Patrick Malone, *Rules of the Road* (2d ed. 2010).
5. See Mark Mandell, *Case Framing* (2015).

