

## **How to Get Inside A Juror's Mind; Forget facts and logic. Focus instead on deep-seated beliefs.**

May 1, 2009

By John Allcock and Dan Gallipeau

Lawyers often think they can persuade jurors by using claims, defenses, and legal arguments. But those rational constructions mean nothing to jurors. Jurors are persuaded by themes and stories that appeal to deep-seated psychological anchors—the beliefs that inform their worldview. Focus groups (abbreviated mock trials) can discern jurors' psychological anchors and help lawyers to use them to their advantage, rather than crashing into them.

Picture 50 mock potential jurors answering a questionnaire about their backgrounds. A hand goes up. One juror is puzzled about a question that asks, "Have you ever been the victim of a crime?" The jury consultant politely asks, "What problem are you having with the question?" The mock juror responds, "Well, I almost was—twice. Once when someone broke into my house, and the other time when they broke into my business. But I shot the guy each time before he was able to take anything. So I really was not a victim, so I'm not sure how to answer the question." The other jurors do not raise an eyebrow; some nod in agreement with the juror's answer.

The juror's question has shed light on a psychological anchor—a fundamental belief about the world that can influence a jury's view of the facts of a case: "Property is very important, and a person has the absolute right to protect it." Lawyers who ignore this anchor—or fail to discover it in the first place—do so at their peril. Moreover, even the best legal arguments will not dislodge the anchor from the jurors' minds.

Instead of viewing a focus group as a dry run for the trial, lawyers would do better to discover the most relevant psychological anchors that prevail in the jury pool, and then to test which theme will make the anchors work for, not against, them.

Jurors use psychological anchors to help them decide who is right. In the example above, the patent holder's theme is easy to choose: "The patent is property, and the other side is taking it." The defense cannot argue against the anchor—but it need not pack its bags and go home. The defense theme could be: "With the patent comes a fence, imposed by the U.S. government, and the plaintiff is crossing that boundary and trying to claim for itself property it does not rightfully own." Ignoring the anchor is losing a persuasion opportunity and maybe the case.

Ideas about property rights are a common anchor that turns up in focus groups, but there are others. For instance, jurors are understandably influenced by concerns about how the result of a case could indirectly affect their own lives as patients and consumers. For example, in a case involving online shopping, jurors believed a decision adverse to the defendants would harm their own access to products at good prices. In national survey work conducted in 2006–07, Dispute Dynamics, Inc., found that more than 60 percent of mock jurors agreed that "Consumers suffer when large retailers who sell online lose major lawsuits." Aging jurors may care about the availability of a medical device such as a stent because it could have a direct impact on their health.

Innovation matters to jurors, but some innovations matter more than others. For example, in a case involving cell phones, the benefits tested in a mock trial included downloading pictures and surfing the Internet. But research revealed that 60 percent of the jurors did nothing with their cell phones but make calls. Using examples of features that jurors don't use has little impact on them. Examples should focus on what matters most to the specific jury pool.

How to explain the patent's importance? Here, engineers and jurors part ways. The expert may focus on improvements in performance that are measured in nanoseconds. Jurors look at the end product and want to know: Is it cheaper? Is there longer battery life? Is the picture more lifelike? Is the diagnostic test more accurate? You can test how to best explain a patent's benefits in a focus group.

Somewhat surprisingly (considering the furor over patent-holding companies within the IP world), the overwhelming majority of jurors do not care whether a plaintiff invented the patented technology or simply bought the patent. Belaboring that point may backfire, because while jurors care about property rights, they often do not care about how the property was acquired. "I didn't build my house, but it is still my property" is a refrain that is often heard. Fully nine out of ten jurors will agree with the statement that "A company has a right to enforce a patent it owns regardless of whether it bought the patent or got it for inventing something."

Jurors regularly state that they consider themselves "outsiders" and resent being asked by counsel to secondguess the decisions of the Patent and Trademark Office. So lawyers need to find ways to make jurors feel that they are indeed part of the "checks and balances" that is the patent system. The role that jurors play is included in the Constitution—they are not outsiders. In a focus group you can test ways to influence them so that they see themselves that way.

John Allcock heads DLA Piper's U.S. IP group. Dan Gallipeau, Ph.D., is president of the jury consulting firm Dispute Dynamics, Inc.

Reprinted with permission from the April/May 2009 edition of IP Law & Business © 2009 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.