

Social Influence in the Courtroom: What It Is and What to Do About It?



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ARISTOTLE ONCE SAID, “MAN IS BY nature a social animal...Anyone who either cannot lead the common life or is so self-sufficient as not to need to, and therefore does not partake of society, is either a beast or a god.” Few places epitomize the idea of partaking in society quite like a courtroom. In the courtroom, members of society convene to hear arguments and make decisions that impact the lives of others. Sometimes these decision makers are judges and other times they are jurors. All the time, however, parties with a vested interest in the case outcomes are trying to persuade the decision makers to side with their perspective.

Because the courtroom is predicated on the notion of persuasion, social influence can play a pivotal role in the decision-making process of attorneys, judges, and jurors. This influence can occur at any time throughout the case, can manifest itself in many forms, and can originate from various sources. However, if attorneys do not know the who, what, where, when, why, and how of social influence, how can they confidently value their clients’ cases? Moreover, how can they provide their clients with an accurate recommended settlement amount or evaluate the level of exposure if the case were to go to trial? Not knowing the answers to these questions (or receiving the wrong answers because of improper research) could lead to recommended settlement amounts that are too high, costing the client thousands, if not millions, of dollars. It could also lead to winnable cases being settled and cases that should have been settled going to trial; once again, causing clients to pay unnecessary amounts of money.

This paper provides answers to the who, what, when, where, why, and how questions to help attorneys feel more confident in their decisions to settle or take cases to trial. First, we identify the various types of social influence that operate over the course of a trial. Second, we provide suggestions for the ways in which counsel and clients can strategically use social influence to their advantage.

Majority Influence

As social beings, individuals want to be included and feel like valued members of society. This often means going with the status quo. As social psychologists have found, individuals in a group setting often conform to the majority, even when the majority is incorrect.¹ In mock jury settings, we have often seen lone jurors cave to the rest of the group after minutes, sometimes hours, of resistance to the majority. We possess similar evidence of group pressure from jurors during thousands of post-trial interviews.

This majority influence, or conformity, occurs as a result of two distinct processes. The first process, normative influence, occurs when individuals conform to other group members in order to be liked and accepted by them.² This reflects the group’s power to punish or reward its members—follow along with the group and get rewarded by the positive feeling of inclusion; go against the group and experience the unpleasantness of ostracism.

The second process, informational influence, occurs when individuals turn to other group members to help obtain information and aid in the decision-making process. This type of behavior is common when

individuals are concerned with providing accurate responses³—a scenario akin to the courtroom. We have especially noticed that informational influence occurs during jury deliberations in mock trials containing highly complex information (e.g., patent cases) because individuals who lack confidence in their thoughts will rely on others to help them make what they believe to be a correct decision.⁴ This can be extremely dangerous to either side's case if there is one "expert" juror on the panel. We have seen jurors with "specialized knowledge" dominate deliberations in mock trials and persuade other group members to side with the dominant juror's perspective.

Minority Influence

There are times, however, when a small few can influence the larger group. The quintessential example is the movie "12 Angry Men." In the film, Juror #8 begins deliberations by voting "not guilty" in the face of 11 other jurors who voted "guilty." Over the course of the film, Juror #8 convinces the other jurors to change their votes to "not guilty," ultimately ending up in an acquittal for

the defendant. Although this is a Hollywood movie, there are times when a small group of individuals can be influential. In approximately 1 out of 10 jury trials, the initial minority vote becomes the final group vote.⁵

Several factors need to be present before minority group members can be influential, though. First, there must be more than one individual in the minority.⁵ Unlike "12 Angry Men," a single individual is not typically influential enough to sway the opinions of 11 other people (although it has been known to occur, particularly in intellectual property litigation).

Minority group members also need to remain consistent in their stance.⁶ Consistency is important because: (1) it causes the majority group members to take notice of the discrepant opinion and rethink their position; (2) it gives the impression that the minority group is convinced they are correct and committed to their stance; and (3) it creates doubt in the minds of the majority group members regarding their opinion. All minority group members need to remain consistent, however. Once one minority



member moves to the majority, the minority group loses their credibility and becomes less influential. Finally, the minority group needs to be flexible in their ideas and open to hearing the viewpoints of the majority group members. The minority group can also increase its influence by compromising with the majority group and moving more toward the majority group's position.⁷ Doing so signifies to the majority that the minority group is rational in their thought processes and not dogmatically adhering to their initial views.⁸ As a result, the majority group shifts its opinion in the direction of the minority group.

Social Desirability Bias

Jurors are also influenced by societal expectations. Society's influence affects jurors' decision-making at two points in the trial process: *voir dire* and jury deliberations. During *voir dire*, attorneys ask

jurors probing questions in an attempt to uncover jurors' beliefs and attitudes on case-relevant topics. However, these questions are typically asked in open court and the responses could be potentially embarrassing for jurors. For example, answering questions about attitudes toward race/ethnicity-related issues, large corporations, frivolous lawsuits, and religious affiliations in front of strangers can elicit stress in jurors. Private post-trial interviews with both actual and mock jurors have revealed that many jurors are compelled to express "politically correct" attitudes toward sensitive topics.

Although attorneys may believe that jurors are being open and honest in their responses, it is more likely that jurors are responding in a socially desirable way. Social desirability bias is a social psychological phenomenon in which individuals answer questions in a manner that will be viewed favorably by others. These favorable responses can



take the form of over-reporting “good behavior” (e.g., frequency of volunteering behaviors), under-reporting “bad behavior” (e.g., frequency of alcohol use), possessing socially acceptable attitudes (e.g., the belief that discrimination of any kind is bad), and so on. It is difficult to know whether an individual is responding in a socially desirable way. However, as we will discuss in a later section, there is an approach that can help to identify socially desirable responding.

Social desirability can be especially dangerous if an attorney inadvertently allows “bad” jurors onto the panel. Take, for example, a case involving a large corporation. Only a few hands may be raised in response to the *voir dire* question, “Does anyone have strong feelings, positive or negative, about large corporations?” The fact that so few people have raised their hands immediately tells those individuals who have raised their hands that they possess a minority opinion. When these individuals are probed further by counsel, they may downplay their negative feelings about large corporations out of a fear that they will be ostracized by the larger group for holding such an extreme position. As a result, an attorney’s concern about a potential juror may not rise to the level of striking the juror. However, unbeknownst to the attorney, one of the jurors who was passed over actually believes that all large corporations put profit over safety and would always side against them. While this may seem like an extreme example, it is observed regularly by our trained eyes and ears as litigation psychology experts. Moreover, it highlights the notion that the courtroom is not always a place where “what you see is what you get;” it is closer to, “you get what I want you to see.”

Social desirability bias can reappear in the deliberation room. For example, consider a sexual assault case. Jurors in these types of cases can be reluctant to bring up rape stereotypes, such as “women ‘cry rape’ when they have been caught being unfaithful” and “women lie about being sexually assaulted.”^{9,10} Today, such comments often make individuals look insensitive, at best, or like a misogynist, at worst. We have seen primarily male jurors initially bring up these notions, only to be subsequently rebuked by the female (and some male) jurors. Therefore, rather than entertain the notion that a sexual assault did not occur (assuming the facts of the case warrant such an assertion), jurors come to their verdict decision using other pieces of information—sometimes factual, other times attitudinal.

We observed this very process in a recent sexual assault mock trial. Initially, the male and female jurors of a deliberation group were discussing case relevant topics until one of the female panel members indicated that she had personal experience with sexual assault. For her, the focus was less on the case facts and more on her worry that any verdict against the plaintiff would be tantamount to “encouraging victim blaming” and “endorsing a rape culture.” The few male jurors who initially brought up the possibility that the plaintiff initiated the sexual contact or was not being entirely truthful about the events tempered their opinions after this female juror shared her experience with the group. Essentially, this female sharing her personal experience set the precedent for how sexual assault should be viewed by the other group members. This jury ultimately rendered a verdict of \$7,860,125

(\$360,125 for compensatory and \$7,500,000 for exemplary/punitive damages). This number is in stark contrast to the award amounts given by the other two deliberating groups—\$40,000 and \$125,000 in compensatory damages, respectively; neither of these two remaining groups awarded exemplary/punitive damages. Had counsel relied on the group verdicts from the other two juries, they could have made a costly mistake for their client.

One may argue that a juror with personal experience with sexual assault would never be allowed on a jury in a case involving sexual assault; however, this presupposes that potential jurors would disclose this information to the court. As we've previously mentioned, jurors may not always be forthcoming when asked about sensitive issues in open court or during written questionnaires. Jurors may even be motivated to profess neutrality, while concealing biases that may decrease their chances of being on the jury (i.e., a "stealth juror"). Moreover, with 1 in 5 women experiencing rape at some time in their lives,¹¹ it may be difficult to exclude all rape survivors from the venire. This is why it is important for counsel to conduct mock trials or focus groups

to understand the group dynamics and how jurors' interactions with one another can shape their opinions of the case. At the very least, counsel must be ready to offer cogent arguments for cause challenges to level the playing field during selection.

Group Polarization

A final topic of social influence we would like to discuss is the notion of group polarization. This occurs when a group adopts a more extreme position than that which was initially held by most of its members. Over the course of discussion, the individual positions of group members often become more extreme, leading to a more extreme group-level decision—sometimes referred to as a "severity shift."¹² The strong opinions that result from group polarization often culminate in surprisingly high compensatory and punitive damage awards. Data collected from post-trial interviews with actual jurors and during mock trials reveal that polarized jurors often attempt to "one-up" each other in sharing their individual damage award preferences within the group.



It should be noted that group polarization processes also can be favorable for the defense. On several occasions, we have observed mock jurors' anger towards an unsympathetic plaintiff intensify as several jurors provided examples of the plaintiff's irresponsibility and untrustworthiness over the course of deliberations. Such defense-oriented polarization has resulted in a straight defense verdict when many individual jurors initially felt that the plaintiff was entitled to recover *something*. However, group polarization processes tend to exert a stronger impact on plaintiff-oriented decision-making due to the emotional arguments advanced by typical pro-plaintiff jurors and the broad discretion given to jurors in assessing damages.



Utilizing Social Influence in the Courtroom

Despite the existence of the various types of social influence, they can be identified, ameliorated, or exacerbated. How and when to approach these topics will depend on the case specifics; the potential venire; and the extent to which strategically formulated *voir dire* and juror questionnaires can be formulated and administered, as we consider below.

Mock Trials

Prior to trial, one way to understand the effects of social influence is by using mock trials with jurors who closely resemble the venue in which the case is likely to be heard. In a mock trial, attorneys present case evidence for both parties in a truncated

format. After the presentations, respondents retire to a deliberation room and complete a verdict form. Cameras and microphones are placed in the rooms so counsel and clients can view the deliberation process.

Viewing mock jury deliberations is an important component to understanding the pieces of evidence that resonated with jurors. It is also an extremely important way to understand the way in which group dynamics impact the final case outcome. Despite conventional wisdom that suggests jurors make up their minds early in a case, it is the jury deliberation stage that has been found to be one of the most important decision-making times for jurors. Research has shown that about 20% to 46% of criminal and civil jurors indicate they begin leaning toward one side during jury deliberations.^{5,13} A vast amount of academic and applied research also indicates that jury group decisions are not a simple sum or average of jury members' individual opinions and decisions. Up to 25% of the time, group verdicts differ from those rendered by a judge and from the pre-deliberation verdicts rendered by a majority of jurors in a deliberation group.¹⁴

Our experience with mock juries also teaches us that deliberating jury groups exposed to the same case presentations and witness testimony often come to very different conclusions. To illustrate, in a recent mock trial involving a product liability matter, 36 jurors who were exposed to the exact same case presentations were split into three deliberation groups of 12 jurors each. Deliberation Group 1 found the defendant liable and awarded \$2 million in compensatory damages. Deliberation Group 2 found that the defendant was not liable and

subsequently awarded no damages. Deliberation Group 3 found the defendant liable and awarded \$24 million in compensatory damages and an additional \$30 million in punitive damages. These differences occurred despite efforts to ensure that each deliberation group included similar proportions of jurors favoring the plaintiff or defense prior to beginning deliberations. These discrepant findings highlight the importance of conducting mock trials to understand the social dynamics that occurred to result in Deliberation Group 2's verdict (\$0) and those that occurred to result in Deliberation Group 3's verdict (\$54 million). Without knowing these social dynamics, counsel is setting themselves up for a surprising, and potentially costly, verdict.

Supplemental Juror Questionnaire

If cases end up at trial, one of the ways to minimize social influence vis-à-vis social desirability bias is to request the use of a supplemental jury questionnaire.

Individuals have been shown to be more likely to admit to biases when they respond to paper and pencil questions.¹⁵ However, specific care needs to be taken when formulating the questions to make sure they are properly asked. This is where a qualified social psychologist can be beneficial because they will know ways to ask these sensitive questions in a more innocuous way. For example, questions proven to be effective in certain sexual assault cases are:

- Most people think that women who go around wearing low-cut tops or short skirts are just asking for trouble.
- Some of my friends believe that if a female is willing to "make out" with a guy, then it's no big deal if he goes a little further and has sex.

These types of questions are known as "indirect questions" because they require the individual to



respond from the perspective of another person or group.¹⁶ By indicating “most people,” “some of my friends,” and “men typically,” individuals can separate themselves from the sensitive response and project their beliefs onto other individuals. Research has shown this to be a successful technique when asking questions that are prone to socially desirable answers.

Another important reason to use a supplemental juror questionnaire is that it allows counsel to look for discrepancies between juror questionnaire responses and open court *voir dire* responses. These discrepancies can help counsel identify potential “stealth jurors.” Because stealth jurors rarely plan or contemplate consistency in their written and oral responses, they will often “slip up” during oral *voir dire*. For example, we have experienced an anti-oil company juror say in her juror questionnaire that she joined the Sierra Club because of her concern for the environment. When the oil company attorney asked her in open court why she joined, she replied, “I like the hikes.” We have also seen jurors completely disavow anti-corporate juror questionnaire responses in open court.

Although juror questionnaires can be used to reduce social desirability bias and identify stealth jurors during *voir dire*, their use is often disregarded. This may be due to a variety of factors, such as overlooking the tactical advantage it provides, fundamentally disagreeing with its use, believing a questionnaire is not warranted in a particular case, or not arduously campaigning for its use. Whatever the reason, our experience has shown us that the juror questionnaire is the most commonly

neglected weapon in trial strategy. However, failing to use one could significantly increase the chances that “bad jurors” make their way into the jury deliberation room.

Voir Dire

Another way to minimize social desirability bias at trial is to create a safe environment for jurors to express their biases. For example, anti-corporate attitudes are often suppressed by social influence, as we have discussed previously. However, such attitudes are important for a defense attorney to be aware of. To approach this type of situation, a defense attorney may ask jurors, “Some jurors believe that large corporations always put profits over safety. Other jurors believe that large corporations always try to do the right thing by their customers and their employees. Which of these statements are you closer to?” When a juror indicates that his or her attitudes fall more in line with the first statement (i.e., money over profits), the defense should embrace the bias, thank the juror for being so open, and ask other jurors whether they agree with that individual. This approach can be tailored to other case types; however, the key is to understand that social pressures are being exerted on jurors to respond in a way that they believe the attorneys, judge, and other jurors expect them to respond. By changing the rules of what are acceptable responses, you can change the way that jurors will respond by maximizing candor (i.e., they will respond more truthfully).

Jury Selection

Information gathered from a supplemental juror

questionnaire and during oral *voir dire* also is critical in predicting how social influence will unfold in the deliberation room. In addition to revealing pre-existing biases and case-related beliefs, responses to supplemental juror questionnaires and oral *voir dire* inquiries can reveal individual juror personality characteristics that can significantly impact the jury group decision-making process. However, the effects of juror personality on group decision-making is not as straightforward as one might assume. For instance, personality traits such as belief in a protestant work ethic (i.e., the belief that anyone who works hard can achieve success) and belief in a just world (i.e., the belief that the world is a fair place and people get what they deserve) have historically been associated with pro-defense jurors by both academic and applied researchers.¹⁷ Yet, research has shown that, in some cases, individuals with these seemingly conservative beliefs are more inclined than their counterparts to side with the plaintiff in some group decision-making contexts—the so-called “betrayal effect”.¹⁸

Ultimately, identifying group “leaders” is critical for counsel; but again, this task is not as straightforward as it may seem. Although responses to juror questionnaire and oral *voir dire* inquiries may illuminate leaders relatively quickly (apart from stealth jurors), we have seen such identifications backfire dramatically. For example, a male, middle-aged, well-educated conservative Marine was an extremely influential leader in a mock trial we recently conducted. Much to the surprise of counsel, however, this mock juror convinced his fellow jury members to side with the plaintiff. Defense counsel subsequently admitted that, “We would have let him slip by in jury selection, and probably even would

have favored him.” This statement epitomizes why it is important to enlist the services of a doctoral-level psychologist with special training in conducting mock trials, understanding the impact of social influence on jurors, and identifying the various juror “types.”



Conclusion

As previously stated, humans are social beings and cannot escape the influence of one another. From television to movies to social media, we are constantly inundated with information and attempts to persuade our thinking. While we would like to believe that our decisions are made inside of a vacuum, the truth of the matter is that they are not. We would also like to believe that we are intelligent enough to not let the pressures of conformity dictate our thinking. Once again, those perceptions do not match reality. As a result, properly trained and credentialed litigation psychologists and attorneys need to work hand in hand to make sure these social influences are identified, understood, and ameliorated in every case. If not, counsel may be left with only a best guess estimate of how the case may unfold.

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