

LITIGATORS CORNER:

The Collective Memory of Juries: One Reason Why Juries Are Better Than Judges



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I was working out the other day. Lying on a mat, about to do an exercise I find particularly tough, I glanced up, saw a sign, and read it upside-down. Something convinced me that the sign referred to an “abominable” exercise. Of course, I was wrong. The sign referred to an “abdominal” exercise, not an “abominable” one. My anticipation of a tough exercise made a suggestion to me; my eyes saw something that wasn't there, and my brain registered something that wasn't there.

My eyes and brain had played a trick on me. Of course, since I knew instinctively that no health club would say an exercise was “abominable,” and also since I was able to keep staring at the sign, I soon realized my error. But if my perception had been of a fleeting event, able to be seen or heard for only a moment, would I have figured out my mistake? Perhaps not.

Other people have similar experiences. A friend of mine was having dinner with a group of friends, including a person my friend thought she knew. She was annoyed with this person, because he had prepared her tax return the previous year and had done a poor job. She fortunately said nothing, because this person she thought she knew was not the preparer at all, but someone else. She could not remember what the lousy tax return preparer looked like, even though he had made a negative impression on her. She confused the preparer with the person at the dinner because their names were similar. In this case, her visual perception failed.

Judges can make the same errors, not because they are judges, but simply because they are single human beings, whose perceptions can trick them. When I was an assistant U.S. Attorney, we would accept a bench trial whenever a defendant waived his right to a jury trial. Under the Federal Rules of Criminal Procedure, the government had the right to insist on a jury trial, but the U.S. Attorney at the time required us to waive that right whenever the defendant did.

In one instance, we were prosecuting a drug case in a bench trial before a judge who had a fine reputation. The defendant was experienced; he pulled a couple of tricks during the investigation to make undercover agents and surveillance reveal themselves. A meeting was arranged between our undercover agent and the drug dealer. The dealer agreed to meet in a hotel parking lot in the evening.

Our undercover and surveillance agents were in place in the parking lot. The drug dealer drove in and parked. But he did not go right to the undercover agent's car. Instead, he got out of his car with an empty tape cassette box in his hand, and walked around the lot. (The cassette box was the right size for carrying drugs.) He was attempting to draw out any surveillance agents. Our defendant was crafty; he was checking out his customer. Nevertheless, our agents didn't respond to the trick,

because they figured correctly that the box was empty.

We arranged a second meeting. This time, the dealer got in the car with our undercover agent. Before accepting any payment, however, the dealer told our undercover agent to drive to a local bank and exchange the currency he had with him to pay for the drugs. The dealer was making sure that no one was going to give him any marked money.

At the trial, our judge-observer failed to perceive these events, so crucial to a determination of guilt or innocence. He did not observe the drug dealer's behavior, which would have led him to the obvious conclusion that the defendant was an experienced drug dealer, knowledgeable about the ways narcotics agents plan and execute their investigations to gather evidence. Instead, the judge relied on other testimony, erroneously concluding that the defendant had been entrapped.

True entrapment requires that the government plant in the defendant the predisposition to commit the crime charged. In other words, the defendant would not have had the idea or the predilection to violate the law but for the government. Entrapment in our case was obviously impossible. The evidence was clear that the agents had never met this defendant before. They had been introduced to him by another crook.

But the judge's perception failed him, just like mine did on the exercise mat, and just like my friend's did at the dinner with her friends. Of course, his failure had a greater consequence than ours. A criminal was wrongly acquitted, and was free to break the law again.

There is a much better chance that events and details will be recalled more accurately by a jury, since a jury consists of multiple observers, and therefore reduces the risk of a failure of perception. If one member of the jury forgets a fact, or does not perceive an event correctly, the other members are likely to do so. The risk that the result will be premised on a failure to see or hear is thus greatly reduced.

Our attention spans vary. Concentration is hard; we are not movie cameras. It is not possible for any one of us to pay attention one hundred percent of the time. Our attention, like Ferris Bueller's, wandered in school on warm spring days. We've all listened to a boring person whose drone anesthetizes us. One day, we were presenting our evidence in a bench trial before a judge who had graduated from an illustrious law school. (He had a telescope in his office; another assistant U.S. Attorney waggishly

said that he used it to keep in touch with goings-on on the home planet.) The evidence was going in, but the whole trial wasn't exactly thrilling. We noticed our judge was nodding off, something he did in jury trials, too. Our tactic was the standard one: we politely suggested a short recess, offering an excuse of some kind, so that our judge wouldn't feel embarrassed.

We've all been in a conversation with another person where we see that person's attention lapse. When you see your colleague's eyes turn away from you, your audience is gone. We joke about attention deficit disorder, but all of us do this at one time or another, or cause others to do it. Concentrating on someone or something, when you have many tasks to complete and many deadlines to meet, makes paying attention harder.

Testifying for hour after hour is hard. Listening and watching testimony for hour after hour is at least as difficult and may be even harder, because it is such a passive activity. Even we lawyers, defending a deposition, know how our attention can wander during a single day's deposition. That is one reason I took notes in law school. I had been trained to do so earlier in my life, while in the Navy, where Admiral Rickover's method of teaching involved making you hear it and then write it. Taking notes made me hear and repeat something, and kept my attention on the matter. Involvement increases one's focus. With juries, the research on note taking is mixed; in one reported instance, some jurors felt less well informed. My theory is that jurors need to watch, which is hard to do when you are writing. The jurors need to observe witnesses as they testify, because there are visual cues to credibility. These can't be seen if your head is down. Increasing involvement may be one of the best justifications for allowing jurors to ask questions.

The jury reduces the problem of loss of attention as well. A group of observers has less chance (I did not say no chance) of failing to see what is happening. They may individually have lapses of attention. But these lapses are not likely to occur at the same time. Thus, other jurors are likely to recall something that one juror missed when he was daydreaming or nodding off. For a jury to fail in this respect would require that twelve people lose concentration at the same time, and for the same amount of time. Of course, that can occur when a witness or lawyer is repetitive or boring, or goes on too long. But in that case, a jury and a single fact-finder are at least equal. Even then, I still believe a jury will be better, because a



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trial is an unusual event for them. It is not a new event for a judge.

The perception of a trial by multiple observers is good for another reason. Life is not two-dimensional. It is three- or four-dimensional. In everyday life, our vantage points are quite likely to differ, causing each of us to see or hear different aspects of objects and events. One of us sees the back of a purse-snatcher or mugger running away, and cannot see anything but the person's height and clothing. Another sees the mugger running past him, and gets a good view of his face; that observer may recall a face – on which we often tend to concentrate – but may remember less about height and clothing. Yet a third person may be standing behind an obstacle, or looking elsewhere, and catches only a glimpse of a passing person.

Something like this also occurs in a trial. We each have different abilities to perceive based on our physical characteristics, as well as our backgrounds. I remember being a juror in an armed robbery case. When a witness came out to testify, I noticed his shoes. They were sneakers without any laces. Because my life experience included being a prosecutor, I knew the witness came directly from jail to testify. I said nothing to the other jurors, and the defense ultimately disclosed that fact by its questioning.

Even though this was a simple case, the jurors' perceptions varied. Some found the victim's identification of the defendant in a line-up most persuasive. Others were more impressed by the identification of the defendant by an eyewitness who, like the defendant, was African American, thus reducing the potential error due to cross-racial identification. Others discarded testimony by the defendant's wife about a telephone call from the defendant threatening her with harm should she testify against him, because she had been badly treated by the defendant, and could be getting even.

Jurors individually have ordinary perception. But as a group, they have superior perception; they can correct errors that a single individual may never notice and therefore is incapable of correcting. Jurors have a better attention span; the group watches and compensates for individual lapses, which for an individual leads to an irretrievable loss of information. Jurors have a variety of vantage points, and see more and retain more than one individual can possibly see.

Verdict: Assessing the Civil Jury System, edited by Robert Litan and published by the Brookings Institute in 1993, is good reading. Robert MacCoun says this in his chapter:

Some readers will greet with some skepticism the notion that juries might outperform judges. After all, judges are drawn from a more restrictive population than jurors, they are specially trained in the law, and they quickly accumulate a great deal more trial experience than most jurors are ever likely to get. But unlike judges (in the typical bench trial) jurors perform in groups rather than individually. Social psychologists have been comparing individual and group performances for decades, and considerable evidence shows that groups outperform individuals on a variety of intellectual tasks, including recall of factual material, generation of solution to problems, and correction of errors.

So a jury tends to have better perception, better attention, better recall, and multiple points of view. There is no contest to me regarding who is the better fact finder. And the available evidence, which I will discuss in a future column, shows that a jury is a better fact-finder in complex cases, too. **IPT**