

Poker Face: Understanding How Jurors Think

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Introduction

Blink. In a split second, we form impressions. We don't know we're doing it, but our mind is constantly absorbing and processing information subconsciously. While our senses are collecting information from all around us, we also overlook an enormous amount of information that is right in front of us. In the context of a trial, it is important for us to understand how jurors receive and perceive the information presented in the courtroom.

However, before diving into a discussion about how jurors think, let's first focus on our own mindset. As a young lawyer, it is natural to be nervous and apprehensive about your first trial. You might even find that you feel somewhat afraid. Am I good enough? Do I know what I'm doing? Can I do a good job for my client? What if I make a mistake? What if I lose the trial? What if the judge yells at me? What if the jury doesn't like me? What will happen to my other cases while I'm stuck in trial? These feelings are natural, and these are good questions to ask. In fact, most experienced trial lawyers will tell you (if they are being honest with themselves) that they still feel the same way and ask the same questions before every trial. There is a great deal at risk when going to trial – your fee, your costs, your time, your reputation, and so much more. Laying it all on the line for your client takes a great deal of courage. A belief in yourself, your ability, your client, and your case will go a long way in fortifying your resolve and giving you the courage you need.

Let's face it – in most cases, trial is a last resort. When all efforts at obtaining a fair and reasonable settlement for your client have failed, the only thing left is trial. Trials are high-stress, high-stakes proceedings, and the preparation leading up to trial can be daunting. Preparation for trial actually begins way back at the beginning of the case. When your client first contacts you and you are deciding whether or not to take the case, you must first ask yourself “Am I willing to try this case if I can't obtain a fair settlement for my client?” If the answer is no, you should not take the case. Getting into the right mindset to try the case, therefore, begins long before the actual trial starts. If you are mentally prepared to try the case the day you sign it up, the rest becomes much easier.

7 Common Defense Tactics:

1. “Have you even looked at the file yet?”
2. “I’m surprised your firm would even take this case.”
3. “We really want to get this case settled. How about an early mediation?”
4. “We’ll give you all the extensions you need, so don’t feel like you need to hurry anything.”
5. “I’ve tried a lot of these types of cases, and I’ve won most of them.”
6. Last-minute rush of activity, followed by a motion to continue
7. “Objection, objection, objection!”

Juror Attitudes

Let’s start with the obvious. Jurors don’t like us. They don’t like our clients and they don’t like our cases, at least at the outset. There is a certain level of distrust created the very second that jurors identify us as trial lawyers. Regardless of how misplaced such feelings may be, we need to recognize how we are perceived by jurors. We often start out with a strike against us, maybe even two. Jurors will filter all information they receive in the courtroom through this biased lens. Our challenge is to recognize this bias and to take steps from the beginning to overcome jurors’ preconceptions. The difficulty is that impressions are formed quickly and usually unconsciously, and once formed, they are often hard to overcome.

The Power of the Glance

We’ve all heard the saying – “You never get a second chance to make a first impression.” Our common experience tells us this is true. First impressions are formed quickly and spontaneously. They are extremely powerful because they are difficult to overcome and they tend to strongly influence how subsequent information is perceived and processed. We tend to ignore or discredit information that conflicts with our initial impressions, and we more readily accept information that confirms our initial impressions.

Every second of every day, we are taking in information from a variety of sources. We engage in a subconscious process of cutting down the enormous amounts of information that surround us into bite-sized chunks that we can absorb – a process known as thin-slicing. We’re all familiar with intuition or “gut feelings”, which are merely different ways of referring to this concept of subconscious impressions. Our life experience and cultural programming play significant roles in influencing how we absorb and process the information that surrounds us.

Every time we meet someone new, we engage in thin-slicing. We immediately form an initial impression, usually without even realizing we are doing it. Think about some common examples. When you were in school, the first day you walked into a new class at the beginning of the semester and saw your teacher, you immediately formed a positive or negative impression before the teacher even said a word. When you interview a candidate for a job with your law firm, you instinctively know within five seconds of meeting that person whether it will be a good fit or not. When you meet a new client for the first time, you immediately assess his or her likeability and credibility. What about love at first sight? Think back to the moment you met your spouse or significant other – did something “click” in that first few seconds that created a gut feeling that this person was special? These are complicated mental processes that are constantly going on behind the scenes in our subconscious at a rate far too fast for us to consciously keep up. We talk at a rate of 120-150 words per minute, but we think at a rate of 400-800 words per minute. Our subconscious moves even faster. Much like a computer that is constantly processing millions of pieces of data while only a small amount of information is visible on the screen, our subconscious is constantly absorbing and assessing all the input that surrounds us.

In their study *First Impressions: Making Up Your Mind After a 100-ms Exposure to a Face*, 17 *Psychological Science* 592 (2006), J. Willis and A. Todorov concluded that when we see a new face, we form initial impressions within 1/10 of a second. In that fraction of second, we assess five personal traits: attractiveness, likeability, trustworthiness, competence, and aggressiveness. What they found is that in the time it takes us to blink, we assess whether or not the person is attractive and to what degree; whether or not the person is pleasant; whether or not the person can be trusted, and to what degree; whether or not the person is competent or intelligent, and to what degree; and whether or not the person is aggressive or passive. Once this process takes place, our initial impression is formed. That impression then takes root, and all information we receive after that point will either confirm or refute our initial impression. We will be much more willing to accept information that confirms our initial impression, while anything contrary to that impression will more likely be rejected.

The Search for a Leader

When jurors walk into the courtroom for the first time, they are nervous, apprehensive and intimidated. Some are frightened and anxious. They are walking into an unfamiliar environment, and they are looking for someone who will comfort them and lead them. Naturally, they look first to the judge. However, the judge is often perceived as cold and distant. The judge sits far away behind a large bench, elevated above everyone else, wearing a black robe, sitting under a great seal, surrounded by the U.S. and state flags, and is viewed as one with great power and great authority. This is not someone to whom jurors typically relate or with

whom they typically feel a connection.

This is why the jurors' initial impressions of you and your client are so important. These first moments in the courtroom may not be the first time the jurors are seeing you. As you arrive at the courthouse, you may be parking in the same parking lot as the jurors. You may go through the same security lines, stop at the same coffee shop and ride the same elevators. Jurors may have already formed their initial impressions of you long before they walk into the courtroom. Keep in mind that persuasion begins in the parking lot.

Once in the courtroom, jurors will look for a leader. Although they will perceive that a barrier exists between the lawyers and themselves, you can immediately knock that barrier down. As you stand to greet the jurors when they walk into the courtroom, do you smile? Do you appear friendly? Do you exude warmth and compassion? Are you dressed conservatively or do you look slick and fancy? Are you wearing a bunch of flashy jewelry? Is your physical appearance neat and clean, or do you look sloppy? Is your posture open and inviting? Do you appear organized? Jurors will be making these assessments of the lawyers on both sides in the first few seconds, and they will immediately form impressions about which lawyer they feel more comfortable with. We all have a natural tendency to gravitate more toward people who are similar to us. Studies show that we are naturally drawn more to people of our own gender, age range, race, and cultural background. Jurors are no different. While these are factors you cannot control, you can gain an immediate advantage by simply being a friendly, warm and inviting presence in the courtroom. Jurors will naturally place greater weight on what you say when they perceive you to be confident, passionate and sincere, as it is these qualities that establish trust.

Thinking Without Thinking

We all have hidden biases that we don't realize. Our unconscious attitudes often do not match our conscious beliefs. This is important to understand in the context of jury selection, because jurors often don't know their true biases and unconscious attitudes, which will be very influential in the jurors' ultimate decisions. During voir dire, jurors often don't speak their minds because they don't know their minds.

“Every man has reminiscences which he would not tell to everyone but only his friends. He has other matters in his mind which he would not reveal even to his friends, but only to himself, and that in secret. But there are other things which a man is afraid to tell even to himself, and every decent man has a number of such things stored away in his mind.”

-Dostoyevsky

The subconscious is often described as a locked repository of thoughts and ideas. It is not accessible to the conscious mind. It is much like a password-protected computer file that

contains loads of information that cannot be accessed without the right password. Many techniques have been developed to help access the subconscious, such as hypnosis, dream analysis, meditation and random association, although the legitimacy of these techniques continues to be controversial.

For a fascinating interactive demonstration of these concepts regarding hidden biases and subconscious attitudes, I encourage you to visit the Project Implicit website at www.implicit.harvard.edu.

If jurors don't know their hidden biases and therefore are unable to share them with us during voir dire, then how do we uncover them? The answer often is in their nonverbal communication, which will provide clues about their true feelings, thoughts, and emotions. In order to better understand the information being conveyed by such nonverbal communications, you need to first establish a baseline by examining the juror's nonverbal behavior when they first enter the courtroom, and contrasting it with any changes in that behavior as the voir dire process continues.

Visual Cues

The first, and most obvious, nonverbal behavior is that which we can see – the visual cues. This includes:

- Facial Expressions
- Body movement
- Body posture
- Eye Contact

Facial expressions are probably the single most revealing and reliable gauge of a person's true feelings. Hence the saying, "It's written all over her face." This is why professional card players are so good at keeping a "poker face" – they know that the slightest twitch, glance or smirk can reveal the quality of their hand. An important component of facial expressions is what are known as microexpressions – quick and subtle expressions that usually are not consciously noticed either by the person making them or by the person perceiving them. However, our subconscious minds do notice them, and they play an important role in influencing our "gut feelings". The quality of the facial expression is also important. Most people can recognize a fake smile or insincere emotion. Such non-genuine expressions can indicate hostility, distrust, or embarrassment.

Jurors who are nervous or anxious will tend to move and fidget a lot. More subtle movements, such as tapping fingers or twirling a pen, can indicate impatience or discomfort with the situation or subject matter. Tilting the head often indicates confusion or uncertainty, while rubbing or placing the palms together often indicates confidence or hopeful anticipation. Crossed arms or legs, a clenched jaw, or a rigid body position often indicate hostility or a negative reaction to what is being said.

There is a lot of truth to the saying “the eyes are the windows to the soul.” Eye contact establishes trust, but too much eye contact can indicate hostility. Someone who is comfortable with the situation and genuine in what she is saying will usually have softer eyes, while one who is trying to deceive or who is hostile will have a harder look to her eyes. One who is trying to deceive may actually try harder to maintain eye contact, such that it becomes too much or appears unnatural.

Auditory Cues

In addition to visual cues, we must be mindful of auditory cues as well, which include:

- Tone of voice
- Speed of speech
- Word choice
- Efficiency of speech
- Pattern of speech

When a juror is unsure or hesitant, her speech will be filled with “ah’s” and “um’s”. On the other hand, smooth speech that lacks such fillers is generally the sign of someone who is confident in what she is saying. A juror will often speak more or volunteer more information to a lawyer that they are comfortable with, indicating some level of trust in that attorney. Alternatively, a very talkative juror could simply be nervous, and their nervous energy simply creates a “motor mouth”. Be wary of a juror who speaks little to you but who seems to be very comfortable and talkative with the opposing lawyer. Such conduct generally reveals a hidden bias toward you or your client.

Jurors who are nervous tend to talk faster, and jurors who are don’t want to share a lot of information tend to talk more slowly in an effort to fill up more time so you can move on to someone else. Tone of voice can be subtle, but extremely important. Sarcasm and condescension clearly indicate hostility and are indicators of a juror who is not receptive to you. The juror’s choice of words is also a key indicator of their true feelings. For example, a juror who refers to your client as “him” rather than as “Mr. Smith” may be indicating a distance between the juror and your client.

While this paper is not intended to provide a detailed discussion of nonverbal cues and how to interpret them, it is designed to provide a basic overview of some important considerations. Keep in mind that you cannot look at these cues in isolation, as they often mean little by themselves and can in fact be misleading. It is important to view all nonverbal cues together in order to get the complete picture of what the juror is really saying and feeling.

Influencing Initial Impressions

We all know that initial impressions can be influenced. We do it every day. When we want to make a positive first impression when we meet someone, we shake their hand firmly, look them in the eye, smile, and express a genuine pleasure in meeting them. But what about

more subtle influences? Several years ago, researchers at Yale conducted an experiment. A laboratory assistant was stationed outside the lab holding books, papers, a clipboard and cup of coffee. As a student came around the corner, the assistant asked the student to help her by holding the cup of coffee. This was repeated multiple times. Sometimes the coffee was hot, and sometimes it was a cup of iced coffee. The students were later asked to read about a fictional person. Those who had held a cup of iced coffee described the character as more selfish, less social and colder than their fellow students who held a cup of hot coffee. Other studies have shown that people clean up more thoroughly when there is a hint of cleaning solution in the air. They become more competitive upon seeing a briefcase, and more cooperative upon seeing words like “support”. Such experiments demonstrate that everyday sensory cues can activate motives that already exist in others’ subconscious minds.

In the courtroom, we can influence jurors’ initial impressions by understanding and recognizing the extraordinary power of the subconscious and the impact it has on decisions and behavior. Framing is key, as that creates the initial impression to which all subsequent information is anchored. Let’s look at the power of framing:

The glass is half empty.

The glass is half full.

FBI Raids Cult Compound

FBI Meets With Leaders of Christian Services Center

Mr. Jones was careless and caused an unfortunate accident.

Mr. Jones’s reckless decision resulted in a violent and horrific collision.

We must give careful consideration to how we are going to frame our case and each major issue so that we establish an effective mental anchor for the jurors from the very beginning.

We have seen the power of framing in politics, as the goal in politics, just like our goal in the courtroom, is to persuade. For an excellent look at the effective use of framing and the importance of language in crafting your message, read “*Don’t Think of an Elephant*” by George Lakoff.

Lessons Learned the Hard Way (or what to do before and during trial)

1. Mock trials
2. Supply box, with checklist

3. Copier/printer/flash drives
4. Assistant
5. IT/AV help
6. Hotel, war room
7. Nearest FedEx, copy store, supply store
8. Food, water
9. Courthouse parking, loading, security
10. Clothes, shoes, umbrellas – check your client's and your own
11. Be brief – don't waste time