
Juror Comprehension In Complex Cases

Effective Strategy Depends on Careful Assessment of Crucial Aspects

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General Thoughts

Although there has been much discussion on this topic (and relatively little empirical research), the basic question presented is whether jurors have the capacity to participate in a complex case. Many have argued that the right to a jury trial in complex cases should be abolished. This may make sense if: 1) trial judges can rationally make such assessments (even judges might not be prepared for the complexity of some cases), and 2) juror deficiencies cannot be ameliorated by reasonable procedural innovations.

I strongly believe that the best strategies for coping with complex cases are those that reduce the complex-

ity rather than those that focus on the fact finder. The issue in complex cases is not whether a jury is necessarily competent in its fact-finding, but rather whether the lawyers perform their jobs properly. Through the effective use of tools already available to lawyers, jurors can be adequately educated and informed on the issues in complex cases. I address some of these recommendations below.

By way of background, there are really three different aspects of what we call “complexity.” They are as follows:

- 1. Legal Issues May Be Complex:** These relate to causation, liability, and damages, which are guided often by obscure and linguistically complicat-

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ed judicial instructions. The major criticism here is that jurors fail to understand the instructions. It is worth noting that jurors in longer trials are less likely to have a college education or specialized knowledge of the issues in the case.

- 2. Jurors May Be Overwhelmed by the Volume of Evidence:** This is typified usually by an excessive number of expert witnesses. Some studies (e.g., Cooper, Bennett & Sukel, 1996) have found that jurors were more persuaded by “highly expert” witnesses than by a less expert witness, but only when the testimony was extremely complex. When the testimony was less complex, jurors relied primarily on the content of that testimony, and witness credentials had little impact on the persuasiveness of the message.
- 3. Complexity of the Evidence Itself:** If expert witness testimony is highly technical or complex, it is inevitable that jurors will find the testimony difficult to comprehend, especially when witnesses rely on the specialized language of their field.

Much research on the topic of juror comprehension in complex cases is premised on the theories of persuasion. There are two major processes involved in persuasion:

- 1. Systematic or Central Processing:** People tend to scrutinize a communication, analyze its content, and deduce its validity. In this process, persuasion is essentially a function of the quality of the argument that is presented (i.e., the greater the quality of the argument, the greater the persuasive impact).
- 2. Peripheral or Heuristic Processing:** Instead of attending to the quality and validity of the arguments, people resort to shortcuts, or heuristic decision rules, to determine the value of the message. Essentially, we rely on a variety of factors associated with the message or the messenger (Is the attorney credible? Did the lawyer use arguments to bolster his position regardless of the merit of the arguments? Is the attorney attractive? Is he/she a bona fide expert? Is the recipient in a good or bad mood when listening to the attorney?). Moreover, jurors may lack the motivation to process the message because the issue is not relevant to them.

The literature on persuasion suggests that when jurors hear evidence that they may not have the preparation or background to process, they will not engage in a careful scrutiny of the testimony. Instead, jurors will rely on pe-

ripheral cues and engage in heuristic processing. For example, when evidence is scientifically complex, such as in a patent case, jurors may rely on the credibility of the expert as a clue to the validity of his/her testimony rather than trying to process the content of the message. When testimony is complex, jurors are less inclined to process or scrutinize the communication or the evidence, and are more inclined to base their decisions on heuristic cues.

However, the persuasion literature is based on research that is typically not commensurate with the “real world.” For example, in complex cases there typically is not a big disparity in the experts’ credentials, and there is usually more than one expert testifying (i.e., a battle of the experts), which is not consistent with the persuasion literature.

Much concern about jurors’ ability to function adequately in complex trials is generated by the belief that it is too much to expect jurors to weigh accurately the merits of both sides of what is often conflicting and complicated testimony. However, when we are able to better understand how jurors make decisions (e.g., hindsight biases, failed or violated expectations, etc.), then changes can be made to increase the likelihood that jurors will be able to participate meaningfully in complex trials.

Thoughts on Improving Jury Performance

There have been various attempts at improving jury performance, many of which have been very successful. For example, simplification of the jury instructions, allowing jurors to ask questions of the witnesses, allowing jurors to take notes, and granting access to daily transcripts are factors which have been shown to mitigate the effects of difficult legal concepts or a high volume of evidence, although it is unclear what remedies are appropriate if jurors can’t comprehend the testimony.

Other improvements can be categorized as follows:

- 1. Restructuring the Cases:** This can be accomplished by reducing the length and complexity of the trial, implementing time restrictions (e.g., opening and closing statements), elimination of parties and/or joining claims, reducing the amount of testimonial and documentary evidence, division and/or separation issues, as well as Special Masters.
- 2. Restructuring the Juries:** Many advocates have suggested that we have 12-person juries in federal cases, as this would allow more resources to come

to bear on the issue, damages would be less likely to be extreme, and the likelihood of having attrition affect the outcome of the case would be reduced (there are obvious downsides to having 12 jurors as well). Other suggestions include increasing the amenities of jury duty (e.g., paid parking, increased compensation) or altering jury composition by creating “blue ribbon” panels wherein jurors would be required to have a minimum educational level.

3. **Case Management Techniques:** Advocates argue that jury instructions should be simplified, and that judges should pre-instruct jurors on the law, allow the use of memory aids (such as juror note-taking, exhibits, and daily transcripts), break the trial into smaller chunks, provide interim summaries of the evidence, allow jurors to question witnesses, allow jurors to have a copy of the jury instructions, and provide court-appointed experts.
4. **Judicial Interventions:** Some advocates suggest that judges can control the process through the use of J.N.O.V. and directed verdicts, as well as through summarization and comment on the evidence to highlight the conflict between parties for the jurors.
5. **Lawyer Education and Training:** As stated previously, the ways in which attorneys present their cases have a dramatic impact on the ability of jurors to comprehend complex cases. The attorney who is prepared, organized, has conviction, and who understands the ground upon which jurors walk (by doing pretrial research) is the most successful.

Anecdotal Evidence

A lawyer in a recent patent case believed he had a solid argument for a theory of infringement, but he also had a possible appeal to a local prejudice that was identified in the pretrial research. Based on the research, the lawyer made the decision to appeal to the prejudice rather than the “sound” technical analysis and argument (which included well-qualified expert witnesses). Much to everyone’s surprise on the other side, the lawyer was successful in his strategy (which was confirmed during post-trial interviews).

Resource Materials

1. Cooper, Bennett & Sukel (1996). Complex Scientific Testimony: How Do Jurors Make Decisions? 18(1) *Law &*

Human Behavior 379-394.

2. Smith, Penrod, Otto & Park (1996). Jurors’ Use of Probabilistic Evidence, 20(1) *Law & Human Behavior* 49-82.

3. Heuer & Penrod (1994). Trial Complexity - A Field Investigation of Its Meaning and Its Effects, 18(1) *Law & Human Behavior* 29-51.

4. Report of the Special Committee on Jury Comprehension of the ABA Section on Litigation (December 1989), *Jury Comprehension in Complex Cases*.

5. Pennington & Hastie (1986). Evidence Evaluation in Complex Decision Making, *Journal of Personality & Social Psychology* 242-258.

6. Wasserman & Robinson. Extra-Legal Influences, Group Processes, & Jury Decision Making: A Psychological Perspective, *North Carolina Central Law Journal* 96-159.

7. Cecil, Hans, & Wiggins. Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials, 40 *The American University Law Review* 727-774.

8. Goodman, Greene, & Loftus (1985). What Confuses Jurors in Complex Cases, *Trial* 65-74.

9. Lempert (1981). Civil Juries and Complex Cases: Let’s Not Rush to Judgment, 80 *Michigan Law Review* 68-132.