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Lawyer Myths and Mythmaking  
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Regardless of how well educated or experienced we are, none of us can escape the fact that our behavior is guided in part by myths, superstitions, and other beliefs for which we have no reliable empirical validation. Lawyers are no exception when it comes to dealing with jurors. Sometimes the beliefs that guide professional behavior are easily identified. They are merely a reflection of commonly held cultural prejudices. Usually we are not aware of the myths that guide us, we just believe them and act on them. Indeed, many myths are self-perpetuating as we selectively recall our relevant prior experiences. We think we have validation for them. That is why they persist, and that is why we continue to act on them.

Over the course of several years, jury consultants will encounter many lawyer myths about jurors – some they help create. These beliefs are not always idiosyncratic, often times they are truly cultural myths – they pervade the thinking of many trial attorneys. Jury researchers have gathered survey and mock trial data over the years that show that many of the myths that guide attorney behavior are unreliable. Interviews with experienced jury researchers/consultants have revealed a fairly consistent set of lawyer myths regarding jurors, as well as strong agreement regarding the relative validity of these myths. As with findings in research studies related to the development of stereotypes, some of the lawyer myths regarding jurors are shown to have an empirical basis. That is, for a particular case in a particular venue, research showed that jurors with certain characteristics did fit the stereotypic view of a plaintiff or defense juror. However, the relationship between the stereotypic view and the actual decisions of jurors may not hold up in different venues or across case fact scenarios.

Before discussing some lawyer myths and their validity, the second half of this article's title should be addressed. There is another aspect of myths that deserves exploration – mythmaking. Myths have their good side and bad side. To understand the positive value of myths, it is important to understand the cognitive function of myths. Myths are mental tools. They help us deal with unfamiliar or unpredictable situations by making elements of the situation seem

more predictable. We do not know how a particular juror will feel about our client, but we have some beliefs about how people who are like that juror feel about large corporations or plaintiffs possessing particular characteristics. The beliefs serve as shortcuts to action. We strike the middle-aged white lady because we believe she will look down on the behavior of the young, single, black female client. We avoid postal workers at all costs because all defense lawyers in civil suits know postal workers are bad for corporate defendants. The value of creating a cognitive shortcut cannot be underestimated when it comes time to try a case.

Storytelling is an elaborate form of mythmaking. Rather than simply asserting something is true, the mythmaker provides a context for the assertion or conclusion he or she wishes the listener to take away. Even in this era of easily accessible images and one-minute sound bites, storytelling, mythmaking, is a highly valued skill. Storytelling is an art form that good trial lawyers have used for many years. By weaving together facts, argument, and memorable, thematic allusions, trial attorneys are able to spin a story of their case that jurors adopt as their view of reality. This ability is often regarded as an innate talent which is to be envied, but alas, not to be acquired by ordinary beings. The latter belief is a self-defeating myth that will be dispelled by the end of this article showing that it is possible for ordinary beings to be extraordinary storytellers.

## **Jury Selection Myths**

The following excerpts include some common beliefs that jury consultants have encountered over the years in assisting trial attorneys with jury selection. Most of these examples have been drawn from an informal survey of experienced jury consultants, although a few do come from published references. In addition to evaluating how reliable these myths are as guides to jury selection, the validity of these myths will be analyzed to explain how and why they are meaningful. For instance, there may be underlying relationships between individual or group characteristics and behavioral tendencies related to decision-making in a jury context. These explanatory relationships

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may be useful in understanding jury behavior where the more visible stereotypic characteristics prove unreliable.

***Myth #1: Like equals liking equals winning.***

Trial attorneys often believe that, if a juror likes the lawyer, that juror will want the lawyer and his or her client to win. Moreover lawyers often like particular jurors because of their perceived personal similarities or simply because they find them attractive. Trial lawyers will sometimes tell their jury consultants that these jurors are “untouchable” during jury selection because of the ensuing rapport that will presumably be established and nurtured throughout trial. Finally, there is a belief that jurors, who are like the client in observable ways, will like the client and therefore will want the client to win.

Prospective jurors who are perceived to be more like the opposing litigant than one’s client are to be avoided, as are those who have nothing in common with one’s client.

This myth will be explored in two contexts – now and in the next section dealing with advocacy myths. It is probably the source of greatest disagreement between jury consultants and trial attorneys. Like most myths there is some basis in reality. There is even some basic research support for the first part of the myth, the proposition that like equals liking. Jurors often express greater empathy initially for litigants with whom they identify. They put themselves in that litigant’s shoes and use their own reactions as a frame of reference for how that litigant must have felt or reacted. However, this connection is often very tenuous, especially if the litigant’s suffering might be a result of their actions or inactions. The jurors who are most similar to the litigant try to separate themselves from the litigant by a variety of means.

There is even less support for the proposition that liking the attorney equals a stronger desire on part of the juror to see him or her win. The mutual attraction or lack of attraction between jurors and lawyers is particularly irrelevant. While we are more comfortable with people like ourselves, and hence would rather spend our time with them, it is a mistake for trial attorneys to allow their comfort level or discomfort level to sway their judgment when it

comes to jury selection. The results of numerous post-trial interviews have demonstrated that jurors do not mix their likes or dislikes regarding the trial lawyers with their verdict decisions. Research on the perception of personal characteristics and attraction in jury decision-making scenarios indicates that, while there may be a superficial rapport, it does not last. The superficial reaction is quickly overridden by the situational factors that define the case issues.

***Myth #2: “You can tell almost as much about a man by how he walks as how he talks” (Texas Observer, May 11, 1973).***

Unfortunately, this is a myth that some jury consultants actively foster. Basic research in nonverbal communication over the years has revealed relationships between nonverbal communications and certain emotional states related to diverse phenomena such as rapport and lying. While these would seem to be important signals for jury selection, research has also shown that most observers are unable to use these cues reliably. Moreover, jury selection lacks the controls of a clinical or experimental situation so the likelihood of accurately detecting something meaningful is low. Of course, an attorney might have good reason to be concerned about the juror who glowers at her and smiles at her opposing counsel. Numerous experiences suggest, however, that the attorney who thinks the lady who nods and smiles whenever she speaks is likely to be disappointed on judgment day. The fact is that the behavior jurors’ exhibit in the courtroom is largely a function of how jurors think they should act rather than how they feel about the lawyers or the litigants and will have nothing to do in the end with their decisions.

This proposition extends beyond nonverbal behavior, however, into the arena of signs and symbols. The appearance of a juror is fraught with associations – some of which are stereotypic and others symbolic. The same prosecutor commenting in the *Texas Observer* noted that handicapped people would be bad for the prosecutor while well-dressed people would be good for the prosecution. As with appearances generally, these associations are deceiving. Tort defense attorneys are often inclined

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to strike handicapped individuals because they might feel sympathetic to the plaintiff. The reality is that the emotional reaction of handicapped jurors is more a function of the way they have dealt with their handicaps rather than the fact of their handicap. If the attorney were to listen to the juror talk about his or her life they would soon know whether they wanted that person judge their case. On the other hand, a well-dressed, conservative juror may indeed be conservative in other aspects of their life, but then there are a lot of well-dressed liberals. Some signs may indeed be tip-offs to characteristics that have meaning. A well-dressed woman, wearing religious tokens and carrying religious materials, may be truly punitive when it comes to wrongdoing. If you are the defendant, do you want to chance her wrath? If you are the plaintiff, can you rise above her measure of appropriate behavior? Lawyers often make fun of jury consultants who ask about juror's bumper stickers, but signs and symbols often reveal a person's heartfelt values. Appearances cannot be accepted at face value. Very often the obvious association is the least valid, while a sign or symbol is most telling.

***Myth #3: Rich man, defense juror. Poor man, plaintiff juror.***

Akin to racial and ethnic stereotypes are those based on socioeconomic status (SES) characteristics: income, years of education, and social status. In some instances of course there is a confounding of racial, ethnic, and SES characteristics. Though the former are prohibited criteria for jury selection, it seems likely that the prohibition can and will be extended to social class as well. Batson has been expanded to include "reverse" Batson challenges and more generally to other demographically discrete groups. There is very little support for the proposition in this myth and its obvious extensions even where there is an individual plaintiff paired with a large corporate defendant. This finding surprises corporate counsel in particular, mainly because of the results of trials in some notorious venues such as the Bronx or some rural southern venues. As it turns out, the Bronx is about a fifty-fifty proposition for defendants, and the rural southern venues are anomalies even in the

states where they occur. Recent tobacco verdicts and even the infamous McDonald's hot coffee verdict indicate that reasonably well-educated, middle-class jurors can tee off on corporate America. Similarly, a breast implant defense verdict in one of the poorest counties in the country, having the lowest recorded educational level and the highest proportion of ethnic minority citizens, shows that there are serious limits to this stereotypic assertion.

Where there is a statistical correlation in jury research, there is almost always a related set of qualifiers. Jury researchers often find statistically significant correlations among demographic and perceptual variables when they do large-scale jury studies. The scientific approach to jury selection is based on profiles generated from correlations and regression formulas. These are probability statements. They are not explanations for jury behavior, and they do not say a great deal about individual jurors typically. While it may turn out that the prediction formula contains some demographic characteristics, which typically do not carry over from study to study, the real profile of the prejudiced juror is somewhere in the combination of life experience and attitudinal variables. In product liability cases, a juror's relevant personal experiences, along with attitudes about individual responsibility and risk acceptance, are more important than demographic characteristics such as race, gender, or SES. The latter may be a correlate of important juror predispositions. For instance, jurors who feel that the system works for them will respond quite differently to a set of case facts than those who feel the system works against them. Indeed, one of the few jury profiles that does generalize from case to case and venue to venue is that of the punitive tort plaintiff juror. This profile describes a person who feels victimized, who experiences social and economic marginality and has experienced recent traumatic events. Here the connection between life events and attitudes is predictable and understandable. For most other jurors, predispositions that prevent them from listening to one side of the case or the other are more idiosyncratic and narrowly defined. These predispositions are not likely to be revealed in demographic typologies or rich man/poor man myths.

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## **Trial Advocacy Myths and the Keys to Successful Mythmaking**

Myths regarding the reactions or motivations of jurors interfere with successful advocacy and the use of the storytelling method by limiting the advocates' options or causing the trial lawyer to spend time on counterproductive or wasted efforts. A good example of this is the manifestation of the like-equals-liking-equals-winning myth in trial advocacy. The belief that in order to win the jurors must like the attorney is one of the most prevalent myths. It is a self-limiting belief that simply is not true. The best-liked attorney does not always win, indeed most jurors have only superficial regard for the trial attorneys and that is tempered by their understanding of the trial advocate's role. An attorney who goes out of his or her way to be liked by jurors is not only misdirected, but runs the risk of being unlikeable when they act naturally. It cannot be denied that there are charismatic persons among us who have such presence that others are more than anxious to accept their utterances. However, liking for the advocate, or a desire to be liked by the advocate, is only one source of persuasive power and probably the least relevant in a trial situation. Of all the bases of persuasive power – identification (charisma), authority, reward potential, coercion, and knowledge – the latter is probably the most effective channel for lawyers to use in a trial setting. Jurors respect lawyers for their knowledge and more importantly appreciate anything that makes their task easier. An attorney who is not only a good storyteller but also is a good teacher will score a lot more points with jurors than an attorney who tries to charm them.

The courtroom is a peculiar social milieu. Jurors are the observers; the judge, attorneys, and witnesses are the players. Jurors understand these roles. They watch the whole stage. Attorneys must understand that they are onstage. How they relate to others does exert subtle influence on the way they are regarded by the jurors. It is important for attorneys to recognize that the way they behave toward others at their own table, at other tables, is a sign to jurors of what the attorney is really like as a person. Jurors understand that the attorneys have to be nice to the jurors. A

lawyer who routinely berates his or her associates does more to destroy juror's goodwill than can be repaired by any gesture to the jury.

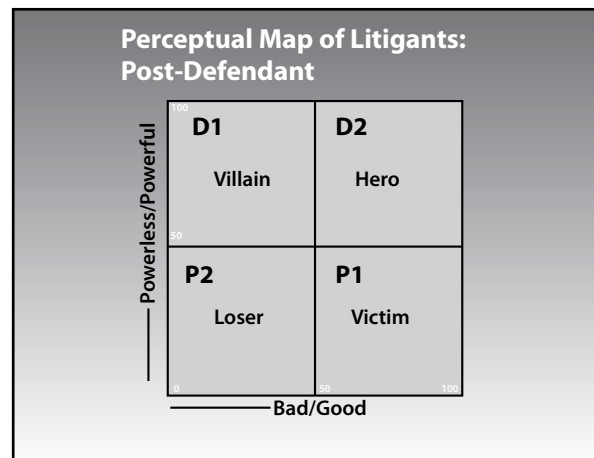
There is a formulation of the liking-equals-winning that is supported by empirical findings. Jurors find a way to reward the party they would like to see win. Jurors often form a psychological verdict that expresses their desire for a party to win and then figure out how to make that outcome a reality. The psychological verdict is the way jurors balance their personal scales of justice. Their story of the case includes their desired ending. While it is hoped that the jurors will come to their desired ending by listening fairly and objectively to both sides of the issue, it is well documented that jurors' stories of the case contain elements of their personal experiences and preconceptions. Experienced jury researchers devote much of their attention to understanding how jurors put their stories together. Of particular interest are the themes that bind the diverse elements of the story together – including the desired outcome. The key themes are usually reflections of jurors' preferences and attitudes. These predispositions merge with arguments and especially salient facts to form themes that give the juror's story of the case its persuasive power as a cognitive tool and motivator.

For instance, a commonly held attitude is expressed in the following statement taken from a juror attitude survey: "Large corporations care more about profits than the safety of their products." This statement is typically endorsed by more than half the persons surveyed in a given venue. After hearing the plaintiff story about all the warnings and test results the large corporate defendant ignored, it is not surprising that the jurors' stories contained the theme: "XYZ Corporation knew its product had problems, but rushed it to market in time for the holiday season anyway." The plaintiff story matched a pre-dispositional belief. The jurors' desired outcome in this case is not too hard to guess. The defense had better have a motivating theme of its own because the burden has definitely shifted to the defense. Jurors will dismiss defensive arguments as excuses. Finding motivational themes that inspire jurors to pull for the corporate defendant, or at least to put the defendant on an equal footing, is not an

easy thing to do. Moreover, many trial attorneys fail to see the need to provide jurors with a motive for finding in favor of their client. In an objective and fair world where jurors follow the letter of the judge's instruction, motivational themes are irrelevant. However, in the real world of jury decision-making it is always worth asking: "Why should jurors want my client to win?"

**Myth #4: The jurors will be swayed by the weight of the scientific evidence.**

While it is true that cases are won because of the strength of the scientific evidence, the route to the "right" decision is often circuitous. The strong science defense has several problems: it is usually too complex for the average juror, it deteriorates into a battle of the experts that jurors feel unqualified to referee, and jurors usually find nonscientific thematic elements more compelling. The last reason is the most troubling for defense attorneys because the plaintiffs usually have the better motivational themes – those that evoke sympathy or anger. If the plaintiff attorney succeeds in capturing the hearts of the jurors, it is unlikely they will want to put the required effort into understanding the defense's scientific explanations of why its product was not really harmful after all. Good science works best as defense when the plaintiff is not as sympathetic as the plaintiff lawyer suggests. The following diagram shows how a nonlinear defense strategy reopens jurors' minds so they are willing to consider the defendant's good science.



Following the plaintiff's opening statement in a toxic tort-product liability case the litigants occupied the quadrants in the jurors' psychological space indicated by P1 and D1. The plaintiff (P1) is in what is known as the VICTIM ZONE (perceived as relatively powerless, but worthy) while the defendant (D1) occupies the VILLAIN ZONE (perceived as powerful, but evil) because of all the things it could have done, but did not do to prevent the plaintiff's suffering. If the situation were to stay this way, the jurors' desired outcome would include a large dose of punitive damages. The dilemma for the defense is how to get the story of its safe product to be considered by jurors. Overwhelming the jurors with test data will not be persuasive because the jurors know the plaintiff was poisoned by the defendant's product containing arsenic, and many jurors are predisposed to believe that there is no such thing as a safe dose of poison. The defense needs to grab the attention of the jurors, get them to let go of the plaintiff story of the case, and adopt the defense story that the product was indeed safe if used properly.

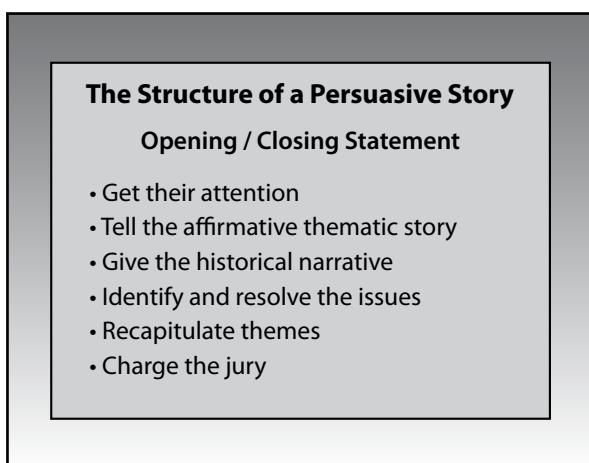
The goal from the defense attorney's perspective is to reshape the jurors' psychological space so that the plaintiff (P2) is relegated to the LOSER ZONE (perceived as having caused his own problems by misusing the product) as the defendant corporation (D2) ascends, if not to the HERO ZONE, at least to a point where it is perceived as having fulfilled its obligations as a good manufacturer. The good science, safe product story becomes effective once the defense attorney captures the attention of the jurors, levels the playing field by exploiting a slightly counterintuitive theme (e.g., "many times good things contain an ingredient that would otherwise be bad for you"), and then shifts the jurors' attention to the responsibilities of a person using the product. Then and only then can the defense's good science be introduced successfully.

**Every Trial Lawyer Can Learn to Be an Effective Mythmaker**

Storytelling seems to come naturally to some lawyers. Indeed, most people who do not view themselves as good storytellers think that

storytelling is related to a personality trait –one they did not inherit. While telling a story with pizzazz and personality may come more easily to some than others, there is no reason why most everyone should not be able to tell a good story. The goal of an opening statement is not to entertain the jurors, but to give them a tool they can use to evaluate the evidence they will hear later. The story comes into play as a device to make your theory of the case more memorable and useful. Jurors will create their story of the case based on what they hear about the case during the openings. Their story will be rich in themes and images, not dates and numbers or other facts. The goal of the trial attorney during the opening statement is to have jurors remember the essential elements of his or her client's story of the case and repeat it as their, the jurors', story of the case at the end of trial. In order for that to happen, the trial attorney must weave a story of the case that captures jurors' attention, builds on themes jurors would likely use themselves, and have a coherent story-like structure.

The following elements create the ideal structure for an opening statement story. These elements are similar to the syntax of effective stories delivered in other contexts using a variety of media: novels, movies, even classical music.



Trial attorneys typically include story elements in their opening statements that are effective: an historical narrative of the case facts, identification of case issues, and usually a desired resolution of the issues. What is most often missing is the affirmative

thematic story. Attorneys who are successful storytellers make a conscious effort to find out how jurors would envision the case. If the importance of the matter warrants it, they may even conduct jury research to see how jurors put the facts together and resolve the issues. They learn how the attitudes and experiences of jurors will merge with case facts to create simplifying, motivating case themes.

Coming up with a good attention-getter is also missing from many defense openings, perhaps because this is a difficult challenge. The use of a compelling graphic or other visual communications aid is one way to capture and focus jurors' attention. It is important to keep in mind that visual aids are just that. They assist storytelling, they do not substitute for storytelling. The storytelling structure is the key. Showing a lot of colorful, disconnected charts is counterproductive. Using a graphic or visual aid as part of the story or one that tells a self-contained story is very effective in this visual age. Challenging jurors with counterintuitive themes is also effective as an attention-getting device. The worst thing a defense attorney can do after an emotionally compelling, plaintiff opening statement is to start off by saying something the jurors expect and have already rejected as irrelevant, e.g., the good corporate citizen spiel. Once the attorney has captured the jurors' attention and built his or her credibility by addressing one or two issues jurors think are most relevant, then the good corporate citizen story can be told.

As with many writers, trial attorneys often have difficulty closing their opening – they leave the charge to the jury to the inspiration of the moment. Again, it is very important to give the jurors motivation to find for your client. Clearly the opening (this goes for closing statements, too) needs to build momentum and provide the rationale for a favorable finding. It is important though to think through and write out the ending. If the presenter leaves this to the passion of the moment, it usually comes out as more of a whimper rather than a closing bang. One tried-and-true method is to close with a recapitulation of the attention-getting themes used in the beginning. Jurors will have even greater appreciation for key themes of your story, and the exercise of tying these

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themes together in a brief, parting shot models the use of the story as a motivational and cognitive tool. This is the positive aspect of myths – mythmaking. Telling your client’s best story in a memorable way. It matters little that the jurors like the attorney if they did not recall his or her story of the case or find it compelling.

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*This article originally appeared in the American Bar Association’s Product Liability Newsletter 2000, vol. II, no. 2.*