

Welcome to the May Flowers issue of **THE JURY BOX**. New things are blooming all over our website. On the "media files" page, you can find the editorial I wrote about the ABA "Principles for Juries and Jury Trials," published in Massachusetts Lawyers Weekly, as well as Power Point slide shows for a couple of my recent presentations on jury decision-making. I also want to alert you all to our exclusive JURY MEMO, a powerful and economical diagnostic tool. It is a great way for a lawyer to get feedback on jury-related issues for any case. Find out more on the website's "Services" page, or give me a call for more information. The annual meeting of the American Society of Trial Consultants is being held in Philadelphia in June. There are several timely and interesting topics on the agenda, including the use of jury consultants in alternative dispute resolution forums and the intellectual property of mock trial techniques. Look for my post mortem in the July issue.

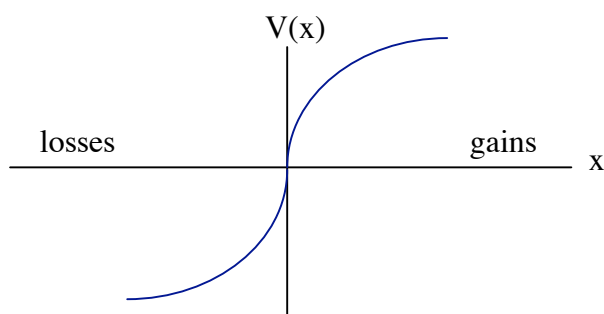
-Edward P. Schwartz

Many of you who know that I am trained as an economist and a game theorist have asked how these skills come into play in my trial consultant work. Since these are pretty unique skills among jury consultants, I thought I would offer a few insights drawn from my expertise in these areas.

Issue Framing and Endowment Effects

Daniel Kahneman and Amos Tversky developed an empirically motivated theory of decision-making under risk, called "prospect theory." These scholars discovered that people reacted differently to risky situations when they perceived themselves to be "gambling" with profits than when they thought they were facing losses. Typically, people are fairly risk loving in losses, but quite risk averse in gains. The typical risk profile hypothesized by prospect theory is illustrated in the figure below.

The Valuation Function of Prospect Theory



One of the best-known examples of this phenomenon involved asking respondents about alternative treatments for a public health epidemic. Treatment A will almost certainly be moderately effective. Treatment B, however, might prove to be highly effective but might also turn out to be pretty much useless. So, Treatment B is the riskier alternative. When the dilemma was framed in terms of casualties, many more people chose Treatment B. However, when exactly the same problem was framed in terms of lives saved, respondents typically chose Treatment A.

This result, confirmed by numerous subsequent studies, caused researchers to become acutely aware of the potential influence of survey wording on subject responses. The lesson is that there really is no completely neutral way to ask a subjective question, so researchers need to be sensitive to the possibility of bias introduced by question framing.

There is a similar phenomenon in microeconomics, known as the endowment effect. In short, studies repeatedly find that people almost always demand more to sell an object than they would be willing to pay to buy it. So, how much is the object really worth? There may not be a simple answer to that question.

In any litigation involving damages, a lawyer is faced with estimating how much something will be valued by the ordinary people serving on the jury. The jury may be instructed to identify how much it would cost to "make the plaintiff whole." This is typically a hypothetical exercise for the jurors, since they are unlikely to have experienced anything like what the parties to the case have gone through. An attorney would do well to understand how framing this problem for the jury can very significantly affect the damage award that the jury ultimately chooses.

As an example, if one were to ask the jury "How much would Mr. Jones have paid to get out of this contract?" one would likely get quite a different number than were one to ask the jury "How much should Mr. Jones be paid to stay in this contract?" Employing economic theory and decision theory, I can help an attorney to frame such questions most advantageously for her case.

All those in Favor...

At the crossroads of game theory, economics and political science is a discipline known as "social choice theory." Social choice theory involves the study of strategic agenda-setting and voting within political institutions. A good chunk of my academic research has been devoted to the application of social choice theory to decision-making within juries. (One of my non-technical articles is posted to the "media files" section of the website.) Juries are free to conduct their deliberations and take votes in virtually any way they choose. Given what social choice theorists understand about how procedures can

affect outcomes, lawyers should consider which deliberation and voting methods would be most advantageous for their clients.

Not all votes are created equal. If a jury takes a secret ballot, the jurors will all feel fairly comfortable in voting sincerely. When a jury votes "around the table," there can be a cascading effect, as votes pile up on one side or the other. Each juror might be reluctant to be the first one to vote "the other way." This effect can become more pronounced for the last few jurors to cast their votes. A simple show of hands can result in a game of "chicken" as the jurors all look around to room to see how many other hands are going up. Sometimes a foreperson or other active juror will essentially call for "unanimous consent", daring the other jurors to suggest that she is wrong. "I think we can all agree that Dr. Jones didn't do anything wrong, so let's move on to Dr. Smith." This puts enormous pressure on any jury who thinks that Dr. Jones might have actually been negligent.

A lawyer's attempt to tell a jury how to deliberate and vote would likely meet great hostility from the judge, not to mention opposing counsel. That said, there are subtle strategic choices that an attorney can make in how she couches her arguments that can "nudge" a jury towards deliberating in one way or another. Once a litigator has a strong sense of how a jury is likely to split on the important issues in a case, perhaps because we have run a focus group or mock trial, I can help her to fashion her arguments accordingly.

We also understand how special questions on the verdict slip can affect deliberations. This is one of the few mechanisms available to a litigator to fashion the jury's deliberation agenda. Depending on the contours of the case, we might want the jury to vote on each issue separately, or we might prefer to give them an "omnibus package" for an up-or-down vote.

The Name of the Game

Game theory is the study of strategic interaction among two or more parties, with at least partially conflicting goals. As such, game theory can be very useful in evaluating litigation strategies. If there is any uncertainty about what trial strategies opposing counsel will employ, it might prove useful for me to derive a game tree of the trial, so that an attorney can identify what her optimal responses will be to various contingencies. The key is to identify the best response to your opponent's strategy, given that her strategy will be a best response to yours.

While both parties' trial preparation is performed pretty much simultaneously, the trial itself follows a prescribed sequence. An attorney should be prepared with an optimal strategy regardless of which branch of the game tree she finds herself standing on.

In the News

NY study reveals support for jury trial reforms

New York recently conducted a study of proposed jury trial reforms, designed and managed by Elissa Krauss of the New York State Jury Office. Judges were asked to try out a variety of procedural reforms, from pre-instructing the jury on the law to allowing juror note-taking to providing jurors with written copies of the judge's instructions. Over all, the study included 112 trials with at least one innovation, involving 26 judges, 210 lawyers and 926 jurors. After each trial, questionnaires were completed by the judge, attorneys and jurors in the case.

Most of the innovations received very favorable reviews, even by lawyers who were initially skeptical about their effects. Virtually all respondents were enthusiastic about instructing the jury about the law prior to opening arguments. Jurors felt that this helped them focus on the testimony and arguments that would ultimately prove relevant to the verdict. That is, they knew what to look for as the trial progressed. Juror note-taking was also well-received. None of the initial concerns about distraction, lack of focus, or the undue influence of note-takers materialized. Interestingly, the act of taking notes seemed to improve juror recall more than the notes themselves.

One of the more controversial innovations involves allowing jurors to submit questions to witnesses. The method employed in this study, allowing written questions to be submitted to the judge for review after the completion of direct and cross examinations of a particular witness, is generally recognized as the most effective (and least distracting) way to handle such questions. Of the 347 questions submitted, 41 prompted an objection, with 4 of the 41 being asked over said objection. Judges were generally supportive this innovation as were jurors, including those who asked questions, those who didn't, and even those whose questions prompted successful objections.

Juror questions did incite strenuous opposition from the defense bar for criminal cases. The concern is that such a practice perverts the burden that is normally on the prosecution to prove its case beyond a reasonable doubt. Defense lawyers did not like the idea of a juror being able to correct the oversight of a prosecutor by asking a question designed to resolve her lingering doubt. Interestingly, a woman convicted of assault in Colorado has appealed on the grounds that allowing juror questions violated her 6th Amendment rights.

The full report of the New York study is expected to be available by the middle of May at www.nyjuryinnovations.org. Those who would like to examine the survey instruments themselves should drop me an e-mail to that effect.

Want to know more?

Access all issues of [THE JURY BOX](#) At
www.eps-consulting.com/jurybox

