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Secret Ballot Or A Show Of Hands?

Lawyers Gain Advantage By 'Nudging' Jurors To Preferred Voting Method

By Edward P. Schwartz

When going to trial, a litigator always asks herself the same question: "How will the jury vote?" This is a great question, but maybe not for the reason you think. I encourage my clients to think about the *method*, as well as the *outcome* of jury voting.

This is important because the method jurors use to cast their votes can have a profound effect on the outcome of the case. For example, if the jury votes by a show of hands, a juror may be reluctant to vote her conscience if she is worried that her choice will be unpopular with her fellow jurors.

It is therefore important for lawyers to understand the various methods juries use to reach their decisions, how each method might favor one side or the other, and how lawyers can subtly influence the jury's voting method without running afoul of the court.

Get In The Game

Game theory is the study of strategic interaction. The focus is on how people choose strategies in anticipation of the strategies chosen by others. For instance, a soccer player taking a penalty kick wants to kick the ball in the opposite direction from where the goalie is diving. The goalie, on the other hand, wants to dive the same way the ball is being kicked. Should the goalie dive left or right? Well, that depends on what he thinks the kicker is going to do.

The application of game theory to voting situations is called *social choice theory*. Most voting institutions – traditional elections, the Supreme Court, and Senate votes to close debate – have well-defined voting rules. It is interesting then that the jury, comprised of ordinary citizens with little or no voting experience (other than in elections), is asked to reach verdicts without any guidance about how to structure their votes. A casual observer might think that the voting method would not matter very much.

A social choice theorist, however, understands that procedure can have a profound impact on outcomes. A litigator would be wise to appreciate this connection and try to influence the jury's voting method accordingly.

Common Voting Methods

Jury voting methods run the gamut from the traditional secret ballot to the simultaneous show of hands. Each comes with its own strategic dynamic and lawyers can gain an edge for their clients if they can somehow convince the jury to use a method that maximizes the strengths of their case.

Of course, a lawyer's direct 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 ways an attorney can couch her arguments that might "nudge" a jury towards deliberating in one way or another.

- *Secret ballot.*

Not all votes are created equal. If a jury uses a secret ballot, jurors will all feel fairly comfortable voting sincerely. As such, if your client has an unsympathetic, but principled case, a secret ballot might be your best option. It maximizes the chance that those favoring to your client will actually vote that way.

Studies have shown that people become committed to a position when they have publicly espoused it. As such, when a juror votes for a particular verdict, it is harder to get her to change her mind than if her position had remained private.

A secret ballot increases the likelihood that your supporters will act on their beliefs. On the other hand, its anonymity will limit the level of commitment that such a vote will engender.

Once a litigator has a strong sense of how a jury is likely to split on the important issues in a case, perhaps because she has run a focus group or mock trial, a good trial consultant can help her to fashion her arguments accordingly.

For instance, an attorney could begin the final paragraph of her closing with "After you have deliberated on these important issues, and as you tear up little slips of paper to cast your votes, I would just ask that you remember..."

- *Around the table.*

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.

Research has shown that jurors who initially favor the defense position are less likely to switch their votes than pro-plaintiff jurors. As such, a plaintiff's attorney who anticipates majority support on the first ballot might have an advantage if the jury uses a voice vote, as it can limit the effectiveness of dissenting voices (which may never be heard).

Closing argument is a good time to sow the seeds of this voting method: The lawyer can point to each juror, in turn, as she sums up, "As each of you, in turn, informs the rest of the jury how you intend to vote in this case, keep in mind how the power is in your hands alone to insure justice for my client."

- *Show of hands.*

The game of "chicken" recalls images of testosterone-crazed, teenage drivers, barreling towards each other on a deserted stretch of highway. If both try too hard to "win," they both lose in a big way. This game was famously used to model U.S.-Soviet relations during the cold war.

While slightly less dramatic, a simple show of hands in the jury room can result in a game of "chicken." Suppose a juror fears that her position is unpopular, or appears insensitive or stupid. Before raising her own hand, she will look around to room to see how many other hands are going up. Other like-minded jurors might be employing the same strategy. The result can be zero votes for a particular verdict, despite the fact that several jurors actually support it.

As such, a show of hands is usually a good voting method for a plaintiff's attorney with a very sympathetic client.

Voir dire can be good time to plant the seeds of voting procedures. An attorney can ask a prospective juror: "Jurors often have tough decisions to make. It's really important that each juror vote according to her conscience and her evaluation of the evidence. Do you think that you could raise your hand high to vote for the verdict you believe is right, without worrying about whether it will be popular with the other jurors?"

The irony of this question is that it is designed to *make sure* jurors worry about their popularity with other voters.

Or maybe your main goal is to make sure the jury *doesn't* use this method.

An attorney could then use voir dire to ask prospective jurors about their experiences with prior jury trials. "How did it make you feel when you were the only juror to vote for the plaintiff? Would voting by secret ballot have made you feel less self-conscious?" While this will not necessarily inspire jurors to use a particular voting method, it will at least alert them to a possibility that they otherwise might not have considered.

- *Unanimous consent.*

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 juror who thinks that Dr. Jones might have actually been negligent.

This is a particularly dangerous scenario in a case where jurors might feel ill-equipped to resolve issues, such as a patent or anti-trust case.

An attorney might try to exploit this possibility if she is confident that the foreperson is on her side, but it is very risky because you never know who will be controlling the agenda. Normally, I would recommend trying to avoid such a scenario by reminding the jury to deliberate and vote on every issue.

If you are concerned that your case is a long-shot and your best chance for victory is to have an advocate on the jury co-opt the deliberations, you can try to strengthen the hand of that advocate. Paint your verdict as the easy, most obvious verdict to reach. During closing, a lawyer could offer helpful advice on prioritizing the deliberations: "This is a very complicated case. It could take weeks to review everything that you've seen and heard. And, by all means, you should take all the time you need. We are confident, however, that if you focus on the important issues, pushing aside the smokescreens and diversions that the other side has thrown at you, it should be a simple matter to return a verdict for my client."

Playing The Game

Attempts to influence deliberations in these ways may lead to objections from opposing counsel, but I wouldn't worry too much about this. First, since your suggestions appear completely verdict-neutral, jurors will wonder why opposing counsel doesn't want them to listen to you. They are more likely to speculate about your opponent's motives than your own.

Second, one mention of your preferred voting method may do the trick. If the judge objects to your choice of words, you can apologize and move on. In fact, the more time the judge spends dealing with your language, the deeper the seed will be planted.

And planting that seed can make all the difference in a close case. Just remember: sometimes it's not *how* the jury votes, but *how* the jury votes that matters. Well, you get the point.

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