

# Give the Jury What It Wants Decision-Making in Trial Practice

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Behavioral psychology research has exploded in popularity as scientists have begun to explain the seemingly irrational decisions people make every day. This research has expanded into the realms of economics, marketing, and even political science. The new-found potential of behavioral psychology became self-evident when one of its primary architects—Daniel Kahneman—won the Nobel Prize in Economics in 2002, marking the rise of so-called “behavioral economics.” More recently, books applying its principles have topped the best-seller charts, bringing discussions of “choice theory” into the mainstream.

Yet, despite the surging popularity of behavioral psychology, few researchers have addressed its implications in the jury trial context. This article aims to nudge that application along by providing an initial tool kit, a starter set of applied research, to give trial lawyers the best chance of persuading a jury. At the very least, this article will illuminate the scientific principles underlying the lore of trial practice.

## The Two Systems of Thinking

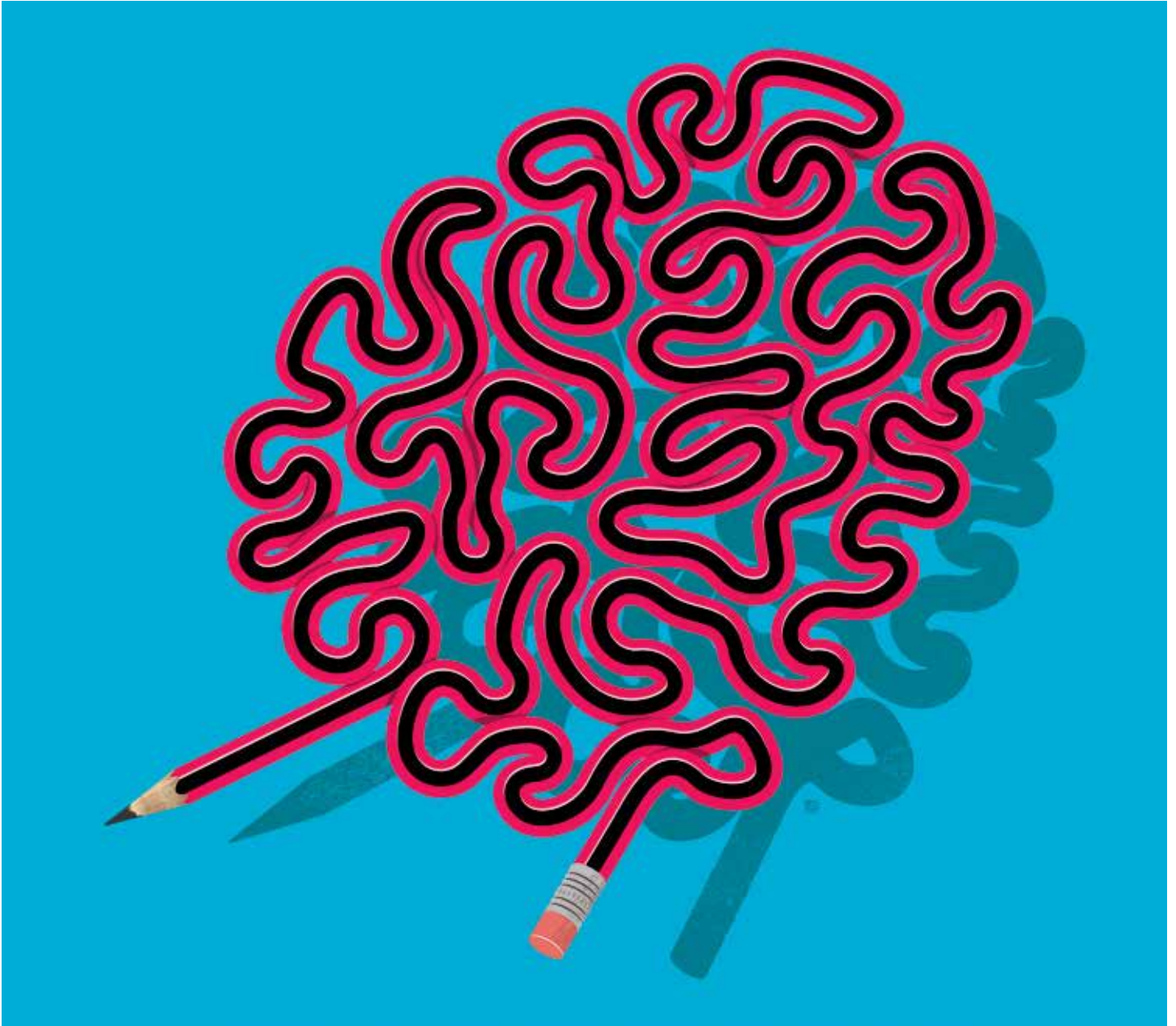
One foundational principle in this field is that not all decisions are made the same way. Broadly speaking, human decision-making falls into two modes of thinking, or “systems.” “System 1” thinking

occurs almost automatically, processing information without effort or voluntary control. “System 2” thinking is effortful and analytic, but it engages only if pushed and if necessary. System 1 operates flawlessly when someone commutes to work on a normal day, following a familiar route to the office. Little thought goes into what turns to make, when to exit, or what parking space to choose. Humans like System 1—it’s easy. By contrast, System 2 engages when driving down an unfamiliar highway, approaching a complicated intersection, while inspecting a map, or remembering instructions given about a route. System 2 is the focused effort necessary to analyze a complex problem.

Importantly, System 2—while rational and focused—is also lazy and hard to engage. So, for example, when given a problem of even moderate complexity, System 1 provides an intuitive, shortcut answer, and many people fail to engage System 2 for a more analytical answer, as in the following problem:

- A bat and ball cost \$1.10.
- The bat costs one dollar more than the ball.
- How much does the ball cost?

System 1 immediately suggests the answer is 10 cents. For most people, it takes a moment to stop, engage System 2, and realize that of course that can’t be correct; the answer is 5 cents. But people



don't always engage System 2; instead, they remain in System 1, relying on mental shortcuts that sometimes lead to mistakes.

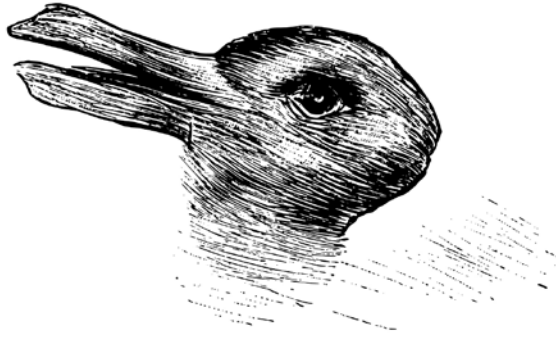
Academics call these mental shortcuts “heuristics.” It is not pejorative to call System 1 “lazy” and heuristics “shortcuts”—heuristics allow people to make fast, effective decisions. In fact, heuristics are a vital part of human decision-making. Practically speaking, limited time and cognitive resources make heuristics necessary for people to navigate countless decisions each day. That is, it's impractical to fully analyze every decision. So people live with a “bounded rationality,” making the best choice available and accepting reasonable limitations to analytical rigor—people satisfy. And in many situations, heuristics produce not only efficient outcomes but good outcomes, too.

In short, heuristics help people make real-world decisions. For example, when people grapple with a decision involving multiple variables or when they're asked to remember compounding details, people tend to rely on heuristics to accomplish the task. Even in situations where people could analyze every variable and review every detail, many times they don't, instead relying on heuristics to understand enough to produce what they consider a satisfactory outcome.

Heuristics may be explained, in part, by “Fuzzy Trace Theory,” which posits that both memory and vision rely on incomplete mental representations, or “gists.” The human brain processes enough information, but not all information. Mental representations allow people to understand the essential meaning of a field

Illustration by Paul Garland

of information without devoting too many resources to processing all the details. For example, together the human eyes and brain allow people to process the gist of this image:



Most people see a duck at first glance, but a rabbit emerges upon closer study. Looking at all of the information, the full picture, two images exist; there are two possible conclusions. Nonetheless, human brains typically see the gist of information and settle on the simplest conclusion. At trial, too, if the evidence is rigorously analyzed, there are likely two possible conclusions—but jurors will commonly see only the gist.

Jurors typically assess credibility, weigh evidence, and reach a conclusion without analyzing every detail, as with the image above, when the mind jumps to a relatable image without examining every line, curve, and shadow. Therefore, a good trial lawyer must ensure jurors see the gist of the case. Presenting stacks of evidence—lines on the page—is not enough. Trial lawyers cannot assume that merely because they can easily discern the “duck” in the evidentiary picture, jurors see the same thing.

If evidence is not enough, how then can trial lawyers persuade jurors? That is, how does the trial lawyer best convince jurors that they’re looking at a picture of a rabbit? What follows are examples of several prominent heuristics that apply to the types of decisions juries often make.

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## Juror Heuristics

The first key to understanding decision-making is to know that decisions are not made in a vacuum. Rather, System 1 decision-making often renders judgment based on reference points, or anchors. Those reference points may create boundaries or provide context to the decision at hand and will certainly influence the outcome. To be clear, these reference points are often external to the rational decision-making process. For example, whether a person had previously been looking at other pictures of rabbits has no bearing on what is actually pictured above—but it may influence what they see. And anyone who has listened to mock jurors deliberate knows that jurors take cues from their own lives and try to fit evidence into categories they recognize—whether logically applicable or not.

Numbers, in particular, become strong anchors for jury decisions. Anchoring is so powerful that entirely unrelated, meaningless numbers can influence a decision. For example, in one series of tests, mock jurors were asked to deliberate on a damages award. As part of the test—unbeknownst to the jurors—one of the test facilitators made an offhand comment about the cost of courtroom renovations. Although renovation costs had nothing to do with the damages under consideration, that subtle cue significantly influenced damages awards across the juries tested. Other experiments have shown that meaningful anchors—i.e., numbers tied to the decision at hand—will have an even greater effect on decision-making. Therefore, numbers must be used carefully because they make a strong mental impression.

System 1 thinking often leads jurors to walk the path of least resistance. In some instances, choice overload, inertia, or uncertainty may lead them to neglect an important decision and follow a default option of inaction. In other instances, “channel factors,” which make a decision easier, influence the outcome, whether or not that outcome is optimal or even rational.

For example, one study showed how these channel factors influenced peoples’ choice to participate in a vaccination program. An initial communication to potential participants helped inform the participants about vaccines and their availability, but it didn’t cause participants to get vaccinated. But when the communication included a map and directions to a vaccination center, participation increased. The reasons in favor of vaccination did not change, but the ease with which participants could act on that information did.

Perhaps that result is not surprising, but lawyers often provide juries with an overload of important information—in the form of an evidentiary trash heap—leaving it up to the jury to sort through what matters to come to the right decision. That’s not enough: Trial lawyers must provide a road map to make connecting the dots easy for the jury. This must occur throughout trial but especially during closing argument.

In another study, employee participation in a 401(k) plan increased when employees received a “quick enrollment” option. The “quick enrollment” option allowed the employees to participate without deciding asset allocation or contribution percentages. Again, the motivation to save for retirement did not change, but the ease with which people could act did. It was that ease with which people could act, the “channeling,” that caused 401(k) plan participation to increase.

A few outstanding trial lawyers may make jurors care about a case as much as they do (or should) about their own retirement savings, but even that isn’t enough. The complexity of the jury’s decision—balancing important information, weighing competing viewpoints—can overload jurors’ decision-making capabilities. In other words, trial lawyers must keep it simple. They shouldn’t ask jurors to do math; they should avoid complex instructions;

Image: Wikimedia Commons

and, whenever possible, they should let jurors simply check a box for “yes” or “no.”

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## How Information Is Presented Is Key

In making complex decisions, people do not treat all available information equally. Relying on System 1, people rely more heavily on information that most quickly comes to mind. That is, the way information is presented—not just the substance of the information—affects how people make decisions.

This “availability” heuristic affects how people make decisions because it shades what people “know.” For example, people commonly report believing that natural disasters are far deadlier than common conditions like asthma. People recall dramatic, violent events much more easily and, therefore, when analyzing decisions, tend to over-weight that information.

In fact, studies show that the “availability” of information can be affected through much more subtle means than by tying facts to dramatic events. For instance, one study showed that people are more likely to apply heuristic shortcuts when numbers are written out as words. That is, merely displaying the same information with numerals made the information easier to process—more “available”—and caused more people to correctly apply it to reach the optimal result.

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Similarly, given the same information, people are more likely to use and apply that information if they don’t need to recall or search for it. At least one study has, in fact, shown that participants were more likely to apply information to reach the optimal decision when the information was presented on a screen in front of them rather than asking participants to recall information previously told to them. And research further shows that this difference is exacerbated as individuals’ “cognitive load” increases. Put differently, as the difficulty of tasks increases, and as more distractions interfere, the ready availability of information becomes more important.

People also don’t treat all available information equally. Instead, research has shown that people will more readily believe information that is consistent with their preexisting worldview, while discounting inconsistent information. Most people find cognitive dissonance—or simultaneously holding inconsistent

thoughts—uncomfortable. Therefore, they become averse to information that engages System 2 and challenges their beliefs. So-called “motivated reasoning” describes how people readily absorb information that is consistent with their beliefs while ignoring and devaluing information that challenges their beliefs.

As one researcher explained, when information is consistent with people’s beliefs, they merely ask themselves, “Can I believe this?” But faced with information inconsistent with their prior beliefs, people instead ask, “Must I believe this?” So, a simple battle of facts usually won’t persuade a juror to jettison an entrenched belief and may even lead that juror to become further entrenched in his or her preexisting beliefs. Stated differently, the weight jurors give to evidence depends significantly on whether or not it is consistent with jurors’ foundational beliefs.

To combat motivated reasoning, some research has found it more effective to attack the bias behind the information, rather than simply offering contradictory facts. For example, in a debate about climate change, information about greenhouse gas emissions is not likely to persuade someone who does not already believe in climate change. Instead, the underlying distrust of academic research must be addressed head-on to have any chance to persuade.

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## The Role of Tribalism

People will give greater weight not only to information consistent with their beliefs but also to information that comes from a source they view as trustworthy. These heuristics reinforce one another, because people view those experts who espouse opinions as consistent with their own as more credible. In addition, though, some people tend to be more trusting of people they believe are like them.

This phenomenon explains, in part, tribalism, which is of course an ancient concept but which has also become a vogue term in marketing as companies and individuals have built “tribes” around their brands. In the former, in-group trust was a natural part of societal development; in the latter, trust and loyalty have become qualities to be cultivated.

Trial lawyers who have tried cases in small towns outside their home state know that the home-court advantage is real. This may be counteracted by hiring local counsel, studying the locale, or adopting local speech patterns, but it begins by acknowledging people’s predisposition to trust their in-groups.

None of these heuristics reflect particularly new or novel concepts. Indeed, great trial lawyers have for centuries intuitively adopted—and passed down—skills that impliedly embrace heuristics. Storytelling, the clear presentation of evidence, and credibility are all core components in most trial advocacy curricula. But beyond confirming the wisdom of such textbook tactics, heuristics offer a framework to better understand why these trial

tactics work. Looking more closely at trial practice shows how heuristics influence juries.

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## Jury Selection

An initial word of caution about jury selection: Research shows that, statistically, people tend to trust others who are more like them. But it would be a mistake for trial lawyers to pick jurors simply based on who, superficially, appears more like them or their client. In fact, picking jurors based on demographics is a gross oversimplification that, at best, yields mediocre results. Instead, jury selection must attempt to find those jurors whose life experiences are consistent with the chosen narrative of the case.

That is, an effective trial lawyer must uncover those jurors who are more predisposed to believe a case or argument. Some important juror experiences may be plainly evident during a typical voir dire. For example, if a potential juror was previously a plaintiff in a lawsuit against an insurer, voir dire would commonly expose that. And most insurers would intuitively realize that juror would likely be inclined to believe a story about an insurer acting in bad faith—consistent with the juror’s own perceived experience. But other, less obvious experiences may also incline a prospective juror toward a particular case.

For example, a recent divorcee may relate to themes of betrayal—important in cases involving breach of fiduciary duty, fraud, and partnership theft. Another venire member whose former employer has wrongly accused him of misconduct may subconsciously impose a higher burden of proof, knowing firsthand what it’s like to be wrongly accused. These life experiences color jurors’ worldviews and provide stronger insight than demographics. It is these experiences that must be ferreted out.

Lawyers commonly misunderstand jurors’ predispositions as if jurors have already picked sides or as if there are plaintiff’s jurors and defendant’s jurors. But that’s typically not the case. Take the extreme example of a police brutality case in which a white police officer assaulted a black man. Defense counsel may avoid black jury members, believing they’re already “against” him. That belief, however, disservices the jury system. In reality, it’s true that, in that case, a black juror, having potentially experienced police misconduct personally or in her community, may tend to believe the plaintiff. But those jurors aren’t “against” the white officer; rather, they are more likely to believe the plaintiff’s version of events, which is consistent with their own life experiences because those experiences are “available” to them in the form of direct memories.

More generally, defense lawyers seeking to impanel a favorable jury in light of an emotionally charged case should consider finding jurors more willing to engage System 2 thinking. A defense lawyer is well served to unearth potential jurors more willing to think critically, who take fewer shortcuts. Conversely, that same

lawyer should take care to weed out those potential jurors who demonstrate a propensity to answer questions with whatever initial thought enters their head or who uncritically follow suggestions of others.

Thus, by considering how jurors make decisions—what life experiences they will rely on to understand the case and how likely they are to think critically about information presented—trial lawyers will have far better insight into their jurors and how to present their case.

Once the jury is impaneled, heeding the conclusions discussed above can help ensure that your presentations actually influence the jury’s decision-making. This framework emphasizes the need for persuasion, which extends beyond merely presenting evidence and expecting the jury to discern the picture you want them to see.

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## Effective Storytelling

Effective trial storytelling encompasses many of the heuristics discussed above. To begin, trial lawyers should create a story that allows the jury not only to connect the case to their similar past experiences but also to construct a coherent narrative based on the limited evidence they encounter (and remember) over the course of the trial. It’s surely not enough to present the case and hope the jury connects the facts to an experience they’ve had. Rather, from the beginning, the trial lawyer must tie the case to a readily identifiable and coherent story that every juror can tie to his or her own shared experience. Many lawyers use “themes” at trial to connect cases to jurors, but a story is the superstructure that binds together the themes and the evidence. That way, when a lawyer presents evidence, it becomes accepted as consistent with the jury’s beliefs, and the other side must fight to un-entrench jurors by engaging their otherwise-lazy System 2.

In fact, one of the most widely adopted theories of jury decision making (first developed by Nancy Pennington and Reid Hastie), the “Story Model,” asserts that the initial step in a jury’s deliberative process is to first create a cohesive narrative. In many instances, that means a jury’s first task is to piece together the disjointed, fragmented evidence the lawyers present at trial. So instead of leaving a jumbled mess of evidence for the jury to untangle and weigh, an effective trial plan must include a road map, making it easy for the jury to compartmentalize and decipher information. If the jury understands the story, they can quickly figure out what the crucial issues are and, more importantly, what evidence supports those issues.

Stated differently, jurors need a story to understand evidence. Trial lawyers shouldn’t make them work to create their own story. Particularly considering the effect of “channel factors,” it’s important that trial lawyers make their story the easy, default option.

In addition, the right story can make a case more palatable to

jurors. If the story shows why a client's position is fair and equitable, jurors' motivated reasoning will help them accept the facts presented supporting that story. Although juries may be far removed from the ins and outs of trade secrets, for example, a jury can easily decide right and wrong in a story about theft of someone else's hard work. In contrast, it's not enough that the trial lawyer presents sufficient evidence to prove the case, if jurors are looking for any excuse to disbelieve that evidence because they think it is unfair or supports a mere technicality. Basic concepts of fairness and equity are strong motivators, and jurors will likely weigh and believe evidence according to their own sense of justice.

To succeed with juries, trial lawyers must make their evidence available and easily retrievable. This means using demonstratives to summarize expert testimony and having those summaries admitted into evidence whenever possible. If an exhibit is important, lawyers shouldn't ask the jury to squint to view it, and they shouldn't ask the jury to remember what "Exhibit 34" is. Instead, trial lawyers must use technology and ensure that the information is available to and retrievable by the jury.

It also means highlighting testimony and exhibits during closing arguments, so it is at jurors' fingertips for their deliberations. If, in closing, the defendant highlights a key admission from the plaintiff on a clearly visible screen, and perhaps returns to that screen several times, jurors are more likely to call it to mind during deliberations. Jurors are decidedly less likely to consider that same information if they must independently call it to mind from among the hours of witness testimony or if they have to sift through stacks of exhibits for it.

Likewise, when calculating damages, lawyers must give jurors everything they need to decide in their favor. Trial lawyers shouldn't ask jurors to do the math that an expert could do in a simple demonstrative; instead, lawyers should show the jury the calculation and the answer. And if a lawyer has related exhibits, the lawyer should group them together and cite specific pages and lines so the jury can easily access the most important information during deliberations.

A trial lawyer must make the jurors' decisions as easy as possible. Forcing jurors to decide between two competing versions of events does not accomplish that essential objective. So, while the best facts must take center stage, trial lawyers must also address the "bad facts" and proactively defuse any predictable attacks. Failing to account for all facts, on the other hand, will create cognitive dissonance for the jury, requiring them to entertain two competing, incomplete ideas. So, to avoid a battle of facts, lawyers should preview the opposition and explain to the jury that their opponent will present a biased, unreliable characterization of events.

To return to the picture discussed above, a plaintiff's lawyer should have the advantage of showing the jury a duck. The plaintiff's lawyer must be careful not to lose that advantage by ignoring

the rabbit. If the defense is the first to show the jury the rabbit, the defense will likely gain credibility for showing the jury the whole picture, and jurors will be stuck, uncomfortably seeing both a duck and a rabbit. So the plaintiff's lawyer should make a convincing case for the duck, then explain that the defense will likely try to convince them that the duck's beak is, instead, a pair of rabbit ears. The plaintiff thus warns the jury that the rabbit is merely an illusion.

Throughout any presentation, lawyers must realize that numbers, in particular, have an anchoring effect. Lawyers, therefore, must use them wisely. Punitive damages offer a good illustration. A defendant's net worth and annual revenues are typically admissible evidence when punitive damages are available, and those can help anchor a large verdict. Because anchoring is more effective when the number has significance, a trial lawyer shouldn't merely tell the jury the defendant's net worth is \$20 million, with \$2 million in annual revenue, and then ask for \$5 million in punitive damages. Rather, the lawyer should ask for \$6 million and explain that it's because the jury should punish the company by taking three years' revenue, thus tying it to the anchor.

At the end of trial, the jury charge is the road map to the jury. Lawyers should ensure that when drafting a proposal, it is easy to follow, and then they must show the jury precisely how to reach a verdict in their favor (in jurisdictions where this is possible).

In the first step, the plaintiff should consider whether she really wants all of her pleaded claims and defenses in the charge. All claims may be distinct and relevant, or there may be substantial, unnecessary overlap among them. If the lawyer can streamline the jury's decision-making, she should do so.

In the second step, it's not enough for trial lawyers to regurgitate evidence and ask the jury to find in their favor. They must go through the questions the jury must answer and explain how the evidence presented fits into each of those questions and, therefore, why the jury must decide in their favor. If possible, a lawyer should show the jury what the charge will look like and—particularly for damages amounts—fill in the desired answer.

Although not perfectly rational, juries are excellent decision-makers. Jurors bring with them shared experiences, common sense, and some cognitive limitations. All of these elements—each essential to our shared paradigm of human decision making—help make the jury system exceptional at dispensing justice. Understanding the quirks of the human decision-making processes and tailoring a case to those will not magically win an otherwise frivolous case, but it may help nudge the jury in a close one. ■