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Overcoming 'Reptile Dysfunction' at Trial, Part II: Values of the Heart

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This is the second in a series of articles discussing my Theory of Core Values. In the previous piece, I criticized the "Reptile Theory," which suggests that many trial lawyers appeal to the primitive reptilian portions of jurors' brains, thereby eliciting sufficient fear, terror and anger to lead to a favorable verdict.

After more than 40 years and at least a thousand civil and criminal cases, I find the Reptile Theory lacks the nuance necessary to explain what really motivates jurors. Instead, jurors are motivated by a combination of "core values," which are the fundamental beliefs and highest personal priorities that motivate us to decide an issue of major consequence, including who prevails at trial. There are 11 such values that neatly divide into three categories, each associated with a part of our body traditionally connected to emotion and decision making: our heart, our gut and our brain.

To reach a verdict we require jurors to unanimously agree on who wins, but NOT on how

Courtesy photo

Chris Ritter of IMS Expert Services.

each juror individually gets to that conclusion. In fact, jurors virtually never agree on a single path to or reason for their otherwise unanimous verdict. Some jurors decide based on the heart-based core value of "fairness"; others rely on the brain-based core value of "checklisting" (a methodical analysis of the law); others will rely on the gut-based core value of "self-interest." By engaging in mental mining, a process to be detailed in subsequent articles, trial lawyers determine which combination of core values will be triggered by the facts, law

and arguments in their dispute and adjust their persuasion strategy accordingly.

This article explores the core values associated with the heart: compassion, empathy, fairness and mercy. Initially, you may see little difference among these values. Yet, there are important distinctions, which affect when each is likely to be most effective. The easiest way to see these differences is to examine: (1) the jurors' perspective or point of view when they apply such values and (2) the goal the lawyer hopes for in stimulating that core value. Empathy calls upon jurors to view the world "in the first person," as if they themselves were a party and from this perspective conclude, "I would have done the same thing; so that party's actions were justified." Compassion, fairness and mercy require jurors to apply an external or "third party" perspective. From this more omniscient position, jurors motivated by compassion act to eliminate suffering; those motivated by fairness confront unjustified favoritism; those motivated by mercy temper the degree of punishment imposed on an otherwise established wrongdoer.

A final point before exploring individual core values: Two jurors can be motivated by the same core value but differ on exactly why. When interviewed after reaching a verdict, multiple jurors may say they did so based on fairness (or any other core value), but when pressed, they may have entirely different perceptions of what exactly is fair or unfair. This does not make the Theory of Core Values any less valid. Instead, it highlights that once you determine that a core value is generally helpful, you must then develop the specific combination of facts, arguments, and teaching tools likely to trigger that value in a diverse group of jurors. That's part of the art of being a trial lawyer.

Compassion: Desire To Relieve Suffering

According to the Greater Good Science Service Center at University of California, Berkely, compassion is "the feeling that arises when you are confronted with another's suffering and feel motivated to relieve that suffering." The sufferer need not be a named party. They can be associated with or affected by one of the parties, e.g., a crime victim or the party's employees who will be hurt by the verdict. In most cases, relief results from awarding damages to the plaintiff, but it can also occur when jurors refuse to award damages or a conviction against a defendant suffering as a result of an overreaching plaintiff or prosecutor.

Appeals to compassion require four factors to succeed. First, the jurors must perceive the suffering as genuine. Second, the person seeking compassion must not be responsible for having caused his own suffering; that is, the suffering is not self-inflicted. Third, the person urging compassion truly believes it is warranted. Finally, the appeal for compassion is not overplayed and is presented in a way such that jurors feel they came to this conclusion magnanimously and on their own.

A word of caution: We live in a time of compassion fatigue, or at least compassion wariness. Woe to the party who undeservedly "plays the compassion card" by advancing a claim perceived as unwarranted, trivial, or self-inflicted.

Parties perceived as seeing themselves as "unjustifiably entitled" rarely win.

Empathy: 'I Would Have Done the Same Thing'

The law prohibits trial lawyers from asking jurors to "walk in my client's shoes" or to "do unto others as you would have them do unto you." However, this does not preclude lawyers from offering evidence and arguments to trigger the core value of empathy, thereby leading jurors to conclude: "I cannot blame that party; I would have felt/done the same thing!"

For example, I had a client accused of stealing trade secrets; he had left the company where he had worked for 30 years to start a competing company. He testified he did so because: "Venture capitalists who knew nothing about us destroyed what had felt like a family, eliminating people's pensions, changing our employee-friendly policies, destroying 100 years of tradition, and folding us into an impersonal conglomerate." Jurors who favored the defendant admitted in post-trial interviews: "I don't blame him; if [the Plaintiffs] had done that to me, I would have said 'I'm out of here!' and started another company."

This is an example of "positive empathy," i.e., a juror visualizes doing the same thing and thus endorses a parties' actions. There is also "negative empathy," where the juror concludes, "I would NEVER have done that! So I am ruling against the party who did." Here, jurors distance themselves from the offending party and that party's arguments.

Fairness: Ensuring You Get What You Deserve and Deserve What You Get

I envision the core value of fairness spanning a continuum. At one end there is Aristotle, you know the guy—student of Plato, teacher of Alexander the Great. Above him are his words, "Equals should be treated equally, unequals unequally." On the other end are my three wonderful children as I remember them between the ages of three and sixteen chanting, "That's not fair! That's not fair!" Together these endpoints highlight the objective and subjective nature of fairness.

Jurors determine whether something is fair in much the same way as statisticians calculate standard deviation. Both calculate a mean (the jurors' assessment is based on personal expectations and far less empirical) and then determine whether what they are being asked to assess falls within an accepted band above and below this mean. Most jurors perceive fairness as balancing on three legs: that which is reasonable, that which is right and that which is desirable. There is no balance if any one characteristic is missing.

Jurors motivated by fairness can be particularly dogmatic, because the parameters of what is fair (i.e., how wide is that band of acceptability that straddles the mean) is deeply personal. Jurors rarely want to admit to being unfair. Additionally, whether intentional or not and whether consciously or not, these jurors outwardly justify their verdict not on the basis of fairness but on something more objective, e.g., "That's what the evidence or law compelled me to do."

Jurors typically judge fairness based on four aspects of a dispute. First, was the status quo

ante, that is, the state of the world prior to the dispute, fair? Second, was the means by which the status quo was disrupted fair? Third, is the judicial proceeding that is being used to resolve the dispute fair? Finally, will the end result be fair?

Mercy: Tempering Punishment for a Greater Purpose

"Mercy" is derived from the Latin word "merces," meaning "price already paid." From this concept, John Locke defined mercy as "the power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it." Phrased differently, it is the exercise of forgiveness by a person with the power to punish another who otherwise deserves to be punished but declines to do so.

Mercy arises far less frequently than other heart-based core values. Not because jurors are incapable of exercising it, but because it only arises at the infrequent intersection of four necessary elements. First, the defendant's wrongdoing is not contested. Second, the defendant herself has already suffered (often substantially) as a result of her own wrongdoing. Third the additional punishment or compensation sought affords no meaningful benefit or protection to the aggrieved party. Finally, the decision maker has the discretion (often not explicitly acknowledged) to act in a way they perceive as serving a greater public good.

Over the past 40 years this core value has only arisen a handful of times in my practice. However, when it has, its effect has been substantial. In my previous article, I discussed a case where my client, a profoundly schizophrenic mother, drowned her three children because she was morally certain that God had ordered her to do so. The prosecutor insisted on filing three counts of first degree murder; the jurors instead found my client not guilty by reason of insanity and sent her to a medical facility, not prison.

The next article in this series will examine the "brain-based" core values, including checklisting and science. I hope you will join me for it.

As a senior advisor at IMS Expert Services, **Chris Ritter** *provides insightful guidance in all aspects of case analysis and persuasion strategy development, mock trial and focus group research, and witness preparation. After graduating from the University of Chicago Law School, he taught law and tried cases for almost 20 years. Ritter has worked on more than 1,000 civil and criminal cases throughout the country, including more than 200 mock jury and focus group projects. The American Bar Association published three of his books on persuasive trial strategy, two of which were ABA bestsellers.*