

# THE MODERN JURY

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## Litigation can turn on jurors' snap judgments

Visceral aversion to an attorney can spell disaster for the case.

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JURORS, OPPOSING counsel, even judges make decisions immediately about trial attorneys based on what they can perceive in a matter of seconds. According to some researchers, most of these impressions are reached subconsciously. Often, this first impression lingers and can influence the level of credibility that decision-makers assign to the arguments and witnesses. When entering the courtroom, or even the alternative dispute resolution setting, it is helpful to understand why all people (jurors included) are so susceptible to snap judgments—why a juror is more likely to form a mistaken first impression in the courtroom, what the trial attorney can do to put his or her best foot forward and why who the trial lawyer seems to be may affect the outcome of the case.

The old adage, “You never have a second chance to make a first impression,” is as much a reality in the courtroom as anywhere else. When considering jurors’ perceptions of counsel, it may even be more apt than in other instances. Research shows that people make determinations about each other very quickly, sometimes within milliseconds. These first impressions are often startlingly accurate, but sometimes incredibly wrong, leading the observer down the wrong path.

Two early studies, one done in 1966 and one done in 1988, found that people are very good at rating a person’s extroversion and conscientiousness within the first few seconds of

meeting him or her. Both studies found that the first impressions of the observers correlated highly with the self-ratings of those being observed. In other words, the first impressions were accurate. Warren T. Norman and Lewis R. Goldberg, “Raters, Ratees, and Randomness in Personality Structure,” 4(6) *J. Personality & Soc. Psychol.* 681-691 (1966); L. Albright et al., “Consensus in Personality Judgments at Zero Acquaintance,” 55(3) *J. Personality & Soc. Psychol.* 387-395 (1988).

## Jurors have very specific expectations about demeanor.

### Examining first impressions

While there have been no empirical studies done specifically on first impressions and attorneys, researchers have examined snap judgments or first impressions about teachers. In 1993, a researcher took six-second silent clips of graduate students teaching a class. Students were asked to judge based on those six seconds alone the quality and performance of the teachers. Shockingly, those results correlated highly with the end-of-the-year evaluations. Nalini Ambady and Robert Rosenthal, “Half a Minute: Predicting Teacher Evaluations from Thin Slices of Nonverbal Behavior and Physical Attractiveness,” 64(3) *J. Personality & Soc. Psychol.* 431-441 (1993).

According to Malcolm Gladwell’s book, *Blink*, people make an initial assessment very quickly—in about 50 milliseconds. Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (2005). These first assessments or impressions are not based on conscious, rational decision-making, but rather

are made at an unconscious, visceral level. For the trial lawyer, what matters most is what can happen next. Fact-finders may unconsciously filter all subsequent information through their initial assessments of counsel. If a juror’s visceral reaction to an attorney is negative, that juror will unconsciously look for reasons to discount his or her arguments, and to dismiss positives. Human beings unconsciously attempt to support a first impression; retaining information that supports it and discarding information contrary to it. This is why it is an uphill battle to overcome a bad first impression. Counsel may literally be fighting physiology.

### Extralegal factors

Some may doubt the impact perceptions about trial counsel can have on the outcome of a case. Many believe that jurors’ personal opinions about counsel in no way color the facts, witnesses and arguments. Clearly, focusing on first impressions of trial counsel assumes that extralegal factors such as demeanor, presentation style, even attractiveness have an influence on jurors’ decision-making and ultimately on verdicts. Research findings on the impact of extralegal factors are mixed and pose other problems when one attempts to generalize those findings to the unique area of snap judgments.

Earlier studies addressing jurors’ reactions to extralegal matters including individual attorneys and their presentation styles as opposed to the actual evidence generally found that the former play little if any role in the jurors’ decision-making process. For example, in a 1986 study of actual jurors in real sexual assault trials, the researchers found that extralegal factors had an effect, but it largely was limited to cases in which the evidence was weak. Barbara F. Reskin and Christy A. Visser, “The Impacts of Evidence and Extralegal Factors in Jurors’ Decisions,” 20(3) *Law & Soc’y Rev.* 423-438 (1986).

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In another study, conducted in 1996, researchers measured discussions about attorneys during deliberations, the effects of witnesses on the perception of attorneys and the role of opening statements and closing arguments. Shari S. Diamond et al., "Juror Reactions to Attorneys at Trial," 87(1) *J. Crim. L. & Criminology* 17-47 (1996). These researchers also found that an attorney's style or personality only had a limited effect on the process as a whole. Judging from these findings, it would be easy to conclude that jurors' first impressions of an attorney—an extralegal factor much like the ones measured previously—does not affect jurors' decision-making.

However, the studies discussed thus far, both experimental and qualitative in design, relied at least in part on the self-reporting of the jurors or mock jurors. These studies, although informative in other ways, assume that self-reporting is an accurate measure of motivation, but there is a wealth of social science research to the contrary. In fact, asking a person why he or she feels or thinks a certain way is often a terrible way to get at the real answer. The truth is, most people have no idea why they think or feel a certain way, because many of their thoughts and feelings are unconscious.

Psychologist Timothy D. Wilson describes the unconscious much differently than the one Sigmund Freud articulated more than 100 years ago. Rather than a murky and dark respite for our negative desires, Wilson defines what he calls the adaptive unconscious as "mental processes that are inaccessible to consciousness but that influence judgments, feeling or behavior." Timothy D. Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* 23 (2002). The phenomenon is probably best described by the subtitle of Gladwell's book: "The Power of Thinking Without Thinking."

Research shows that extralegal factors in general may or may not affect the outcome of any given case. Add to that mix the issue of the unconscious nature of first impressions and the difficulty of measuring its effect in the first place, and it seems that first impressions may indeed count.

## Expectations

Much of the research done on first impressions has to do with extroversion, competence, responsibility and attractiveness. Some of these issues relate directly to components necessary in the courtroom, which makes this research informative. However, in the courtroom the main issue is expectation. Put another way, does trial counsel meet jurors' expectations of what a lawyer should be?

Despite the ever-present lawyer jokes, most jurors have a generally positive expectation of attorneys. If those expectations are met on a cognitive level, lawyers can make a positive impression and move on to the pressing issues of facts, arguments, witnesses and the rest.

As mentioned above, people often make mistaken first impressions. Of great interest to the trial lawyer is the fact that that often these mistakes are made in high-stress environments. Research has shown that first impressions tend to be more accurate when the person forming the impression is relaxed and in a positive mood. Nalini Ambady and Heather M. Gray, "On Being Sad and Mistaken: Mood Effects on the Accuracy of Thin-Slice Judgments," 83(4) *J. Personality & Soc. Psychol.* 947-961 (2002).

By most accounts, jurors are not in a good mood when they are called for jury duty. For some, the environment is unfamiliar, even hostile. For a small minority, even having to enter a courthouse can be a stressful experience. Unlike counsel, they do not necessarily have a laser focus on the case at hand. At least initially, they are thinking about how they are going to manage child care issues, keep their jobs and continue to put food on the table at home. Unfortunately, it is at this initial juncture that they form their first impressions of trial counsel.

The trial attorney therefore is seeking to make a positive impression upon entering the courtroom, most likely before even opening his or her mouth to speak. For this to happen, the attorney must meet the expectations of the jury (and the judge for that matter). If counsel fails to meet this expectation, it is much more likely that judge and jury will make a negative snap judgment and possibly filter all information through that negative lens.

What is the archetypal or stereotypical attorney? Unlike lesser-known professions or trades, most people have some idea of what an attorney should be. Books, television and popular culture all shape the archetype, or stereotype, of an attorney. Certainly, attorney stereotypes have positive and negative attributes. Given the possibility that jurors will unconsciously make a determination about counsel very quickly, it certainly seems important to ensure that jurors assign the positive stereotypes to the trial lawyer.

There are numerous steps that lawyers can take to ensure that jurors' perceptions of them are as favorable as possible. The best way is by meeting jurors' subconscious expectations—look the way they expect an attorney to look. This may vary slightly by region, but jurors in all venues generally have some version of the same stereotype. They expect attorneys to be

well groomed, professionally dressed and assertive. Jurors expect attorneys to be professional, which means formal. They expect them to be organized and efficient. Digging in boxes, being even a moment late or seeming unprepared can make a devastating first impression. Jurors expect trial attorneys to be well spoken, intellectual and to believe in their case. These are all factors that the prospective jurors will likely analyze and make decisions on even before an attorney rises to speak. Jurors will make these judgments before they know they've made them.

## The effects of television

Jurors also have very specific expectations when it comes to demeanor. These expectations are largely based on television. All legal professionals know that the courtroom antics on television go far beyond what actually takes place in a courtroom, but that doesn't change the fact that jurors expect an assertive style. Studies have shown that a more aggressive presentation style in the courtroom, characterized by a forceful tone, exaggerated hand movements, fewer qualifiers, fewer hedges and fewer interrupted words and sentences, is simply more effective. Peter W. Hahn and Susan D. Clayton, "The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions," 20(5) *Law & Hum. Behav.* 533-554 (1996).

It may be enticing to believe that in the courtroom it's "just the facts, ma'am," but that would be a dangerous mistake. Jurors filter information not just through the lens of their own experience, but also according to how they perceive the messenger. There are many moving parts in the mind of a juror just entering a courtroom for voir dire. The trial lawyer who comes prepared, looking and acting like a professional who believes in his case, not only allows that juror to make that quick, unconscious, positive assessment of him, but very likely sets up a positive lens through which that juror views the rest of his case. While this is certainly not the only factor that will shape the outcome, it certainly should not be overlooked. **NLJ**

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