

WILL BIRDS OF A FEATHER FLOCK TOGETHER?



IMPLICATIONS OF JUROR-LITIGANT SIMILARITY FOR YOUR DEFENSE STRATEGY

By Alex Jay, Ph.D. IMS Consulting & Expert Services

As your trial date approaches, one lingering question inevitably moves to front of mind: *What jurors do I want?* Or, perhaps more accurately given the reality of the jury selection process: *What jurors do I not want?*

Litigators often encounter potential jurors with some similarity to one of the litigants, such as age, culture, interests/hobbies, or relevant professional experience. We sometimes call these jurors “juror

knowledgeables,” as, depending on the relevance and extent of the similarity, their experience can elevate them into a persuasive position with the other jurors in deliberations. That is, their similarity can have a

tangible effect on the trial outcome.

While jurors can of course share similarities with both plaintiffs and defendants, for the purposes of this article, we will examine a somewhat common situation for corporate defendants—when jurors share a similarity with the defendant. In many instances, a defense attorney may perceive juror-defendant similarity to be a positive. Consider, for example, a medical malpractice case where healthcare providers at a hospital are accused of falling short of the standard of care. Defense counsel might reasonably assume that a healthcare-professional juror—say, a registered nurse—would be more favorable to their case; after all, such juror knowledgeable understand the rigors of being a healthcare provider and might more readily see the case from the defense’s perspective.

Although such assumptions about the implications of a juror’s similarity to the defendant are intuitively appealing, psychological research suggests they could be wrong. Indeed, relying on them wholesale during jury selection could lead to striking, or failing to strike, the wrong jurors. So, in a world where jurors with similarities often outnumber the strikes available to you, and cause challenges are far from guaranteed, it is crucial to determine if a juror knowledgeable is going to interpret the facts favorably.

But how do we know whether a juror similar to the defendant will be good or bad for the defense?

JUROR-DEFENDANT SIMILARITY DEPENDS ON THE PSYCHOLOGY OF THE JUROR

To assess the possible impact of juror-defendant similarity, the first step will be to determine whether a similarity exists in a meaningful way for the juror. We can start with a basic premise, Tajfel’s and Turner’s (1986) “Social Identity Theory” (SIT), wherein similarity to others is determined based on some shared, identifiable social group that has generally agreed-upon values and rules. Typical examples of social identities include social groups based on nationality or religion, but a person’s social identity is multi-faceted and can be comprised of any social group that is important to how they think about themselves, including their profession (Ashforth & Mael, 1989).

POTENTIAL BENEFITS OF JUROR-DEFENDANT SIMILARITY

According to SIT, because people are motivated to think of themselves in a more positive light relative to others, they are more likely to think of their in-group(s) more positively, too; their social identities are tied to their self-esteem. This desire for a positive

self-image means people are likely to have a positive in-group image and are more likely to react more favorably to in-group members. As it relates to juror decision-making, this bias is termed similarity-leniency (Kerr et al., 1995), and has been demonstrated in numerous studies where jurors are more lenient on criminal defendants who are similar to themselves (e.g., Devine & Caughlin, 2014; see also Jay et al., 2021). Similarity to a defendant can lead jurors to give in-group members a “pass” of sorts. That is, similar jurors might focus on the situational factors that could explain the defendant’s apparent transgressions, justifying and excusing the defendant’s behavior rather than deeming the alleged transgression to be evidence of a flawed character (Pettigrew, 1979).

The similarity-leniency effect suggests that a juror whose healthcare profession forms a part of their social identity might indeed be more favorable to a healthcare-provider defendant in a medical malpractice case. If only it were so simple.

POTENTIAL RISKS OF JUROR-DEFENDANT SIMILARITY

As one might expect, there is a limit to the potential benefits of juror-defendant similarity. Sharing a social identity can also make people, including jurors, react more negatively to “similar” others who have behaved badly. Because an individual’s self-esteem is partly dependent on maintaining a positive perception of their in-group(s), deviant in-group members can threaten that self-esteem by, put simply, making the whole group look bad.

When that happens, people are motivated to derogate or create distance from deviant in-group members—otherwise known as the “Black Sheep Effect,” (Marques et al., 1988; see also Santuzzi & Ruscher, 2006). This effect has been demonstrated in numerous studies that have found jurors are harsher on defendants who share a social identity compared to defendants who do not (e.g., Peter-Hagene, 2019).

Whether a juror is inclined to explain away a defendant’s alleged transgressions or judge them all the more harshly will depend in part on the nature and strength of the evidence relating to the transgression. One component of a shared in-group identity is that group members ascribe to a similar set of norms or rules that are unique or particular to the group. When an in-group member appears to violate a rule egregiously, the transgression is not as easily explained away. In our healthcare-professionals example, one such rule might be something like, “Do no harm to patients.” If the alleged deviation from the standard of care involves a reckless disregard

for patient safety, a healthcare-professional juror would react particularly negatively to create distance from the deviant in-group member. As evidence of that rule-breaking behavior grows stronger, our registered nurse juror’s in-group image—and thus their self-esteem—will be increasingly threatened in anticipation of discussing the defendant’s rule violation with other jurors in deliberations.

IMPLICATIONS FOR JURY SELECTION AND VOIR DIRE

Jury research, including qualitative and quantitative juror profiling, is the ideal way to assess how jurors with similarity to a litigant might interact with the fact pattern and parties of your case. If you do find yourself approaching trial and have not conducted jury research, keep in mind that it is dangerous to rely on intuition alone. At the least, counsel will want to talk to potential juror knowledgeable during voir dire to get a sense of the extent to which their perceived similarity might be relevant to their case judgments (i.e., if the shared element seems important to their personal identity). Following through with our med-mal example, attorneys might consider asking questions such as “What motivated you to become a healthcare professional?” or “How important is your profession to you?” or “Are most of your friends outside of work also healthcare professionals?” Paying attention not only to what jurors say in response, but how they say it, can aid this assessment.

Voir dire is also an opportunity to elucidate the types of “rules” that jurors with perceived similarity to the defendant hold near and dear to their hearts, and therefore to evaluate whether the bad facts of your case might be particularly offensive to these jurors. Hypotheticals like “If you hear about a doctor faced with a split-second decision to save a life, what more would you want to know?” can be one way to pursue this goal. That way, if counsel is unable to excuse these jurors for cause and is forced to use its preemptory strikes on more demonstrably worrisome jurors, it can make critical strategic adjustments in anticipation of a juror knowledgeable’s heightened sensitivity to bad facts.



Alex Jay, Ph.D. is an experimental social psychologist with expertise in jury decision-making and complex commercial litigation. As a jury consultant with IMS Consulting & Expert Services, Dr. Jay specializes in quantitative and qualitative jury research, witness preparation, theme development, juror profiling, and jury selection.