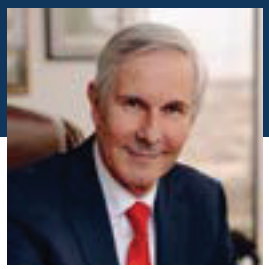
Busting Trial Myths: What Science Says About Jury Behavior and How Plaintiff Lawyers Should Adapt



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There are certain myths in our trial lawyer universe that the legal system abides by and assumes are true, such as: "If the judge tells the jury to disregard something, they'll comply," or "Jurors don't need to take notes," or "One note-taker among them is enough," or "The jury should only receive their instructions at the end of the case because that keeps the focus on the facts." While these protocols or beliefs may be frequently used and are comfortable, they are not correct. Recent empirical psychological and legal research indicates that a number of these trial world assumptions are flawed.

In this article I identify **three common myths or misbeliefs**, review the relevant empirical literature, and then convert those findings into practical strategic recommendations for plaintiff trial lawyers who want to present a more persuasive case. The goal is to use the current science of memory, decision-making, and juror comprehension to maximize our chances of winning in court.

MYTH NO. 1: If inadmissible or improper evidence is seen or heard, a Judge's instruction to disregard it will purge its effect.

The Myth: We often accept as true that if the judge gives a limiting or curative instruction ("You must not consider X"), the jury will follow it, and the harmful evidence will be deleted from their collective or singular subconscious. In other words, once something is said or seen, jurors can magically "unring the bell" when directed to do so.

What the science says: That is not true. Research shows that the assumption that jurors can fully disregard inadmissible evidence is deeply flawed. For example:

- In his article, *Evidentiary Instructions and the Jury as Other,* Professor David Alan Sklansky points out that although our system presumes that jurors will obey instructions to disregard, the presumption "is almost universally acknowledged to be false."[1]
- Older work similarly found that "jurors are in fact unable to disregard inadmissible evidence even when they are instructed to do so and are willing to do so."[2]
- A more recent article confirms that curative instructions do reduce the salience of inadmissible evidence but do *not* eliminate its effect.[3]
- The metaphor "unring the bell" is widely used precisely because once a fact is introduced, even if later stricken, jurors have trouble ignoring it.[4]

Why it matters: If we believe or act as if this old myth is true, we may be careless in better protecting the record. One might think, "Well, the Judge will take care of it" when an opponent slips in a prejudicial remark, or we might fail to better frame an objection because we assume the jury will forget. In fact, once the information is in the jury's mind, it often continues to influence cognition and decision-making — even if jurors intend to disregard it.

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That means that from the outset we should do all we can to prevent damaging evidence from ever getting in, rather than assuming the instruction will fix or neutralize the problem.

Strategic take-aways for plaintiff lawyers:

1. *Objection readiness & motion practice:* We must be proactive and aggressive early on. If there is a risk of inadmissible evidence (for example, comparative fault evidence, or character evidence), we should file the appropriate motions and obtain rulings before voir dire or early in trial.
2. *When an improper statement or exhibit is introduced, we must treat it as though it cannot truly be removed from the jury's minds or consciousness.* We should reemphasize our theme, redirect attention strongly to key points that combat what the jury was told to disregard, and in closing we must remind the jury of the proper evidence that they should consider. Again, we must accept the reality that while we cannot completely erase what the jurors are supposed to disregard, we can diminish its impact.
3. *We must use visuals and repetition to anchor our admissible evidence narrative.* Because once extraneous material is in the jurors' memory, we need to strengthen the importance of our own admissible evidence to compete with it.
4. *We must preserve the issue for appeal.* We should recognize that even though the instruction may not perfectly purge the harm, our failing to object on the record or movefor a mistrial could likely waive a possible reversal.

MYTH NO. 2: Jurors will remember trial evidence well enough without note-taking; or only one juror needs to take notes to bring into deliberations

The Myth: Of course, this myth is dependent on what the Judge will allow or not permit on juror note-taking.

Some courts limit note taking or rely on the assumption that jurors' memories will suffice. And there are many lawyers who assume it is bad that jurors can take notes or that it is sufficient if only one juror is note-taking throughout the trial— "the jury will discuss everything in deliberations anyway," or "notes are a distraction," or "we focus on delivery, not note-taking."

"Once jurors hear improper evidence, the idea that they can unring the bell is...false."

What the science says: Recent empirical studies indicate note-taking by every juror improves recall of trial evidence:

• In the 2016 a study on *Memory* by Thorley found that mock jurors who took notes during a trial video recalled more trial information than those who did not.[5]

• A 2019 study by Lorek found that when jurors took notes, their recall of critical evidence was stronger and that note-taking improved encoding, not merely retrieval access.[6]

• A more practitioner-oriented article in JD Supra advises encouraging juror note-taking because "engaging the fine-motor system to produce letters by hand has positive effects on learning and memory."[7]

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• A University of Liverpool press summary notes: "Jurors who recalled more incriminating evidence were more likely to find the defendant guilty... jurors with faster handwriting speed, higher short-term memory and better attention remembered more..."[8]

Why it matters: If jurors remember better when they take notes, then as plaintiff's counsel there are three strategic implications:
• We want *all* jurors (if possible) taking notes.
• We want to design our trial presentation to lend itself to note-taking (clear headings, signposts, repeated thematic anchors).
• We cannot assume that deliberations will magically make up for memory deficits, If jurors forget or inaccurately recall critical elements of our evidence, we may lose. We have all experienced how jurors have questions during deliberations that demonstrate a disconnect between what we thought we communicated as crucial points or facts and what jurors actually remembered.

Strategic take-aways for plaintiff lawyers:

1. *We should advocate for juror note-taking privileges.* Where local rules allow, we should move early on to permit jurors to take notes. We should consider handout rule proposals, notebooks, and thematic outlines for jurors.
2. *We need to structure our presentation for note-taking.*This should cause us to use clear transitions during our case in chief. For instance, consider stating "Point 1: duty; Point 2: breach; Point 3: causation; Point 4: damages" while we repeat key phrases. We want to emphasize the "headline" of each witness and their testimony, just as we see in the newspapers, social media, and TV. We must make sure our experts use simple language that the jury can easily jot down.
3. *We must remind jurors that taking notes helps them.* In opening we might say: "You'll want to take notes; we're going to ask you at the end to remember four things: what happened, who did what, why it mattered, and what harm followed — feel free to write that down."
4. *During our summation we should explicitly reference the notes.* For example, "If you have notes, look back at your sketch under the heading 'hazardous condition,' you wrote down..." Reinforcing the act of note-taking and linking summation to the juror's own notes should be done.
5. *We need to address limitations or push-backs.* If the defense objects to note-taking claiming distraction or bias, for example, we need to be prepared to use scientific literature for the Judge showing improved recall, and argue that better recall improves accuracy, reduces confusion, and overall, it is in the interest of justice.
6. *We should plan our chronology and witness order accordingly.* Because jurors' recall improves when note-taking is enabled, we want to organize our evidence so that our key proof comes when jurors are freshest (often earlier) and where and when note-taking is easiest. To that end, we should avoid overly complex slides or crowded visuals.

"The science is unequivocal: memory improves when every juror writes things down."

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MYTH NO. 3: It's best, or sufficient, to provide jury instructions only at the end of the case (after closing arguments); preliminary instructions or early instructions don't matter much.

The Myth: A common practice both with many lawyers and Judges is that jury instructions (often substantive legal charges) are delivered after closing arguments. And lawyers often believe that this approach is fine because the jury needs the evidence first and then instructions at the end to frame deliberations. Some attorneys also worry that giving instructions early on might confuse jurors or cause them to prejudge issues or facts.

What the science says: Recent empirical work suggests timing matters. Delivering instructions before or during evidence has been shown to reduce bias, improve framework comprehension, and help jurors more accurately process evidence more. Here are a few salient illustrations:

- An experiment by Elizabeth Ingriselli found that jurors gave lower guilty judgments when instructions were given prior to the presentation of evidence compared to post-evidence instructions.[9]
- The broader scope of literature shows that juror comprehension of instructions is poor. It should be no surprise to most trial lawyers that one meta-analysis finds that simplified instructions help a bit, but overall comprehension remains low.[10]
- A 2018 study developed a model showing that jurors who get instructions earlier tend to produce "more accurate" verdicts.[11]
- Legal commentary notes that preliminary substantive jury instructions are increasingly embraced to give jurors a roadmap early in trial.[12]

Why it matters: If jurors receive important, substantive instructions earlier than later, they are better prepared to understand how the evidence we present fits the legal schema, thereby potentially reducing the impact of extraneous information or biases, and facilitating more focused deliberation. By contrast, when instructions are dumped only or mostly at the end, jurors may have already formed narrative structures or biases which they then force to fit the law rather than the other way around.

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Strategic take-aways for plaintiff lawyers:

1. *Early on we should request preliminary jury instructions (or at least an outline).* In our pretrial or early motion practice we should propose: "Your Honor, we respectfully request that the jury receive a 'road map' instruction just after Voir Dire or just before opening that outlines the issues, burden, elements of plaintiff's cause of action, and general rules of evidence, such as those on credibility and the burden of proof."
2. *We need to frame our opening statement in light of early instructions.* We should use the jurors' "roadmap" to anchor our opening. We can refer back to the instruction headings when we present witness testimony. For example, "This morning you heard the judge say you'll be asked to decide three things: A, B, C. I will show you how witness Smith's testimony tied directly into element B."
3. *Using interim mini-instructions at logical breakpoints is beneficial.* Also, we should ask the court to give brief "boiler" reminders at the close of each day or after key testimony: "Ladies and gentlemen, remember that you must decide the case only on evidence that you have heard in this court and apply the law as I have stated."
4. *In closing, we tie headings to the instruction schema.* We need to use the same headings the jury had in the preliminary instructions. For instance: "The judge told you the law requires proof of duty, breach, causation, and damages — you heard from four factwitnesses and an expert and here's how they satisfied each heading."
5. *We educate the court and combat pushback.* Some judges and defense counsel may resist early instructions for fear of confusing the jury or "giving away" the law prematurely. We need to be prepared to cite relevant empirical research, such as Ingriselli's research, showing that early instructions reduce bias and improve decision-making.
6. *We enhance juror comprehension.* Given the well-documented comprehension problem such as that jurors understand only 50-70% of instructions, we consider ways to enhance juror understanding. We use simpler language; we show them "jargon-explainer" sheets; We periodically reinforce key concepts; we request that the jury receive a printed copy of the instructions if local rule permits.[13]

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Beyond These Three — Additional Myths Worth Considering and Challenging

In addition to these three major myths, here are several others we should consider:

- **Myth: "Jurors always deliberate in a rational, evidence-based way."** In fact, research shows that juror reasoning is often heuristic, story-based, and influenced by biases.[14]
- **Myth: "We don't need to worry about how jurors talk among themselves; deliberation will inevitably correct misimpressions."** In truth, models of jury deliberation show strong herding and individual stubbornness effects which may amplify rather than correct distortions.[15]
- **Myth: "Because the jury is instructed to consider only evidence, visual aids or demonstratives are just style, not substance."** Not so. Cognitive psychology shows visual/motor encoding, such as handwriting, visuals, physical models, increases encoding strength and recall. Our visuals and presentation style do matter strategically.[16]

Ethical Considerations & Professional Responsibility

As plaintiff lawyers we are obligated to zealously advocate for our clients, but we also must maintain ethical standards and preserve the integrity of the trial process.

The application of psychological research to trial strategy must be done with care:

- **We must be transparent with the court:** If we request permission for juror note-taking or preliminary instructions, we need to be candid about our rationale and cite the empirical support.
- **This is not about manipulation or deception.** The goal is to help jurors understand the case, not confuse or mislead them. It is up to us to ethically use research to increase clarity, comprehension, and fairness.
- **We always protect the appellate record.** Given the richness of empirical scholarship, when we object or make a record about juror cognition issues (instructions, note-taking, prejudicial evidence), we strengthen our arguments when it comes to a possible appeal. We cite leading articles and make sure that our objection is contemporaneously done.

Conclusion

We can each improve our legal system, get better trial results, and advance the law if we stay on top of behavioral science research and then challenge various trial world myths.

Clearly, certain myths and outdated assumptions that we live by or do not challenge are increasingly out of step with recent empirical research.

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As plaintiff trial lawyers, we should study and embrace the science of jury cognition and smartly and ethically use it to give us a competitive edge. It will help us structure and present our cases in ways that can more powerfully harness how jurors actually think and remember, rather than how we hope they will. If we understand how to use present day science, we will better engineer our cases for maximal juror comprehension and accurate recall. This will help us achieve full and fair justice for our clients.

View Endnotes for this Article Here:

Key References (for further reading):

- Lorek, J., Centifanti, L. C. M., & Thorley, C., *The impact of prior trial experience on mock jurors' note taking during trials and recall of trial evidence,* 10 Front. Psychol. (2019). https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2019.00047/full/