

The Jurors Are Watching You

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It is common to notice a juror who, at least for a few moments, is not looking at the witness at all, but is instead watching the lawyers and paralegals at counsel's table. The activities of trial participants who are not addressing the jury, and may not realize they are being watched, are referred to as the "offstage" behaviors. Experienced trial lawyers know that jurors attend to the offstage. But, the questions are how much? And how, if at all, does it impact verdicts? The answers may surprise you.

New research published in *LAW & HUMAN BEHAVIOR* found that in 80% of the cases studied, at least one juror made at least one comment about offstage behavior. However, the number of comments within any given case was usually quite limited. On average, six comments about offstage behavior occurred per trial across the entire trial (i.e., discussions that occurred during breaks in the trial, deliberations, and post-deliberation discussions). Recording the number of "conversation turns" during deliberations (of which there were over 78,000 across 50 cases), the researchers found that "just 1.5% of deliberation turns were devoted to offstage activity." At 322. Further, juror comments about offstage behavior seldom resulted in an observable shift in the direction of the deliberations. Instead, the jurors' use of the offstage information was more subtle. For example, the researchers concluded that "during deliberations, offstage remarks tended to shore up positions jurors had already expressed." At 320.

The research was conducted by a group of well-respected legal psychologists, who analyzed a unique database of video recordings of 50 trials and jury deliberations from Arizona state courts. The database resulted from a project sanctioned by the Arizona Supreme Court in which, with the consent of parties and jurors, certain civil trials and deliberations were filmed for the purpose of studying a jury innovation that allows jurors to discuss evidence prior to deliberation. The cameras captured not only the jurors' deliberations, but also other conversations that the jurors had in the jury room. For the separate purpose of studying the

impact of the offstage, the researchers painstakingly coded the jurors' discussions and deliberations to identify juror references to offstage behavior. The database consisted primarily of personal injury cases, though there were also a handful of contract cases.

The results also show that jurors made reference to the offstage behaviors of a variety of targets, including the plaintiff (26% of juror comments), non-witness audience members (20%), counsel (17%), the defendant (16%), the judge (15%), and witnesses (6%). With regard to the parties, the jurors' comments about offstage behaviors were more likely to be critical of the plaintiff than of the defendant. However, this may be a function of the researchers' database, which consisted almost entirely of personal injury cases.

With regard to counsel, an exchange among jurors in one case highlights the need for attorneys to monitor their behavior. The researchers quoted the following banter between jurors 1, 4, and 9.

#4: *The [plaintiff's] lawyer, she was making faces.*

#1: *Watch her make faces when [the defendant] is talking.*

#4: *She's like a little kid. I like watching it.*

#9: *But that's not smart. They don't realize we are watching them.*

#4: The [plaintiff's] lawyer, she was making faces.

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In the end, the researchers concluded that the primary focus of the spoken deliberations was clearly on the evidence, not the offstage. There is no point, however, in risking the possibility that your case will be the one outlier in which the offstage overwhelms the evidence. Trial lawyers remain well advised to monitor their own behavior at all times and in all areas of the courthouse, and to counsel their clients, witnesses, and assistants to do the same. An eye-roll or a smug grin at counsel table may well become a topic of conversation in the jury room.

Source: Mary R. Rose, Shari Seidman Diamond, & Kimberly M. Baker, *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 *LAW & HUM. BEHAV.* 310 (2010).