



The Jury Expert™ *For Excellence in Persuasion,
Communication & Jury Selection*

Volume 18, Issue 12

December 2006

Facts Can't Speak for Themselves¹ (Part Two)

By Eric Oliver

Part one of "Facts Can't Speak for Themselves" appeared in last month's issue of The Jury Expert (Volume 18, Issue 11). The article focused on how legal decision makers unconsciously construct their own case stories and use them to judge cases, and how legal professionals have not yet adjusted to this reality.

New Ground

The bulk of current science says that predicting verdicts based on piecemeal profiles of "jurors who think this way about this fact" or "who think that way about this law" does not offer a huge return on the value invested. Instead of searching for types of people who may be good or bad for your case, the more productive priority may be to first seek out just how many possible versions of your story people can create, and then relate any differences among the people to that collection of case themes, scopes, viewpoints and plots. On any given day, an otherwise "bad" juror may be ready to build a very "good" version of your case story.

The differences in decision makers' case stories may be tied to more than just personal differences among people. If you leave the realm of questions, answers and specific responses and jump up a few logical levels to the category choices made to attempt to control the overall research process, you can easily spot the big missing element in older, dated thinking. What if there is a third, independent variable in the testing territory, besides the lawyers and the jurors, that can have an equal or greater role in determining the outcome of any given case?

¹ Excerpted with permission from *Facts Can't Speak for Themselves: Reveal the Stories that Give Facts their Meaning*, published by NITA and available at www.NITA.org. The article printed here is compiled from a wide-ranging sample of excerpts from the book.

© 2006

American
Society of Trial
Consultants

1941 Greenspring Dr.
Timonium, MD 21093
Tel: (410) 560-7949
Fax: (410) 560-2563
www.TheJuryExpert.com

WHAT'S INSIDE

8

Wyzga On Words:

See how a new approach to an opening statement can transform a case.

10

Jury News:

Current studies discuss juries' competence in dealing with expert evidence, and commonalities among physicians as expert witnesses in brain injury cases.

11

Quick Courtroom Tips:

Boil your case down to its essence and open with a headline.

The Jury Expert is published monthly by the American Society of Trial Consultants, 1941 Greenspring Drive, Timonium, MD 21093. Phone (410) 560-7949; Fax (410) 560-2563; E-mail: astcoffice@aol.com; URL: www.astcweb.org. The annual subscription rate is \$99.95 and includes 12 monthly issues. Single copy price \$10.

Editor:
Teresa Rosado, Ph.D.

Assistant Editor:
Kevin Bouilly, Ph.D.

Contributing Editors:
Kevin Stirling, M.B.A.
Debra Worthington, Ph.D.

Content Development:
Kristin Modin, Ph.D.

Copy Editor:
Elise Christenson

New Market Director:
Alexis Johnson

Advertising Manager:
Teresa Rosado, Ph.D.

Typesetter:
Newsletters, Etc.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent person should be sought. The publisher makes no warranty regarding the accuracy, integrity or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein, which said documents are provided for illustrative purposes only.

© 2006 American Society of Trial Consultants. All rights reserved. Reproduction prohibited without permission.

The maxim in physics and in communication theory is that the element in a system with the most flexibility tends to control or direct reactions within that system. Our three variables are an interacting system of lawyers, decision makers and case stories. And possibly the most flexible, most changeable, most reactive variable is the *case stories* themselves—the case as it is perceived and processed by each decision maker. It may just turn out that what people try to see as

“established” facts and law are actually far from it. Most pretrial tests examine what a set of people claim to think about a stack of facts and law assumed to be predetermined. What if the trial professional set out to more fully explore the whole range of stories each individual can build from a single case? Instead of seeking out types of people, what if you were to seek out *types of stories* as the primary aim of the research, not just as evidence of juror category distinctions? With this approach, focus groups could provide answers to some critical questions.

for any given juror on any given day.

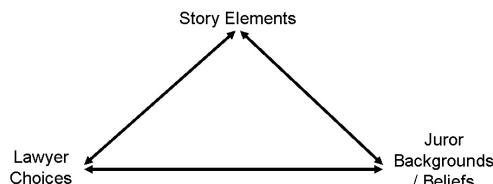
How can a set of facts and points of law be so variable? By their very nature, the law and the facts in a case story have no independent, objective nature as they are introduced to jurors in the box, mediators on a panel, or a judge on the bench. Even if a videotape of the event in question exists and is presented, the factual events are still not happening for decision makers. They are being retold, recreated or reiterated in written form. And, by its nature, the law decision makers must apply is conceptual, not objective, requiring each person to provide uniquely personal meanings for every “reasonable” and “willful” on the page. The facts and the law that make up every case story aren’t even second-hand reality. They are third-hand versions, retold first to attorneys and then literally *re-presented* to the negotiating representative of the opposition, the mediators, or the judge and jury. That means that the third variable, the undecided case story, is subject to unlimited, uncontrollable influence at each stage of the process that brings it to the ears and eyes of the decision makers. Behind the eyes of each decision maker, the case stories take on their own separate reality during the retelling, no two alike, and none fully predictable in the course it may follow.

If our stories are the source of decisions producing judgements, then it is important that all professionals in the trial world adjust to that reality.

The facts are distorted each time they move from one head to another in the discovery process, by both the vagaries of human communication, memory, and perception and by orders of the court regarding evidence. Expert opinions change and evolve over time, sometimes disappearing completely, but still leaving a trace in the way the story is carried on thereafter. And each witness whether live, on videotape, or entered by deposition, influences the nature of the facts by the many ways in which

Case Stories

What affects the forms they take for Jurors and Judges?



If the case story is truly variable, and not fixed as some still presume, then there is a system of interacting parts at work among these three, primary variables, not an either/or controlled arrangement in which only the “or” side can provide answers about the value and strengths of a case as each person rewrites it. Imagination could trump “type”

his or her presentation of those facts affects each listener's responses differently. None of this metamorphosing of fact perception and retention even begins to take into account the huge role of the first variable: lawyer input. Every part of the factual case is influenced by the choices a lawyer makes about inclusion, exploration, minimizing or emphasizing, visually supporting, verbally discounting, and even behaviorally (i.e., nonverbally) contradicting facts throughout the preparation and presentation of a client's case.

The law is also an extremely variable, third-hand event in the decision makers' minds. To appreciate even the simplest statutory direction, a normal human being first processes the general principle involved, then tries to assimilate the specific language of the statute in its apparent meaning, and finally applies that personal appreciation, based on uniquely individual views, to the particular circumstances represented by the facts of the specific case. Each person does this in a unique way, unreachable and uncontrollable by verbal or written direction from a lawyer, a court, or a professional researching juror attitudes, because the primary work is done outside of conscious control. The blending of facts, perceptions, individual references, and legal concepts is a human part of the process, whether that human is a layperson or professional. Legal professionals just dip into different pools of experience and bias such as prior cases of the same general type, personal or third-party knowledge of the attorneys or firms, appellate hopes or fears, and the like, to do their private promoting of one story element over another.

The three primary variables are intertwined, reacting to and influencing each other. But the case story itself, the stack of facts and the legal rules to be applied to those facts, is a most potent variable in and of itself. The influence of the full scope and reach of the case story, and of the multiple shapes and forms it can and

most likely will take, is a variable every bit as deserving of testing, scrutiny and appreciation by trial professionals hoping to rate and improve their chances of success. This is no less effective for success in mediation or negotiation than at trial. And that few people may have seriously looked at cases this way in the past makes it no less accurate.

What if our imaginations allow legal case stories to work on us as much as our biases work on them? Consider a single fact taken from a single case story in which a power company's stray line burned down an unoccupied warehouse. The focus group was told during opening statements that the defendant company had already admitted liability and that their job was restricted to determining the true, fair value of the losses incurred in the fire. Another fact that was not in dispute was the time the fire burned: eight hours. Something that was very much in dispute, however, was the exact nature of the building's contents and how flammable they may

have been. The group got an introduction to the process and their job, as well as to the law they would be applying. Each side was given just under ten minutes to provide a complete opening statement after which group members were individually surveyed in writing and then debriefed as a group by the moderator. Within the first few minutes of the debriefing, just after hearing both attorneys' opening statements, one participant declared, "Well, it must have been really flammable, because it burned for a *solid eight hours*."

Less than two minutes later, another participant who sat facing the first acting as if he'd never heard the prior comment, said, "How flammable could it be? It took *eight hours* to burn." Setting aside important considerations about expert testimony, input from fire departments and the like, as well as consideration of how "flammability" may be handled in the court's instructions, stop for a moment and consider what these two declarations about a single

fact in this case story reveal about the third variable. Each person had just heard and seen both attorneys summarize their cases minutes before.

Both participants had exactly the same input and based their responses on exactly the same messages about the case. Yet they each saw the same fact in exactly the opposite way from their colleague on the panel. Based on the older analytical model, many people might be tempted to ask a question like, "What kind of person thinks of eight hours as solid, and what kind thinks

of it as so slow?" Or perhaps they would like to know, "What percentage of people can I expect to see on a panel in this venue who are 'solid' thinkers, versus 'slow' ones?" Some might even go so far as to ask, "If I have a lot of 'solid' thinkers on my panel, what level of influence can I expect from that view, in the light of people who tend to think of corporations as strongly responsible for safety?"

Two additional questions could reveal the huge range of possibilities that even a single fact holds for the third variable—the case story. First, "What were the focus group members asked that prompted their conflicting answers?" And second, "What else did other people say?" The first answer is that they were asked, "What are your first impressions of the story you just heard?" The answer as to what other people said is little else about the flammability, and a lot about other things. As a focus of the case stories participants generated that day, "slow" and "solid" were not very important categories after all.

This "flammable" story invites the reader to fix on the familiar either/or choice and engage life lessons that have encouraged and reinforced the "good/bad" mind set for many people. But

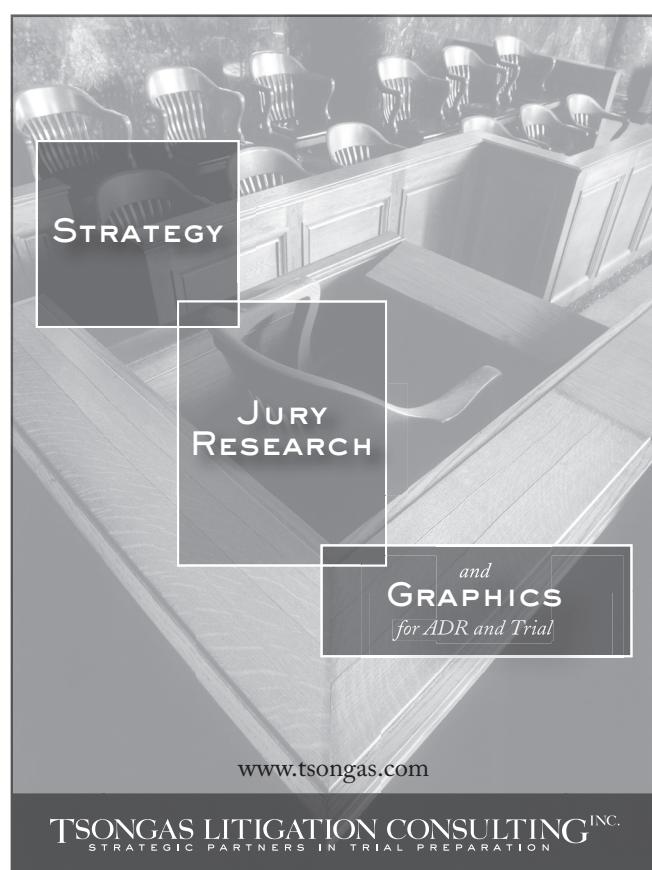
this approach invites professionals to start asking, "What else is there?" more often than "Which is it?"

Roots of Story Growth

Since legal decision making in or out of court starts with stories "made up" by each party judging a case, volumes have been written about how we might construct these stories. Research

on decision making has developed models for appreciating the conscious/other than-conscious interplay that eventually produces

each private version of a case story. The research is worthwhile even though its target defies precise measurement or definition. We know that the story-building process happens, even if we can't be real precise about how. There are perhaps dozens or hundreds of stories/models that seek to determine how we might be building our individual stories of a matter put before us.



Linguist Charles Fillmore sees a single sentence as the shortest form a story can take. Many students of rhetoric, language and perception, like Charles Faulkner, would also suggest that the form of the individual sentences being used begins to invite an effect for the listener. "When these rhetorical devices and the greater narrative work in concert, it is often termed art, or at least a compelling story." How does one go about making the "greater narrative" and the rhetoric used to deliver it work "in concert" for the decision maker hearing and judging the next case story? The answer may lie in avoiding the powerful temptation to prematurely limit the many possibilities in even the simplest case story. The task gets easier once one gets used to thinking of decision maker case stories as independent variables constructed from a huge range of possible story formulations instead of a fixed, unchanging stack of facts and laws.

Common Bias, Experience, and Sense

Decades of research and trial work have relied on the unproven assumption that, if asked, people can have access to their thinking process. They don't.

The commonly accepted version of trial case stories is that there can only be one story per case, interpreted either well or badly by the decision makers, but never authored by them. Einstein reportedly said, "The significant problems we face cannot be solved at the same level of thinking we were at when we created them."

Consistently expecting people to build independent stories, and not just interpret a fixed set of predetermined facts and legal guidelines, can quickly draw professionals to more expansive, inclusive approaches to asking questions, rather than to reductive, limiting ones. Instead of rushing to reduce input from each focus group member to a single conclusion about which side is winning the point, or to an either/or response between fixed choices (i.e., burning slow or fast? health care as consumer or parent?), professionals can be more open to

the unexpected: the many ways participants can find significance where there seemed to be none or insignificance where obvious truth seemed to reside. You may soon discover that each person starts out with many versions of the client's story from which he or she can decide the case. Soon, each potential juror and each focus group participant may start looking not like the "type of person" that always has just one type of story to tell, but rather like someone that can build any number of possible versions of the client's story, some helpful, some not so, and maybe one that is quite compelling indeed.

Most very common experiences prompt biases and presumptions that are the *least* likely to be noticed, much less consciously identified as significant influences on our thinking. By first tracking similarities and differences among all the verbal, written and nonverbal responses of each focus group participant and those of their colleagues, focusing on the stories being spun

rather than influences on the spinners, we can start overcoming very common biases about decision maker thinking that common experience has so far suggested made good sense. But, the large

and often conflicting accumulation of verbal, written and nonverbal material harvested from these groups can often look daunting to sift through.

Winnowing

Once the painstaking nonverbal, verbal, and written sorting is done, you must begin to compile all the observations into a coherent guide. There are choices to make regarding:

- what to push forward or hold back,
- where to start and finish,
- what mental images need strengthening, and which don't,
- how to say what needs to be said and what language to avoid,
- who the central character and active party or ingredient are, and

© 2006
American
Society of Trial
Consultants

- the selection of all other story elements and components.

Now, at last, the aim is to turn from expanding and inclusion to begin to hone the material into a single story. A preliminary or shortcut story assessment outline can help to organize and refine the large amount of input you've received. We developed this method for cases in which a full scale focus group report wasn't possible due to budget or time constraints. But it works equally well as an aid to your first pass through the mass of material a comprehensive group can produce. The added perspective on likely landmines and strongest story elements has to be provided by the consultant.

1. Biggest landmines. Of all the impediments that could prevent a decision maker from building a case story closest to the one you want, which is the one fact, impression, perception, legal reference, image, bias, distraction/distortion, filling defect, missing link, unsupported conclusion, or other factor (or top few) most likely to derail that process?

2. One-topic voir dire. If for any reason you had only twenty minutes to voir dire the panel preparing to hear the case presentation, what is the one topic you would have to discuss to get any sense at all of who is inclined to build a productive or destructive version of the case story? (This may relate to the top landmine, but usually does not.)

3. Three visuals (sequence). If you were to divide your whole story into three steps, how would you illustrate those steps in individual demonstrative exhibits? Do these steps fairly represent the beginning, middle and end of the whole arc of the client's story or are there other more important factors? How did the group see the story arc progressing, and what demonstratives, in what order, best codify that progression visually? (Note that these three steps very

often do not need to be chronological to be most persuasive.)

4. First witness: story requirements, then presentation strengths. If the story sequence as represented by your three key visuals is the order of your proofs, then which witness can best establish the first step of that sequence for the decision makers? Sort first by who can best address the early sequence requirements of your story, and then by who among those witnesses presents themselves best to the decision makers. A great presenter that can't set up and reinforce the story in its best sequence is not the first choice for the start of this particular case.

5. Central image (actions, choice, event). If you think of the story as a play, a movie or a book, what is the one scene that focuses the whole story's impact? Is it a solitary decision being made, a wreck, or a conversation? It is not always, nor even mostly, found in the purported bad act, although murder cases are usually an exception. What is the point in the story to which those people keep returning who see it as you'd most wish? Is there even a person in the picture at that point, or is it something else?

Consistency and discipline in the attorney's management of testimony and supporting imagery will make all the difference for people waiting to be invited to reauthor the story in the most productive way.

6. Active ingredient/Point of view. Who or what is the active ingredient associated with the central image of the case story, the locus of control, whether circumstance or personified act, that in some decisive way drives the events now in conflict? Just as importantly, who is the central character

or thing through which this entire story will best be referenced in order to produce the most compelling version possible for the decision makers hearing and seeing it?

7. Scope. What is this story's reach? Broad or narrow, long or short, many or few, or maybe just one? This story element doesn't often emerge immediately from a consideration of the material from groups or just from

the case itself. It is also very vulnerable to a trial professional imposing what he or she presumes is the best scope, rather than what may be right there waiting to be seen.

8. Theme. What is this whole thing really all about? The theme is often the first, central and overriding element of any case story, the one that must be consistently established, reinforced and maintained by all the other elements during presentation. However, it is also often the most problematic. That is why it comes last in the string, instead of first. On occasion, the theme clearly and easily emerges during the early part of the analysis. Other times, it is still unclear until very near the end. Always be wary of preselecting, consciously or otherwise, the territory in which you believe the theme will be found. Stories can be "typed" by experienced professionals, with results that are as disappointing as those sometimes produced by trying to type decision makers. And always remember to keep one eye on the language of the questions decision makers will be required to answer at the end of the line, as the theme will need to account for them as well.

This condensed story outline can prove very helpful when poring over pages of transcripts and hours of video. Just as five-minute openings serve to focus the story-building talents of the focus group members, so a set of necessary and essential story elements can help the culling process for the professional attempting to sort out the wheat from the chaff (or the high explosives) in the mass of available material at hand.

A professional's presumption about the scope of a case versus the best one suggested by a group or the facts and law themselves was never better expressed than in the comment by a lawyer at the end of a group on a complex medical case. As the group was still filing out of the room, the attorney was heard to remark, "Thank God discovery is still open. We thought we had a case against the doctor. Who knew it was really against the nurses, first?"

Packaging the Full Yield

Once the most accessible and compelling story package has been compiled from all the varied elements offered by the test group(s), then the planning can begin for how best to present that particular story in whatever venue it will be decided. It is a huge waste of resources not to apply this kind of focus group product to every venue in which decision makers will hear and see your case.

Now that the case story has been revealed, to do the presentation job well, the attorney must be concerned with the same three written, oral and nonverbal (or visual) factors through which the test groups provide their many gifts. Now, those three parts of the lawyer's presentation can be used to their best effect to persuade the decision makers in the conference room and the courtroom. If discovery is still open, the plan can start being applied there, shaping the face of the eventual text toward your ends. But, wherever in the process the fruits of your research labors will now be used, consistency and discipline in the attorney's management of testimony and supporting imagery will make all the difference for people waiting to be invited to reauthor the story in the most productive way.

Eric Oliver has specialized in nonverbal, verbal and implicit communication skills for over 25 years, and is the founder of his consulting firm, MetaSystems, Ltd. Besides teaching effective communication skills to attorneys and their firms, he spends most of his time helping trial attorneys prepare and present more receiver-friendly cases in court and for settlement presentations and discussions. He helps lawyers build a presentation plan for each case—adaptable to any venue—integrating the verbal, visual and personal parts of the trial based on jurors' needs and expectations uncovered in focus groups and voir dire. He resides with his wife and partner, Tess, in Canton, MI. He may be reached at (734) 397-8042 or by e-mail at eric@eric-oliver.com.

Eric is co-author of Courtroom Power: Communication Strategies for Trial Lawyers, and his latest book, Facts Can't Speak for Themselves: Reveal the Stories That Give Facts Their Meaning® 2006 by the National Institute for Trial Advocacy. Reprinted by permission of the publisher. Available at www.NITA.org or call (800) 225-6482.

© 2006
American
Society of Trial
Consultants

Wyzga On Words

By Diane F. Wyzga, R.N., J.D.

I firmly believe that crafting each winning legal story takes place in three ordered steps:

1. identify the story,
2. shape the story, and
3. deliver the story.

Identifying the real story is so intrinsic to the process of being on target with what you want to accomplish with the decision makers that to skip it robs you of the chance to get it right. Only when the attorney—ideally with the assistance of a story-oriented trial consultant—has clearly and unequivocally identified what the client's story is *really* about can he or she proceed to Step 2: shaping the story, sequencing the action, developing the themes, addressing the land mines, and humanizing the characters. Finally, in Step 3, you get to deliver the story using language with power, passion and precision to get the best shot at the desired verdict.

Attorneys owe it to themselves and their clients to always be open to learn, improve and observe others with different approaches.

Chris Whelan is a highly successful trial attorney in Sacramento, California. As the program speaker for a recent meeting of the Central California Trial Lawyers Association (C.C.T.L.A.), I worked with Chris before he was expected to go to trial on an enormously complex and rigorous case just three days later. We were involved in a compression exercise I use with my clients which requires them to tell me their entire case from start to finish in increasingly shorter amounts of time. The purpose is to show attorneys whether or not they have identified the true heart of their story.

Following are Chris Whelan's remarks about the transformation he experienced in identifying what his client's story was about. Chris departed from his standard story model, and on the eve of trial, began to rewrite his opening statement.

1. What was your standard approach to telling the client's story in opening?

My standard approach was to tell an abbreviated version of the story, and then come back and tell it again with great detail. It was always told in chronological order: I would start at the beginning and end at the end. I would pile on the facts adding as much detail as time would allow.

2. What was the "Aha!" moment you experienced during the C.C.T.L.A. program that caused you to rethink how to tell your client's story?

Hearing the confused and annoyed questions of the C.C.T.L.A. lawyers after my attempts to present a one-minute opening statement of a complicated case, with initially startling facts that were really only a background for what happened to my client. I did not want to give up those facts because I always got a great reaction to them; however, the time limit prevented me from getting to the point in the story that tied those events into what directly happened to my client.

My second attempt was to start talking faster and faster with the unfulfilled hope of getting to my client's involvement. However, the audience was again misdirected or confused or annoyed because they still could not understand how my client fit into the story. I initially thought my case was just more complicated and couldn't be squeezed into such a short time limit.

I then saw that my standard method, even without the time limit, would only result in the real jury being initially confused or annoyed or distracted in the first five to 10 minutes of my opening statement. This serious and self-created problem would be cured only when I eventually won them back by showing how my client fit into the story. But there's no guarantee I could make that happen. And if you confuse,

you lose. I thought, if there is a way to do an opening without having to overcome hurdles I created, I want to learn it.

3. You are a successful litigator with a successful model. What convinced you to break your own mold to produce a more compelling story?

Realizing that a natural chronological description of a long and complicated series of events might not be as understandable as quickly showing the jury how the events impacted the plaintiff. I saw that other C.C.T.L.A. participants could communicate the heart of their cases in one minute. With my old method, the real jury, just like the audience, might also be confused, misdirected or annoyed for the first five to 10 minutes before I revealed how my client fit into the story. I realized that if my old method would confuse or annoy jurors, something had to change.

4. How did you know you would be more effective?

I saw how the audience appreciated knowing the purpose of the story. I watched the audience's reaction to other participants who worked with Diane: they were able to convey their story within the compressed time limits of less than one minute.

5. What advice do you have for other lawyers looking for ways to tell well and win more?

Get out of your comfort zone! Attorneys owe it to themselves and their clients to always be open to learn, improve and observe others with different approaches. The experience of working with you showed me that I could present a much better opening statement.

Diane F. Wyzga helps attorneys win more cases by developing their critical listening and persuasive communication skills. She teaches lawyers how to use storytelling techniques and principles to translate compelling case images into verdict action. With over 20 years' experience, Diane founded Lightning Rod Communications (www.lightrod.net) to train attorneys to identify, shape and effectively deliver their stories using language with power, passion and precision. She may be reached at (949) 361-3035, or by e-mail at diane@lightrod.net.

INTERESTED IN ADVERTISING IN THE JURY EXPERT?

It is with great pleasure that we offer the opportunity for you to advertise in *The Jury Expert*. This service allows you to communicate directly with our readership (trial attorneys and trial consultants).

If you are interested in advertising or have any questions, please contact Teresa Rosado (information below). You may also visit our web site at www.thejuryexpert.com to download the rate card and advertising contract in PDF format. We look forward to helping you promote your services in our publication.

For more information contact:

Teresa M. Rosado, Editor
(734) 944-0283 (Office)
trosado@juriscomm.com
www.thejuryexpert.com

© 2006
American
Society of Trial
Consultants

Article Ideas?

Is there a topic you would like to see covered in *The Jury Expert*? Please feel free to contact me at the e-mail address below with article ideas.

Thanks for reading *The Jury Expert*!



Teresa Rosado, Ph.D., Editor
trosado@juriscomm.com

Are juries competent at dealing with expert evidence?¹

Many assertions have been made about the competence of juries in dealing with expert evidence. This article reviews the types of expert evidence that jurors hear and the impact of adversary legal procedure on the form and manner in which evidence is presented.

Findings:

1. Empirical research indicates that jurors understand the adversary process.
2. Juries, according to the empirical evidence of this article, do not automatically defer to the opinions of experts.
3. In the final analysis, the verdicts coming from juries appear to be generally consistent with external criteria of performance.

According to this article, juries are bright groups of people that are not swayed by the expert witness. The expert witness must meet the same level of credibility as any witness. The article goes on to discuss the conflicts between the American adversary system and changes in trial procedures that might assist the jury in its task.

Are there any commonalities amongst physicians who frequently testify as expert witnesses in neurologic birth injury cases?²

© 2006
American
Society of Trial
Consultants

Much debate surrounds physicians who testify in controversial types of medical malpractice litigation, but little is known about them. This article seeks to describe characteristics of physicians who frequently act as expert witnesses in neurologic birth injury litigation.

Findings:

1. Seventy-one frequent physician expert witnesses participated in 738 cases (89 percent of the sample), which paid \$2.9 billion in compensation.
2. Most (56 of 71) testified for one side in at least three-fourths of cases, and 40 percent of cases were located outside the witnesses' home states.
3. Frequent plaintiff witnesses had a higher median annual case rate than their defendant counterparts (2.9 cases compared with 1.9 cases, P=.002); they were also older (57.2 years compared with 50.8 years, P=.007), less likely to have subspecialty board certification (38 percent compared with 95 percent, P<.001), and had fewer academic publications (5.0 compared with 53.5, P=.002).

¹ Based on Neil Vidmar (2005). "Expert Evidence, the Adversary System, and the Jury." *American Journal of Public Health* 95, S137-S143.

² Based on a report published in August 2006, representing cases analyzed from 1990 to 2005. "Characteristics of Physicians Who Frequently Act as Expert Witnesses in Neurologic Birth Injury Litigation" was researched and written by Aaron S. Kesselheim and David M. Studdert.

A small cadre of physicians testify in most neurologic birth injury litigation, and witnesses tend to act consistently for one side. Plaintiff witnesses have fewer markers of expertise than defendant witnesses. These descriptive and analytical findings may reflect suboptimal expertise or bias in physician expert testimony.

Study Design: Using jury verdict reports, the researchers identified 827 cases between 1990 and 2005 involving birth-related neurologic injury to a child. Frequent expert witnesses were defined as those associated with more than 10 cases. From the verdict reports and other public data sources, the researchers compiled case descriptions (e.g., injury type and severity, legal outcomes) and characteristics of the frequent witnesses (e.g., age, gender, board certification, academic publication record). The researchers then analyzed these characteristics by comparing witnesses with each other (plaintiff compared with defendant) and with nationally representative data.

Joe Custer is the Associate Director of the University of Kansas Wheat Law Library. He is also a faculty lecturer at the University of Kansas School of Law and adjunct professor in the Legal Information Management program at Emporia State University. He holds a B.A. from the University of Northern Iowa, an M.A. from the University of Missouri, and a J.D. from the University of Arkansas. He is a member of the Missouri Bar, Kansas Bar, American Bar Association, and the American Association of Law Libraries. He may be reached at jcuster@ku.edu.

Quick Courtroom Tips

By
Bob Gerchen

Headline Your Case

In an opening statement, it's critical to get jurors' attention before you can actually tell them anything. The jurors are still strangers in a strange land. It's possible that they just came out of the jury selection process and, pow! The trial is starting. They're getting settled in. They're replaying the arguments with their spouses from earlier in the morning. You need to interrupt them and get them tuned in.

This doesn't get their attention: "*This is a case about...*"

How about, "*I want to give you a road map...*"

Or even better: "*On behalf of my client, I want to thank you...*"

In advertising a headline is the ad for the ad. It is designed to interrupt readers'/listeners'/viewers' alpha state and snap them into beta mode. Here are a few famous examples:

Own a Gold MasterCard? A Premier Visa? Not after you read this, you won't.

Is the Life of a Child Worth \$1 to You?

Last Saturday we were robbed. Where the hell were the police?

The ad copy then says, "Okay, you're paying attention. Now I have some worthwhile interesting information to give you about this topic."

Your case needs to have a headline, too. Boil your case down to its essence and say a sentence that will make your jurors want to sit up and listen. Some of the better ones I've heard over the years:

Jane Madsen sees two of everything.

We all remember where we were on 9/11. So does Alice ______. She was face down, underneath her car, wondering if this was how she was going to die.

Jack ---- wasn't fired for being gay. Jack wasn't fired for being late. Jack wasn't fired for talking about his lover's illness. Because you see, Jack wasn't fired.

Bob Gerchen is the Director of the St. Louis office of Litigation Insights. He may be reached at (314) 863-0909 or by e-mail at rgerchen@litigationinsights.com.

For more information about Bob Gerchen's book, [101 Quick Courtroom Tips for Busy Trial Lawyers](http://www.CourtroomPresentationTips.com), visit www.CourtroomPresentationTips.com.

© 2006
American
Society of Trial
Consultants

FOCUS POINTE GLOBAL



JURY RECRUITING & FACILITIES

- ♦ Oversized Rooms
 - ♦ Dual Climate Control
 - ♦ Advanced Digital Recording
 - ♦ High Speed Internet/WIFI

FACILITIES

Atlanta
Bala Cynwyd
Boston
Chicago
Dallas
Los Angeles
New Jersey
New York
Philadelphia
San Francisco

CONTACT US

jury@focuspointeglobal.com
888.873.6287



**FOCUS
POINTE
GLOBAL**

Thanks for reading *The Jury Expert*!
If you have recommendations for future content coverage, please feel free to contact me at the e-mail address below.
Teresa Rosado, Ph.D., Editor trosado@juriscomm.com

*American
Society of Trial
Consultants*

© 2006

New Subscription/Renewal Form

Yes, please send me 12 months of *The Jury Expert*!

Please start my one-year subscription to *The Jury Expert* right away. I will pay the regular \$99.95 subscription rate. You'll pay all of my shipping and handling charges. I may cancel at any time for a complete refund of all unsent issues.

Name: _____ Firm: _____

Address: _____ **City:** _____ **State:** _____ **Zip:** _____

Phone: _____ **Fax:** _____ **E-mail*:** _____

*Providing your e-mail address allows you to manage your subscription online.

New Subscription: Regular \$99.95 Renewal: Regular \$99.9

Library \$199.95 Library \$199.95 "American Society of Trial Consultants"

Please charge my: MasterCard Visa American Express

Full name on card: Card #: Exp.

Or subscribe/renew online at www.TheJuryExpert.com!

Asian Society of St. Louis, Vol. 18(1), Spring 2003, pp. 1-11