



The Jury EXPERT

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Four Generations in the Jury Box

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Generations in the Jury Box: *Tailor Your Message, Make the Connection*

by Cam Marston of Generational Insights

There has been a lot of buzz lately about generational challenges in the workforce as companies struggle to make sense of the different needs and perspectives of four distinct generations working side by side. Businesses worldwide have entire budgets dedicated to understanding how to connect with employees and customers based on generational nuances. Jurors are no different.

Understanding how shared life experiences and perspectives can color one's view of the truth – or overall trustworthiness – is critical to connecting with jurors. Choosing words and arguments carefully with a view for how specific generations of jurors will receive them can make or break a case.

So, how do you communicate with a group of jurors who may be Matures, Boomers, Gen Xers, Millenials, or more likely, all of the above? Meet them where they are, so you can bring them where you want. Ignoring the truths of generational norms will get you nowhere.

You need to know how each gained its collective persona in order to craft a message that earns credibility and brings them closer to your side of the case. So, let's discuss the differences in each generation.



Matures

Our nation today lives in the world created by a generation known collectively as the Matures. Born prior to 1945, they total approximately 30 million people. Heavily influenced by the military, the Mature generation places great emphasis and power in hierarchy – they desire a clear chain of command. Their work life, likewise, was defined by climbing the corporate ladder and earning the associated perks along the way. This same sense of order and expectation is desired today. The Mature juror needs to know the process, and will follow it implicitly.

Matures also place great trust in the traditional institutions that many Gen Xers dismiss. Degrees and longevity hold great swaying power. This presents a challenge when addressing a jury of mixed generations – one must be able to

present expert testimony that is deemed trustworthy on both ends of the spectrum: traditional, established experts and unaffiliated, unbiased peers.

The Mature juror needs facts, a proven history and a sense of order amid a world that, in his perspective, is becoming increasingly chaotic and loose with the fundamental truths. Straight talk by pedigreed experts will gain favor. Younger attorneys should refrain from attempting to establish false camaraderie with a Mature juror, as they have not yet had time to climb that hierarchal ladder. Courtesy and respect for the sacrifices they've made are the keys to connecting with a Mature audience.

Boomers

Born between 1946 and 1964, Baby Boomers are an optimistic bunch who value a strong work ethic. They grant credibility based on proven history. There is your hook. The Boomer juror needs to know that there is a successful background supporting the argument. Your challenge is to find a way to say “we’ve proven ourselves worthy of your attention and trust.”

Boomers also bring an interesting dynamic to the jury box in that they are facing a life change themselves. The United States is entering a period of mass Boomer retirements, so this group is beginning to think about their personal legacies. Craft a message that speaks to this hunger...how will this jury experience work into the Boomer's legacy?

Finally, it is important to recognize that Boomers are often traditionalists. They may use technology happily or begrudgingly, but as a whole they view it as something to augment the old way, not replace it. They do not want to be outdated or pushed aside. When introducing technologies into the case argument, it is important to balance the need to inform about new innovations with respect for the way things used to be. Never imply a disdain for the traditional approaches that many Boomers still prefer. Nor should you assume a Boomer is not informed about the latest technologies. It's a fine line, but walking it carefully will minimize unintended insults.

Generation X

Born 1965-1979, Gen Xers are a smaller generation – 49 million compared to 80 million Boomers and 75 million Millennials - that has made a big impact. Raised in a world that appeared to be falling apart, they have always questioned authority and maintain a strong skepticism today. They are not easily impressed and want to know all the details for themselves before making a decision. They approach jury duty with a sense of defiance, requiring you to prove yourself, your client and your case. Trustworthiness is not blindly bestowed to anyone.

Understand that Xers take nothing at face value. To an Xer, everything requires reputable support and that support comes from individuals, companies, organizations that they, the Xers, deem trustworthy. Want to further your credibility with Xers? Demonstrate the use of unbiased resources and experts to prove you've got nothing to hide. Remember, these are the folks who lived through church scandals and presidential affairs. Honesty is unexpected yet highly treasured. If you can capture their trust, it will open the doors to their hearing your argument.

Another way to address the cynicism of GenX is to poke a little fun at it. Gen Xers can laugh at themselves and will appreciate your direct approach, *if done well*. Be careful not to belittle the choices they make, but rather the cynical way they see the world. It's all about the attitude.

Finally, never underestimate the power of their peers to influence Gen Xers. They want to hear from real people, so peer-to-peer testimony carries tremendous weight. In the retail world, Xers invented reader reviews and buyer feedback for online merchants, underscoring how they rely less on the opinion of experts and more on the opinion of peers when making decisions. Examine your expert witnesses carefully to determine if they will carry weight with a Gen X juror, or if there is another, more peer-driven way to deliver the same message. For this generation, degrees and awards do not confer trust. In fact, sometimes they have the opposite affect. Choose wisely.

Millenials

Born between 1980 and 2000, the Millenials are, generally, more optimistic and ambitious than the Xers before them. However they are in a tricky spot right now as they slowly, and sometimes reluctantly, extricate themselves from their increasingly coddled childhoods and take on the world. They have been taught to look for the helping hand. Address Millenial jurors with the right touch and they will quickly seek to gain your favor.

Millenials as a whole are an inclusive crowd. They have been raised in a world of increasing diversity and their optimistic nature wants to continue that. Because they ultimately trust their peers over any other source, they want to see their peers in your argument. They have little tolerance for racial, economic, religious or social stigmatism and will respond negatively to any insinuation of elitism.

Millenials are incredibly active – frequently to the point of being stressed – and on the move. They look for the immediate application in everything. They are concerned about the world and their place in it. Include Millenial jurors in the conversation and guide them to see the bigger picture and their place in the outcome. Let Millenials feel like they are part of something bigger and your argument will hold more value.

Closing Remarks - One Size Fits Some.

Each generation has a strong personality and perspective that drives decision making. Ignoring those differences can backfire completely, pushing away a generation of potentially sympathetic jurors, or at the very least wasting time and energy on a message that doesn't fit. So while the rules of communication may change with each generation, the fundamentals do not – know your audience. What do they value and how do they see the world? A generational perspective provides that understanding and helps make the connection, ultimately helping you make the case.

Cam Marston is president of Generational Insights and speaks about generational issues to worldwide audiences. His book, *Motivating the “What’s In It for Me?” Workforce* details the cultural experiences that shape the collective views of each generation and provides strategies for effective communication.
www.generationalsinsights.com.

CONSULTANTS REACT TO GENERATIONS IN THE JURY BOX...

We asked three experienced trial consultants who are members of ASTC (Katherine James, Tara Trask and Stanley Curbo) to react to Cam Marston's article on Generations in the Jury Box.

Here are their thoughts, on Cam's article and on the impact of generational status in general.

Katherine James, ACT of Communication

I think it is a wonderful idea and vital idea to consider generational differences between jurors. Heaven knows, it is a wonderful and vital idea to consider generational differences between lawyers. And, cryptically enough – we have to consider them within the trial consulting population as well.

How many times has this Boomer trial consultant found herself in the room with a Mature or Gen X attorney thinking, “Wh-a-a-a-a-t are you TALKING about...?” only to remind myself, “That’s right. Different crowd.”

My major comment about Cam Marston’s article is that the division of the generations isn’t “fine” enough. Meaning, I find that all people divide into much finer divisions than

the “big four”. The generational studies that define the generations in 10 year increments have always proven to me to be much more helpful. If the criteria for the division is a big defining cross cultural event, then 10 years is just more accurate.

Let’s just take Boomers. The event that defines my particular group in this broad category is “duck and cover”. You can hear it in the responses of jurors in focus groups all the time – we just don’t trust authority in general. I find that I have to watch myself so that I don’t assume that some person near my age who pipes up, “Yeah, right – as if you can believe THAT” about the government doesn’t get more credence from me simply because I hear my own point of view – generationally – echoed. Now, my sister, who is ten years younger than I am is still a Boomer according to the broad category, but her defining event is different. Put the two of us on a jury and you really will find that you need to address us differently according to our finer needs.

I am also fascinated by the group coming up – the ones who are young teenagers right now. There is no way they are in the same group as the people in their mid-twenties.

Katherine James is a California-based trial consultant who teaches

attorneys to be more effective and more relaxed in the courtroom. [<http://www.actofcommunication.com>].

Tara Trask, Tara Trask and Associates

Cam Marston does an excellent job of laying out the fundamentals of the different generations in the U.S. today. I agree with his characterizations of the different generations and also with his suggestion to keep in mind the historical context, learning styles and interpersonal needs of each of the generations.

He rightly challenges the trial attorney to take these issues into consideration when addressing the venire. The question that I often get from trial attorneys on this issue is how to best tailor a message with all four or even three generations represented in the venire. The answer to that question is two-fold.

First of all, it is impossible to please everyone all the time. The trial lawyer has to pick and choose which generation he is trying to persuade on which issue. Often, there is overlap, for example a well-pedigreed expert who is also relatively young with excellent communication skills has great cross-over appeal.

Second, and most importantly though, many juries in many jurisdictions are not as diverse as the populations they represent. We know that older people are more likely to serve on juries than very young people. Most juries are largely made up of Boomers and Gen Xers with some Traditionalists thrown in. The savvy trial lawyer also searches out potential leaders and contemplates the generational dynamics of the potential leaders who have been seated.

Generational insight is a dynamic and ever-changing view of the venire. While I certainly agree that taking these issues into consideration is important, learning and understanding the youngest generation, the Millennials is really about preparing for what is coming next.

Tara Trask and Associates, San Francisco, CA

Author of “The Changing Face of Juries”, *The Recorder*, San Francisco, October 2003.

“Communicating to Gen X and Net Gen Jurors, Part II”, *The Jury Expert*, December 2004.

“Getting to Know Gen X and Net Gen as Jurors”, *The National Law Journal*, January 2005. [<http://www.taratrask.com/>]

Stanley Curbo, *Courtroom Sciences*

When I read Cam Marston’s piece on the generational

characteristics of Matures, Boomers, Gen Xers, and Millennials (a/k/a Gen Yers?), I sort of experienced a collective déjà vu awareness that “fast-reversed” over my twenty-eight years of interchange and dialogue with jurors – the real ones, the mock ones and the pseudo-real/shadow or mirror jurors. It was like a, “So that’s what was going on there” reaction.

The value I found in the piece was the refreshing of what I have known for some time. That is, that being aware of the unique generational characteristics of these four groups is the first step toward understanding how each may problem-solve issues distinctly differently and how each may “critique” the presentation of the story differently. Mr. Marston’s premise is that by understanding these specific generational distinctions, one can choose words and arguments to “tailor the message.” The author speaks to choosing the words to meet the generations where they are. If choosing words and arguments also includes “avoiding” certain styles and delivery that are not compatible with a generations belief system, I would concur.

For example, it has been my experience that Gen Xers and Millennials are not receptive to

emotional overtures and what they perceive as an advocate’s attempt to “play” them. They just want you to tell them the rules, don’t waste their time, and they will tell you who deserves to win and why. They can have some “hard bark” on them, brought on by what they perceive as a healthy cynicism. A long while back, I stopped asking attorneys at focus groups and mock trials if they would care to join in the focus session with the full panel at the end of the day for this reason. An attorney who wanted to come in and harvest feedback about her presentation of the Plaintiff’s case was told by a “thirty-something” young man that: “I was probably 75% in favor of the Defendant before you even got to the end of your presentation, primarily because I began to doubt whether in fact you were even a real attorney.” And, the young man delivered this sobering “slap-in-the-face” critique in an even, unemotional manner as if he had just said, “make mine a double-double, chocolate latte light moch-mocha hooma-homma!”

Boomers – a caveat. Being a boomer myself (1947 – 1951), and that is as close as I’m revealing without a fight: I would slightly challenge Mr. Marston’s description of my

“bunch” as totally optimistic. My experience, not so much my personal experience but what I have learned from my fellow boomers in decision-making settings relating to their perceptions of institutions (corporate and governmental), is that they have to some extent experienced an erosion of this optimism. They manifest a certain bitterness and cynicism brought on by their personal experiences with corporate lay-offs, jobs moving off-shore, and misdeeds by the officers and directors of the very institutions their parents taught them to have faith in. This bitterness and cynicism may not be totally pervasive across the collective Boomer generation; but it is there, and a bitter and cynical forty to sixty-something juror can take it out on his/her perceived nemesis, and vehemently!

Knowing your audience, appreciating the generational make-up of that audience and the distinct differences each brings to the game is the important message Mr. Marston’s piece delivers. How to tailor your message to this diversity is a challenge indeed, but a challenge that should be embraced for the benefits a successful connection with your audience can yield. Jurors make decisions and filter everything they see and hear through their unique perspectives. Understanding this uniqueness and how the

words one uses and the style one employs to deliver the message is essential for victory.

Stanley Curbo is a senior litigation consultant with Courtroom Sciences in Irving, Texas. [<http://www.courtroomsciences.com>].



Favorite Thing...

Tucked into every issue of The Jury Expert you’ll find a “favorite thing”. Something special you submitted or something we found and thought of value.

This issue, our favorite thing is a webpage from the website of ASTC member Kathy Kellermann.

It’s called “Jury Research Updates”.

Every seven days, Kathy takes questions from litigators and answers them based on social science research.



Take a look at our May 2008 “favorite thing” located at the URL below:

<http://www.kkcomcon.com/CCResear.htm>

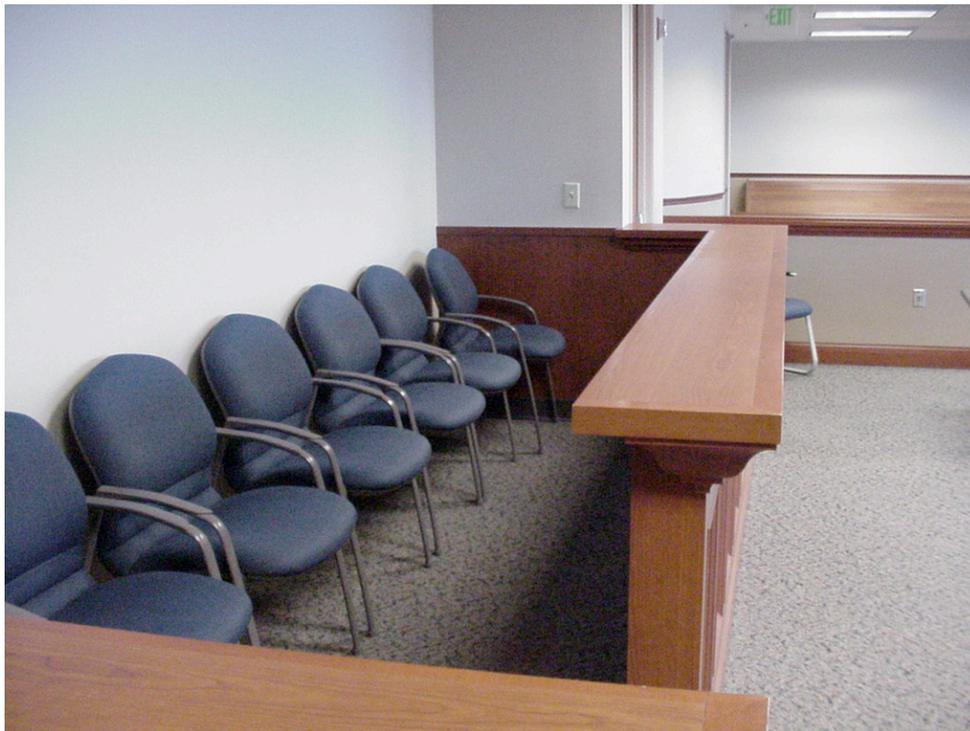


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Practical Tools for Staying Organized during Voir Dire and Jury Selection

by Kelley Tobin
Tobin Trial Consulting

If your legal pad and seating chart with one-inch squares are no longer cutting it to manage all the information you learn during voir dire, keep reading.

The challenges for the trial lawyer during voir dire are many. Establishing rapport, building a theme framework, and laying grounds for cause challenges with high-risk jurors (after recognizing and remembering which ones they are) can feel like juggling a feather, a bowling ball, and a flaming torch. With some simple plan-ahead tools and a consultant you trust, there is no need to look or feel overwhelmed and flustered.

No voir dire is ready to proceed without:

1. An organized consultant you can count on
2. A reference seating chart with juror numbers and names in Mr., Mrs., Miss or Ms. format
3. An understanding of the high-risk juror profile
4. A game plan to lay the groundwork for cause challenges

THE TOOLS

1. Juror Profile Sheets in a three-ring tabbed binder

How many times have you or your legal assistant kept notes on a legal pad or seating chart during voir dire, but had an impossible time reading your tiny writing or finding a particular comment when you needed it during the strike conference?

No doubt you need that seating chart. But it cannot possibly hold all the information you must acquire, digest and be able to retrieve on demand.

Looking for a specific reference on page after page of a legal pad is like searching for a song note on a cassette tape.

Instead, consider using a tabbed, three-ring binder with a single page devoted to each potential juror. This allows plenty of room to write exactly what a juror says during each segment of voir dire and packages it in a way that allows for quick retrieval.

Trust your trial consultant to keep the notes for you. You stay focused on being present and mindful.

The Juror Profile Sheet for each potential juror should include their juror number, name, occupation, basic background information, and space to write in exact question-and-answer exchanges during both sides' voir dire. Change ink colors for the plaintiff and defense portions of voir dire, so at a glance you know which side gleaned what information.

Leave room for an assessment of leadership potential and initial impressions about the juror.

A dedicated space at the bottom of the page is the place to record invaluable exact quotations that can be vital to getting or defending a cause challenge.

Juror #: _____	Male: _____	Female: _____	Age: _____
Background: _____			
Leader potential: Low Medium High		Impression: Red Yellow Green	
Name: _____			
Occupation: _____			
Questionnaire Notes and Follow-Up:			
 Plaintiff Voir Dire:			
 Defense Voir Doir:			
 Potential for Cause:			

2. High-risk opinion tracker

If voir dire time is strictly limited or issues are particularly sensitive, consider reading opinion statements that help reveal high-risk jurors. Ask jurors who tend to agree more than they disagree with a particular statement to raise their hands. Call out juror names or numbers slowly and in numerical order for your consultant. The consultant needs a legal-size tracking spreadsheet that lists each high-risk statement and allows room to record which jurors raise their hands. In addition to being a quick way to identify problem jurors without having to have lengthy “pollution discussions” this is a great way to stay ahead of your opponent in the information gathering contest.

HIGH-RISK OPINION STATEMENT	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
A. Statement #1																	
B. Statement #2																	
C. Statement #3																	
D. Statement #4																	
E. Statement #5																	

3. Cause challenge tracker

At the conclusion of voir dire, if and when the judge asks you to step to the bench and state which jurors you need to call back or challenge for cause, your consultant should be able to hand you a document in numerical order that gives you exactly what you need in a format that makes you look and feel confident and informed.

JUROR	TOPIC	CAUSE “QUOTE” OR POSSIBLE REHABILITATION	GRANTED (x)	DENIED (x)
1				
2				
3				

Encourage use of these practical tools and spend time planning your voir dire logistics ahead of time. Staying organized will help you make the best decisions for your clients.

Kelley Tobin (kktobin@swbell.net) of Tobin Trial Consulting in Houston, Texas, is a research and communications professional who has worked in the legal field since 1990. She assists civil trial lawyers with witness preparation, the development of case themes, and the execution of comprehensive jury research and jury selection processes. As a jury consultant she has specialized in jury communication issues on hundreds of cases involving business disputes, products liability, securities, fraud, misappropriation of trade secrets, contract disputes, legal malpractice, nursing home negligence, personal injury, wrongful death and medical malpractice. Prior to starting her own firm, she served for seven years as full-time Trial Research Director for Moriarty & Associates, P.C. She is a member and past Education Committee Chair of the American Society of Trial Consultants. Her website address is: www.tobintrialconsulting.com.

Caveats of the Death-Qualified Jury: Ways Capital Defense Attorneys Can Use Psycholegal Research to Their Advantage

By Brooke Butler, Ph.D.

University of South Florida--Sarasota



What is Death Qualification?

Death qualification is a process unique to capital trials in which venirepersons (i.e., prospective jurors) are questioned about their beliefs regarding the death penalty. In order to be eligible for capital jury service, a venireperson must be able and willing to consider both legal penalties (i.e., death or life in prison without the possibility of parole) as appropriate forms of punishment. A person who meets the aforementioned *Witt* (1985) standard is deemed "death-qualified" and is eligible for capital jury service; a person who does not meet the aforementioned *Witt* (1985) standard is deemed "excludable" and is barred from hearing a death-penalty case.

Technically, the judge has the ultimate opinion on capital sentencing and the jury's decision is considered advisory in nature (*Ring v. Arizona*, 2002). However, the jury's recommendation is rarely overturned.

The death qualification process is extremely unusual. Jurors in non-capital cases are prohibited from hearing about post-conviction penalties, as exposure to this information has been deemed to be prejudicial. However, in capital voir dire, the focus of jury selection is drawn away from the presumption of innocence and onto post-conviction events. It is particularly ironic that in cases where the defendant is facing the ultimate punishment are the standards for jury selection most in violation of capital defendants' right to due process.

Death-Qualification Theory

Death-qualified jurors are very different from their excludable counterparts. My research has suggested that death-qualification status is actually a constellation of dispositional factors which may, in fact, be more typical of certain demographic subgroups than others (Butler & Moran, 2008c). The aforementioned dispositional factors tend to drive certain attitudinal indices which tend to drive certain behaviors (Butler & Moran, 2008c).

Demographic Differences

Death-qualified jurors are demographically different from jurors excluded from capital jury service. For example, death-qualified jurors are more likely to be male, Caucasian, moderately well-educated, politically conservative, Catholic or Protestant, and middle-class (Butler & Moran, 2002).

Dispositional Differences

Death-qualified jurors are also dispositionally different from their excludable counterparts. For example, death-qualified jurors are more likely to have a high belief in a just world (Butler & Moran, 2007a). Lerner's (1980) just world theory suggests that some people want to believe that the world is a fair place and that people generally get what they deserve. When an unjust event occurs, there are two ways in which people with a high belief in a just world can restore this aforementioned belief: (1) attribute blame to the victim or (2) alleviate the victim's suffering. This may suggest that capital defendants are at a "double-disadvantage." Clearly, they are on trial for having perpetrated victimization. If their defense attorney portrays the defendant as having been victimized during the sentencing phase of the capital trial, jurors with a high belief in a just world might react in a punitive fashion. In fact, research has suggested that jurors with a high belief in a just world are extremely skeptical of mitigating factors (i.e., arguments for a life sentence), many of which involve aspects of victimization (Butler & Moran, 2007a).

Death-qualified jurors are also more likely to espouse legal authoritarian beliefs. Legal authoritarians are more likely to feel that the rights of the government outweigh the rights of the individual with respect to legal issues and are more likely to be conviction- and death-prone than their civil-libertarian counterparts (Butler, 2007a; 2007c; Butler & Moran, 2007a; Narby, Cutler, & Moran, 1993). Legal authoritarians are also more receptive to aggravating circumstances and less receptive to mitigating circumstances (Butler & Moran, 2002; 2007a).

Death-qualified jurors are more likely to exhibit an internal locus of control (Butler & Moran, 2007a). An internal locus of control is characterized by participants' belief that the events in their lives are due to things that they control (Nowicki & Duke, 1983). People with an internal local of control can be particularly skeptical of others claiming to be affected by things outside of their control, such as victimization or addiction (two of the most frequently-used mitigating circumstances in capital cases).

Finally, death-qualified jurors have a low need for cognition (Butler & Moran, 2007b). The need for cognition is defined as "the tendency to engage in and enjoy effortful cognitive activity" (Cacioppo, Petty, & Kao, 1984). Although participants with a low need for cognition are no less capable of engaging in such contemplation, they tend not to do so unless they are extrinsically motivated. Low need for cognition affects the way jurors process complex scientific evidence and evaluate methodologies (Butler & Moran, 2007b). In fact, death-qualified jurors, when compared to their excludable counterparts, are not as able to draw appropriate conclusions from flawed science (Butler & Moran, 2007b).

Attitudinal Differences

Death qualified jurors are attitudinally distinguishable from their jurors ineligible for capital jury service. Death-qualified jurors are more likely to be racist, sexist, and homophobic (Butler, 2007c). They are more likely to weigh aggravating circumstances (i.e., arguments for death) more heavily than mitigating circumstances (Butler & Moran, 2002; 2007a). Death-qualified jurors are more likely to evaluate ambiguous expert scientific testimony more favorably (Butler & Moran, 2007b). They are also more likely to be skeptical of defenses involving mental illness (including the insanity defense) (Butler & Wasserman, 2006).

Death-qualified jurors are also more susceptible to the pretrial publicity that surrounds capital cases (Butler, 2007a). They are more affected by the victim impact statements that occur during the sentencing phase of capital trials (Butler, 2008b). Death-qualified jurors are more supportive of capital punishment as it relates to the elderly and the physically disabled (Butler, 2008a). They are more likely to evaluate mitigating circumstances more negatively when a



combination of strong and weak mitigation is presented than when only strong mitigation is presented (Butler & Moran, 2008a).

Behavioral Differences

Most importantly, death qualified jurors are behaviorally different from their excludable counterparts: Death-qualified jurors are more likely to find capital defendants guilty and sentence them to death. This pro-conviction, pro-death bias has been found in death-qualified jurors' evaluations of both adult and juvenile defendants (Butler, 2007b).

Process Effects

The mere process of death qualification profoundly affects jurors in capital trials. For example, Haney (1984a; 1984b) found that jurors exposed to death qualification were significantly more likely to find the defendant guilty, think that other jurors believed the defendant to be guilty, sentence the defendant to death, and assume that the law disapproves of opposition to the death penalty. Since capital voir dire is the only voir dire that requires the penalty to be discussed before it is relevant, the focus of jurors' attention is drawn away from the presumption of innocence and onto post-conviction events. The time and energy spent by the court presents an implication of guilt and suggests to jurors that the penalty is relevant, if not inevitable.

Death qualification also forces jurors to imagine themselves in the penalty phase. Research has shown that simply imagining that an event will happen makes it more likely that the event will actually occur (Tversky & Kahneman, 1974).

During death qualification, jurors are repeatedly questioned about their views on the death penalty. Consequently, jurors can become desensitized to the imposition of the death penalty due to repeated exposure to this extremely emotional issue and jurors are forced to publicly commit to a particular viewpoint, both of which increase the likelihood that jurors will vote for a death sentence.

In addition, jurors who do not endorse the death penalty also encounter implied legal disapproval by being judged "unfit for service" and the connotation of the terms "excludable" and "scrupled" are quite negative. All of the research concerning the process effects of death qualification was conducted under the now-defunct *Witherspoon* (1968) standard. One day, I hope to replicate this earlier study under the current *Witt* (1985) standard (Butler & Moran, 2008a).

Death Qualification is Here to Stay

In *Lockhart v. McCree* (1986), the Supreme Court reviewed the research surrounding death qualification and concluded the process to be both constitutional and necessary. Twenty years later, the data have only grown more conclusive. Yet, in *Uttecht v. Brown* (2007), the Court not only ignored the growing body of social scientific data suggesting that the death qualification process was a violation of capital defendants' right to due process, but granted the prosecution even more leeway in excusing jurors who do not make their views about the death penalty "unmistakably clear." In doing so, I suspect that *Uttecht* will magnify preexisting differences between death-qualified and excludable jurors. Consequently, although the Court might have thought that it slammed the door on the issue of death qualification; *Uttecht* might have the opposite effect.

My Research Practices

Through my 10 years as a litigation consultant, I understand that attorneys are skeptical of psycholegal research. This is why I collect all of my data at courthouses in Florida. I think that surveying venirepersons is important for several reasons: 1) Venirepersons are a random sample of the jurisdiction from which they are selected and 2) Venirepersons are a representative sample of the jurisdiction from which they were selected. In addition, I think that surveying participants in field settings (i.e., "real people in the real world") enhances both the ecological and external validity of my research.

All of my studies involve parsimonious designs. I like to keep things simple for two reasons: 1) I think straightforward designs yield more powerful, practically significant findings; and 2) I want my research to be accessible to both legal scholars and legal practitioners.

What to Avoid in Death Qualification

We know is this: Demographic variables predict very little about attitudes and even less about behavior. We simply can't generalize about a particular gender, ethnicity, sexual orientation, religion, occupation, or political affiliation. I understand why attorneys rely on stereotypes, given the way categorizing people is part of human nature, the nonexistent training attorneys receive in law school regarding how to pick good juries, and the fact that most judges view jury selection as a formality and would love to have it completed in an hour or less.

In an Ideal World...

I also understand that mock trials, focus groups, community attitude surveys, shadow juries, paid litigation consultants are very informative, but expensive and time-consuming. I also know that capital defense attorneys (many of whom are paid by the state) don't have the money or time to pull something like that together.

Use Psycholegal Research to Your Advantage

The best way to pick a capital jury is to ask attitude-specific questions...and as many as the judge will allow. The good news is that many legal psychologists have constructed well-designed measures (i.e., surveys) which have questions that tap into dispositions (e.g., belief in a just world; legal authoritarianism; locus of control; need for cognition; see Appendix) and attitudes toward specific things (like the death penalty, the insanity defense, implicit racism, sexism, and homophobia; see Appendix).

My research has demonstrated that responses on these measures predict verdicts in capital cases. These measures can be easily located by both academic and Internet searches as well as in the "References" section at the conclusion of this article (Wrightsmann, Batson, & Edkins, 2004).

The Benefits of Pretrial Surveys

As I mentioned, judges like to limit the amount of time spent on jury selection. To complicate matters, many jurors are reluctant to admit their prejudices in public (and sometimes this can be because they aren't aware of them, as research indicates that the most prejudiced people tend to be the least aware of their prejudices). This is where a pretrial survey comes into play. This way, jurors can answer questions privately, and, quite possibly, more honestly (although, of course, both sides will be privy to the information). In addition, it saves time during voir dire, so certain responses can be explained and explored, etc. We know that judges like saving time, and this can be a major selling point when arguing for the inclusion of a pretrial survey.

Academicians Can be Your Friends

Finally, never underestimate the value of your local university or community college. My students and I have done a substantial amount of pro bono work for the Public Defender's Office of the Twelfth Judicial Circuit. Many academicians are willing to assist capital attorneys at reduced rates and many capable students are usually eager for internship opportunities at community agencies. It doesn't hurt to ask!

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Appendix

Sample Questions from Dispositional Measures

Belief in a Just World

1. I've found that a person rarely deserves the reputation they have.
2. Basically, the world is a just place.
3. People who get “lucky breaks” have usually earned their good fortune.
4. Careful drivers are just as likely to get hurt in traffic accidents as careless ones.

Legal Authoritarianism

1. Unfair treatment of underprivileged groups and classes is the chief cause of crime.
2. Too many obviously guilty persons escape punishment because of legal technicalities.
3. Evidence illegally obtained should be admissible in court if such evidence is the only way of obtaining a conviction.
4. Search warrants should clearly specify the person or things to be seized.

Locus of Control

1. Do you believe that most problems will solve themselves if you don't fool with them?
2. Do you believe that you can stop yourself from catching a cold?
3. Are some people just born lucky?
4. Most of the time, do you feel that getting good grades meant a great deal to you.

Need for Cognition

1. I would prefer complex to simple problems.
2. I like to have the responsibility of handling a situation that requires a lot of thinking.
3. Thinking is not my idea of fun.
4. I would rather do something that requires little thought than something that is sure to challenge my thinking abilities.

Sample Questions from Attitudinal Measures

Attitudes Toward the Death Penalty

1. A judge should have the right to sentence the defendant to death, even if the jury has recommended life in prison.
2. People on death row are permitted to appeal their sentence too often.
3. If there is any doubt about a defendant's guilt, he or she should not be executed.
4. If a defendant on death row wants a DNA test of evidence, the state should automatically grant it.

Attitudes Toward the Insanity Defense

1. If a person is unable to appreciate the wrongfulness of their conduct, then they should be found not guilty by reason of insanity (NGRI).
2. The insanity defense is used on a frequent basis.
3. The insanity defense is a "legal loophole."
4. If a person is unable to control their conduct, then they should be found not guilty by reason of insanity (NGRI).

Homophobia

1. Gay people make me nervous.
2. Gay people deserve what they get.
3. Homosexuality is acceptable to me.
4. If I discovered a friend was gay I would end the friendship.

Implicit Racism

1. Discrimination against blacks is no longer a problem in the United States.
2. It is easy to understand the anger of black people in America.
3. Blacks have more influence upon school desegregation plans than they ought to have.
4. Blacks are getting too demanding in their push for equal rights.

Implicit Sexism

1. Discrimination against women is no longer a problem in the United States.
2. Women often miss out on good jobs due to sexual discrimination.
3. It is rare to see women treated in a sexist manner on television.
4. On average, people in our society treat husbands and wives equally.

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Reactions from trial consultants:

We asked three experienced trial consultants who are ASTC members to respond to Dr. Butler's article based on their own experiences in capital cases. In the following pages, Sonia Chopra, Carey Crantford, and Julie Howe offer their reactions to Dr. Butler's ideas.

**Response to Butler by
Sonia Chopra, Ph.D.
National Jury Project**

First and foremost I want to thank Dr. Butler for revitalizing research in the area of death qualification. Following the Supreme Court's decision in *Lockhart v. McCree*¹ in which the Court chose to essentially ignore solid social scientific evidence demonstrating the conviction-prone and demographically unrepresentative juries that death qualification produces, many academics gave up hope and abandoned research in this area. As someone who was recently asked to write a declaration on the prejudicial effects of death qualification in terms of a non-capital co-defendant's right to a fair trial, it was extremely helpful to be able to point to research conducted and published within the last few years.

From a practical standpoint, research demonstrating the prejudicial effects of death qualification is probably most helpful to attorneys seeking to have the death qualification process modified or limited. Defense counsel can (and should) argue first and foremost against death qualification. Research and practical experience shows

that the defense is hurt worse by death qualification than the prosecution. This is because greater numbers of jurors who have reservations about capital punishment will be lost due to prosecution cause challenges as compared to those who are successfully challenged by the defense for being strong or "automatic death penalty" (ADP) jurors. Individuals who are against the death penalty tend to be less susceptible to attempts at "rehabilitation" by the trial judge or counsel (likely because they are also lower in measures of legal authoritarianism than death penalty supporters as demonstrated by Dr. Butler). While it is unlikely that death qualification will be completely abandoned, defense counsel should, in the alternative, ask for individual questioning of prospective jurors during the death qualification portion of voir dire. This takes into account Dr. Haney's research on the biasing "process effects" of death qualification that Dr. Butler refers to.

Dr. Butler's findings regarding death qualified jurors and locus of control, need for cognition, and belief in a just world are theoretically very interesting and help explain

why certain people are less inclined to weigh and consider evidence in mitigation, and how people will evaluate scientific evidence. In my experience, however, I have found these constructs to be less practical for jury selection. Typically, the prosecution and/or judge will want to argue about many of the questions the defense wants to put on a jury questionnaire. There will be the competing interests of efficiency and information gathering. A judge may ask, "What do those questions about people getting lucky breaks or being about to stop yourself from catching a cold have to do with anything?" Answering that the question is part of the belief in a just world/locus of control scale will not likely get you very far. For the most part, it will be difficult to get any complete scale onto a jury questionnaire². Using one or two questions may be possible, but then there are concerns about scale validity and decisions to be made about which questions to use and which to omit.

The sad reality is that *all* of the jurors on a capital jury are ultimately going to be "death qualified." The primary goal for most capital defense attorneys is

to determine which of these death qualified jurors, because of the strength of their views, personality and beliefs, will *always* vote for the death penalty if they are convinced of guilt, and get them off the jury. A potential juror with an internal locus of control and/or belief in a just world probably *is* more likely to be skeptical of mitigation evidence. But rather than identify these jurors through their completion of a locus of control or belief in a just world scale, I find it more effective to simply ask jurors what they think about the idea of listening to or considering information about a defendant's background, childhood, mental health issues, alcohol/drug use, etc. It is not socially unacceptable to say you don't think these things should matter, and a large percentage of prosecution, ADP jurors will be happy to do so.

Items from two of the scales Dr. Butler has used in her research do have potential to be helpful for jury selection: The Revised Legal Attitudes Questionnaire (RLAQ) (used to measure legal authoritarianism) and the Attitudes Toward the Death Penalty Scale. Even though inclusion of the complete scales would be unwieldy and thus unlikely³, these

scales deal with legal concepts and beliefs about the justice system, therefore individual questions from these measures are less likely to raise objections from the other side and are easier to justify including. I have found that often times it is easier to get a juror excused for cause based on their beliefs regarding criminal justice concepts like the defendant's right not to testify or the presumption of innocence as opposed to a juror's strong pro-death penalty views. The RLAQ can provide some assistance in formulating questions to get at jurors' attitudes on these issues.

I was also intrigued by Dr. Butler's findings regarding death qualified jurors being more aware of case specific facts from pre-trial publicity. The research demonstrating the biasing effects of pre-trial publicity is about parallel to the research on death qualification in terms of breadth of scope and convergent validity. When arguing for change of venue in a capital case, it would be helpful to cite Dr. Butler's research as evidence that pretrial publicity is likely to be an even greater concern in seating a jury, due to the inevitable death qualification process that will take place.

Once again, I applaud Dr. Butler for contributing to the literature on death qualification, and even more so for her willingness to assist counsel pro bono and her suggestion that capital defenders reach out to academic institutions for trial assistance. Many defenders think consultants are out of reach financially, but the reality is that it is becoming more and more common for at least some state funds to be awarded for trial consultants in capital cases.

¹ 476 U.S. 162 (1986).

² For example, the Locus of Control scale consists of 40 items, the Belief in a Just World scale has 20 items, and the Need for Cognition scale has 18 items.

³ The RLAQ is 23 items long, as is the Attitudes Toward the Death Penalty scale.

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Response to Butler
by Carey Crantford
Crantford & Associates

Dr. Brooke Butler does an excellent job of cataloging the major psychological/ demographic factors that influence jury behavior when confronting death penalty choices. The factors she cites provide a clear, useful checklist of influences that profoundly shape a juror's performance when considering a death penalty verdict. Although there might be an argument about some of the demographic components she combines to make up the class of jurors more predisposed to vote for a death penalty verdict, as a whole her list of variables offers practitioners a useful screening tool for classifying jurors during death penalty voir dire.

The dynamics of a death penalty trial are so unique that the ability to adequately define a juror's predisposition to vote for the death penalty does not provide enough information on which to build a successful jury selection strategy. In many areas of the country support for capital punishment is so widespread that the majority of potential jury members are predisposed to vote for the death penalty. The application of an analysis of

the factors Dr. Butler outlines plays a first step role in grading these jury pools. This initial analysis illuminates the worse case choices which are either targeted for disqualification or put on the strike list. Ultimately, both the bias in the selection process and the presence of a large number of death penalty supporters in the pool means that those who favor the death penalty will be seated. The issue at this point is not how to identify them but what to do with them once they make their way into the jury box.

Every juror seated on a death penalty case has affirmed in open court that they believe in capital punishment and can be fair in its application. Prosecutors certainly work hard to reinforce the fairness concept during voir dire. We all want to be regarded as fair and, in a matter as grave as a death penalty case, only jurors who hold very extreme views on the issue seem willing to admit their inability to bring an open mind to the proceedings. Consequently, the jurors who are ultimately seated represent an uncertain group in terms of what factors will determine when a death sentence is warranted. At this point the concern about seating a juror is not so

much about his or her predisposition to applying the death penalty but what will trigger a "fair application" of the death penalty sentence. And gauging how a juror will approach defining what constitutes the "fair application" of the death penalty sentence presents the defense team's biggest problem in forecasting how a juror will act if seated.

Death penalty cases, by their definition, contain the most aggravating of circumstances surrounding the crime of murder. Crimes of this type are always disturbing and difficult to comprehend. But it is precisely the details of the crime which probably have more to do with structuring the "fair application" of the death penalty sentence by jurors who are qualified as eligible to serve. Although schemes like forecasting a juror's predisposition for supporting a death penalty verdict are useful, they do not take into consideration how specific details of the case are likely to influence a fair juror's view of the death penalty sentence. Having some notion of how the details of the case will influence juror types may be the most important analysis a trial team can undergo for two critical reasons. (1) During jury selection the case details are

not known by potential jurors so their notion of fairness can only be tested in the abstract. (2) Before sentencing can be considered, the jury will hear all of the vivid and emotional details of the crime as they are asked to determine if the defendant is guilty or not guilty. Consequently a juror's predisposition to support a death penalty sentence cannot be fully illuminated by even the best psychological/demographic scheme without taking into account how the details of the case either push jurors toward, or pull them away from, considering a death penalty verdict.

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Response to Butler by

Julie Howe, Ph.D.
J. Howe Consulting

Applying research results to the courtroom and to a specific case is not always an easy task for litigators and is often considered one of the benefits of retaining skilled trial consultants. Dr. Brooke Butler's summary of research findings is an excellent place for

capital defense attorneys and trial consultants to start as they draft juror questionnaires and think about voir dire and the information they would like to elicit and learn about jurors.

As someone who sits next to capital defense attorneys in the courtroom and participates first hand in the death qualification process, the factors and concepts Butler identifies have a ring of truth to them. As I read the article, I was able to say to myself: "yes – that's true, I've seen that type of juror," or "yes, that is something I do take into account when I'm evaluating individual jurors, drafting questionnaires or helping attorneys craft their voir dire." Thus, for the most part, the findings line up with my experience observing and evaluating jurors in capital cases. For example, I tend to evaluate more negatively jurors who are politically conservative, hold authoritarian beliefs, have an internal locus of control, seem to have a low need for cognition, appear to be racist, etc. Most importantly, these concepts line up with juror responses in their questionnaires and during voir dire when asked the most direct, straightforward and truly the best indicator of jurors' predisposition in favor of the death penalty: "*How do you feel about the death penalty for a defendant convicted of intentional murder?*"

For a capital jury selection, all potential jurors will be "death qualified." Thus, the pool of candidates from which the jury will be selected is likely to hold many of the characteristics outlined by

Butler. The key is to determine which of the death qualified jurors are the most dangerous to the defendant in a particular case. In actuality, we are really de-selecting a jury.

So, how do we put this research into practice? The process is not as simple as it might seem. It's more than identifying well-researched and valid measures of dispositional or attitudinal differences, inserting them into the juror questionnaire, scoring the measure and picking a jury. However, putting the research into practice is extremely important. The factors and concepts that Butler identifies are ones to think about and try to incorporate into questionnaires and into rating scales when evaluating jurors and deciding peremptory challenges. Litigators and consultants alike might keep the following in mind:

- 1) Juror questionnaires need to be negotiated with the other side and accepted by the court. Capital defense attorneys should think about the strategy for working with prosecutors in developing a questionnaire that is informative, on target for the case and that will be approved by the court. In reality, we might not have the luxury of including the full "need for cognition" assessment. We might only be able to include a few questions from the scale or have to rely on other proxies for the concept. For example, depending on the

information I am able to glean from the questionnaire and during the voir dire, I may need to intuit “need for cognition” based on juror education level, occupation, the type of newspaper read, etc.

- 2) Case issues, specific case evidence, strength of the defense, specific aggravating and mitigating factors associated with the case on trial are central. For example, it’s important to think about the victims and what are the mitigating factors. It may be that the strongest mitigating factors have to do with the victims themselves, not the defendant. If the case does not entail traditional mitigation related to defendant background, abuse, victimization, etc., and the victims themselves are drug dealers or otherwise involved in criminal activity, etc., I might place less emphasis on dispositions like “belief in a just world” as I rate and identify the death qualified jurors whom I need to challenge. Jurors with this predisposition may believe the victims got what they deserved and I might chance keeping such a juror on the jury. Again, depending on the case specific mitigation.
- 3) It’s possible to incorporate many of these concepts into

a juror profile developed prior to jury selection. The most important part of the profile is to identify jurors who are bad for the defense in the specific case. Remember, we are deselecting a jury. Attorneys and their consultants then can develop and use meaningful rating scales to evaluate the juror immediately after questioning to help identify the worst of all the death qualified jurors.

Butler’s comments about capital defendants being at a disadvantage because of the death qualification process are not only a reality, but something capital defense attorneys need to take to heart. Death qualified jurors are conviction prone and are more likely to impose the death penalty than non death qualified jurors. The problem, of course, is that every seated juror will have been death qualified. It is extremely important to address this disadvantage with jurors directly. I encourage capital defense attorneys to stress to jurors:

- 1) We are dealing with hypotheticals only: the defendant has not been found guilty, the only reason the death penalty is being discussed is because it’s our only opportunity to talk to jurors.
- 2) The law never requires jurors to impose the death penalty.

- 3) A unanimous vote is needed to impose the death penalty. Therefore each and every juror’s decision is important. Jurors should respect each others viewpoints and no juror should be pressured for their vote. If jurors are not unanimous then the defendant will be sentenced to life. A life sentence does not have to be unanimous. (Note: Florida is the only state in which unanimity is not required for a death sentence.)

Further, jurors should be asked, in the questionnaire and in person, if the emphasis on the death penalty has led them to believe the defendant is probably guilty or deserving of the death penalty and if they have any doubts about their ability to presume this defendant innocent and consider a life sentence.

In conclusion, I agree with Butler – the best way to pick a capital jury is to ask attitude specific questions and her article provides a nice starting point for capital defense attorneys. It highlights important concepts to keep in mind when evaluating death qualified jurors and identifying peremptory challenges. It also points the attorney and consultant to specific measures shown to be valid in identifying pro death penalty jurors. The capital defense attorney, however, also needs to keep the specific issues in his or her case in mind and incorporate questions designed to understand the

circumstances under which a death qualified juror would be more likely to impose the death penalty. The focus of a capital jury selection is not just to identify jurors predisposed to vote for the death penalty, but to identify the jurors who are most likely to vote for the death penalty in the particular case at trial.

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How to Successfully Integrate an iPod into your Litigation Practice

By: David W. Mykel, M.A.
Courtroom Sciences, Inc.

Apple's iPod has infiltrated every aspect of our lives (music, videos, movies, television), so it is no surprise that it is now being used in litigation practices nationwide. In this article, I will walk you through the various ways in which you can turn an iPod into an effective ally for your litigation practice. Some of these uses include: playing audio files, viewing exhibits, watching videos, recording notes and even transferring files.

As litigation becomes more and more digitally oriented, it's easy to see how an iPod can be an attorney's best friend, next to, of course, his/her Blackberry!

Every year, attorneys look for more ways to increase their efficiency, bill more hours and overall make life easier. Imagine you're working from your laptop at 35,000 feet: reviewing video deposition testimony, reading over transcripts, documents and viewing case photos. Now imagine doing all of this without having to carry around a bulky laptop, mouse, power source and a bag. Can you? Probably for an expensive price tag, right? What if I were to say that you could accomplish this with something you already own? Now imagine doing all these things as well as recording your "on the fly" ideas, proofing PowerPoints and listening to some relaxing music all while in the back of a sedan. This is how technology like the iPod has revolutionized our daily lives. Our work has become ultra efficient AND ultra portable.

We all know that iPods play music but as technology advances, they are taking on more and more tasks for the technically savvy user. The newer version (and some older versions as well) can now play music, view pictures, act as an organizer, store files, record audio and watch videos.

Just take a look at your basic iPod: <http://www.apple.com/ipod/ipod.html>

So you may be asking yourself, how can I use this for my litigation practice? The iPod fills the void as a litigation tool that is user friendly, can complete all the above tasks and is ultra portable.

Imagine having the ability to walk into a deposition, hand your iPod to the court reporter, have her download the deposition transcript, hand it to the other side and have them download all their exhibits, then hand it to the videographer and download the deposition video onto it as well. As you're waiting for your cab,



you take some beautiful pictures of the city skyline at sunset and download them to your iPod to share with your family. Now you're sitting in the cab on the way to the airport, listening to your favorite music to unwind for the plane ride. Once you board the plane, you can review the deposition, read the transcript, examine the exhibits and record your thoughts without having to worry about your battery dying (8+ hour battery life). Once you land, you can show off those beautiful pictures on your high resolution screen, all with one handheld device.

View Videos

Today, an iPod is similar to a mini computer. In fact, it operates on very similar principles. However, since it was built primarily as an audio player and evolved into a multimedia device, some files (video and text) need to be converted for compatibility. In order to ensure video compatibility, you will need to use Apple's proprietary player iTunes.

Note: iTunes will support all video formats that can be played in QuickTime

Some videos may be ready for use with an iPod after you import them to iTunes.

To view these videos:

1. Open iTunes
2. Open folder where videos are located
3. Drag the video file to your iTunes library.

If you try to add a video to your iPod and a message says the video cannot play, then you must convert the video for use with iPod.

To convert a video for use with iPod:

1. Select the video in your iTunes library.
2. Choose Advanced > "Convert Selection to iPod."

The most commonly available and widely acceptable format of video for this application is MPEG1. This format is utilized by most videographers and the ONLY format that can be used in trial presentation software like Sanction and Trial Director. Noting this, please be sure to request that the videographer provides the deposition video in MPEG1 format.

Adding videos to your iPod follows the same procedure as adding songs. You can set iTunes to sync all videos and audio files to your iPod automatically when you connect it, or you can set iTunes to sync only selected playlists. Alternatively, you can manage either manually. Using this option, you can add videos from more than one computer without erasing ones already on your iPod (this is especially helpful if you're sharing these files with different colleagues).

Listen to Audio Files

By default, your iPod is set to sync all songs and playlists when you connect it to a computer. This is the simplest way to load A/V files onto an iPod (you just connect your iPod to the computer, let it add songs, videos, and other items automatically, and then disconnect it and go). Loading songs into iTunes is just as simple as dragging and dropping in any other Window's application.

Automatically syncing is the easiest and most user friendly way to load items on your iPod, it is not the most efficient when dealing with multiple computers and files from your colleagues. If you are going to use an iPod

successfully in your litigation practice, you are better off managing your files manually. Setting iTunes to let you manage iPod manually gives you the most flexibility for organizing A/V files on an iPod. Also, you can load audio and video files from multiple computers to your iPod without erasing existing items, which is extremely beneficial when receiving files from the other side (refer to deposition example above).

Note: Setting the iPod to manually manage music and video turns off the automatic sync options in the Music, Movies, and TV Shows panes. You cannot manually manage one and automatically sync another at the same time.

To set iTunes to let you manage music and video on iPod manually:

1. In iTunes, select iPod in the Source pane and click the Summary tab.
2. In the Options section, select “Manually manage music and video.”
3. Click Apply.

View Photos and Exhibits

As previously mentioned, you have the ability to manage and view photos and case exhibits on your iPod manually or as a slideshow. The most commonly used format of photos is JPEG (.jpg), which is compatible with an iPod. However, the most commonly used format for exhibits (TIFFs and PDFs) are not automatically compatible with an iPod. In order to overcome this slight inconvenience, be sure to request case exhibits in JPEG (.jpg) format.

Once you’ve handed opposing counsel your iPod, have them follow these simple instructions in order to download case exhibits.

To add photos from a folder on your computer to an iPod:

1. Drag the images you want into a folder on your computer.
If you want images to appear in separate photo albums on iPod, create folders inside the main image folder, and drag images into the new folders.
2. In iTunes, select iPod in the source list and click the Photos tab.
3. Select “Sync photos from:...”
4. Choose “Choose Folder” from the pop-up menu and select your image folder.
5. Click Apply.

When you add photos to iPod, iTunes optimizes the photos for viewing.

Full-resolution image files aren’t transferred by default. Adding full-resolution image files is useful, for example if you want to move them from one computer to another, but isn’t necessary for viewing the images at full quality on iPod.

To add full-resolution image files to iPod:

1. In iTunes, select iPod in the source list and click the Photos tab.
2. Select “Include full-resolution photos.”
3. Click Apply (iTunes copies the full-resolution versions of the photos to the Photos folder on iPod).

Viewing Photos on iPod:

1. Choose Photos > All Photos. Or choose Photos and a photo album to view only the photos in the album (keep in mind, thumbnail views of the photos might take a moment to appear).

2. Select the photo you want and press the Center button to view a full-screen version.

Organize Your Life

An iPod can do a lot more than just play multiple A/V files. It can also be used as an external disk, alarm, or sleep timer; show the time of day in other parts of the world; display notes as well sync contacts, calendars, and to-do lists. When your iPod is enabled as an external hard disk it can be used to store multiple data files, similar to a portable hard drive (thumb/jump drive).

Please Note: In order to add music and other audio or video files to iPod, you must use iTunes; however when using the iPod as an external hard drive, you can simply drag and drop files.

To enable iPod as an external disk:

1. In iTunes, select iPod in the source list and click the Summary tab.
2. In the Options section, select “Enable disk use.”
3. Click Apply.

*When you use iPod as an external disk, the iPod disk icon appears on the desktop on Mac, or as the next available drive letter in Windows Explorer on a Windows PC.

Not only can your iPod act as a jump drive, but it can also function as an organizer, similar to today’s Palm Pilot or Blackberry.

Sync Contacts, Calendars, and To-Do Lists

If you’re using Mac OS X v10.4 or later, you can use iTunes to sync the contact and calendar information on iPod with Address Book and iCal. If you’re using any version of Mac OS X earlier than 10.4, you can use iSync to sync your information.

If you’re using Windows XP and you use Windows Address Book or Microsoft Outlook 2003 or later to store your contact information, you can use iTunes to sync the address book information on iPod. If you use Microsoft Outlook 2003 or later to keep a calendar, you can also sync calendar information.

To sync contacts or calendar information:

1. Connect iPod to your computer.
2. In iTunes, select iPod in the source list and click the Contacts tab.
3. Do the following:

In order to sync contacts, in the Contacts section, select “Sync Address Book contacts,” and select the option to either sync “all contacts” or “selected groups.”

Similar to devices like Palm Pilots and Blackberries, an iPod has the ability to view documents. One of the main differences between the devices is that in order for an iPod to display documents, they have to be in a certain format. Noting this, always be sure to ask paralegals, staff and/or court reporters to provide the documents in text (.txt) format. Once your iPod is connected to a computer and the files are in .txt format, simply drag and drop the files (just like you would in any Windows Explorer application).

Record Voice Memos

In addition to these features, you can also record on-the-fly voice memos using an optional iPod-compatible microphone. You have the ability to store voice memos on iPod and sync them with your computer just like A/V files. Voice recording can be saved as either low-quality mono (22.05 kHz) to save space, or high-quality stereo (44.1 kHz) for better sound.

Note: Voice memos cannot be longer than two hours. If you record for more than two hours, iPod automatically starts a new voice memo to continue your recording.

To record a voice memo:

1. Connect a microphone to the Dock connector port on iPod.
2. Set Quality to Low or High.
3. To begin recording, choose Record.
4. Hold the microphone a few inches from your mouth and speak. To pause recording, choose Pause.
5. When you finish, choose Stop and Save. Your saved recording is listed by date and time.

To play a recording:

1. Select Extras > Voice Memos and choose the recording.

Voice memos are saved in a Recordings folder on iPod in the WAV file format. If you enable iPod for disk use, you can drag voice memos from the folder to copy them.

So as you can see, the iPod truly is a “little white wonder” and can be used for a variety of everyday tasks and across multiple platforms in your litigation practice. Now, that you possess the know-how put down that bulky laptop, power adapter and pick up your iPod!

****most instructional information quoted directly from Apple manual****

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Witness Preparation: Hidden false assumptions, Real truths and Recommendations (Part One)



By David Illig, PhD
Litigation Psychology

Introduction

Attorneys and witnesses make basic assumptions that greatly impact their behavior both in preparation for testimony and testimony itself. Some of the assumptions are accurate, very obvious and attorneys consciously know they are using these assumptions. These assumptions are “in awareness and fully conscious” to attorneys and witnesses. However, attorneys’ and witnesses’ actions, behaviors, attitudes and approaches betray these assumptions.

Instead, their behaviors, actions, attitudes and approaches are more consistent with other “false assumptions.” Too often these “false assumptions” operate at another level of brain process which is not in full awareness or full consciousness. They happen outside our awareness in the unconscious like background computer programs which are operating that you can’t tell are having an impact. Attorneys and witnesses use these unconscious assumptions without knowing it, like the giant purple dinosaur sitting in a room that nobody mentions.

Over time, I will lay out a series of frequently operating “unconscious” false assumptions and clarify what the more correct assumption should be to ensure effective witness preparation for attorneys and for witnesses. Finally, I will provide some recommendations about changing your witnesses’ assumptions, changing their behaviors and demonstrate what witness preparation can look like when you follow more correct assumptions.

If **YOU** are aware of the false assumptions held by many in the litigation field that can sneak up on you, and you take them into account in your practice, you will have a strong competitive edge over your adversaries and your peers. You will get better results and your clients will greatly benefit. This article lays out numerous false underlying assumptions about witnesses, testifying, deposition and trial testimony, as well as witness preparation. Your first reaction might be that that you and your peers rarely use these false assumptions. They seem so obvious. That is the magic here. These false assumptions are often in operation, even when we think they cannot be.

False Assumption 1) Witnesses are prepared for testimony through their everyday communications and experiences.

Put another way, our normal life experiences prepare us for being interrogated by a professional interrogator who is extremely experienced, skilled, and well trained. Perhaps our normal life is good preparation, and being interrogated is not that difficult. Perhaps not much preparation or practice is really needed. (Cross examination or deposition is truly an “interrogation” and will be referred to as such. Direct examination is basically a critically important interview that tells a story through the questions and the answers.)

This is one of the most powerful, and most consistently operating hidden FALSE assumptions in the litigation field. It operates in average, good, and in great attorneys. More so than anyone would want to admit. It continues to operate just because it is so obviously wrong and presumed not to be operating.

This assumption suggests that most people will be able to testify well and therefore little preparation is needed or performed. Given the many thousands of hours of depositions that attorneys sit through, it's not surprising their brains lose awareness of both how familiar *they are* and how *unfamiliar* their client is with the process of interrogation. Attorneys lose track of what an unusual universe they spend their lives in. Witnesses do not live in the world of interrogation.

The reality is that interrogation by an expert is extraordinarily different than most life experiences. It's very different than typical questions and answers in normal everyday life. The professional interrogator's goal is to make a witness look bad, support their own side of the conflict and weaken the story of the witness.

The reality is that being interrogated by a trained and skilled interrogator is very, very difficult for the witness. It is an unusual and strange situation for almost every witness and almost every witness requires preparation and training for extremely difficult and unusual tasks.

A corollary to this false assumption is that honest, sincere, intelligent, competent, innocent, educated, smart and likable witnesses will most likely be good witnesses in deposition and/or trial. Therefore they do not need much preparation.

There is very little correlation between these positive attributes and success as a witness. They often make very poor witnesses without training. Skillful interrogation is designed to make honest, intelligent, competent, smart, educated people look bad and reduces their ability to get their accurate story out. Most interrogation techniques are developed to be used against smart people, they frequently lead to inept, inaccurate, or untruthful responses.

What You Should Do About This Assumption:

First, you need to recognize it as a false and common assumption. Most witnesses actually believe their experiences prepare them for deposition or trial. Teach witnesses that deposition and trial testimony are very *different*, and very *unusual* compared to their life experiences. Teach them it is *difficult* to do. It is not like their normal life and that many normal typical patterns will not work in testimony.

The witnesses need to be told that they will have to learn new unusual behaviors and patterns in order to be a really good witness. Teach witnesses that even though they are a successful CEO or a brain surgeon, or an honest minister, they will still have to learn new patterns and give up some of their old ones. Persuade witnesses that this learning will take training and practice.

Ironically, the more professional, educated, and experienced the witness, the more you may have to work to communicate to them that the interrogation situation is both different and difficult. You need to teach them that no matter who they are they still need deposition/trial training and practice. And it may happen despite their kicking and screaming.



If you can't get your witness to agree to training and practice, try convincing them that you need to do a "full assessment" of their testimony to reassure you, the carrier, your partner, them, or somebody. The full assessment should be a formal simulation of their deposition, cross or direct. Record the whole thing on video. Then analyze it and show them where they were weak and how training and practice might improve their performance. Make them watch part of the video if they can handle it. Most witnesses will need additional work and will show improvement. Most will want to do it.

False Assumption 2) The honest witnesses' truth is more likely to be communicated than something other than their truth.

Put another way, getting the truth across during testimony is a "natural act," and the most likely outcome. However, getting something other than the truth out of a truthful witness is actually the most likely natural event. It has nothing to do with lying. Under the bizarre and stressful conditions of skillful interrogation, the truth is the improbable outcome, not the most likely, especially with an untrained witness.

A witness has to fight to get the truth out and across to their audience. Witnesses operate under the assumption that if they are *intending to be truthful* then the truth is what comes out and gets across to the audience. In other words, if they are *being* truthful, then the truth easily does come out and gets to the audience. That assumption is wrong.

What tends to come out of a witness under expert interrogation "naturally" is quite often something other than what gets the truth across and is often an inaccurate picture of the witness. This is called: "**The Interrogation Effect**" (IE).

There are many components to the IE. It affects both the content and the impact of the witness and the testimony. Years, thousands of hours of depositions, as well as formal training of the attorney build the IE effect. The setting of interrogation and the interrogation process itself can have a huge and often hidden impact on the target witness. An experienced interrogator exerts numerous and powerful subtle and non subtle influences, many of which the interrogator is unaware. And many of the interrogation influences are not detectable to the witness. But they are very powerful. *The "Interrogation Effect" significantly impacts almost every witness.*



Some experts in the field of hypnosis actually say that part of the IE impact is basically hypnosis, which they define as unconscious influence. It is directed by someone in opposition to the truth of the witness and who is offering an alternative truth. I once had a surgeon-witness give an answer during deposition training of the number "thirteen." He stopped about five minutes later, shortly after we taught him to correct any errors as soon as he noticed that he had made one. He told us that that answer wasn't "thirteen." We asked him what the correct answer was, thinking that maybe it was eleven, ten, nine, or eight. Instead, he told us the correct answer was "one"! When we asked him why he said "thirteen" he said he didn't know except that he felt this huge urge to give a much bigger number and he couldn't stop himself. He was stunned. After that he became a really good student. Ironically, the question was a trivial one: "How many med schools had you applied to?" But his brain played a trick on him. The IE impacted his brain.

A corollary to this false assumption is that honest, sincere, intelligent, competent, innocent, and likable witnesses won't have significant difficulty getting their truth across under interrogation.

A witness does not know this is false and nobody usually tells them. You need to. Once again this applies to honest, intelligent, competent, sincere and likable witnesses. Almost all the difficulties of interrogation apply fully to all types of people. The Interrogation Effect has a large impact on all of them. Fighting for the truth against a skilled experienced interrogator is not easy or probable from a witness just because they are honest and likable or competent in their world.

There is little correlation between being able to get the truth across under interrogation and being honest and likeable. No more than being likeable and honest or an M. D. makes you a good comedian, or speech maker. Almost all people need support, training and practice to succeed in this unusual environment.

What You Should Do to Deal with this Assumption:

Teach the witness that getting the truth across takes lots of work, effort, and intensity. They have to be very clear about what their truth is and you can help them. Then they have to work very hard to get it across to their audience. Teach the witness that they have to fight against the interrogation effect and they have to fight for their truth.

That is *different* than fighting the interrogator. In fact, fighting the interrogator is usually one of the seductions of the interrogator effect. Instead of fighting for the truth the witness ends up fighting the interrogator. Teach witnesses that they have the right to fight for their truth. This *is not* attempting to get the opposition attorney to agree with them. It is making sure that their clear truth is stated firmly, strongly, and clearly so the audience knows what they believe their truth to be. Teach them repeatedly that they *have permission* and *duty* to state their truth as they see it. *And they must*. Teach them to resist the Interrogation Effect. Teach them to determine what is their truth, and teach them to state their truth clearly, strongly and effectively.

Next issue we will cover more False Assumptions and Truths about Witness Preparation and testifying in deposition and trial. Start using these initial ideas today.

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What Do You Hear When You Listen?

Five Principles with Tips for Developing Critical Listening Skills

by Diane F. Wyzga
Lightning Rod Communications

A mother's ear is attuned to hear her baby's cry. Each of us has had the experience of sitting bolt upright in bed having heard a "bump in the night." There is a critical difference between hearing and listening

although we often exchange one action for the other. And what is that difference? To listen means 'to hear with thoughtful intention'. When we listen, we actually attend to the speaker's verbal and nonverbal messages.

When I teach critical listening skills to lawyers, I coach them to listen with awareness. How come we must listen with awareness instead of merely hearing? Awareness improves the chance that we hear the message accurately, acknowledge the desires, and address the concerns. Following are five principles and related tips designed to help you use critical listening skills when meeting with clients, colleagues, judges, adjustors, and mediators. To narrow your focus and keep your listening on track remind yourself to ask: (1) To whom am I listening?, and (2) What do I want to learn?

Principle #1: Listening Establishes a Two-way Relationship to Improve Understanding.

"We are lonesome animals. We spend all of our life trying to be less lonesome. One of our ancient methods is to tell a story begging the Listener to say - and to feel - 'Yes! that is the way it is, or at least that is the way I feel it. You are not as alone as you thought.'" [John Steinbeck].

The downside of Blackberries, text messaging and automated phone system technology has been to isolate us one from the other. Our society has become a sound-bombarded, disoriented mess. We say we have no time to listen. Yet, think about it: how did it make you feel to receive someone's undivided attention for say, two uninterrupted minutes? It's a gift. We owe it to ourselves to give and receive the gift of listening. How else will we tell our stories? How else will we hear the stories we need to tell?

Yes, attorneys are advocates. We are taught to prize the spoken word. Law school taught us that the louder we spoke, the more forcefully we spoke, the more frequently we spoke we would be sure to hit on something that someone would listen to. Yet, like the silence between notes of music, like the pause before the punch line, attentive listening draws out a willingness to relate. In this day and age of dear, animosity, and confusion we need relationship based on listening.

Let's begin with the initial contact between the attorney and her client. And what do we call this initial contact? The attorney-client relationship. A typical approach for many attorneys is to ask a series of rapid-fire questions which force the client to answer factually. The attorney asks questions designed to elicit information to tell her if there is a viable legal cause of action. What the client wants to know is whether the attorney has heard the story being told. The client's story takes place within a context, a set of circumstances that make the facts meaningful to the client. The response the client is looking to hear is that the attorney "gets it". If the attorney has listened attentively and reflected back to the client, the client will become a better ally with the attorney in the legal problem. Why is this so? Because the client now believes he is not as alone as he thought.

Tip: Listening is a gift generally. When we listen with awareness we elevate the conversation to a relationship that improves understanding between the parties. The next opportunity you have to listen to a friend or family member, practice listening for several minutes without interrupting the thought process - or story line. It may be helpful to nod your head to let the person know you are present to what they are telling you. Consider asking yourself how it felt to listen to that person without interruption. Next, practice this skill with a new client. Let them begin to tell you the story of what happened to them without it being fractured by a series of questions. I guarantee you that you will improve your understanding of the client's situation. The client will understand better that a lawyer is a counselor at law. And counselors listen.

Principle #2: Attend to the Speaker's Underlying Messages.

"There is no greater burden than carrying an untold story." [Zora Neal Hurston].

Attorneys frequently face situations where they must listen to the disenfranchised - those who have no voice or believe they have no voice. This person wants to tell you their story so you can help them figure out their legal problem. But oftentimes they have no clue where to begin, what you need from them, or even how to move through the shame of their particular situation. Recall: attorneys are first and foremost counselors at law. And this is where the counselor side comes out: with listening that attends to the speaker's underlying message. Along with the facts you are listening for feelings, attitudes, biases, concerns, and fears.

When we become aware of the undercurrent that flows beneath speech and action we are better able to understand the reasons people think and behave as they do. We can easily discern the goals or needs of our clients by simply paying close attention. Their words and the preferences they express can provide us with insights into their intentions, needs and desires even if they are doing their best to hide their thoughts and feelings from us.

Tip: Consider voir dire. When people respond to a jury summons, they gather at the court house to form a pool of potential jurors from which they are called in groups for specific criminal or civil trials. Attorneys for each side and/or the trial judge question the prospective jurors about their background, life experiences, and opinions to determine whether they can weigh the evidence fairly and objectively. This process is called voir dire, an Anglo-French term meaning "to speak the truth."

Unfortunately, "speaking the truth" is not something that comes naturally to a juror, especially when answering personal questions in a group of strangers. If the attorney is not turned to listening the speaker's underlying messages, she will likely take statements at their face value and miss the more accurate response which is layered and shaded. Be prepared to ask your question in slightly different ways about three or four times to reach the most authentic reply possible in that setting. Some openings you can use in voir dire: Of all the things that could bother you about this case, what one thing is bothering you the most? And how come? How did you arrive at that position? Behind every

position a person holds there is a story. You want to know the story to understand the position, how deeply it is held, whether that position works for or against your client.

Pay attention to three things: (1) the facts they use to answer your question, (2) the emotion they use to express themselves, and (3) the intention behind the words. You might hear energy, boredom, fatigue, doubt, confusion, or enthusiasm. The way words are spoken informs the attorney about underlying messages. And reminds us that “It’s not what we say; it’s what they hear.” [Frank Luntz]

Principle #3: Encourage Disclosure Without Judgment.

“Listen. Do not have an opinion while you listen because frankly, your opinion doesn't hold much water outside of your Universe. Just listen. Listen until their brain has been twisted like a dripping towel and what they have to say is all over the floor.” [Hugh Elliott].

My storytelling mentors taught me that I knew the story I wanted to tell. Their job was to listen it out of me. Today, I use the same approach. I begin with the belief that my client, the attorney, knows the story they want to tell on behalf of their client. My job is to listen so completely that I can coach the attorney to identify what his client’s story is really about. Only then will be able to shape it, choose key visuals that fortify the content and deliver the story as opening statement and closing argument. During the process of discovering the true story I must be able to encourage the attorney to speak in an atmosphere of complete acceptance so we can distill the true legal story from the plethora of facts and evidence and distortions and distractions.

How often has someone acted as a ‘sounding board for you? My guess is they listened frankly, without judgment, and asked open-ended questions. They encouraged you to speak your mind without fear of judgment or embarrassment. One of the key factors to listening without judgment begins with setting up an atmosphere that encourages your client to believe that you are listening fully, even to stories that are difficult or shameful. Do this well and you will get the skeletons hiding in your client’s closet before opposing counsel discovers them in deposition.



Tip: “Tell me more” is the most invaluable statement you can ever use to encourage someone to speak. This phrase takes the burden off the attorney to keep on crafting questions when all you may need at the time is to hear the client’s guided narrative. A similar technique you can use in a group setting, such as voir dire, is to ask the “who-who-who” questions: who thinks, who sees, who feels, etc. Likewise, to encourage conversation in jury selection, leave aside the word “any” as in “anybody have something to say?”, “any more questions?”, or “anything else?” The word ‘any’ effectively cuts off conversation. Think about this the next time your waiter asks you, “Do you want anything else?” You might have been considering coffee and dessert but you end up asking for the check.

Principle #4: Ask Questions That Elicit Desired Factual Information.

“We want the facts, ma’am, just the facts.” [Sgt. Friday - Dragnet]

Once you have heard the client’s narrative, it is time to narrow the field and seek facts. Facts are content. Facts are evidence. Facts help get the job done. When we listen for facts, we are listening for *what* is said. How will your client know you are listening for factual information? Clue in the client by asking closed-ended questions.

Tip: A closed-ended question is one which can be answered with “yes,” “no,” or factual data. Closed-ended questions often begin with words like “do,” “did,” “have,” “can,” “will,” and the like. Begin by asking yourself, “What one question would I ask if I could ask only one?” This focuses your inquiry. Next, ask yourself, “What else is important?” Finally, ask, “How will knowing that one thing help me understand the situation?” Then ask the Speaker for the facts. In the alternative, if you want more narrative or context with the facts, ask open-ended questions favored by journalists which begin with the words: who, what, where, when, how, and how come (instead of ‘why’).

Principle #5: Discourage Defensiveness.

“Know how to listen, and you will profit even from those who talk badly.” [Plutarch].

Wanting to be heard is a natural response. The 21st century pace does not let up hurling information in sound bytes faster than we can comprehend them. Our defense is to begin jockeying to get a word in edgewise just so we can be heard. And the truth of the matter is that when everyone is jockeying to be heard, no one is heard. It happens when the attorney is not listening to what’s being said and is listening in their head to the next thing they want to say.

Tip: Let go of the question “Why?” “Why?” is heard defensively. Think about it: you forget an important dinner date. You are asked “Why?” And you want to defend your actions in some way. The immediate defensive response takes you both into a rabbit warren of excuses all because the word ‘why’ triggered a defensive response. Instead, substitute the word ‘because’ and ask it as a question. You can use this in voir dire, depositions, client interviews. For example, the research is incomplete because....? You will do two things for the person you are asking: (1) remove the defensive trigger, and (2) enable them to complete their thought. Another tip is to encourage discussion or solicit views and opinions by asking this series of questions in voir dire, “What are your first impressions of what you just heard?” And follow it up with, “What else comes to mind?” “How did you come to see it that way?” “How did you arrive at that position?”

Conclusion. A mother’s ear is attuned to listen to what her baby’s cry is telling her. Our particular sensory skills tell us what to listen for when we hear a “bump in the night.” When people talk to you, listen completely. You will help others tell their story by simply paying attention to the verbal and nonverbal signals they project. After today, you will hear differently because you are listening.

Diane F. Wyzga, RN, JD (diane@lightrod.net) helps more attorneys win more cases more often 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 desired 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. Diane specializes in legal strategy, focus groups, opening statements, witness preparation, and jury selection.

Becoming Real

This is our first on-line edition of The Jury Expert. The labor was prolonged. We want to thank the authors in our first issue (and in those to come) for believing in this new digital concept of TJE and making its very existence possible by writing about their work. The Board Members of the American Society of Trial Consultants also deserve thanks for allowing us to dream big and to stretch the parameters of The Jury Expert into a living and breathing and changing entity.

We will continue to evolve over time based on your feedback and as we learn what works well and what we could rethink. Please send us your feedback, ideas, and perspectives on how we can make TJE a "must read" publication for litigators.

Send your comments to us at: EditorTJE@astcweb.org.



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