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

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The "Why" and "How" of Focus Group Research

By Douglas Keene, Ph.D.

Why focus groups?

Properly conducted focus groups are extremely useful in getting reactions to a wide array of aspects of the case. While it is not prudent to expect that the "verdict" of a small group research project will be repeated at trial, it is very likely that the same values, hot buttons, and sensibilities that engage the research group will resonate in the jury room.

- What do jurors want in the way of persuasive evidence? Brainstorm with them about the evidence that they used to come to their conclusions, and what additional evidence they would need to change their minds.
- What will a jury think of the witnesses? Show brief tape excerpts from depositions and solicit feedback.
- What sorts of demonstrative evidence will be helpful in getting this story across? Devise a focus group to examine what you have in mind and offer suggestions.
- What themes and language resonate most effectively with jurors who hear this set of facts? Lay out the story and get the group to describe their associations, impressions and reactions to the situation.

The premise

Focus group participants are ideally very savvy. You are not looking for opinions off the street. You are looking for people who will influence deliberations when the jury room door is closed. To engage them fully in the process, it is important to elevate their role from partisan to peacemaker. The moderator should tell them that they are there at the behest of *both sides* in a dispute that is

American Society of Trial Consultants

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

WHAT'S INSIDE

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headed for the courthouse. The litigants are blind to what real people think of the case, and it is [the moderator's] hope that the collective wisdom of the focus group will offer both sides a basis for coming to a resolution of the dispute without the need for trial. Their impressions and conclusions will be extremely important in that process, and will be provided to the lawyers to share with their clients in a lengthy report. It makes the participants key players in an important process.

It is far less productive to allow them to think that they are working in the interest of one side or the other. That stifles openness. And this premise must be maintained with complete fidelity from start to finish. Never tell them anything different, or they will feel betrayed. If you lied to them about that matter, they are free to lie to you about their confidentiality agreement. Plus, you have stolen their good feeling about trying to end the conflict.

When preparing for a focus group or a mock trial, the goal needs to be to test the strength of the opposition, more than to see what the range of damages is or whether you will "win" at the end of a three-week trial.

Constructing your presentation

When preparing for a focus group or a mock trial, the goal needs to be to test the strength of the opposition, more than to see what the range of damages is or whether you will "win" at the end of a three-week trial. This is small group research, and it should not be considered predictive of a full jury trial. As all trial lawyers know, trials rarely go as anticipated. Rulings on evidence, performances by key witnesses, the composition of the jury, and myriad other factors all offer uncertainty about what will happen in court, and cannot be precisely replicated in pretrial research. What is far more reliable, though, are the values, sensibilities and evidentiary requirements of jurors in their efforts to understand what underlies the dispute. If you know what jurors are likely to find most compelling about the case, and the social and personal values that are likely to drive decision making, you are in a position to modify your trial strategy to maximize those effects.

The smartest strategy in conducting pretrial research is to construct a presentation that gives the opposition the benefit of the doubt on all unknowns:

- Assume all evidentiary rulings go against you.
- Offer a greater percentage of the evidence and case theories favored by the opposition.
- If you have evidence or testimony that is devastating to the opposition's case (the elusive "smoking gun") hold it back and see if the case survives its absence. You might introduce it after the deliberations start as additional data for consideration.
- If deposition video clips are shown, make sure that the segments used for opposition witnesses are as flattering as possible, and hold back on the best parts for your own witnesses.

The principle is that you want to challenge your case as vigorously as possible, in the way that a battleship is taken out to test seaworthiness before it is sent into battle. See what additional resources are required to meet your objectives at trial. Learn where the case springs leaks, and if it sinks completely, find out in time to bolster the weak areas.

Different groups for different objectives: concept focus groups, structured focus groups and mock trials

Concept focus groups resemble a brainstorming approach to developing themes for trial. This approach is akin to the discovery phase of trial preparation, and is most often used in that time frame of the case development. Concept focus

group participants serve as community attitude consultants, responding to issues and facts of the case, telling us how to construct the story, and guiding us as to the most important avenues to explore in supplemental discovery or depositions. They tell us about biases that are going to show up at trial, and provide ideas for how to deal with them. When land mine issues are encountered, they let us know, and give invaluable help on areas for discovery that have been overlooked.

Structured focus groups involve a set presentation, usually of facts and arguments that are anticipated at the time of trial. Structured groups, like mock trials, are also helpful for the trial team in that to do them well requires thorough consideration of what the themes and strategies of the opposition will be. The length of the group sessions, as well as the size and number of groups to be run, are areas of flexibility. A thorough report of the groups examines the value and impact of each element of the presentation, as well as addressing specific questions and issues of concern about the cases.

If you know what jurors are likely to find most compelling about the case, and the social and personal values that are likely to drive decision making, you are in a position to modify your trial strategy to maximize those effects.

Mock trials are a more formal and thorough approach to case testing than focus groups, but the goals are similar. Mock trials typically involve presentations of evidence and argument, witnesses (either through video tape or live using actors for the opposing witnesses as well as the actual witnesses from your side), formal use of demonstrative evidence, evaluation of the impact of opening statements, witnesses, evidence and closing argument. Feedback from the mock jurors usually takes the form of observing their deliberations and having them (individually and/or as a group) complete mock verdict forms. This can be supplemented with additional questionnaires at points during the trial presentations, as well as additional written questions at the end of the event. Normally, mock trials do not have moderated deliberations. Mock trials offer a more formal structure, closer to the style of a mini trial or summary jury trial, but what they can lose in the process is the information gleaned from teasing out the meaningful elements of the presentations that comes from skilled moderation of the discussion. For cases that warrant a mock trial, the normal approach is to conduct preliminary focus groups about crucial aspects of the case.

The form of the presentation

In concept focus groups, the "presentation" is typically made by a very experienced trial consultant, sometimes with the assistance of one of the trial counsel to make sure the facts are immediately at hand when needed. Although it may look simple, it is actually the form of research that requires the most skill and experience. Many trial consultants do not conduct them at all. When it is done properly, however, the results can be remarkably productive.

The presentation is more like a brainstorming session with the jurors, telling them a bit about the story, and eliciting reactions from them about the facts, while also asking them what questions those facts prompt in them. The outline of facts and issues that are to be covered in the session is agreed upon with the trial team, and key documents and evidence are arranged ahead of time.

Over the course of the presentation, the scope is covered, although an energetic group often results in the order shifting somewhat. An experienced consultant will be able to get jurors to explain why their questions are meaningful to them, what they will do with answers in one direction or the other, the part the answers will play in their assessment of the case. The consultant can gauge which of those questions should be answered directly and which are better left unanswered at that point in the process. Skilled consultants are especially good at eliciting high levels of comment from jurors, and keeping the more talkative jurors from

dominating the discussion too much.

In structured focus groups, the presentation options are very different. The first question is with regard to roles. The trial consultant in this case serves as a group host and moderator. He or she establishes with the group confidentiality issues and the value of their input, and sets the tone and agenda for the presentation.

When you conduct the focus group with an "adversarial" approach, more like what you would think of as being a mock trial, there are ways to structure it to get more useful results:

- First, have the trial consultant read a preliminary statement of facts not in dispute, and perhaps a brief statement of the positions of the parties. That takes the parts of the story that are easy for the jurors to agree with out of the plaintiff's hands, and provides more balance to the presentation, both in terms of time and content. It also streamlines things.
- Second, have the attorney who knows the case best play the role of opposition counsel. They will know where the hot buttons are.
- Third, if you are going to show any demonstrative evidence, such as PowerPoint™ slides or graphics, make sure that there is balance in the plaintiff and defense presentations. If one side has a slick PowerPoint™ presentation and the other side is using a flip chart, the different presentation types can skew the results.
- Fourth, if there are going to be video clips from depositions, be cautious about whose voice is going to be heard on the tape, and whether the examining counsel sounds too interrogative. If the defense counsel is heard badgering his own client, the whole program can be seen as suspect by the jurors. The purpose of the clips is for jurors to get a feel for the likeability, credibility and personality of witnesses. That can take five to seven minutes. Select the clips to show the witness talking, and try to avoid long predicate speeches by counsel. If you want to have the jurors see the witness go through specific fact testimony, it generally takes more time, and time is often in short supply.

For structured focus groups, the presentations are done by trial counsel. One challenge that arises frequently, especially in small firms, is that only one attorney really knows the case. She is able to stand up and explain both sides of the case fluently. Unfortunately, in a focus group, there is no one that can play the part of the opposition with that level of fluency, unless a good deal of time is spent bringing them up to speed. Even then, the second counsel is often relying on notes, while the first counsel is relying on months or years of learning the facts. Jurors notice the difference, and they favor the more prepared counsel.

The principle is that you want to challenge your case as vigorously as possible, in the way that a battleship is taken out to test seaworthiness before it is sent into battle.

So what do you do? We suggest a creative modification for solo practitioners or those who do not have a second chair that is totally at ease with the case facts: the "mediator" approach. The mediator approach involves having the one attorney who knows the case thoroughly doing the presentation, but doing it as a third party neutral. They explain to the focus group that they have been asked by the parties to attempt to get feedback from real jurors about the merits of the case, in the hopes of coming to a resolution without the need for trial. The mediator offers an overview of facts not in dispute, and then offers the disputed positions of the parties.

What is very difficult for many trial lawyers is to take off the advocacy role and be neutral when that is called for, and be balanced in the characterizations of the case for both sides. If any imbalance in passion or argument is discerned by the jurors, it needs to be mildly in favor of the opposition. If there are favorable facts or documents that are so damning of the opposition that they overwhelm the salience of other facts, hold them back until the end of the

group, after the deliberations have largely taken place, so you can see how the case will fare in the event that the hot document is excluded. At the same time, if the explosive information favors the opposition, include it in your presentation unless its admissibility is highly questionable. The goal is not to "win" the focus group. The goal is to test the weaknesses of your case and discover strategies for dealing with them, and then assess the strengths.

Deliberate or moderate?

When the presentation in a structured focus group is complete, you want to get the highest quality feedback from the jurors that you possibly can. It is the payoff for doing the exercise. So, how do you get it?

Deliberations in focus groups or mock trials can bring you to a consensus, or a near consensus, and give you an idea of how a deliberation might unfold. You provide a mock jury charge (with key questions and simplified instructions), and a presiding juror attempts to get people to discuss their views and their reasoning.

The drawbacks to this approach, in our view, are several. First, the jury, just like at trial, can be dominated by one or two people that drive quick decisions and suppress meaningful discussion. Second, the discussion is the most useful part of the process. That is where you learn why they feel as they do, what they might require in testimony or evidence to persuade them differently, and what parts of the case they liked and disliked the most. Their final decision is rarely based on the full scope of trial testimony, so the value of watching them deliberate is somewhat questionable.

Moderator-led discussions take a different path. The same juror questions are submitted, and completed by jurors individually. The discussion is guided to make sure that everyone is heard from, that no one dominates the discussion unreasonably, and that all of the key issues are covered as needed. If there is a gross misunderstanding of some part of the attorney presentations (which indicates the need to do things differently at trial to avoid repeating the confusion), the moderator is able to clarify the error before it derails the whole process. The moderator is able to remind the jury of some piece of evidence or theme that one side or the other thinks is key, and ask them whether they thought it was significant or not, and why. And finally, the moderator can provide additional facts about the case that the jurors have not yet been told. While all of this can be done in a deliberation-style group, it takes much more time, and time is what you have the least of.

Logistics

Careful adherence to some key planning issues can make the case more effective. One rule of thumb is that while the most expensive focus groups are not necessarily more useful than a mid range group, the cheapest ones are definitely less useful. When you factor in how much time you are going to spend on the case to do research, consider the hours of your time, your staff time, and the benefit you hope to attain. Make sure that your decision making is consistent with your goals.

- *Recruiting*. You want participants who resemble the jurors in the venue on a bad luck day for your case. When you look at the group, or see profiles of their attitudes and life circumstances, they need to be realistic. You do not find them in employment agencies (those jurors are generally much more liberal, have negative attitudes toward corporations, and are plaintiff-oriented). You do not find them by putting an ad in the classified section of the newspaper (for many of the same reasons). You do not want participants who have been in mock trials or litigation focus groups before, because you don't know what they were told, what their experience was like, and whether they have some appreciation that the premise may not be true. And most of all, real jurors are not professional jurors. There are some people in major cities who make a significant amount of money going from focus group to mock trial and back again.

  Plaintiffs want focus group jurors who are mildly more conservative than the venue, and who will offer some resistance to their views. We skew the recruit very slightly in favor of people with a bit more education,

because we want to know what the decision makers in the jury are going to think of the case. Remember, this is primarily a test of the problems in your case, not a pre-race victory lap. We use professional recruiters, and provide them with a detailed "screener" which forces them to find people of proper socio-economic, ethnic, employment and demographic diversity. It costs more, but it gives you a much greater likelihood of getting the kind of cross-section you need.

- *Paying participants*. Pay the jurors well. You will have jurors in the venire who have household incomes of over $100,000 per year. If you want to know what these people (who tend to have more influence in deliberations) think of the case, they don't read classified ads for part-time temporary work, and they won't come in for $25 and a hot lunch. For a four to five hour group, we typically pay jurors $120-$200, depending on the venue. Full day groups are between $150-$300 for eight to nine hours. Metropolitan areas in the northeast and west tend to demand higher participant fees.

You want participants who resemble the jurors in the venue on a bad luck day for your case.

- *Time*. There is never enough. If you are planning a five-hour group, you need to plan presentations that last no longer than two to two and a quarter hours, including all introductory remarks, evidence and argument. A four-hour group cuts presentation time back to less than 90 minutes. If you run longer than that, it ends up both overwhelming the jurors, and cutting badly into the payoff time (getting feedback). For a full day group, the total time for presentation can run as long as three and a half hours.

- *Report*. Most consultants distill the results of the group into a report. Do you want one? What you see in front of you as the group discusses the case is far too fleeting. You will miss a great deal, even if you are taking copious notes. You might take the video tape home, and a pile of questionnaires, but you are very busy and will not be able to spend the amount of time looking at it that you always intended. Plus, the questionnaires simply are too overwhelming to make productive sense out of without a system for analyzing them.

  Most consultants write reports that do that work for you. It can be time consuming (thus, potentially expensive), but it covers key information that can turn a good exercise into an invaluable tool. Some consultants write brief summaries, while others don't include much direct analysis of juror comments and just provide impressions of key themes and issues. Others write comprehensive reports that lay out key features of bias, evidence, juror comments, the reasoning behind their ultimate conclusions, where the jurors got most confused or distracted, evidence they found most persuasive, and trial themes and strategies. Ask the consultant if you can see a redacted copy of an old report to get a feel for what kind of analysis you might expect.

Focus groups are not indulgences. They are increasingly becoming standard preparation for trial practice in significant cases. If you want a basis for recommending a settlement strategy to a client, a focus group (while not predictive of trial outcome) can be a good place to start. If you need to know whether a land mine in the case can be dealt with effectively, or how to maximize the impact of evidence, argument and story sequencing, this is your best way of knowing how confident you can be going to trial.

Douglas Keene, Ph.D., is the founder of Keene Trial Consulting in Austin, TX (www.keenetrial.com) and President-Elect of the American Society of Trial Consultants. His trial consulting practice includes pretrial research, development of themes and strategies for case presentation, jury selection, witness preparation, concurrent trial consultation, and post-verdict research. He may be reached at (512) 347-1144 or by e-mail at dkeene@keenetrial.com.

Arming Your Jurors for Deliberation

By Tsongas Litigation Consulting, Inc.

Over the past fifty years, an extensive amount of literature has been devoted to an examination of the impact of "extra-legal" factors on a jury's decision-making process. Extra-legal factors are those factors that lie outside the scope of what is deemed legally relevant to judgments of guilt and/or liability. While legal theory presumes jurors are only influenced by those elements formally presented at trial, extensive research shows that extra-legal factors can have a considerable influence upon a jury's decision-making process. Examples of common extra-legal factors include attorney presentation style, hindsight bias, injury severity, implicit case themes, and juror personalities.

Playing a role in the making of a "just" or "right" verdict is a psychologically satisfying outcome that will motivate many jurors.

A well-known theory of persuasion, the Elaboration Likelihood Model (ELM), offers both a framework and a solution for addressing these confounding variables within the courtroom. ELM posits individuals process messages through two cognitive routes: central or peripheral. Depending upon which route is used, one's opinions will be modified or changed differently.

In the central route, message processing involves a higher level of cognitive reasoning. There is more elaboration or more effort used to find and scrutinize material or arguments. In a trial setting, a juror who cognitively processes information using the central route more actively engages with the evidence put forth by each side and evaluates that evidence against the applicable laws as dictated by the Court, the attorneys, and the jury instructions.

On the other hand, peripheral route information processing is low effort and less elaborative, with a focus on cues such as a speaker's tone or appearance rather than the message or argument itself. A juror who cognitively processes information using the peripheral route allows peripheral cues or extra-legal factors (e.g., how the plaintiff interacts with his or her attorney while they sit together) to influence the formation of that individual's beliefs and attitudes towards the case.

At the heart of ELM lie the issues of motivation and ability. Specifically, how motivated is the individual to actively engage in or process the information and arguments being presented? And, does the individual posses the ability to actively process the information and arguments being presented? Motivation comes in a variety of ways: genuine interest in the information or material, belief that the information is personally relevant in some way, or the belief that they are participating in an exercise that is righting an injustice. Ability refers to one's cognitive abilities: one's skill level or aptitude for understanding the material being presented. Individuals who are both motivated and able to process a message will use the central route while others will rely upon peripheral cues to guide the formation of their attitudes.

This raises two important questions for attorneys:

1. Has the trial team effectively developed the necessary psychological motivations to compel jurors to apply the law in favor of their client?

2. Has the trial team devoted adequate consideration to ensuring the information is accessible and comprehensible?

ELM research has consistently shown that the strength and longevity of attitudes resulting from central processing are significantly more prevalent than attitudes resulting from peripheral processing. A natural extension of this finding is that jurors who use central processing in a way

that favors your trial team will possess greater influence in the deliberation room because they are both motivated and able to be your advocate. In essence, you have armed your jurors to be your advocate at the most critical time: in the deliberation room.

The first issue the trial team must address is motivation. A juror will not become your advocate in the deliberation room unless the motivation exists to do so. Psychological motivation needs to be established early in the case, as early as opening statements. Remember, the goal is to compel jurors to process information in a manner that is favorable to your client. If the psychological motivations are established late in trial, the jurors have missed out on a number of opportunities to arm themselves to effectively argue your case in the deliberation room. Or, even worse, they have interpreted the information to favor the other side.

If jurors do not adequately understand your case issues, they are not equipped to argue your case in the deliberation room.

To help establish motivation you might ask yourself, "What can the jury feel good about if a verdict is rendered in my client's favor?" Playing a role in the making of a "just" or "right" verdict is a psychologically satisfying outcome that will motivate many jurors. Motives can vary across cases. In a medical malpractice case, a physician who is highly regarded and appears likeable on the witness stand may steer jurors towards a defense verdict. In this case, jurors might find it difficult to punish a physician they believe is a good person and could see as their own family doctor.

Another example involves a construction case. In a case where apartment building tenants are suing a construction company that built the apartment complex for injuries resulting from exposure to toxic mold, a jury could find it psychologically satisfying to steer the tenants in the right direction by finding that it was the lack of maintenance on the part of the apartment's management team that led to the mold exposure and not negligence on the part of the construction company. By pointing the tenants in the right direction, the jury is allowing them to see the real source of the problem and take action to prevent similar injuries in the future. This is an outcome that jurors can feel good about.

The second issue to address is the jurors' ability to process the message. Once the jurors are motivated to embrace your case theory, they must possess the means to be your advocate. This requires that jurors be provided with the language and explanations to effectively argue your case in the deliberation room. Without this, your greatest supporters function as weak advocates during deliberations. In our mock jury research, we often witness mock jurors who are motivated to fight for one side but do not have the ability to articulate their strong feelings about the case because the attorney representing that side has not armed them with sufficient language and themes. This makes it difficult for these mock jurors to fight back when facing strong mock juror advocates for the other side. Or even worse, the natural human tendency when lacking the confidence to articulate an opinion is to remain silent. Silent advocates do not lead to favorable verdicts!

A variety of studies have shown that when message comprehensibility is low, peripheral cues play a significantly greater role in the formation of attitudes. What this means for the trial team is that if your evidence and testimony are not accessible to the jury, they will look elsewhere for guidance in interpreting the case issues. This is where extra-legal factors tend to exert undue influence in the decision-making process and/or where the jury begins to embrace the other side's story.

A recent example of this problem was observed during a medical malpractice trial. The attorney, who has a very distinguished career representing defendants in medical malpractice litigation, rigorously examined the expert witnesses covering all the minute details of the case. While

it was quite an impressive display of his medical knowledge, the information was communicated in a manner that made it inaccessible to the jurors. During post-trial interviews, jurors frequently commented on how impressed they were with the attorney's knowledge on the medical issues. However, despite their awe, they were unable to adequately understand the complex medical issues that were discussed. Jurors consistently stated their regret that the attorney had not asked each of the experts to explain the medical issues in layperson terms. If jurors do not adequately understand your case issues, they are not equipped to argue your case in the deliberation room.

Focusing on these two issues, motivation and ability, is critical to the success of any litigation. Attorneys should address these issues early, not only early in the trial, but also early in the planning stages for trial. A strategy that incorporates these concerns can help guide discovery and the development of an appropriate case strategy, and is the first step towards a verdict in your favor.

Tsongas Litigation Consulting is a full-service trial consulting firm with offices in Seattle and Portland. The authors may be reached at (503) 225-0321 or by e-mail at info@tsongas.com.

Quick Courtroom Tips

By Bob Gerchen

Make Your Strikes to the Jurors, Not to the Judge

This is a tough one. If you have to make strikes in open court, it is a lot easier to stand up, look at the judge and say, "Your honor, we'd like to thank and excuse Juror Number Eight." And that uncomfortable part of your life is over.

Here's a radical idea, though. Instead of talking to the judge, look right at the juror. Smile, nod, perhaps even add a personal comment. ("Now you get to leave early for that vacation.") It will make the excused juror feel less rejected (even when someone wants off the panel, there's a feeling of rejection when excused), but more importantly, the jurors who remain will remember how you handled it.

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

For more information about Bob Gerchen's book, ***101 Quick Courtroom Tips for Busy Trial Lawyers****, visit www.CourtroomPresentationTips.com.*

Article Ideas?

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

Thanks for reading *The Jury Expert*!

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

The "CSI Effect"... in Civil Cases as Well as Criminal Ones

By Rich Matthews, J.D.

Over the last several years, criminal trial observers have noted the phenomenon of jurors having unrealistically high expectations that they be provided technical, exact and conclusive evidence. Jurors expect that this evidence, often expensive and time-consuming to process, will be offered without regard to the relative importance of the case or seriousness of the charges, nor how expensive it might be to produce the evidence. This overestimation of both the availability of technical, scientifically processed evidence and the advisability of district attorneys' offices prioritizing it for a given case has been termed the "CSI Effect," after the highly rated CSI series on television. (Dick Wolf, creator of the 371 variants of "Law & Order," believes that the CSI Effect actually predates "CSI" and is more properly attributable to his television series.)

Attorneys and trial consultants who work in criminal cases have noticed this for a long time. Prosecutors are now offering scientific evidence that they wouldn't have awhile back–either because it was deemed unimportant or because the management of a crime lab's resources and priorities would have prevented its production. Whatever the reason, they must do it now, lest a jury wonder where the CSI stuff is, and quickly and incorrectly assume that *an absence of proof is a proof of absence*. This is the inherent danger of the CSI effect: a layperson's assumption that, if the evidence existed anywhere in the universe, the prosecutor would introduce it. Accordingly, when the attorney does not produce the evidence, the jury assumes that it doesn't exist and that the claimed event in fact never happened.

While the phenomenon of the CSI Effect in criminal cases is widely agreed upon by criminal lawyers, trial judges and trial consultants, it also occurs in civil cases. Counsel should be aware of it when working on a case that involves *anything* technical or technological in the story *at all.* An example: In a federal suit, a plaintiff alleges sexual discrimination and violations of the Equal Pay Act. Part of the dispute is over who saw which e-mails and when, and either party's ability to offer any hard evidence is relatively meager. This is a standard, run-of-the-mill civil lawsuit. However, while the fight is over how much the plaintiff has been paid during certain years, whether others have been paid more for improper reasons, and whether her pay has been affected by her complaints, counsel did not notice the technical nature of this lawsuit.

Juries wonder where the CSI stuff is, and quickly and incorrectly assume that an absence of proof is a proof of absence.

Why is a pay dispute a technical lawsuit? Focus groups in this case showed how civilians react to the major issues, how they respond to graphics, and how they decide what happened, who's liable, and what the damages should be. One mock juror said, "What do they mean they can't tell who got which e-mails and who didn't? The FBI can find hard drives from computers that have been blown up or burned, and they can put them under microscopes to see if the individual bit is a one or a zero, and can visually reconstruct the contents of the hard drive. That's how they've caught a bunch of terrorists. So why aren't we seeing that evidence? Because they don't want us to see it. Or they aren't sure of their case." Jurors overestimated both the availability of crime lab resources and attorney prioritization of scientific evidence.

Another case involved a plaintiff's claim of sexual harassment in the workplace. The

plaintiff alleged that some of the harassment occurred via company e-mail. However, she deleted the e-mails. Naturally, mock jurors hearing these facts assumed that the Internet service provider could simply be subpoenaed and, presto, all the e-mails could be recovered.

This is the inherent danger of the CSI effect: A layperson's assumption that, if the evidence existed anywhere in the universe, the prosecutor would introduce it.

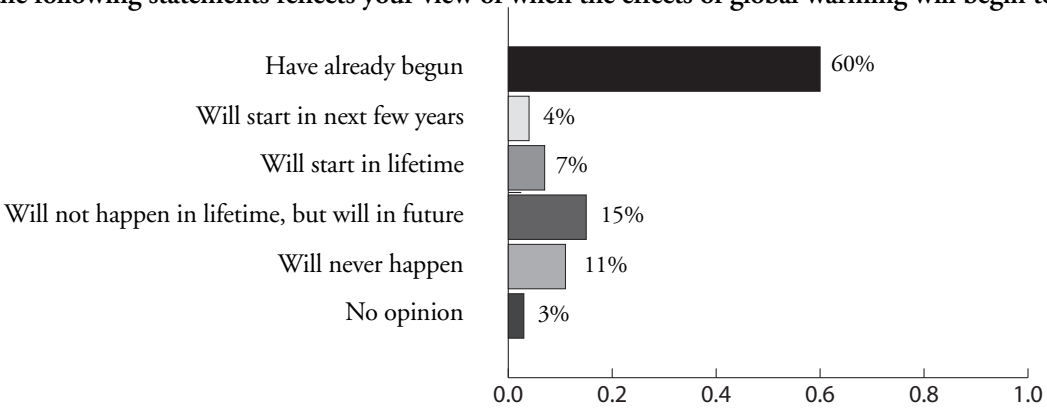
These examples yield an important lesson. Lawyers should anticipate that even in cases that don't *appear* technical in nature, if any transaction occurs by technical means, jurors may harbor grandiose ideas about the availability of evidence on that topic... and then mistake an absence of proof as a proof of absence.

Attorneys should tell their story so laypeople will access and process it correctly. Even in civil cases, attorneys must fashion their stories by taking into account the CSI Effect. In your presentation, inform jurors they won't be seeing the evidence you think CSI would lead them to expect. Preempt any expectations about the nature of the evidence by simply stating this in all phases of trial: voir dire, opening, during the presentation of evidence through witnesses, and closing.

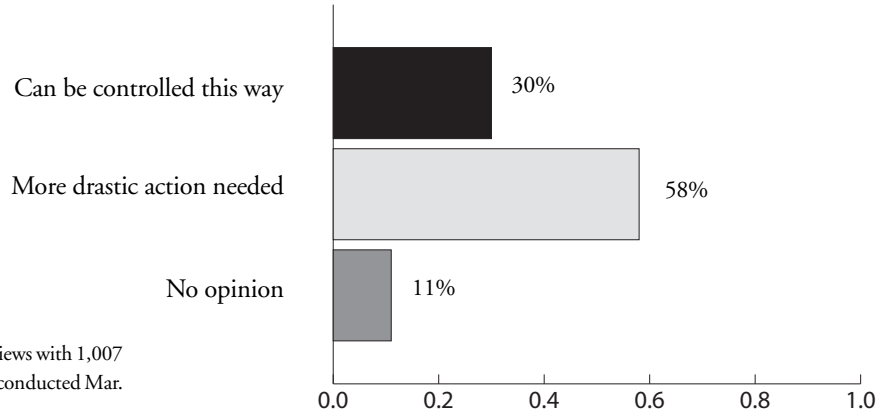
Rich Matthews, J.D., is a senior trial consultant with Decision Analysis, Inc. in San Francisco. His areas of practice include civil plaintiff and defense work, commercial litigation, and mediation and arbitration. His areas of trial consulting include case theory and presentation, communication strategy, and applications to ADR. He may be reached at (415) 387-9900, or by e-mail at rpmatthewsesq@aol.com.

JUROR ATTITUDES:
Global Warming

Which of the following statements reflects your view of when the effects of global warming will begin to happen[1]:



Do you think the effects of global warming can be controlled if most people take steps such as driving less, recycling, and turning down their thermostat, or will more drastic measures be needed?[1]



[1] Source: Gallup Poll, telephone interviews with 1,007 national adults, aged 18 and older, conducted Mar. 23-25, 2007.