



# The Jury EXPERT

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## Strategies for Combating Anti-Gay Sentiment in the Courtroom

by Sean Overland, Ph.D.

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California voters' recent passage of Proposition 8, which "re-banned" same-sex marriage in the state, and the success of similar anti-gay marriage laws across the country, has prompted some observers to comment that "gay is the new black." In other words, while overt, anti-black sentiment has been largely relegated to the fringes of American society, homophobic attitudes remain common and socially-acceptable in large segments of the population. In the courtroom, jurors' attitudes toward homosexuality may affect their views on a wide range of cases, including discrimination and employment lawsuits or trials involving a gay or lesbian litigant.

This article describes the extent and nature of anti-gay sentiment, how it differs from racial bias, and how attorneys and jury consultants concerned about homophobia can combat anti-gay bias in the courtroom.

## How Widespread is Anti-Gay Sentiment?

In the January 2009 edition of *The Jury Expert*, Naveen Khan and Dennis Elias offer strategies for addressing anti-Muslim bias in the courtroom. In their articles, Khan and Elias cite national polls showing that 39% of Americans admit that they “feel some prejudice” toward Muslims. How does that figure compare to current attitudes toward homosexuality?

Since 1996, I’ve helped conduct an on-going research project on popular attitudes toward homosexuality undertaken by the jury research firm of Mattson & Sherrod, Inc. As part of this project, questions about homosexuality, gay rights, and same-sex marriage have been piggy-backed on questionnaires used in mock trials across the country. With the cooperation of Mattson & Sherrod, I have assembled data from over 100 mock trials conducted between 2002 and 2008. These data include responses from over 7,800 mock jurors. Looking at the numbers from year to year reveals some consistent patterns in jurors’ attitudes toward homosexuality. For example:

- Approximately 55% of people think that gays and lesbians should not be able to have officially recognized marriages.
- Approximately 45% of people think that homosexuality is not an acceptable lifestyle.
- Approximately 40% of people believe that gays and lesbians could change their sexual orientation and become heterosexuals if they really wanted to.
- Approximately 33% of people think that sexual orientation should not be a civil right that is protected by the government.
- On average, between 15 and 20% of people report that it would bother them if a gay or lesbian couple moved in next door to them.
- Similar percentages (15 to 20%) of people think that employers should be able to refuse to hire someone because of his or her sexual orientation.
- Between 10 and 15% of people report that it would bother them if they had to work closely with someone who is gay or lesbian.

Anti-gay attitudes are more prevalent in the South than in the rest of the country<sup>1</sup>. Almost 60% of Southern jurors believe that homosexuality is not an acceptable lifestyle, 50% believe homosexuals could change their sexual orientation if they really wanted to, and nearly 25% would be bothered if a gay or lesbian couple moved in next door to them.

## How do Anti-Gay Attitudes differ from Racism?

While homophobia and racism have some features in common, they also have important differences. For the purposes of courtroom strategy, the key difference is the comparative social stigmas attached to each. Overt racism carries a powerful negative social stigma, as racism is widely considered to violate the egalitarian norms embraced by the vast majority of Americans. As was discussed in the most recent edition of *The Jury Expert*, this negative social stigma presents an opportunity to inoculate jurors against even subtle race-based arguments.

<sup>1</sup>By “the South,” I mean the states of Texas, Oklahoma, Louisiana, Arkansas, Tennessee, Mississippi, Alabama, Kentucky, Virginia, North Carolina, South Carolina, Georgia, and Florida.

Anti-gay sentiments, on the other hand, do not carry the same negative social stigma. As the numbers above suggest, anti-gay attitudes remain socially-acceptable and even desirable among large segments of the population. Many people believe that homosexuality is deviant, morally wrong, and a threat to traditional family structures. This important difference between racism and homophobia means that combating anti-gay bias in the courtroom requires a different strategy than you might use to confront race-based appeals.

### How Can Attorneys and Consultants Combat Anti-Gay Attitudes in the Courtroom?

Because homophobia does not have the negative social stigma associated with overt racism, opportunities for inoculating jurors against anti-gay appeals or for overcoming anti-gay bias during trial may be limited. Depending on the type of case, witness preparation and a persuasive case story may help some jurors look past their bias, but eliminating the most homophobic jurors from the panel during jury selection is a critical part of an effective trial strategy. Thus, I focus primarily on jury selection strategies and identifying jurors with the strongest anti-gay biases.

One of the fundamental challenges of voir dire in any case is asking questions that identify jurors who are least likely to be receptive to your client's case, while not "outing" jurors who are most likely to support you. For example, the questions discussed above about homosexuality could all be used during voir dire to evaluate jurors' views. However, any juror who believes that gays and lesbians should have officially-recognized marriages, or who thinks that sexual orientation should be a civil right, becomes a target for a peremptory challenge by the opposition. The best questions for identifying strong anti-gay bias during voir dire would therefore be:

- Would you feel bothered if a gay or lesbian couple moved in next door to you?
- Do you think employers should be able to refuse to hire someone because of his or her sexual orientation?
- Would you feel bothered if you had to work closely with someone who was gay or lesbian?

In an average jury venire, relatively few people (10 to 20%) will answer "yes" to these questions. A "yes" answer therefore gives valuable information about anti-gay attitudes, while a "no" answer gives the opposition little usable information.

In addition to these direct questions on jurors' attitudes toward homosexuality, several other attitudes and lifestyles are consistently strong predictors of anti-gay sentiment. These factors include:

#### Religiosity

- Jurors who report that their religious beliefs are "often important" or "always important" in guiding their daily decisions tend to be more homophobic than jurors for whom religious beliefs are only "sometimes important" or "never important" to their daily decisions.
- Jurors who try to attend religious services every week tend to be more homophobic than jurors who do not.



### Political Ideology

- Jurors who identify themselves as politically conservative tend to be more homophobic than politically liberal or moderate jurors.
- However, a juror's political party affiliation (Republican, Democrat, or Independent) is not a particularly effective predictor of attitudes toward homosexuality.

### Personal Friendships

- Jurors who have a gay friend are far more accepting of homosexuality than jurors who do not.
- While having a gay friend affects people's views on homosexuality, simply knowing someone who is gay, or having a gay relative, does not.
- On average, just under half of jurors report having a gay friend. Although asking jurors this question runs the risk of identifying "pro-gay" jurors, the relatively large proportion of jurors with gay friends makes striking all of them impossible.
- Moreover, attention can be drawn away from the "gay friend" question by also asking about gay acquaintances and family members. For example, ask first whether the juror *knows anyone* who is gay (on average, about 85% will say that they do), then whether they have any gay friends (about 50% will say "yes"), and finally, whether they have any gay relatives (on average, about 35% of jurors report that they do). This sequence creates the impression that the questions are gaining in importance, when in fact only the "gay friend" question has any real bearing on jurors' attitudes toward homosexuality.

### Demographics

Recent media coverage of popular attitudes toward homosexuality has focused on the importance of demographics. National polls suggest that factors such as race, gender, education, and age may affect a person's views on homosexuality. However, a careful examination of the data shows that the factors discussed above – particularly religiosity, political ideology, and having gay friends – account for almost all of the observed differences between demographic groups. For example, African-Americans appear to be more homophobic than white people, but this difference is due to the fact that, on average, African-Americans are more religious than whites. In other words, people with the same religious practices tend to have the same views on homosexuality, regardless of their race.

Gender bucks this trend somewhat. On average, women are slightly more accepting of homosexuality than men, even when other factors like religiosity and ideology are taken into account. However, the difference between the genders is relatively small.



## Concluding Thoughts

Anti-gay bias presents unique challenges to attorneys and trial consultants. Because homophobia does not hold the same negative social stigma associated with racism, the tactics used to combat racism may not be as effective when dealing with homophobia. Identifying homophobic jurors and removing them from the panel during jury selection is therefore a useful tool for combating anti-gay bias in the courtroom. Asking certain direct questions about jurors' views on homosexuality, as well as questions about jurors' religiosity, political orientation, and personal friendships, can identify jurors with the strongest anti-gay sentiments.

*Dr. Overland would like to thank Dr. Drury Sherrod and Dr. Peter Nardi for their comments on a previous draft of this article.*

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# The Graphics Guy: Turning Timelines into Plotlines

by Jason Barnes

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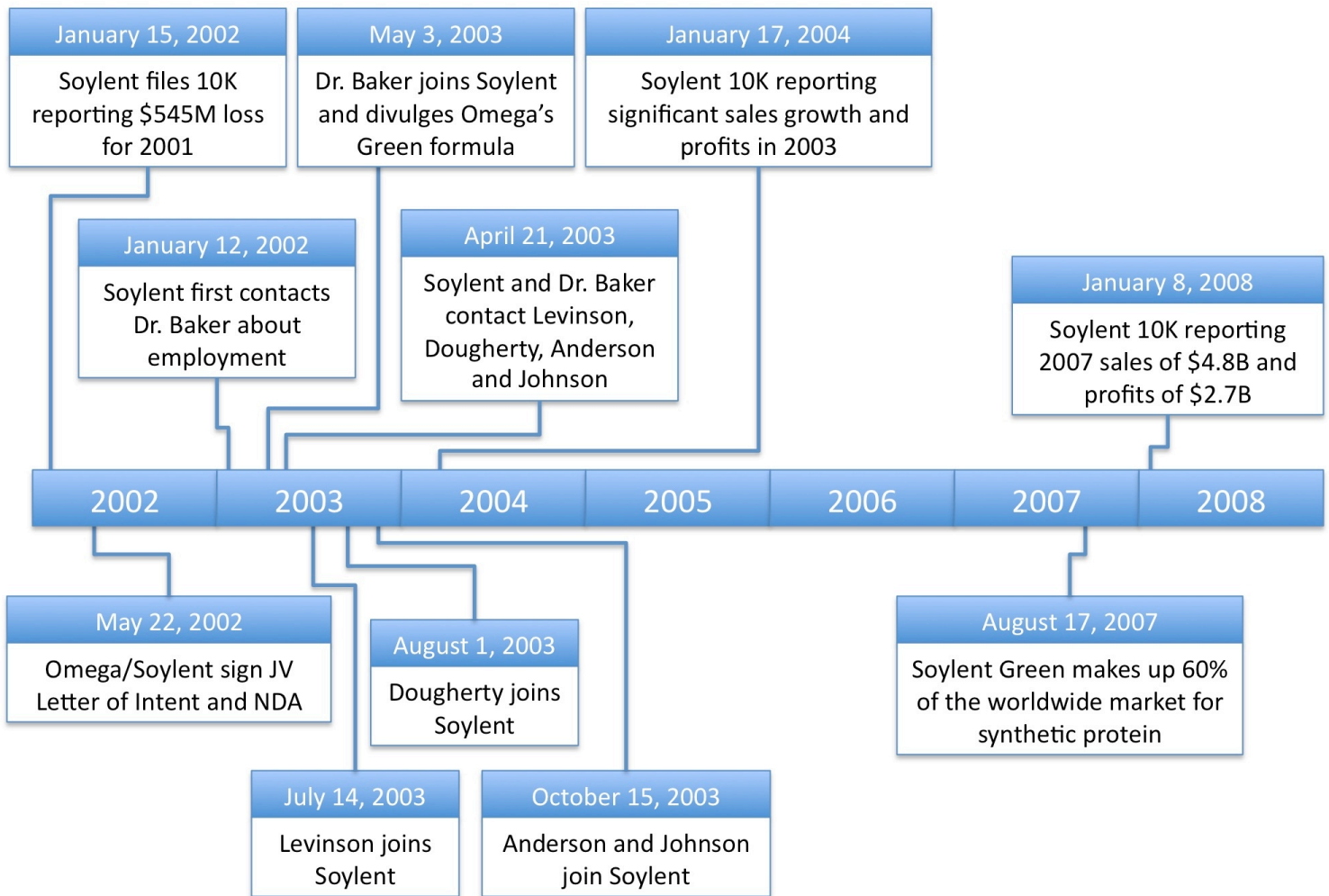
Consider the humble timeline. A trial graphic staple, it is often the first to be constructed. There are even computer applications devoted to the automatic creation of timelines. However, in spite of the widely held opinion that storytelling is the most powerful means of communication, we often fail to tell our story in the one demonstrative especially suited for that purpose.

Properly conceived and executed, a timeline might more accurately be called a Plotline. Whereas a timeline simply arranges discrete events in chronological order, a Plotline weaves each event into a single, logical flow of information. A Plotline does not limit itself to the who, what and when. Rather, it adds the why and the how; the cause and effect; the motive, means and opportunity.

In the best stories, writers, directors and editors are careful to link one event to the next in a seamless progression. They work to provide the characters' context, motivation and actions in sufficient detail for the audience to be immersed within the story - to emotionally identify with the characters. While litigators don't have all of the devices available in the art of novels and movies, with a few slides and some boards, litigators can strengthen their storytelling to great benefit.

To illustrate the issue, I have created two graphics. The first example is typical of what we have all seen in trial and what might be produced by timeline software. With a nod to Charlton Heston, I made up some facts surrounding an imaginary case between Omega and Soylent which involves claims for breach of a joint venture agreement, employee raiding and theft of trade secrets.

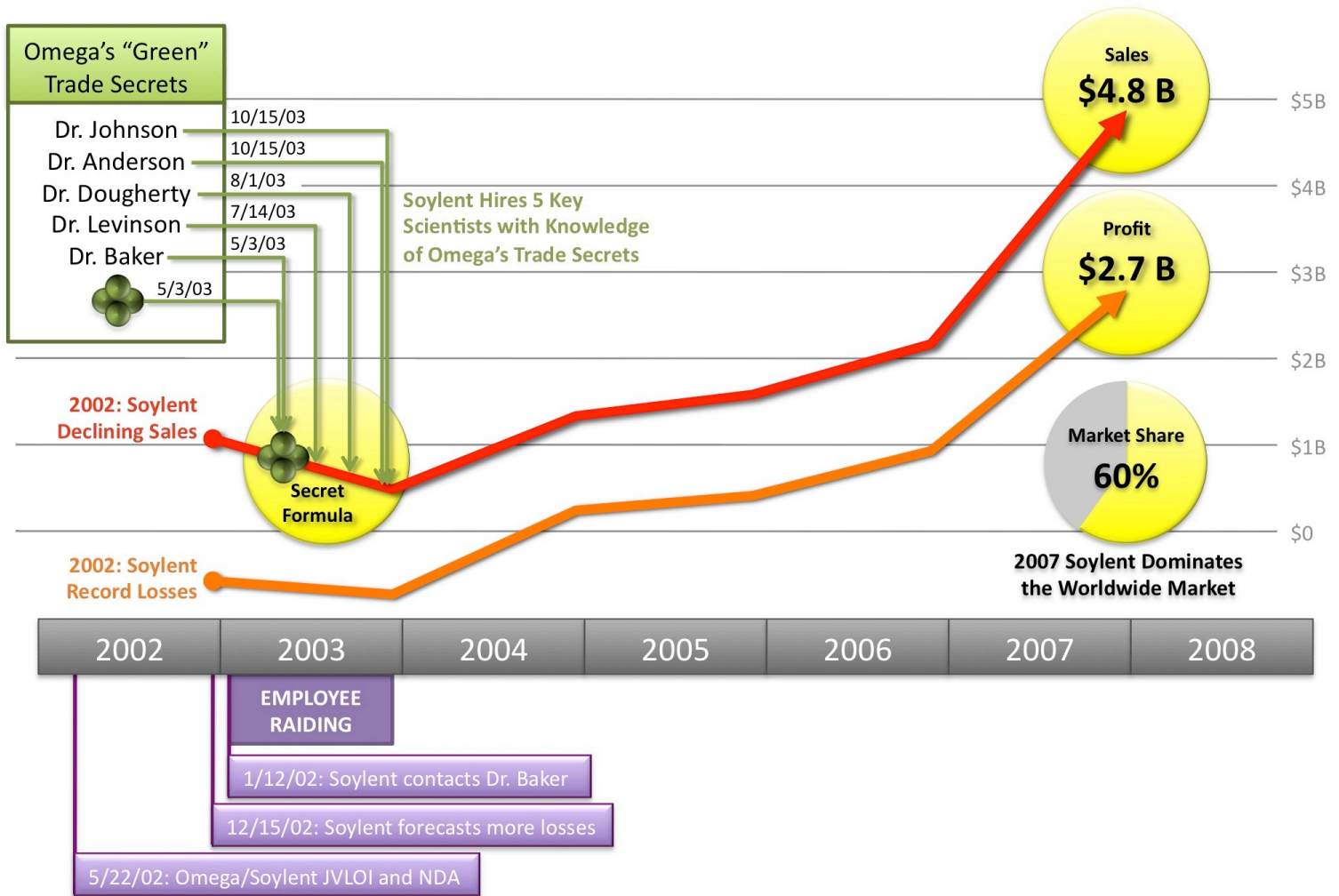
# Key Events



This timeline has the facts arranged in neat boxes with easily read text and a pleasant color scheme. However, it tells the audience virtually nothing about the story we wish to communicate. It does not provide character motivation or illustrate cause and effect. Its layout does not provide an easy framework for the mental insertion of other details that will be exposed during the trial.

In the second example, the Plotline, I've attempted to correct the deficiencies of the timeline shown above.

# How Soylent Got "Green"



I would like to point out a few features:

- 1. Title:** The title explains the meaning of the Plotline.
- 2. Structural Elements:** As the least important elements, the time bar and the graph value lines are colorless and recede into the background.
- 3. Color Grouping:** The purple group, the green group, the red group and the yellow group each have their meaning, and each are tied one to another to provide cause-effect links that follow logically in a common sense world.
- 4. Summary Statements:** There are four summary statements (red, orange, green and black) which reiterate the story.
- 5. Limited Information:** Each entry is brief with little in the way of detail. Evidence supporting each entry should be explored in detail separately (as addressed below).



Admittedly, the Plotline is more challenging to the audience. But, it is orders of magnitude more interesting. We were able to combine a flow chart, two line graphs, a pie graph, a bullet-point list and a traditional timeline into a single, coherent Plotline - and we were still able to leave plenty of white space in our design.

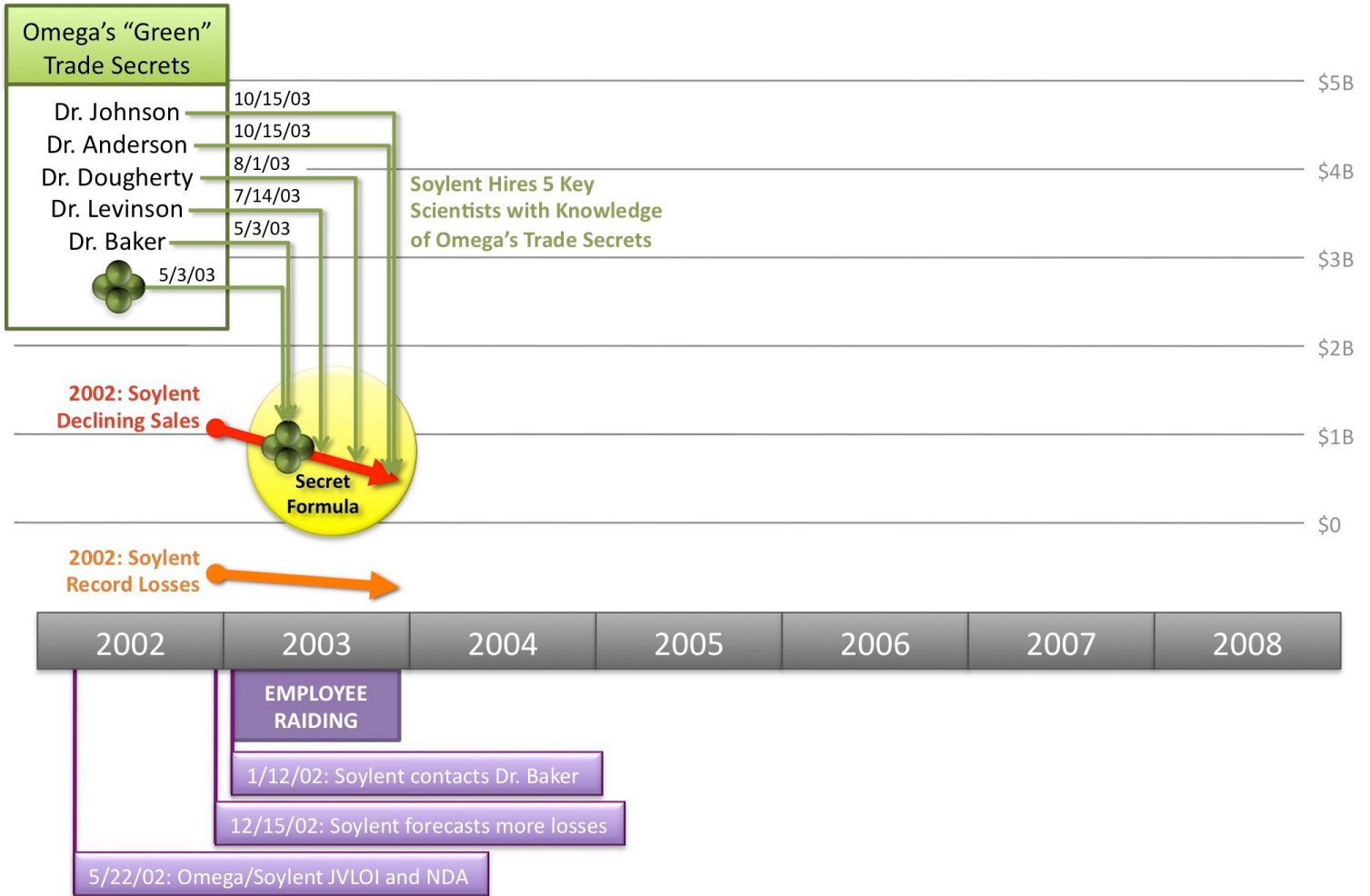
We often see complex information graphics such as this Plotline in newspapers and magazines. They are packed with information but require the viewer's curiosity and time commitment. In trial, by contrast, we cannot wait while the jury figures out how to understand our more complex demonstratives. For this reason, we have been trained to severely limit the amount of information on any one demonstrative. I won't quibble with that basic premise. I would, however, argue that the jury can easily understand and benefit from more complex graphics if carefully designed and presented.

It would be advisable, therefore, to introduce the information on this Plotline in step-by-step fashion through an on-screen presentation. How many steps and in what order would depend upon the presentation. If presented in opening statement, the information could be revealed chronologically. If presented through a fact witness, it may be that certain elements might come out of time due to limitations of that witnesses knowledge. Either way, the revelation of each element should be supported by some piece of admissible evidence. One possible sequence is shown below:

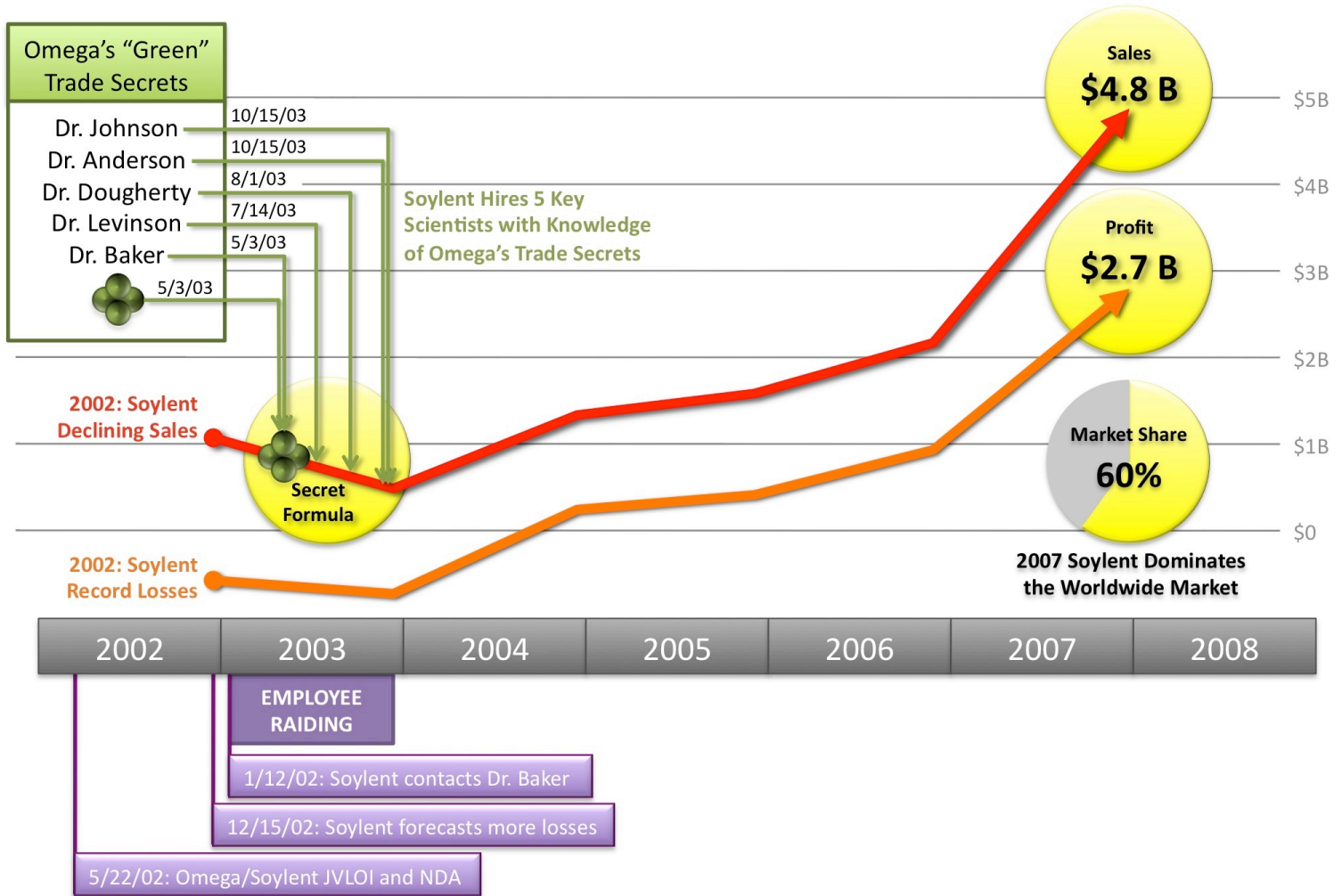
## How Soylent Got "Green"



# How Soylent Got "Green"



# How Soylent Got "Green"



Regardless of the sequence, after being fully constructed, you may wish to produce a trial board for permanent display in the courtroom. Placing a large timeline on an easel provides easy reference for attorney, witness, judge and jury alike. It also provides a framework for discussion of evidence not literally included on the Plotline. For instance, Soylent emails to Omega employees can be framed into the "Employee Raiding" period shown on our demonstrative.

Neither our lives nor our cases are comprised of a series of discrete, unrelated events as we saw in the first conventional timeline example. Each event flows naturally from one to another through cause and effect, action and reaction. A good story follows this natural rhythm and so will a good Plotline.

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## Grime and Punishment:

### How disgust influences moral, social, and legal judgments

Yoel Inbar and David Pizarro, Cornell University

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We experience a wide range of emotions every day: a bad mood because we skipped breakfast, anger because we got cut off in traffic, and even nostalgia from receiving an old picture of high school friends over email. To be sure, the insight that emotions influence judgment existed long before psychologists were able to confirm it experimentally. Yet a great deal of psychological research in the last few decades demonstrates that emotions just like those described above can subtly alter a wide range of judgments, including judgments that are completely unrelated to the original source of the emotion. In his *Rhetoric*, Aristotle exhorted his pupils to learn how emotions might influence human judgment so that they might best utilize these emotions to persuade their audience (Aristotle, 350 B.C.E./1991). But the explosion of research on the topic has allowed us to document exactly *how* these emotions influence judgment, as well as what kinds of judgments are particularly prone to their influence. For instance, we know that anger over the traffic incident on your way to work may lead to an increased reliance on racial stereotypes moments later when interviewing a job candidate (anger seems to encourage the use of cognitive “shortcuts” such as stereotypes; DeSteno, Dasgupta, Bartlett, & Cajdric, 2004). Mild sadness, on the other hand, would have an opposite effect—because it tends to make people more careful, analytic thinkers, it would actually lead to less reliance on stereotypes when evaluating a candidate.



Not surprisingly, legal scholars have taken a keen interest in understanding exactly how emotions influence the kinds of judgments that are central to the legal process, such as judgments of blame and responsibility (Feigenson, 2008). Here we examine disgust, an emotion that has received little attention historically—at least relative to emotions such as fear, anger, or sympathy—but about which much more has become known in the past few years. On its face, disgust may seem less relevant to legal judgments than emotions such as sympathy or anger. Unlike those emotions, its influence on courtroom proceedings is not intuitively obvious. Nonetheless, it has become increasingly evident that disgust plays an important role in a

much wider set of social and moral judgments than was once believed. This article sheds light on what disgust is, how it influences judgments, and why legal scholars, judges, and attorneys should pay attention to it.

### *What is disgust?*

Imagine coming across a putrid piece of meat, or walking into a public bathroom stall only to find that the previous occupant did not bother to flush. Chances are that in just one sentence we made you experience, at the very least, a mild disgust response. But why do we have a disgust reaction in the first place, and why do those particular things seem so good at eliciting it? Most psychologists consider disgust to be a *basic* emotion. Basic emotions are thought to be part of our evolutionary heritage: they are present in all cultures (even though the situations evoking them and the acceptability of displaying them may vary); they are accompanied by characteristic facial expressions that are widely recognizable by other people; and they emerge predictably at around the same age in normally developing children (Ekman, 1994). Most importantly, these emotions are thought to have evolved to fulfill specific functions that aided in the survival of our ancestors. Fear, for instance, most likely evolved because those organisms that felt fear possessed a distinct survival advantage over those that did not (among other things, fear would motivate a quick escape from predators).

Disgust most likely played just as important a role in human survival. The psychologist Paul Rozin and his colleagues have argued that disgust prevented our ancestors from eating (or even approaching) things that might have made them physically ill or even killed them (Rozin, Haidt, & McCauley, 2000). As evidence for this claim one need only look at the sorts of things that tend to make us easily disgusted. Humans across all cultures find certain things—rotten meat, fecal matter, blood—especially disgusting, most likely because these are the very kinds of things that increase our risk of being exposed to harmful pathogens if consumed or even touched. Consistent with this contamination account, the facial expression characteristic of disgust—withdrawal of the upper lip, thrusting out of the tongue, and wrinkling of the nose—may have its origins in the adaptive action of expelling noxious food from the mouth and shrinking the nasal passages in order to prevent pathogens from entering (Susskind et al., 2008). And, of course, vomiting—the utmost expression of disgust as well as one of its most reliable elicitors—purges potentially harmful matter from the digestive tract. This basic disgust reaction to noxious stimuli is what researchers have come to refer to as “core” disgust—the disgust that is tied to those elicitors that signal the possibility of contamination. Importantly, as was perhaps made evident from the first sentence of this section, disgust is extremely easy to elicit. One need only show a picture of an unflushed toilet or of maggots feeding on putrid meat in order to observe a full-blown disgust reaction in the audience. This makes sense—just like seeing a predator and fleeing due to fear, the ability to make a quick determination that an object is a potential contaminant would be quite advantageous.

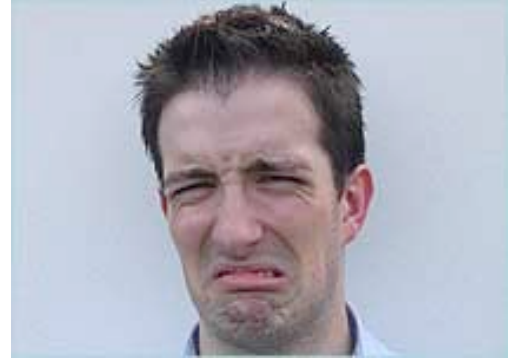
### *How does disgust affect judgments?*

While disgust has its origins in avoiding and expelling dangerous substances, recent research has demonstrated that it has extended its reach beyond the domain of physical contamination and made its way into our social and (especially) our moral judgments. A fair amount of research is converging on the conclusion that feeling core disgust seems to make us harsher moral judges, even when the person or action we’re judging has nothing to do with the thing that originally disgusted us. Another source of evidence that disgust has moved beyond physical contamination and into the domain of morality comes from findings that physical contaminants are no longer the only elicitors of disgust. Moral misdeeds that do not involve any literal threat of contamination seem to be reliable elicitors of the very same disgust emotion that was once probably only elicited by contaminants like feces and rotting meat. Indeed, our everyday language points to this expanded sense of “moral” disgust—many immoral behaviors are said to be “disgusting,” “revolting,” or “stomach-turning”—and calling something disgusting is a powerful way of expressing one’s moral disapproval. We now turn to evidence



of two ways in which disgust seems related to moral judgments—as a cause of moral harshness and as the result of moral infractions.

Evidence for the influence of core disgust on moral judgments comes from recent studies utilizing experimental manipulations of disgust and its influence on subsequent judgments, as well as from studies looking at individual differences in the proneness to experience core disgust in everyday life. For instance, in one recent experiment researchers investigated whether a subtle disgust manipulation would affect subsequent, unrelated moral judgments. Under hypnosis half of the participants in the study (who had been pre-selected because they were particularly prone to being hypnotized) were given a post-hypnotic suggestion to feel a “brief pang of disgust” when they read the word “often”, while the other half were given the same suggestion when they read the word “take”. Participants were further told that they should forget these instructions upon being woken from hypnosis. All subjects then read descriptions of immoral behaviors (for example, a congressman who takes bribes from tobacco lobbyists), and were asked to indicate how morally wrong they believed the behavior to be. These descriptions contained *either* the word “often,” or the word “take.” Subjects who were hypnotized to feel a flash of disgust at the word “take” found the behavior described in the “take” stories to be more immoral—as well as more disgusting. The opposite was true for subjects hypnotized to feel disgusted by the word “often”—they found the “often” stories to be more immoral and disgusting (Wheatley & Haidt, 2005). In another study, participants seated at a dirty desk made harsher moral judgments (doling out more blame to individuals who had committed fairly minor moral infractions) than those seated at a clean desk (Schnall, Haidt, Clore, & Jordan, 2008).



This “moral harshness” effect from feeling disgust may be especially easy to induce when making moral evaluations of certain issues or groups of individuals (such as issues pertaining to sexuality which may be seen as mildly disgusting to begin with). For instance, in a recent study conducted in our lab at Cornell, we found that people reported more negative evaluations of gay men and lesbians when there was a noxious odor in the room than when there was no such odor present (Inbar, Pizarro, & Bloom, 2009). However, the presence of the foul odor did not affect a variety of other social/political judgments.

Another source of evidence that core disgust can shape moral judgment comes from correlational studies that measure individual differences in the propensity to experience disgust—so-called “disgust sensitivity” (Haidt, McCauley, & Rozin, 1994). In a series of studies conducted in our lab, we have found that individuals high in disgust sensitivity are more likely to hold the sorts of moral beliefs that are characteristic of political conservatism (e.g., these participants are more likely to be pro-life and opposed to gay marriage; Inbar, Pizarro, & Bloom, 2008). In addition, even when participants explicitly report that they are not morally opposed to homosexuality (as is true of many of the college students that attend our University), those participants higher in disgust sensitivity are more likely to display anti-gay attitudes when using implicit measures of attitudes (i.e., measures that do not rely on the explicit reports from participants, such as the Implicit Association Test; Inbar, Pizarro, Knobe, & Bloom, in press).

Yet another source of evidence implicating disgust in moral judgment comes from findings that disgust is elicited by moral infractions that have little to do with the elicitors of core disgust, such as when people claim to be disgusted by pedophiles, sociopaths, or lawyers (present readership excluded). One obvious question is whether this disgust response is actually the same emotional response as the disgust response to physical

contaminants. Recent studies suggest that it is indeed the same response; there seem to be overlapping physiological mechanisms for both moral and “core” disgust reactions. For instance, studies looking at brain activity in participants who contemplate morally disgusting acts compared to contemplating elicitors of core disgust have demonstrated substantial overlap in the brain regions activated for both (Moll et al., 2005). Similarly, in a recent study investigators demonstrated that the same facial muscles that are activated in response to the oral ingestion of bitter substances and in response to core disgust elicitors (the levator labii muscles that underlie the lip curl and nose wrinkle characteristic of the disgust facial expression) are also activated when participants feel morally slighted (in this case, when receiving unfair monetary offers from another participant in an economic game designed to have clear fair and unfair options; Chapman, Kim, Susskind, & Anderson, 2009).

But although disgust is likely involved in a wide variety of moral judgments, the psychologist Jonathan Haidt has argued that it is especially implicated in the condemnation of actions violating the moral norm of *purity*. Behaviors that are seen as degrading, defiling, or unnatural reduce purity and evoke disgust in the observer; they are thus often seen as immoral even if they do not cause harm oneself or others. This belief seems to be especially strong among social conservatives: self-described conservatives surveyed by Haidt and Graham (2007) were more likely than self-described liberals to agree that whether “someone did something disgusting” was quite relevant to deciding that an action was right or wrong, and were also more likely to view “harmless” violations of the purity norm to be immoral.

### *Disgust in the courtroom*

So what does this mean for the trial attorney or jury consultant? Aside from the obvious prescription to ensure that the jury deliberation room is not filthy, lest the jurors become harsher, there are a few key areas where disgust is likely to be of special concern.

#### **1. Disgust sensitivity in jury selection.**

For cases dealing with behaviors that might be seen as violating norms of purity, disgust might be quite important. In particular, individuals who are high in disgust sensitivity may be more likely to view these sorts of behaviors as immoral and to seek to punish the perpetrators. Consider Joanne Webb, a Texas woman who was charged under obscenity laws for selling (and explaining the use of) a vibrator to two undercover detectives posing as a couple attending a private “passion party.” A passion party is similar to a Tupperware party, except that the goods on offer are sex toys rather than storage ware (Herald, 2003). According to a moral view that places a strong emphasis on purity, selling sex toys, even to mentally competent adults, could be seen as degrading, defiling and thus immoral. A juror who is especially sensitive to disgust, and thus more likely to find purity violations offensive, would be more likely to convict in such a case (Webb was ultimately acquitted).

A potential juror’s disgust sensitivity might be assessed by a short questionnaire during voir dire. See, for example, the Disgust Sensitivity Scale (short form) developed by Jon Haidt and colleagues (Haidt, McCauley, & Rozin, 1994). (Some of the items on this scale are quite graphic and, depending on the standards of the community might be considered offensive). If the administration of a jury questionnaire is not possible, demographic variables may be used instead—as mentioned earlier, conservatives are, on average, more disgust sensitive, as are lower-income individuals. While these relationships are reliable, they are statistically small and caution should be used when inferring disgust sensitivity from these (or, indeed, any) demographic characteristics.

## **2. Tort cases involving perceptions of greed or excess.**

Recently, former Merrill Lynch CEO John Thain was revealed to have paid out billions in bonuses to employees, even as the firm floundered under a mountain of bad investments and was on the verge of a taxpayer-backed takeover by Bank of America. It also became known that while Merrill was incurring enormous losses, Thain spent several million dollars decorating his office, including \$85,000 for a rug, and \$35,000 for a “commode on legs”. These revelations were widely met with outrage and disgust by the press and public—news stories literally described Thain’s behavior as “disgusting” (“Billions of Taxpayer Dollars Flushed Down John Thain's 35K Commode”). Granted that paying out large bonuses and expensively redecorating one’s office as one’s company loses billions is morally blameworthy as opposed to simply stupid and feckless, why react with disgust and not anger? Haidt and Graham (2007) argue that the concept of moral purity involves more than physical and sexual propriety—it also entails an obligation to act in a way that is not greedy, grasping or venal. Thus, greed and (metaphorical or literal) gluttony evoke disgust and moral condemnation. The thought of Thain and his traders “gorging themselves at the trough” even as the world financial system teetered is a powerful disgust elicitor, and an equally powerful motivation to seek retribution.

This sort of reaction need not be limited to billionaire CEOs. For example, in her response to Bryan Koenig’s “Do Conservatives and Liberals Punish Differently?” in the November 2008 issue of *The Jury Expert*, Jan Spaeth recounts the story of “Jennifer,” a woman who was verbally promised \$2 million for her part in successfully growing a \$100 million company over 10 years, then was fired with nothing. Spaeth points out that mock jurors polled by her company found it offensive and immoral that the company’s owners had profited so richly while failing to pay Jennifer what they had promised.

We agree with Spaeth’s analysis, and attorneys on both sides of civil suits in which defendants could be seen to have acted greedily or gluttonously should be aware of the role that disgust can play in moral condemnations of such behavior. Plaintiffs’ attorneys should make every effort to play up greedy or excessive behavior on the part of defendants (for example, an attorney representing shareholders in a suit against Merrill Lynch would do well to emphasize Thain’s obscenely expensive commode); while defendants’ attorneys should do their utmost to emphasize the abstemious and restrained aspects of their clients’ character (perhaps Thain always flew coach?).

## **3. Parties belonging to outgroups seen as foreign, strange, or dirty.**

One extension of the view of disgust as preventing us from engaging in behaviors that could lead to contamination or contagion is that beyond applying to foodstuffs or contaminants, disgust has also played a role in motivating us to avoid people and groups who were seen as carrying a risk of contagion. This view of disgust as a “behavioral immune system” (Schaller & Duncan, 2007) implies that members of groups that are perceived as foreign, strange, or norm-violating—especially in their physical cleanliness, food preparation, and sexual behavior—should elicit feelings of disgust and a motivation to avoid contact. At some time during our evolutionary history, proponents of this view argue, avoiding unfamiliar groups (and any pathogens they may have carried) conferred a survival benefit on our ancestors, but now this once-useful avoidance mechanism overfires, causing us to shun groups and people inappropriately and unfairly.



This disgust-motivated avoidance tendency could apply to defendants or victims in criminal cases, or to plaintiffs or defendants in civil cases. Any individual seen as belonging to a group viewed as strange, foreign, or “dirty” is at risk for evoking a disgust response, and for the reduced moral sympathy that it may entail. So, for

example, a victim seen as belonging to a despised outgroup would elicit reduced sympathy (as in, for example, cases of assault against gay men and lesbians in which perpetrators are punished lightly if at all). A *perpetrator* belonging to such an outgroup would likely elicit greater moral blame and harsher punishment. The suffering of plaintiffs belonging to such an outgroup would be less consequential to jurors—and so on. Attorneys representing members of such groups should take pains to emphasize the similarities between the individual and members of the jury. In the case of individuals belonging to foreign groups, similarities between cultural practices of the group and American culture should be emphasized. In the case of stigmatized minorities, special emphasis should be placed on those universal human qualities—family, pursuit of happiness, essential rights—that the individual shares with jury members. The idea is to “de-otherise” the individual—to the extent that jury members can put themselves in the other person’s shoes, their empathy for him or her will be increased (Batson et al., 1997). There should be care to ensure that the opposing counsel are not using these factors in their favor by highlighting the exoticism, unfamiliarity, or dirtiness of outgroup members, as we suspect that this strategy would be quite effective.

*Coda: Should disgust play a role in the law?*

Infusing moral values into science is often considered one of the worst “sins” a scientist can commit. In studying moral psychology it is especially necessary to maintain an objective stance in order to arrive at an accurate descriptive account of how morality works; we are interested in how and why people make moral judgments, not how they *should* make moral judgments (that is the business of moral philosophers, after all). Nonetheless, it is difficult not to chime in to the already widely debated question of whether moral or legal judgments should be influenced by the emotion of disgust. Unlike the emotion of empathy, which is prototypically elicited by the suffering of others and is considered by many to be the cornerstone of human morality, the origins of disgust have little to do with morality and a lot to do with avoiding physical illnesses. Nonetheless, for better or worse, it has been “borrowed” by the moral domain and most likely will not disappear from its role as moral emotion anytime soon. Some ethicists have argued that disgust is an appropriate cue that something is morally wrong (most notably the ethicist Leon Kass (1997), who famously described individuals not moved by disgust at human cloning as “shallow souls” who have “forgotten how to shudder”).

Without taking a firm stance on the topic, what we can say as psychologists is this—disgust most likely evolved as a response to physical contamination, it leads to harshness in the moral domain whether or not the disgust has anything to do with the person or practice being evaluated, and it is often associated with a decrease in sympathy and a disdain for outgroups that are likely to be seen as especially dirty or different. As Martha Nussbaum has pointed out in her treatment of the topic, “... throughout history, certain disgust properties — sliminess, bad smell, stickiness, decay, foulness — have repeatedly and monotonously been associated with... Jews, women, homosexuals, untouchables, lower-class people — all of those are imagined as tainted by the dirt of the body.” (Nussbaum, 2001, pg. 347). Indeed, one need only look at wartime propaganda to see how effective disgust can be at making it easy to view the enemy as less than human. Whether or not moral disgust can be of value in keeping people from committing unethical deeds remains an open question, but given the amount of damage disgust is capable of inflicting on innocent people, at the very least it seems as if we should be careful to monitor its influence in the courtroom, in public policy decisions, and in our everyday interactions with others.



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Submit an article for publication in *The Jury Expert*

We asked three experienced ASTC-member consultants to respond to Grime & Punishment and Charlotte (Charli) Morris, John McCabe and Holly VanLeuven swallowed hard and stepped up to the challenge.

## Response to Grime & Punishment by Charli Morris

Charlotte A. (Charli) Morris, M.A. ([cmorris35@nc.rr.com](mailto:cmorris35@nc.rr.com)) is a trial consultant in Raleigh, North Carolina. She has worked on criminal and civil cases since 1993.

Most of the time when I read an interesting article about social science research like the work done by Inbar and Pizarro I am inclined to say, “*Yeah*, that makes sense.” I like learning how things we may know intuitively or anecdotally can be measured, labeled, tested and explained. The research on disgust as an emotion with the power to punish strikes me this same way.

One memorable encounter with disgust in my work as a trial consultant came early, during my graduate school internship. I went with my fearless mentor Rebecca Lynn to visit the defendant who would face trial for statutory rape and child molestation of a woman who claimed that he’d sexually abused her when she was a child. There was no statute of limitations on rape and probably no limit on jurors’ feelings of moral disgust toward sexual abuse.

I remember driving across the middle of Florida on a dark, stormy night and going into my first maximum-security prison. The first hour or so of conversation was unremarkable. But just before we left that night, Ms. Lynn asked him the following question:

“Mr. Doe, you’re going into court tomorrow and the prosecutor is going to tell a room full of potential jurors that you molested your own daughters and one of their childhood friends. How does that make you feel, to know you’re being accused of having sex with young girls?”

He paused for a thoughtful moment then responded, “How young?”

But the article leaves me wondering how disgust operates in the variety of decision-making situations that fall outside the realm of the obviously disgusting (like maggots or child rape) and how broadly we can apply it to our casework. Take, for example, the suggested link between political conservatism and higher levels of disgust sensitivity. I have to

wonder how that squares with water-boarding, sexual humiliation and other “interrogation techniques” made famous by the unabashedly self-described politically conservative former administration?

Likewise, Hurricane Katrina’s effects on Louisiana were notably and visibly disgusting for its victims; we saw women and children wading through waist-deep water contaminated with raw sewage. Did the same conservative administration’s high sensitivity to disgust keep them away from New Orleans at first? Or was this, in fact, a classic case of the “outgroup” response, stifling what should have otherwise been an immediate outpouring of sympathy and support?

I’m curious also about the cited studies that show feelings of anger or sadness can have significant effects on judgment. How lasting are those feelings and their effects? How does it work over the course of days and weeks in a typical civil trial? If a juror experiences road rage on the way to court on the first day of trial and you can pick up on that anger during jury selection, is that different from a fellow juror who experiences road rage on the way to court on the first day of deliberations? If so, is there anything at all that lawyers or trial consultants could do about the second situation?

I also wonder if the moral disgust factor is a moving target. Is it possible to know when we’ve collectively hit “rock bottom” and disgusting conduct starts to lose its nasty luster? When Enron happened people everywhere were outraged. What about now? Is it still possible to reach the same degree of moral disgust when we hear that Madoff made off with all that cash?

The Passion Party case provokes a similar question: Is it possible that disgust can be two things at once – “in the eye of the beholder” (like beauty) AND “you know it when you see it” (like pornography)? If so, a reliable measure of disgust sensitivity would indeed be a serious asset to have in supplemental juror questionnaires as Inbar and Pizarro suggest. I have doubts about the likelihood of its approval by the courts, given the authors’ caveat that the Disgust Sensitivity Scale is “quite graphic” and may be offensive to some. It would be interesting to see, though, how such a scale could be modified and used as attorney-conducted voir dire.

I have also counseled attorneys to think about ways to desensitize jurors to facts that may elicit core or moral disgust (although I didn’t know those terms at the time). I’d like to know if there is any empirical research to support the working hypothesis that if a party embraces the terrible photos of an accident or smoking hot documents, we can actually dial down the disgust response over time.

Similarly, in a recent case involving the carbon monoxide poisoning death of two electrical sub-contractors, the defendant property owner for whom the electrical work was being performed worried about how the gruesome details of their deaths would affect jurors’ liability and damages findings. But we learned that when mock jurors were strategically focused (by us) on the men’s own foreman and his choices on the job – the two employees were instructed to seal themselves in a room with tape and plastic while they cut with a gas-powered concrete saw without the benefit of respirators – the disgust factor didn’t necessarily mean an adverse verdict for our client. Perhaps unknowingly, but convincingly, we were using disgust to our advantage by emphasizing evidence that inevitably led jurors to consider the grim way the worker’s died at the hands of their own foreman.

Despite the questions this article provokes, the idea that disgust is a powerful emotion that can affect legal judgments of responsibility still makes a lot of sense to me, particularly in the cases that seem the most obvious. I hope the research can be extended to address some of the questions that remain on an interesting topic.

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## John G. McCabe responds: How disgust influences moral, social, and legal judgments

*John G. McCabe, M.A. ([john.mccabe@earthlink.net](mailto:john.mccabe@earthlink.net)), is Chair of the ASTC's Research Committee. John is currently consulting while he completes his doctoral work at Claremont Graduate University. He studies means of correcting juror bias that is caused by negative emotional reactions.*

Some limited areas of the trial law (e.g., victim impact statements, compensation for emotional distress, etc.) allow for legal decision-makers' consideration of their emotional responses. Judges consider potential emotional reactions to evidence and testimony in weighing that information's prejudicial versus probative value. Nonetheless, information judged sufficiently probative can still be, and often is, emotionally provocative. Inbar and Pizarro rightfully point out that the influence of disgust in the jury decision-making process is understudied relative to its potential impact. How to effectively screen jurors who may be more sensitive to feelings of disgust and how to handle emotionally charged information are both difficult problems. In a recent case, jurors discounted otherwise credible eyewitnesses because they were members of a swinger's club, violating the moral norm of purity that Inbar and Pizarro identify. The defense attorney relying on those eyewitnesses apparently did not anticipate the extent of the jurors' disgust reaction, its detrimental impact on the jury's evaluation of the eyewitnesses' credibility, and resultant discounting. The attorney's client was found guilty.

Emotional responses like disgust (and anger) not only to lead to greater moral outrage and punitiveness but also to greater certainty in judgments. This greater certainty can lead jurors to use less effortful strategies in their examination and processing of trial-related information. Some even speculate that emotional responses are a heuristic: jurors recall the magnitude of their negative emotional reaction to certain evidence or testimony and use it as a *generic prejudice*, a gauge of the probability of the defendants' culpability or liability unrelated to the facts of the case. As the paradigm of the decision-maker as solely a "rational man (or woman)" quickly recedes into the past, the role of emotions such as disgust in jury decision-making is ripe for understanding.

Although Inbar and Pizarro's short primer on disgust usefully highlights areas that litigators and trial consultants may not be fully considering, it also belies the complexity involved in identifying and communicating about emotions generally. For instance, when reading Inbar and Pizarro's example about former Merrill Lynch CEO John Thain's gluttony, would you say you were more *disgusted* or *angry*? Or were you *saddened* by what the excesses of a culture of greed have wrought for our country? Did it make you *fearful* about the future, or feel *guilty*? Did you experience some *joy* knowing that this despicable character's name has become a punch line for late night comedians? It can be difficult to identify which of these *root* emotions is at play and in what proportion, particularly when gauging others' reactions. Moreover, there are inconsistencies in vocabulary even among people who study these issues. For instance, Inbar and Pizarro's use of *empathy* in the sentence beginning "Unlike the emotion of empathy, which is prototypically..." is confusing. It is unclear whether the authors are referring to empathy as an emotion or are referring to the emotional content of empathy which is often considered an emotional process and not an emotion, per se. One can empathize with any emotion.

Compounding identification and definitional problems are challenges in communicating to an attorney/client about the emotional reactions jurors are likely to have. Although many attorneys instinctively address jurors' potential emotional reactions, many others do not. Some attorneys answer questions about how they *feel* about a given case with, "It depends. Who's paying me?" Legal training generally focuses on reason-based arguments and does not include sensitivity training (meant in the least pejorative sense of the term). However,

considering the potential impact of emotions on jury decision-making, perhaps it should. Indeed, this deficit has not gone unnoticed. Jerry Spence's Trial Lawyer College offers training for attorneys to be more aware of their own emotional states so their use of emotional appeals in jury trials are more emotionally sincere and more effective. The course is called "Psychodrama" and appears to be directed toward plaintiffs' attorneys.

Less emotionally aware attorneys are more likely to become convinced of the righteousness of their cause and lose touch with their case's emotional impact on the jury. This provides an opportunity for the consultant to add significant value to the attorney/client's case. This is precisely why Inbar and Pizarro's article and similar articles are of such import. The psycho-legal literature has just begun to make a concerted effort to address/explore/investigate emotional reactions' effects on the law. Consultants would be well served not only to understand the literature but also to be trained to effectively communicate with their attorney/clients regarding jurors' potential emotional reactions to trial participants, evidence, and testimony.



## **RESPONSE: How disgust influences moral, social, and legal judgments**

**by Holly G. VanLeuven**

Holly G. VanLeuven, M.A. ([hgvanleuven@cox.net](mailto:hgvanleuven@cox.net)) is a veteran trial consultant located in Scottsdale, Arizona. She works on both civil and criminal cases nationwide.

Yoel Inbar's and David Pizarro's research could be very useful in training aspiring trial consultants and lawyers. Accepting at face value the authors' assumptions – which some may not – at the very least the paper raises issues that should lead to valuable discussion in the classroom. Most of the findings coincide with concepts familiar to experienced trial consultants and experienced trial lawyers, whether learned in the classroom, the courtroom or the community; whether

based on objective experimental findings or subjective personal conclusions. The authors also present numerous ways to use their findings to select juries and manipulate responses from jurors, all familiar to experienced trial consultants and experienced trial lawyers.

It would be extremely valuable to incorporate the concepts discussed into in-service training programs for incoming public officials, appointed or elected, at all levels: local, state and national. Particular training benefits could be developed for officials such as police, city commissioners, judges, legislators, and many others dealing regularly with the general public. Human beings charged with making decisions that directly touch the lives of other human beings need all the help they can get to understand how and why we make moral judgments. As the authors wisely conclude "given the amount of damage disgust is capable of inflicting on innocent people, at the very least it seems as if we should be careful to monitor its influence in the courtroom, in public policy decisions, and in our everyday interactions with others." The reader, taking a dim view of the effectiveness of monitoring, would prefer to see an emphasis on training.

My response is strongly influenced by being a student of Sociology. That, and having been raised from infancy on New England Town Meetings where mores traditionally became law, for better or for worse. The laws that apply to the cases we work on are products of the value systems of those with the most power and influence in the jurisdiction involved, local, state or national. Sometimes that means special interest groups win the day, sometimes it's political parties pulling rank. And sometimes, rarely, ordinary citizens organize, flex their political muscles and actually have an impact and are probably fueled by you guessed it: deep-seated, morally indignant, seething DISGUST!

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*Editor's Note: It's been a busy month for juries in the news and Doug Keene (President of ASTC) has spent hours on the phone with reporters attempting to clarify the issues and to communicate the position of the American Society of Trial Consultants (ASTC) on issues related to [jurors and the internet](#) as well as the [Wall Street Journal article on peremptory strikes](#) published barely two weeks earlier. Following is Doug's response to the WSJ:*

## **Fairness, Justice and True Understanding: The Benefits of Peremptory Strikes**

**by Douglas L. Keene, Ph.D.  
President, American Society of Trial Consultants**

Your article of March 5, 2009, "Three Strikes and You're Out? Critics Seek Juror-Dismissal Cap", by Nathan Koppel, raises important questions about fairness and justice in the court system, but it ignores many dimensions of voir dire and the use of peremptory strikes that are crucial for true understanding.

As a psychologist and litigation consultant (and current President of the American Society of Trial Consultants), I am intimately aware of the complexity of discerning bias, and the affect that such bias might have on jury decision-making. Prof. Baldus makes some assumptions in his paper that are superficially tempting but not factual.

First, demographic differences, including race, are not normally the best predictors of juror attitudes. Our senior membership is asked to teach scores of education programs at law schools and legal seminars every year, and this is one of the consistent messages. If all you look at is the race of jurors, you are likely to over-simplify their attitudes, which are not usually driven by race at all.

What drives juror decision-making are core values, life experiences, and the way the juror views the world. There can be an intersection of these factors with the experience of living in a crime-ridden neighborhood, or having a friend who was assaulted, or not feeling that the police have the right amount of authority, for instance, but those attitudes transcend race. The same worries can exist equally in a white suburban homemaker as in an African-American urban retiree, and they could be the cause of a peremptory strike by the same trial lawyer.

One of the unfortunate trends in recent years is that courts have reduced the amount of time allowed for questioning jurors, and this raises the tendency to rely on demographics to 'guess' where to find bias, instead of actual information. Beyond that, in a world where people are struggling to keep up with mortgages, we lose far more jurors to the crisis of economic hardship than we do to peremptory strikes. The poor and those in vulnerable jobs (often under-represented in the venire under any circumstance) are thus least likely able to afford jury service.

Racism does exist, and racial stereotypes are out there, among the public and among some trial lawyers. What is far more important in jury selection is to understand whether those attitudes and biases are going to affect juror decision-making, and what the effect will be.

I am reminded of a research group I conducted on a personal injury case in which members of a Mexican-American family were severely injured in a motor vehicle accident. When considering damage awards, two mock jurors demurred that the medical, rehabilitation and lost wages damages should be very low, because the family (who had lived in the US for decades) might just go back to Mexico. Should we have been limited in our peremptory strikes? These people were not subject to a strike for cause, and in their hearts they did not feel themselves to be biased.

In an Alabama court, an entire community of African-Americans was suing for damages related to a massive chemical spill. One of the peremptory strikes was used for a white woman who sat at an angle in her chair for 3 hours during jury selection, never once even acknowledging the presence of the African-American juror to her left, while talking freely with all of the white jurors sitting around her. She denied any bias related to the race of the Plaintiffs, yet she could not even acknowledge the woman sitting 8 inches to her side.

Without peremptory strikes, fairness is what is lost. Americans are the beneficiaries of a system that is under a dynamic tension, with the considerations of the trial court under the scrutiny of an appellate system that keeps its eye on global ramifications, as well as those specific to a particular case. However imperfectly this legal system works, it does generally work very well. The unintended consequence of changes that Prof. Baldus proposes, and which Mr. Koppel appears to embrace, are that far more racial bias, as well as prejudice of other kinds, will overwhelm justice. Peremptory strikes are not merely a favored anachronism, they are an essential part of the justice process.

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# Keeping Secrets— Protecting Privilege in Pretrial Research

by Kacy Miller

Kacy Miller, M.Ed. is president and founder of CourtroomLogic Consulting, a full-service trial consulting firm in Dallas, Texas. CourtroomLogic Consulting assists clients throughout the nation with narrowing complex issues down to juror-friendly terms long before they enter the courtroom. Kacy provides theme identification, strategy development, pretrial research, witness preparation, jury selection and a host of other services designed to maximize the client's position in settlement conferences or the courtroom. You can read more about Kacy at [www.CourtroomLogic.com](http://www.CourtroomLogic.com), or send her an email at [kacy.miller@courtroomlogic.com](mailto:kacy.miller@courtroomlogic.com).

In an age where technology rules, personal boundaries have narrowed and a man's word is not necessarily his bond, how can we ensure that confidential information *stays* confidential? In the world of litigation, there are rules, procedures and court opinions to preserve confidentiality. But how does that translate into the practice of trial consulting, and more importantly, pretrial research?

## **Is It Privileged?**

Although many clients and attorneys recognize and appreciate how effective and beneficial pretrial research can be, questions regarding privilege and confidentiality continue to linger. Two key issues are typically raised: (1) Is pretrial research protected under the work product doctrine, and (2) What measures can be taken to ensure that the pretrial research process does not become discoverable?

In 2003, the U.S. Court of Appeals took issue with whether the work product of a non-testifying trial consultant is privileged. In an opinion stemming from *Cendant Corporation Securities Litigation*, the Third Circuit held that trial consultants fall within the scope of the work product doctrine and that "communications [with a trial consultant] merit work product protection." While the issue of attorney-client privilege was not specifically addressed in this opinion, the concurring opinion held that the "attorney-client privilege was implicated."

The *Cendant* opinion has become a critical ruling for trial consultants throughout the country but, like anything in the law, there are always exceptions. Generally speaking, unless you are conducting pretrial research in a format that rivals that of Gene Hackman in *Runaway Jury*, you should be just fine. However, there are issues inherent to research that, when addressed carefully, can help ensure that the *Cendant* ruling will apply to your practices.

## **Execute A Retention Letter**

If the attorney and consultant do not already have a detailed engagement agreement, the parties should execute a written agreement formalizing the relationship and scope of assignment. A written engagement agreement leaves no room for questioning whether the consultant has been retained as a third-party, non-testifying expert. By memorializing the relationship, the consultant's work product becomes privileged and communications are protected from discovery.

In addition, in the event that pretrial research involves presentations or attendance by co-counsel or parties not named in the original retention agreement, the consultant is strongly encouraged to execute supplemental agreements with such individuals. These agreements can certainly be narrower in scope, but are nonetheless critical to preserving privilege should an issue arise down the road.



### **Require Vendor Confidentiality**

Typically, one of the first steps in conducting pretrial research is hiring vendors. Depending on the project design, these vendors may include a professional recruiter, a technology team to videotape the process, and a facility site to provide meeting space.

It would be prudent to require each vendor to execute a written Confidentiality Agreement. While some may consider it overkill, there is certainly no harm in executing a basic agreement where the vendor pledges to treat any document, correspondence, process or mental impressions related to the project as confidential in nature. One can never be too careful, and it only takes a few minutes. In fact, if the vendor expresses resistance to entering into such an agreement, it should be a huge red flag.

In addition, by limiting the amount and type of information vendors receive about the actual case, the consultant maintains greater control of confidential information and consequently, minimizes the chance of any breach. Granted, conflicts must be run (depending on the vendor and scope of assignment) and vendors who attend the actual project obviously will be exposed to case-related details, but to the extent possible, consultants should provide specifics on a “need to know” basis.

### **Use Professional Recruiters**

Typically, one of the first steps in conducting pretrial research is hiring a recruiter. While some attorneys choose to do their own recruiting, it is well worth the extra cost to retain a professional recruiter. They understand the confidential nature of the mock jury process, and they are very sensitive to the unique demographic needs that legal research requires.

When using an outside vendor for recruiting, a few measures can be taken to protect privilege.

1. As mentioned above, enter into a written Confidentiality Agreement with the recruiting company.
2. Refrain from providing detailed case information to the recruiter. Share detailed case information with the recruiter on a “need to know” basis. Professional recruiters are more than capable of staffing a project effectively without knowing details about the specific style of the case, parties, or the allegations.

3. Learn how the recruiter contacts participants. Do they have a database? Do they cold-call? Do they place ads in local newspapers? Work closely with the recruiter on what type of information is given to potential participants over the telephone, and if relevant, what information is placed in print. Maintain control of the process by approving advertising methods, if any.
4. Provide the recruiter with specific parameters and goals for the recruit, and monitor the process frequently. Do not assume that consultants with “in house” recruiters will implement first-class recruiting practices: monitor, communicate and oversee all aspects of the project.

### **Screen, Screen, Screen**

Of course the best mock jury panels are those which match the demographic composition of your trial venue, but make no mistake: a good recruit involves *much* more than simply matching basic demographics.

No matter what type of research you are conducting, potential participants must be thoroughly screened before being formally recruited. Clearly every case is different, and the venue of the actual research may impact the complexity and length of the recruiting process, but a screener is always critical. In fact, participants should complete the screener not only during the recruiting process, but also during the morning of the actual project. This helps prevent anyone from slipping through the cracks.

A detailed screener can help identify participants who would not typically serve as an actual juror due to eligibility issues, cause or hardship; it also identifies participants who are a little “too close to the case” for comfort. In pretrial research, allowing a surrogate juror who in any way has a personal connection to the case is an invitation for a breach of confidentiality. Unfortunately, despite best efforts, we cannot control what surrogate jurors do once the project ends: a detailed screener helps minimize the chances of having a Chatty Cathy, Bob the Blogger, Media-Hungry Mike or Counsel’s Cousin on your panel. It also maximizes the chances of seating a panel more akin to what you might see in the actual venire.

When it comes to drafting a screener, sometimes less is best. A good rule of thumb? Be thorough, but judicious.

A fifteen-page screener will undoubtedly weed out potential conflicts, but it will also complicate the recruiting process and potentially eliminate participants who would otherwise make very good surrogates. An overly detailed screener also has the potential of inadvertently giving recruits more information about the case than you may really want to share. When screening for specific conflicts, consider adding a few “teasers” into the mix. For example, if the case involves a pharmaceutical company, include the names of multiple pharmaceutical companies so recruits cannot determine which party is involved in the project.

Even though a screener takes some effort to create, and certainly makes the recruiter’s job more arduous, it would be remiss to conduct small group research without one.





### **Choose the Project Location Carefully**

Ideally, pretrial research is conducted in the actual trial venue. However, sometimes the project design allows for the research to be conducted in an alternate venue. In addition, some trial venues present very unique challenges that cause consultants and trial teams to reconsider project location.

When choosing a location, be sure you are informed of any standing orders or “unofficial” practices implemented by the trial judge. No client wants to invest thousands of dollars in pretrial research only to learn *after the fact* that he must disclose the participants’ names to opposing counsel and the trial court. For example, there is a standing order in the Eastern District of Texas that requires such disclosure under certain circumstances. Know your venue, and know it well.

When small group research is conducted remotely in a relatively small venue, the project is often held in a hotel conference room or public meeting center. These entities are employed by many, and it is impossible to know who-knows-whom. Who’s to say the maintenance supervisor isn’t a relative of the court reporter or local counsel? Chances are slim to none, but you never know. For obvious reasons, in small remote venues it is always a good idea to operate on a “need to know” basis. Be conservative with the type of information you provide to the facility site and its staff members.

In addition, it is also a good idea to work with the facility site on how they “label” the project. It is very common for hotels to display meeting names on signage as well as televised displays throughout the hotel. The last thing you want is a big, bold sign in the lobby stating that the “Smith Law Firm Mock Trial” will be held in Conference Center One. Discretion is imperative.

### **Lock Down Participant Confidentiality**

One of the most important—if not *the* most important—aspects of conducting pretrial research involves the mock jury panel itself. On the morning of the project, you will be faced with a group of strangers about whom you know nothing. In a perfect world, the people we encounter would share our work ethic, our value system and our respect for the confidential nature of the mock jury process. However, we do not live in a perfect world.

The best way to maintain privilege and protect the research process is to conduct a thorough orientation of the participants *before* any case-related information is shared, and to require every participant to execute a written confidentiality agreement. Some consultants (myself included) take things a step further and require participants to verbally attest—on video—that they understand the confidentiality agreement and will abide by the terms. This serves two purposes: (1) it lets participants know we are dead serious about the confidentiality issues, and (2) should a juror violate the terms of the agreement, it lets the court know that we did our best to protect confidentiality.

A confidentiality agreement does not need to be full of legalese or overly detailed to be effective, but it does need to address a few core issues. Have an active discussion with the panel about the agreement; talk about the meaning and importance of each section, and try to candidly answer their questions. If surrogate jurors understand the agreement, they are much more likely to abide by it.

Be sure the written agreements contain clauses that address the following issues:

1. Participant acknowledges that he is being retained by Consulting Company, Law Firm(s) and/or Attorney(s) for research pertaining to a lawsuit pending in [insert appropriate trial venue] (*the actual names of the law firm(s) and/or attorney(s) are not contained in the agreement*);
2. Participant acknowledges that all information related to the project is Confidential. (*“Information” is thoroughly defined*);
3. Participant vows not to disclose any information, opinion or details about the project to any person, business or entity unless required by a court of law;
4. Participant promises not to submit any information about the project on blog sites, social networking sites, message boards, newspaper commentaries, email and/or any internet sources;
5. Participant promises to contact the appropriate party (*typically the consultant*) if he is contacted by anyone seeking information about the project or his participation in same;
6. Participant agrees to be videotaped and/or photographed;
7. Participant acknowledges that his participation, comments, photographs, videotaped media and written questionnaires become the property of the consulting firm;
8. If participant receives a jury summons, participant agrees to privately notify the court of a potential conflict if the case is in any way related to the information presented during the research; and
9. Participant agrees to abide by the terms outlined in the agreement.

The written confidentiality agreement can be quite overwhelming for the panel, and while we certainly want them to view the project and its rules seriously, we don't want the panel to be so intimidated that they refuse to actively participate. It is often helpful to assuage juror fears by offering them a verbal contract pledging to treat *their* feedback and personal information with the utmost respect. Video snippets, photographs and personal information will not be posted on YouTube or the internet, and all information gleaned from the project will only be shared with appropriate parties; it is *not* for public consumption. After all, how can we expect surrogate jurors to treat our information with the utmost care if we fail to do the same?

### **Embrace the Role of Facilitator**

#### *Project Sponsors*

Surrogate jurors are innately curious about the research process and always want to know who is sponsoring the research. Informing the panel that the project is sponsored by the plaintiff, for example, raises a few concerns. First, it has the potential of causing surrogate jurors to modify their feedback or to withhold anti-plaintiff sentiment. Second, it introduces the potential for mock jurors to want to contact opposing parties and/or counsel to discuss the matter further,

especially if that juror votes against you. In the age of Google and search engine tools, the savvy and determined rogue juror could choose to violate the Confidentiality Agreement and become opposing counsel's new best friend.

Therefore, it is suggested that jurors simply be informed that all parties are working together in an effort to settle the dispute and that the facilitator has been retained to work with the parties in conducting the research. This approach not only minimizes potential bias, but it also places the plaintiff and defendant presentations on an even playing field. Neither has a more vested interest than the other does. In fact, by assigning the consultant a "moderator" role, the process becomes more balanced and the forum becomes a safer environment for honest, open feedback—no matter how good, bad or ugly.

#### Actual Names of Parties, Counsel and/or Witnesses

More often than not, the actual names of the litigating parties, attorneys and/or witnesses are divulged during the research process. This makes the research more authentic, and it certainly makes the process easier on the presenters. Documents do not have to be altered, video testimony can be played "as is" and the presenters and consultants do not need to rewire their brains.

However, there are rare circumstances where the case is so unique, the allegations so public or the parties so well-known in the community that actual names are changed. While this tactic certainly adds another layer of protection onto the privilege issue, it can be *extremely* challenging to implement. Slips of the tongue are almost certain, and after more than a couple, surrogate jurors start to question the authenticity of the process as well as the credibility of the presenters—which ultimately impacts the quality and validity of juror feedback.

Unless absolutely necessary, use the actual names of the parties throughout the research process.

#### **Retrieve Documents, Papers and Trash**

If jurors are allowed to take notes, provide notepads and collect them at the end of the project. Inevitably jurors will take their own notes if paper is not provided, and controlling where these notes ultimately end up becomes quite difficult if Jane Doe is writing case information on the back of her electric bill.

After the project is over and the meeting rooms have emptied, conduct a thorough walk-through. As mentally draining as these projects can be, do not be in such a rush to leave that you fail to destroy all case-related information that may have found its way to a corner, a trash can or the floor. Placing documents with identifying case or project information in a public trash can is an invitation for trouble. Carry them with you and destroy them appropriately... or box them up and FedEx them back to the office for shredding.

#### **Notate Every Single Piece of Paper**

As a general rule of thumb, it is always wise to include a footer on every single piece of paper that is generated as a result of the pretrial research. This includes recruiting screeners, confidentiality agreements, written questionnaires, payment forms, emails, formal reports, memos, letters—you get the gist. When creating a document, include a small footer claiming "confidential attorney work product" and put it on every single page, every single time. The devil is in the details.

Once the project has been completed, surrogate jurors have gone home, and the consultant has reviewed and analyzed the juror feedback, a written report is typically generated. In order to preserve the attorney-client and work product privilege, it is suggested that all written reports (and other similar documents) be distributed *directly* to trial counsel. Trial counsel can then distribute the materials to the client, the insurer and/or other appropriate parties as needed.

### **Final Thoughts**

Pretrial research is an extremely valuable tool for litigants throughout the country. A professionally facilitated project custom-designed to meet the needs of your case can provide a road-map for theme development and trial strategy, as well as insight into potential settlement value. Although pretrial research poses some unique situations regarding confidentiality, concerns over privilege should not inhibit anyone from conducting the research or benefitting from the process. By implementing the suggestions outlined above, you can help keep your information secure, safe and privileged. As Elbert Hubbard once said, "Secrets are things we give to others to keep for us." Let's keep them wisely.

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## Injured Body, Injured Mind: Dealing with Damages for Psychological Harm

by Brian H. Bornstein & Samantha L. Schwartz

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A principal function of the civil justice system is to make whole any person injured by another's careless or intentional actions, insofar as that is possible. In theory, this applies to all types of injuries, whether they are of a physical, psychological, financial, or property nature. In practice, however, not all injuries are created equal. Consider, for example, the recent case of Laura Schubert, a 17-year-old girl in Texas. Ms. Schubert sought compensation for injuries suffered in an exorcism conducted during a church youth group meeting<sup>1</sup>. She testified that she was cut and bruised during the exorcism, which caused a variety of subsequent mental and emotional injuries, including mental anguish, emotional distress, post-traumatic stress disorder, depression, and a suicide attempt.

Ms. Schubert and her parents sued the church, the senior pastor, the youth minister, and several church members. They made a number of claims, including negligence, intentional infliction of emotional distress, child abuse, assault, and false imprisonment; only the claims of assault and false imprisonment went to trial. A jury found in favor of Ms. Schubert, awarding her \$300,000 for her pain and suffering, lost earning capacity, and medical expenses<sup>2</sup>. On appeal, the Texas Court of Appeals reduced the award to \$188,000<sup>3</sup>, and on the defendant's further appeal, the Texas Supreme Court threw out the award altogether. The Texas Supreme Court held that the First Amendment's Free Exercise Clause precluded the church's liability for the plaintiff's emotional injuries. More relevant to the present discussion, the Court held that the First Amendment would *not* protect the church from liability for a plaintiff's physical injuries<sup>4</sup>.

### *Examples of Disparate Treatment of Physical and Psychological Injuries*

The *Pleasant Glade* case reflects a widespread double standard with respect to the law's treatment of physical versus psychological injury<sup>5</sup>. There are numerous examples of this double standard; for illustrative purposes, we select two.



**Example 1: The tort of negligent infliction of emotional distress (NIED).**

Plaintiffs can almost always recover general, or noneconomic (e.g., pain and suffering), damages for psychological injuries that are attendant on negligently caused physical injury<sup>6</sup>. There is considerable variability across jurisdictions<sup>7</sup> in what these psychological damages can include: pain (which has a mental as well as a physical component), mental suffering, emotional distress, mental anguish, loss of consortium or parental companionship, loss of enjoyment of life, anxiety, discomfort, humiliation, shock, and impairment of faculties are all compensable elements of general damages in various jurisdictions. There is no question that jurors respond to the psychological components of an injury. Mock jury research shows that plaintiffs' mental suffering contributes more to the perceived severity of their injuries and ultimate noneconomic damage awards than any other injury dimension (e.g., pain, disfigurement) except disability<sup>8</sup>.

Although all of these psychological injuries are potentially compensable when they result from physical harm, only rarely can plaintiffs recover damages for NIED *in the absence* of physical harm. That is, most states require a manifestation of physical harm for plaintiffs to recover damages for NIED<sup>9</sup>. This is true both when the plaintiff has been injured directly and when the plaintiff has witnessed injury to a third party<sup>10</sup>.

Moreover, to recover damages for the intentional or reckless infliction of emotional distress (absent a physical injury), the defendant's behavior must meet the higher standard of "extreme and outrageous conduct"<sup>11</sup>. There are some limited instances – such as wrongful death cases – where the law allows damages for psychological injury alone due to negligence. Nonetheless, compensation for survivors' non-economic losses (e.g., mental suffering, loss of consortium) is controversial and limited, especially compared to compensation for economic losses (e.g., lost earnings). In addition, in wrongful death cases *someone* has suffered a physical injury (i.e. the decedent), even though the surviving plaintiff typically has not.

**Example 2: The Americans with Disabilities Act.** The Americans with Disabilities Act (ADA) classifies a person as disabled if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of the individual"<sup>12</sup>. On the surface, then, physical and mental maladies appear to have equal standing. In practice, however, the courts treat them differently. Compared to physical illness, courts have been less likely to find that mental illness limits a claimant's major life activities; hence mental illnesses are less likely to qualify as disabilities under the ADA<sup>13</sup>. As with NIED, the ADA case law treats physical and psychological injuries differently.

### *Reasons for the Physical-Psychological Injury Distinction*

The law's reluctance to place psychological injury on a par with physical injury arises from "the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability"<sup>14</sup>. These are legitimate concerns, and the courts rightly seek to combat frivolous

litigation and malingering. It is easier to fake mental anguish than many physical injuries, such as a fracture, burn, or puncture wound. Yet as insurance adjusters can attest, claimants have faked virtually any injury imaginable, and some physical injury claims, like chronic pain or soft-tissue damage, can be just as hard to document and prove as psychological harm<sup>15</sup>.

Policy considerations necessarily dictate some limitation on potential defendants' liability, and the courts cannot be faulted for attempting to draw the line at an intuitively appealing boundary – namely, the line between physical and psychological symptoms. Unfortunately, the line is not as clear as it might at first appear. Severe emotional damages can occur in the absence of any physical injury. Consider, for example, a woman who lives with the fear that she is at higher risk for developing certain kinds of cancer because of a drug company's negligence in producing medication that her mother took during pregnancy<sup>16</sup>. Such a fear can be pervasive and debilitating. Barring recovery for such damages, or setting a higher standard of proof, is not necessarily a wise policy.

### *Problems with the Physical-Psychological Injury Distinction*

There are two main reasons why the distinction is problematic<sup>17</sup>. First, it presumes that physical injuries are more legitimate, or serious, than psychological injuries. This presumption, which calls to mind the children's rhyme of "sticks and stones may break my bones, but words will never hurt me," is patently false. Psychological injuries can take as long to heal, can be as resistant to treatment, and can impair an individual's normal functioning, every bit as much, and in some cases more than, physical injuries. Serious mental illness costs billions of dollars in direct costs<sup>18</sup> and even more in indirect costs, such as lost income<sup>19</sup>. In any given one-year period, roughly 20% of Americans, children as well as adults, suffer from a diagnosable mental disorder<sup>20</sup>. These figures make it clear that psychological ailments can be quite severe.

The second problem is that the distinction ignores the close interconnectedness between physical and psychological health (and sickness), and the impossibility in many instances of teasing the two apart<sup>21</sup>. An abundance of research shows that physical ailments have psychological consequences and, in some cases, psychological causes<sup>22</sup>. Chronic illnesses (e.g., diabetes, multiple sclerosis) can cause depression and anxiety, and these psychological elements can worsen the symptoms and course of a chronic disease. Pain is a curious case in point. On the one hand, it is presumed to be a physical symptom that accompanies tissue damage; yet on the other hand, it is every bit as subjective as mental suffering, and it is likewise amenable to psychological treatment.

In addition, a wealth of research over the last half-century illustrates that many presumably "mental" illnesses have biological causes, such as structural brain abnormalities, neurotransmitter or hormonal imbalances, or genetic predispositions<sup>23</sup>. With disorders like schizophrenia, bipolar and unipolar depression, obsessive-compulsive disorder, and substance abuse/addiction disorders all having at least some sort of biological contribution, it is harder nowadays to find a mental illness that does *not* have a physical component than it is to find one that does. Thus, one could just as easily say that Laura Schubert's botched exorcism caused a neurochemical imbalance and a host of physical symptoms (e.g., sleep and weight disturbance) as that it caused a pervasive mood change. Referring to certain disorders, such as schizophrenia or depression, in purely psychological terms would tell (at best) only half the story and would ignore some of the most effective treatments. Yet the courts continue to distinguish between physical and psychological injury, and to deem the former as more legitimate and therefore more deserving of compensation. Although some courts avoid the spurious distinction between physical and psychological injury and simply classify injuries as compensable or non-compensable based on their severity<sup>24</sup>, the majority continue to prioritize, giving greater credence to

physical harm. This creates a challenge for plaintiffs' attorneys whose clients suffer from injuries that are primarily or exclusively psychological in nature.

### *What Plaintiffs' Attorneys Can Do*

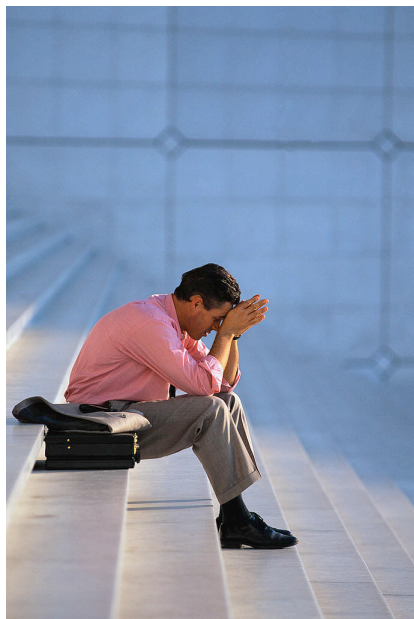
Attorneys have a few options in navigating their client's case of psychological injury. The options differ somewhat depending on whether the issue is one of getting the court to recognize the plaintiff's claim—as in NIED or mental disability—or maximizing the judge or jury's award for psychological injuries, but the same general principles apply to both situations.

*Crossing the legal threshold.* The “physical impact” rule that many jurisdictions apply in NIED cases requires proof that the psychological injury resulted from a physical injury caused by the defendant's negligence. The main issue that can bar these claims from even reaching trial concerns the timing of and the causal link between the psychological injury and the physical harm: For example, did the dysphoric mood state and other depressive symptoms cause the neurochemical imbalance, or vice versa? Research on the biological basis of psychopathology has generally failed to find a simple causal relationship; rather, the physiological and psychological symptoms are co-occurring, reciprocal processes<sup>25</sup>. Thus, plaintiffs' attorneys can legitimately argue that the physical manifestation of mental illness preceded the psychological manifestation, or was at least simultaneous with it. It is noteworthy that even in jurisdictions that uphold a physical manifestation requirement, some courts have ruled that psychological (e.g., nervousness, anger, fear, bitterness) or psychiatric symptoms (e.g., mental illness, severe traumatic depressive reaction) may be sufficient to fulfill the requirement<sup>26</sup>.

With respect to mental disability, the main goal is to establish the extent to which a plaintiff's mental illness limits a major life activity. The ability to do this will vary with the type and severity of the disorder, but the figures cited above regarding the prevalence and cost of serious mental illness can help in such an endeavor.

*Oral argument.* If the case goes to trial, plaintiffs' attorneys can “physicalize” a plaintiff's psychological injuries. Instead of (or in addition to) describing a plaintiff as suffering from stress or depression, they can describe the plaintiff's physiological changes. For example, they could focus on a depressed person's monoamine deficiency, sleep or appetite disturbance, and fatigue. We know of no research that has compared plaintiffs' outcomes (in terms of either liability verdicts or damages) as a function of how they present their psychological injury. Yet if laypeople share the court's double standard—and the longstanding stigma associated with mental illness suggests that they do—then making the disorder seem less mental, and more physical, will help.

*Expert testimony.* Plaintiffs' attorneys can use an expert to substantiate the legitimacy and extent of psychological injury, and to link it to physical injury. Physician testimony is routine to substantiate physical injuries. Medical experts testify to the injury's objective symptomatology, and if applicable, its causal link to the defendant's actions. Medical experts can also testify about the plaintiff's subjective experience of the injury and its psychological elements. However, mental health professionals are better suited to do so, and courts have allowed such expert testimony from psychologists<sup>27</sup>, social workers<sup>28</sup>, and counselors<sup>29</sup>.



These mental health professionals can be particularly helpful in establishing the severity of the plaintiff's injuries and their impact on current functioning. They can buttress clinical impressions and formal diagnoses with results from any of a large number of standardized assessment tests, such as the Beck Depression Inventory, the Minnesota Multiphasic Personality Inventory, and intelligence tests. These instruments are normed and well-established based on repeated testing across multiple samples, allowing for a relative comparison of symptoms. In addition to assessing current functioning, expert evaluations can assess the change from pre-morbid functioning, which is particularly critical in cases of brain damage. Neuropsychologists are especially suited to performing this task,<sup>30</sup> which can also include findings from brain imaging techniques<sup>31</sup>. Neuropsychological assessment can also address the issue of malingering, which, as noted above, is a major concern when dealing with psychological injuries<sup>32</sup>. Based on these findings, the plaintiff's attorney can engage a mental health professional to prepare a forensic report that addresses the diagnosis and the causal link

between the defendant's conduct and the psychological injury.

*Other witnesses.* The expert testimony can be bolstered by additional evidence of psychological injury based on other sources which can demonstrate the plaintiff's injuries more vividly. Lay witnesses who know the plaintiff, such as family members, friends, or coworkers, can testify to the changes they have noticed in the plaintiff, thereby indicating the extent of the injury. For example, a supervisor could testify to a depressed plaintiff's increased absence from work and diminished productivity since the injury. Family members could testify to the plaintiff's increased irritability. Such testimony can be supplemented with demonstrative evidence, such as employee review documents dated before and after the incident, or a day-in-the-life video illustrating the plaintiff's current level of functioning<sup>33</sup>.

### *Conclusion*

In recent years, society in general has become more cognizant of mental illness, which has in turn become less stigmatized. This development suggests that courts will also gradually become more accepting of psychological injuries. Nonetheless, many courts currently continue to apply a double standard to physical and psychological injuries. To address this double standard, we have outlined a number of steps that plaintiffs' attorneys can take to maximize the impact of psychological injuries on judges and juries.

## Endnotes

<sup>1</sup>*Pleasant Glade v. Schubert*, 51 Tex. Sup. Ct. J. 1086 (2008).

<sup>2</sup> The jury apportioned liability as follows: 50% to the senior pastor, 25% to the youth minister, and 25% to the other defendants.

<sup>3</sup> The intermediate appellate court eliminated the damages for lost earning capacity.

<sup>4</sup> Ms. Schubert did allege some minor physical injuries (e.g., scrapes and bruises), but the trial dealt solely with her emotional injuries.



<sup>5</sup> See, generally, P.A. Bell, “The Bell Tolls: Toward Full Tort Recovery for Psychic Injury,” 36 U. Fla. L. Rev. 333 (1984); Brian H. Bornstein, “Physical v. Mental Pain: A Legal Double Standard?” 40(2) APA Monitor 18 (Feb. 2009); G. Perrin & Bruce D. Sales, “Artificial Legal Standards in Mental/emotional Injury Litigation,” 11 Behav. Sci. & Law 193 (1993).

<sup>6</sup> In such cases the psychological injury is often referred to as “parasitic” on the physical injury. See, generally, Edie Greene & Brian H. Bornstein, *Determining Damages: The Psychology of Jury Awards* (2003).

<sup>7</sup> *Id.* See also Roselle L. Wissler et al., “Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities,” 6 Psychol. Pub. Pol’y & Law 712 (2000); Neil Vidmar et al., “Jury Awards for Medical Malpractice and Post-verdict Adjustments of Those Awards,” 48 DePaul L. Rev. 265 (1998).

<sup>8</sup> Roselle L. Wissler et al., “Explaining ‘Pain and Suffering’ Awards: The Role of Injury Characteristics and Fault Attributions,” 21 L. & Hum. Behav. 181 (1997) [finding that disability made the largest contribution to mock jurors’ pain-and-suffering awards, followed by mental suffering]; Roselle L. Wissler et al., “Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers,” 98 Mich. L. Rev. 751 (1999) [finding some variability depending on the respondent sample (i.e., jurors, judges, plaintiffs’ attorneys, defense attorneys), but that in general mental suffering was the second-best predictor of damage awards, after disability];

<sup>9</sup> See, e.g., *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

<sup>10</sup> *I.e.*, “bystander recovery”; see D.J. Leibson, Recovery of Damages for Emotional Distress Caused by Physical Injury to Another, 15 J. Family Law 163 (1976-1977); Restatement (Second) of Torts, §436A.

<sup>11</sup> See, e.g., Restatement [Second] of Torts, §46; *Payton v. Abbott Labs*, at 175-6 (“Although this court has allowed recovery for emotional distress absent physical harm, it has done so only where the defendant’s conduct was extreme and outrageous, and was either intentional or reckless”).

<sup>12</sup> 42 U.S.C. § 12102(2)(A). The distinction between physical and mental/psychological impairments was maintained in the ADA’s 2008 Amendments.

<sup>13</sup> *E.g.*, W. Wilkinson & L. Frieden, Glass-ceiling issues in employment of people with disabilities. In Peter D. Blanck (ed.), *Employment, Disability, and the Americans with Disabilities Act: Issues in Law, Public Policy, and Research* (2000) (at 68).

<sup>14</sup> Restatement [Second] of Torts, §46, Comment b.

<sup>15</sup> See, e.g., Valerie P. Hans, Faking It? Citizen Perceptions of Whiplash Injuries, in Brian H. Bornstein et al. (Eds.), *Civil Juries and Civil Justice: Psychological & Legal Perspectives* (2008), at 131.

<sup>16</sup> This scenario was a central element of the DES class-action litigation. See, e.g., *Payton v. Abbott*, *supra* note 9.

<sup>17</sup> See Bornstein, *supra* note 5; Perrin & Sales, *supra* note 5.

<sup>18</sup> According to the U.S. Surgeon General, direct costs of mental health services in 1996 totaled \$69.0 billion, which represented 7.3 percent of total health spending. Mental Health: A Report of the Surgeon General, Ch. 2 (available at [http://www.surgeongeneral.gov/library/mentalhealth/chapter2/sec2\\_1.html](http://www.surgeongeneral.gov/library/mentalhealth/chapter2/sec2_1.html)).

<sup>19</sup> A recent study estimated that lost earnings amounted to nearly \$200 billion per year. 165 Amer. J. of Psychiatry; Kathleen Kingsbury, “Tallying Mental Illness’ Costs,” Time, May 9, 2008; available at <http://www.time.com/time/health/article/0,8599,1738804,00.html>.

<sup>20</sup> See the U.S. Surgeon General’s Report, *supra* note 18.



<sup>21</sup> To some extent, this interconnectedness is implied by allowing damages for psychological injury that is parasitic on physical injury; but the tendency to view them separately, and as unequally meritorious, ignores the fact that it is not so easy to characterize an injury as purely physical or simply psychological. This latter issue is our concern here.

<sup>22</sup> At least contributing causes, though not necessarily sole causes.

<sup>23</sup> See, generally, Susan Nolen-Hoeksema, *Abnormal Psychology* (4<sup>th</sup> ed.) (2007). By stating that these disorders have biological causes, we do not mean to imply that biological factors are solely responsible for their etiology. Rather, just as with physical ailments, there are a host of physical, psychological, and social/environmental contributing factors.

<sup>24</sup> E.g., *Rodrigues v. State*, 472 P.2d 509 (Haw., 1970).

<sup>25</sup> Nolen-Hoeksema, *supra* note 23.

<sup>26</sup> *Stites v. Sundstrand Health Transfer, Inc.*, 660 F. Supp. 1516, 1527 (W.D. Mich. 1987); *Towns v. Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978); *Toms v. McConnell*, 207 N.W.2d 140, 146 (Mich. 1973) *Leaon v. Washington County*, 397 N.W.2d 867, 875 (Minn. 1986).

<sup>27</sup> *Kinsey v. Kolber*, 431 N.E.2d 1316 (1st Dist. Ill. 1982); *Westinghouse Elec. Corp. v. Lawrence*, 488 So. 2d 623 (Fla. Dist. Ct. App. 1st Dist. 1986); *Hidden v. Mutual Life Ins. Co. of N.Y.*, 217 F.2d 818 (4th Cir. 1954).

<sup>28</sup> *Honea v. Prior*, 369 S.E.2d 846 (S.C. Ct. App. 1988).

<sup>29</sup> *Sabrina W. v. Willman*, 540 N.W.2d 364 (Neb. 1995).

<sup>30</sup> See, e.g., W. Drew Gouvier et al., *Assessment of Damages II: Neuropsychological Concerns*, in R.L. Wiener & B.H. Bornstein (Eds.), *Handbook of Trial Consulting* (forthcoming).

<sup>31</sup> *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1568 (D.Hawaii, 1990).

<sup>32</sup> See also Gouvier et al., *supra* note 30.

<sup>33</sup> Day-in-the-life videos are potentially prejudicial, so they need to be made with care in order to gain admissibility. See Brian H. Bornstein & Robert J. Nemeth, "Jurors' Perception of Violence: A Framework for Inquiry," 4 *Aggression & Violent Behav.* 77.

**We asked two experienced trial consultants to respond to this article on presenting damages for psychological harm. Carol Bauss and Karen Lisko offer their responses.**

## Response by Carol Bauss

Carol Bauss, J.D. ([CBauss@NJP.com](mailto:CBauss@NJP.com)) is a trial consultant with the National Jury Project/West in Oakland, California. She has over 16 years experience in mock juror research, case strategy consultation, witness preparation, supplemental juror questionnaire design, jury selection and post-trial juror interviews.

Brian Bornstein and Samantha Schwartz provide a thorough examination of the double standard in the legal system involving the treatment of psychological and physical injuries. This double standard is also present in how jurors evaluate personal injury claims. One of the greatest obstacles plaintiffs' personal injury and employment attorneys face today is how to convince jurors that psychological injuries like emotional distress and pain and suffering are worthy of compensation. Emotional distress has become a buzz word for the anti-lawsuit crowd and is synonymous with frivolous lawsuits and out of control damage awards.

Jurors express several objections to compensating emotional distress. First, it is difficult to assign a numerical value to someone's suffering. For example, how do you translate someone's depression and sleepless nights into a dollar value?



Second, everyone has to endure suffering in his or her life. Bad things happen to everyone, suffering is merely a fact of life, and money won't change that.

Third, some believe that mental distress is a mind-over-matter challenge. As a prospective juror in a recent employment discrimination jury selection explained, "I don't believe in damages for emotional distress. You have to accept that some stuff happens. If I feel I am having emotional problems I try to get back on track." According to this view, if you can control your suffering, it isn't compensable.

Fourth, some jurors won't accept emotional distress in the absence of medical testimony supporting such a diagnosis or at least demonstrating enough severity to require treatment. However, we know how frequently plaintiffs do not seek counseling for their emotional distress.

As a result of jurors' reluctance to consider intangible damages, I counsel all of my clients who have potential psychological injuries to cover this topic in voir dire. It is helpful to ask each prospective juror how they feel about the concept of awarding these kinds of damages and whether they have any limits in their mind about the amount for non-economic damages. Jurors' responses on this topic are very telling, not only for their opinions about damages but also on their receptivity to liability.

I recently worked on a case where the damages were all psychological in nature. The plaintiffs' home water supply was tainted with toxic chemicals. Although the plaintiffs apparently did not suffer any physical harm, they were seeking compensation for the fear of getting sick in the future. The challenge was to communicate to jurors the plaintiffs' current state of mind. We learned from mock jury research that one effective technique was to have the plaintiffs walk through a typical day and report the number of times they and their family members had to use water and how all-consuming it was to think: "Is this going to make me sick" every time they turned on the water. The fear of the unknown was a constant burden to them.

Jurors often ask themselves, "What will the money accomplish?" when they are assessing damage awards for mental pain and suffering. Because money can't take away a loss, jurors look for a way money can make the plaintiff's life better. They may have an easier time awarding money that can be earmarked for the plaintiffs to use for therapy or for a vacation to take their mind off their worries or for classes to find a new career and increase their self-sufficiency. Helping jurors identify how a damage award could ease the plaintiff's pain and suffering is a good goal for the closing argument.

## Karen Lisko responds:

Karen Lisko, Ph.D. ([klisko@persuasionstrategies.com](mailto:klisko@persuasionstrategies.com)) is a senior litigation consultant with Persuasion Strategies. She is past President of ASTC and current member of the ASTC Foundation Board and works primarily in civil litigation cases across the nation.

Bornstein and Schwartz do their typical thorough job of pairing important jury research with good strategic thinking. Their comments and recommendations fall squarely on point with approaches that work with jury persuasion and damages. Those comments also call forward two further strategic points that counsel should consider when persuading a fact finder to award damages for psychological injury.

### The Four-Square Cycle of Monetary Good

Bornstein and Schwartz note, “An abundance of research shows that physical ailments have psychological consequences and, in some cases, psychological causes.” That logic makes sense to many but demands a fourth element to be its most persuasive. Consider the four-square cycle of monetary good. Harm occurred from the defendant’s negligence (Square One), the plaintiff sustained psychological injury (Square Two), psychological injury can cycle back into heightened or prolonged physical problems (Square Three), and a monetary damages award can break or at least ameliorate this cycle (Square Four). While no known social science study proves this point, the plaintiff’s or an expert witness’ testimony can. More importantly, it must. Mock trial research finds that jurors are more motivated to award money damages when they see good that will come from the award. Without Square Four (the good of the money), the plaintiff’s level of functioning seems hopeless, doing little to motivate an award for psychological recovery. This focus on psychological recovery over psychological damage may seem unfair but seems to be a very real part of many jurors’ evaluative processes.

### Watch for Parallel Universes in Jury Selection

Bornstein and Schwartz further note that “...if laypeople share the court’s double standard—and the longstanding stigma associated with mental illness suggests that they do—then making the disorder seem less mental, and more physical, will help.” So very true. Privately sponsored mock trial research bears out the fact that laypeople absolutely do express this double standard. In addition, that research shows time and again that jurors hearken back to their own lives when evaluating a plaintiff’s claims. Certain prospective jurors are more likely to act as jury experts in this regard. We have frequently heard plaintiff’s counsel make the mistake of assuming that prospective jurors with experience similar to that of their client will make good plaintiff’s jurors. Quite often, the opposite is true, particularly with two specific types of jurors. First, a juror with a personal or familial history of mental illness will filter this evidence through her own experience. If that sifting process ends with the juror concluding that the plaintiff has had less of a difficult time than the juror/juror’s loved one, this juror could prove dangerous for the plaintiff. Second, a juror with a personal or familial history of physical injuries similar to that of the plaintiff can be especially judgmental toward the plaintiff. In this juror’s view, they “got over it without monetary compensation. So too can the plaintiff.”

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# Expert Witness Preparation: What Does the Literature Tell Us?

by Tess M.S. Neal

Tess M.S. Neal [[tmneal@bama.ua.edu](mailto:tmneal@bama.ua.edu)] is a Ph.D. student in Clinical Psychology-Law at The University of Alabama. As a member of Stanley Brodsky's Witness Research Lab, she had been working on several research activities. Her research interests include witness credibility, juror stress, mitigation in capital trials, issues related to competence to stand trial, death penalty ethics, and the use of public domain information in jury selection. She recently won the University of Alabama's Award for Excellence in Research by a Master's Student.

Expert witnesses are retained to take the stand and share specialized knowledge with the court – specialized knowledge that may help the trier of fact make the decision they are charged to make. Naturally, expert witnesses (and the attorneys who retain them) want to appear confident and credible on the stand. However, expert witnesses are not necessarily experts at being witnesses (Brodsky, in press). Witness preparation scholar Stanley Brodsky suggests that expertise is situation-specific: an effective expert witness must prepare for the role of expert witness (in press). The rationale for expert witness preparation is supported in empirical research, which has found that experts who are less credible are less persuasive (Boccaccini, 2004; Boccaccini, Gordon, & Brodsky, 2004; Boccaccini, Gordon, & Brodsky, 2005). This article offers a thorough review of the research literature supporting expert witness preparation as a useful tool for effective expert witness communication at trial.

## *Most common methods of expert witness preparation.*

One of the most common methods of expert witness preparation appears to be self-preparation. There are several books devoted to helping expert witnesses prepare themselves for testimony in court. Warren (1997), Lubet (1998), and Brodsky (1991, 1999, 2004) have all written texts specifically devoted to helping expert witnesses prepare themselves for court testimony. Dozens of other books target specific types of expert witness preparation. Gutheil's (1998) text targets psychiatrists, Blau's (2001) targets psychologists, and Ziskin's (1995) book targets psychiatrists and psychologists who will testify as expert witnesses. There are books written for sociologists who testify as expert witnesses (Jenkins & Kroll-Smith, 1996) and handbooks for mental health professionals as experts (Tsushima & Anderson, 1996). Experts in technical professions (e.g., engineers, chemists, computer analysts, etc.) may turn to Matson's (1990) or Smith and Bace's (2002) books for help in preparing themselves. Ceci and Hembrooke's (1998) edited book and Stern's (1997) book were written for expert witnesses to prepare themselves for testifying in child abuse litigation. There are also books written for both expert witnesses and the attorneys who are working to prepare them for testimony (Lubet, 1998; Stern, 1997).

Attorneys also work with expert witnesses to prepare them for testimony by reviewing, discussing, and sometimes modifying the testimony material with the witness (Applegate, 1989; Boccaccini, 2002). Attorneys have a vested interest in having the experts they retain appear credible and believable on the stand for maximum impact. An important distinction needs to be made between preparing an expert witness to be an effective testifier from preparing an expert witness's testimony. Clearly, untrue or misleading testimony is unethical and illegal; and it is unethical and illegal for attorneys to prepare a witness to deliver false or misleading testimony (American Bar Association, 2001, §1.2d & § 3.4b). The goal of expert witness preparation is to assist the expert in delivering the message he or she has to share in an effective and responsible manner. The following section presents an overview of suggestions and recommendations for effective witness preparation.

*Elements of expert witness preparation.*

In his 2002 review of the state of witness preparation, Boccaccini wrote that the techniques recommended by attorneys (Aron & Rosner, 1998; Beals, 1996; Berg, 1987; McElhaney, 1987; Selkirk, 1992), trial consultants (Anthony & Vinson, 1987), and forensic psychologists (Brodsky, Sparrow & Boccaccini, 1998; Nietzel & Dillehay, 1986) overlap to a large degree. From this review, he distilled three basic components of witness preparation: witness education, attorney education, and modification of testimony delivery.

*Witness education.* The witness education component consists of orienting the witness to the trial process and physical layout of the courtroom in addition to reviewing prior statements and the subject matter of testimony (Brodsky, 1991). These are important elements that prevent the witnesses from making contradictory statements and from appearing nervous or uncomfortable on the stand (Boccaccini, 2002; Brodsky, in press). Experts should also know what to expect during direct examination. Attorneys should review the actual statements witnesses have provided in previous statements (e.g., depositions, police statements) prior to testimony and try to anticipate the questions experts will be asked during direct examination (Beals, 1996; Brodsky, in press). Witnesses should also be physically familiar with the actual courtroom they will testify in prior to taking the stand (Brodsky, 1991; Brodsky, in press; Nietzel & Dillehay, 1986). Brodsky (in press) suggests that witnesses look for opportunities to view other experts testifying and to habituate to the courtroom atmosphere prior to testifying.



*Attorney education.* Attorney education consists of knowing the strong and weak points of the witness's testimony and becoming thoroughly familiar with the anticipated testimony to avoid surprises (Aron & Rosner, 1998; Brodsky, in press). Attorneys should interview and learn about each witness's case-related knowledge in full before deciding which witnesses to call to testify (Boccaccini, 2002).

*Modification of testimony delivery.* Modification of delivery may be the most important of the three components (Aron & Rosner, 1998; Berg, 1987; Brodsky, in press). Modification of testimony delivery includes working with witnesses to increase their testimony delivery skills, which includes any witness characteristics or behaviors the court will hear or see. The witness's physical appearance, demeanor, pace of speech, and confidence may all be targets for preparation (Boccaccini, 2002; Brodsky, in press; Smith & Malandro, 1985).

Boccaccini (2002) summarized the fundamental testifying skills witnesses should be equipped with in his review of the literature. He described the following question-answering and non-verbal behavior skills as fundamental for witnesses.

When *answering questions*, witnesses should:

- 1) always tell the truth,
- 2) listen carefully and then pause and take a breath before answering,
- 3) only answer the question that is asked,
- 4) avoid slang and jargon,
- 5) not memorize answers to anticipated questions,

- 6) speak loudly and clearly,
- 7) not argue with opposing counsel about the line of questioning,
- 8) understand that it is OK to ask for a question to be repeated or rephrased,
- 9) understand that it is necessary to say ‘no’ or ‘I don’t know’ rather than guessing on the witness stand, and
- 10) avoid qualifiers (e.g., ‘I think’ or ‘I guess’) and hesitation words (e.g., ‘uh’ or ‘um’) (p. 166).

Regarding *non-verbal behavior*, witnesses should

- 1) maintain good posture,
- 2) remember to look at the jury (but not stare) when testifying,
- 3) not look to the attorney for answers, and
- 4) use a moderate and natural number of mannerisms and gestures (p. 166).

Boccaccini (2002) also suggests that the witness should be asked, ‘How do you know when a person is believable?’ The witness should then be asked to evaluate their testimony using their own internal norms for believability (p. 166).

Brodsky (in press) suggests there are three elements of the witness modification portion of expert witness preparation. He writes about how he first reviews videotapes of past testimony or in-person testimonial practice by the witness to identify the weaknesses in the witness’s self-presentation. The second step is to give feedback to the witness, followed by behavioral rehearsals or role plays with additional directive feedback to correct the identified problems. His third step is to include an anxiety-reduction component. Brodsky advocates for teaching relaxation techniques – specifically breath control techniques – to help expert witnesses feel relaxed and prepared prior to and throughout testifying.

Regarding preparation for cross-examination, Brodsky (in press) recommends that witnesses think through the ways in which the expert’s credibility could be damaged. He draws from the Federal Rules of Evidence (FRE) criteria for the qualification of a witness as an expert in his systematic exploration of the kinds of questions expert witnesses might be asked on cross. He suggests that challenges to the expert’s knowledge, skill, experience, training, and education are likely, and that prepared experts will be more fully ready to answer questions aimed at these kinds of issues that could potentially diminish the expert’s credibility. In his other books, Brodsky (1991, 1999, 2004) gives specific suggestions for how such questions might be answered well. It should be pointed out that the substance of the expert’s testimony should also be prepared – this isn’t something the attorney can do for the witness, but it is certainly something the witness needs to be doing on his or her own (Brodsky, in press). If a witness is truly up-to-date and familiar with the state of the field and how the issues of the case are related to their professional expertise, he or she will be substantively prepared to handle cross-examination (Brodsky, in press).

*Research with expert witness preparation implications.*

Some literature has been published that is indirectly related but has relevance for expert witness preparation. O’Barr’s (1982) book described a series of studies conducted in the 1970s and early 1980s through the Law and Language Project at Duke University. The project focused on four styles of courtroom verbal communication: 1) powerful versus powerless speech, 2) narrative versus fragmented testimony, 3) hypercorrect speech, and 4) simultaneous speech. The researchers found that witnesses who used powerless speech (e.g., excessive politeness, hedges such as ‘kind of,’ intensifiers such as ‘very,’ and hesitation words such as ‘well’ or ‘um’) were perceived as less competent, intelligent, trustworthy, convincing, and truthful than witnesses employing powerful speech (e.g., the

absence of markers of powerless speech) (Erickson, Lind, Johnson, & O’Barr, 1978). Witnesses who testified in a narrative (e.g., descriptive and lengthier answers) style rather than a fragmented style were found to be more dynamic and competent (Lind, Erickson, Conley, & O’Barr, 1978). Hypercorrect speech (e.g., using words that are more formal than one would otherwise use) when employed by witnesses in testimony led mock jurors to perceive the witness as less competent, intelligent, convincing, and qualified than witnesses who did not use hypercorrect speech (O’Barr, 1982). Finally, O’Barr (1982) reported that witnesses were perceived as having more control than attorneys who spoke over them by accident or potentially on purpose during cross-examination. These collective findings suggest that expert witnesses should be prepared to employ more powerful speech, a narrative style of testimony, to avoid hypercorrect speech, and not to worry so much if they are interrupted during testimony.

In addition to these studies on verbal communication, studies have examined the impact of witnesses’ nonverbal communication styles. Nonverbal cues are an important aspect of communication and may convey more of one’s message than the actual words one uses (Mehrabian, 1981). Jurors may use information conveyed through nonverbal means (e.g., facial expressions, bodily gestures and posture, eye contact, and vocal cues) to make inferences about a witness’s emotions that may impact the way they perceive the witness’s credibility (Smith & Malandro, 1985). Studies show that witnesses who maintain eye contact with attorneys and the jury are perceived as more credible than witnesses who do not maintain eye contact (Hemsley & Doob, 1978; Neal & Brodsky, 2008). Other research finds that people (not specifically witnesses) who lean slightly forward but with a moderately relaxed posture, face in the general direction of their audience, shift their postures relatively infrequently, and use illustrator gestures (e.g., gestures that reinforce a verbal message such as pointing or shaking or nodding one’s head) are linked to more positive evaluations by others (Leathers, 1997). Frick (1985) found that speakers who end their sentences with a rise in pitch may communicate uncertainty and be perceived as less credible than speakers who avoid doing so. These findings suggest that expert witnesses should be instructed to attend to their nonverbal communication cues: specifically, they should maintain eye contact with their audience (including both the attorney and the jury or judge); they should have a relatively relaxed posture, lean forward slightly as they testify, avoid frequent posture shifts, and face in the direction of their audience; they should use illustrator gestures as appropriate; and they should avoid ending their sentences with a rise in pitch.

Anecdotal reports suggest that female expert witnesses are more likely than male experts to be asked personally intrusive questions (e.g., “Have you ever been raped?” or “Are you sexually attracted to the defendant?”). Larson (2008) researched gender-intrusive questioning of both male and female experts to see how their responses to such questions affected mock jurors’ credibility ratings. She found that male and female experts were rated more positively in the gender-intrusive questioning conditions than in non-intrusive conditions. Further, she found that experts who responded assertively to the intrusive questioning were rated as more credible than experts who became defensive or passive.

Assertive responses included pointing out the inappropriateness of the questions, that the questions were intruding unnecessarily into the privacy of the expert, and that such questions targeted personal opinions or experiences and had nothing to do with the professional conclusions the expert was offering to the court. Other research supports that jurors perceive as credible assertiveness on the part of both male and female expert witnesses. For instance, Neal and Brodsky (2008) found that both men and women expert witnesses who maintained high levels of eye contact with the questioning attorney and/or mock jurors were rated as more credible than experts who didn’t maintain high levels of eye contact. The implications for expert witness preparation are that women and men expert witnesses should not be





defensive or passive when asked intrusive questions, but rather appropriately assertive. Additionally, expert witnesses should be sure to maintain high levels of eye contact with the attorney and the jury.

Expert witness credibility is linked to the persuasiveness of the expert (Boccaccini, 2004; Boccaccini, Gordon, & Brodsky, 2004; Boccaccini, Gordon, & Brodsky, 2005). A series of studies has found support for the assertion that credible expert testimony is characterized by knowledge, confidence, trustworthiness, and likability. Griffin, Brodsky, Blackwood, Abboud, Flannagan, and Bradsell (2005) developed a specific and quantified scale to measure the perceived credibility of an expert witness. The reliable 20-item Expert Witness Credibility Scale (alpha = .945), has four empirically derived subscales: knowledge, confidence, trustworthiness, and likability. Additional studies have begun to examine the four components of expert witness credibility separately. Cramer (2005) manipulated expert witness confidence, finding that witnesses with moderate levels of confidence were more credible than experts with “too high” or “too low” confidence. Brodsky, Neal, Cramer, and Ziemke (In press) manipulated the likability of expert witnesses, finding that experts who were more likable were perceived as more credible than experts who were less likable. The knowledge and trustworthiness components of expert witness credibility still require further investigation. However, findings thus far suggest that experts with very high confidence may come across as arrogant and should be prepared to testify with less off-putting overconfidence, and experts with low confidence who might come across as nervous or deceptive should be prepared so they feel more comfortable with their role. Experts should also work to be likable on the stand (e.g., avoid using jargon, smile when appropriate, use inclusive terms such as “we” and “us,” maintain an open posture, etc.).

These recommended techniques and other related research for witness preparation are available in the published literature, but Boccaccini (2002) noted that the methods by which (or the effectiveness of which) attorneys *actually* prepare witnesses are largely unavailable in published literature. He pointed out the several reasons this may be the case, including proprietary protection, practical limitations of investigation, the fact that the people who do witness preparation are generally not researchers, and that ethical concerns may be an issue. He argued for more empirical research on the methods and effectiveness of witness preparation. Thus, the rest of this article focuses on that body of work. Importantly, no studies that examined empirical support for methods of witness preparation specific to *expert* witnesses are available – rather, the body of work represents witness preparation more generally.

#### *Empirically supported methods of witness preparation.*

Only two empirical studies examining the effectiveness of witness preparation were published prior to Boccaccini’s (2002) call for more research. Neither of these studies examined *expert* witness preparation – rather, each had to do with the preparation of *eyewitnesses*. Nevertheless, each study found that “prepared” witnesses differed from “non-prepared” witnesses, which had a positive impact on mock juror perceptions of the witnesses’ credibility and persuasiveness (Spanos, Quigley, Gwynn, Glatt, & Perlini, 1991; Wells, Ferguson, & Lindsay, 1981).

Boccaccini (2004) developed a model for preparing witnesses called Persuasion Through Witness Preparation (PTWP). The PTWP model addresses 11 specific, behavioral elements of witness behavior as targets for preparation (please refer to Boccaccini, Gordon, & Brodsky, 2005 for more information). The 11 witness behaviors included 1) poor posture, 2) fidgeting, 3) expressiveness, 4) gaze, 5) voice quality, 6) response quality, 7) contempt, 8) other individual items, 9) general credibility, 10) confidence, and 11) emotion.

To test hypotheses about the effects of witness preparation, Boccaccini, Gordon, and Brodsky (2004, 2005) had mock criminal defendants testify twice about things they had actually been accused of at some point in their lives. They provided witness preparation to only half of the mock defendants after their first testimony. The witness preparation consisted of improving posture, reducing hand fidgeting, improving the clarity of responses, reducing



guesses, improving phrasing, reducing nervous smiling, increasing illustrator gestures, and reducing inappropriate facial expressions of anger and contempt. The findings revealed that only the witnesses who participated in witness preparation were more confident about testifying (Boccaccini, Gordon, & Brodsky, 2004). Participants in both the prepared and unprepared conditions felt less nervous over time, which suggests that testimony simulations, even without targeted witness preparation, may be important for nervousness reduction (Boccaccini, Gordon, & Brodsky, 2004). Prepared mock defendants were seen as using more effective testimony delivery skills, less likely to be guilty, and more credible than unprepared mock defendants (Boccaccini, Gordon, & Brodsky, 2005). In a second study, Boccaccini, Gordon, and Brodsky (2005) found that trained evaluators perceived public defender clients who underwent witness preparation as having higher testimony delivery skills, better overall testimony quality, and lower apparent guilt.

### Summary and Conclusions

If expert witnesses are prepared for testimony, it is generally through self preparation (e.g., reading books written to help experts prepare themselves for testimony) or by attorney preparation of the witness. When attorneys or trial consultants work to prepare witnesses, the three basic components of the preparation include witness education (e.g., reviewing prior statements and orientation to court processes), attorney education (e.g., becoming familiar with the witness's testimony), and modification of testimony delivery, which may include working with the witness on their communication skills, courtroom demeanor, confidence, and physical appearance.

There are few published studies that specifically explore and evaluate the methods or effectiveness of witness preparation. Research on verbal and nonverbal communication suggests witnesses should speak powerfully in a narrative style and avoid hypercorrect speech in addition to attending to their nonverbal cues. Nonverbally, witnesses should maintain eye contact, have a moderately relaxed posture, lean forward slightly, avoid frequent posture shifts, and avoid ending their sentences with a rise in pitch. Other research conducted with expert witnesses suggests assertiveness is appropriate, particularly when intrusive questions are asked. A series of studies has found empirical support for the assertion that credible expert testimony is characterized by knowledge, confidence, trustworthiness, and likeability on part of the witness.

Research has only begun to explore how and why particular methods of witness preparation work. Boccaccini's Persuasion Through Witness Preparation model proposes 11 specific, behavioral elements of witness behavior should be targets for preparation (Boccaccini et al., 2004, 2005). He and his colleagues have begun to explore the effects of witness preparation methods, finding in general that witness preparation leads to greater witness confidence, credibility, and persuasiveness. Future research will continue to investigate methods and effectiveness of witness preparation.

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## Favorite Things!

Again, this issue we have two favorite things. Two ASTC-member trial consultants share their precious [aka favorite] things.

**Edward P. Schwartz** (<http://www.eps-consulting.com>) tells us about the **Livescribe Pulse Pen**:

One of my favorite things is my new Livescribe Pulse pen. It records audio and synchronizes it

with the notes you take along the way. Wanna know why you wrote down "Groovy" with a little heart? Tap on the word and hear the playback of what the speaker was saying at the precise time you were drawing your doodle.

The pen comes with all sorts of special features and more are on the way. Draw a keyboard and tap the keys to play a piano. Add a marimba rhythm track and change the melody to steel drums. Write the word "bathroom" and tap on it to get the word translated into your favorite language.

The starter kit, with pen, several ink refills and four notebooks can be purchased at Costco for under \$200! Check it out at <http://www.livescribe.com/>.

**Rita Handrich** (<http://www.keenetrial.com>) offers a list of **cognitive biases courtesy of Wikipedia**:

The helpful folks at Wikipedia have provided a concise summary of multiple kinds of cognitive biases that we encounter in juries (and opposing counsel and just maybe in ourselves) with some frequency. They cover "the bandwagon effect", "the focusing effect", the "not invented here" effect, "the ostrich effect". And it goes on and on and on. Something for everyone and something relevant to every case you might have.

Check this out as a resource to aid you in identifying cognitive biases, what they are, which is which, and to help you think through how to confront them and minimize their impact.

[http://en.wikipedia.org/wiki/List\\_of\\_cognitive\\_biases](http://en.wikipedia.org/wiki/List_of_cognitive_biases)



## Welcome to our March issue of *The Jury Expert*!

As spring moves in and brings new life to the world around us, so this issue of *TJE* is packed with new ideas and energy. Some ideas you may find to be things of beauty, others may make you go ‘hmmmm’, and still others may make you wrinkle your face with disgust. Our hope is that every article in *The Jury Expert* elicits some response in you--agreement, disagreement, aha moments, and yes, even disgust!

This issue is filled with contributions from ASTC member trial consultants and from the academics who actually perform the research upon which much of what we, as trial consultants, do is based. Flip through the pages of this pdf file or travel about on-line at our website and view all of *TJE* on the [web](#).

Either way you choose to read our publication (on your computer via pdf, from a hard-copy print version of the pdf, or on our website) please come back to the website and comment on what you see, think, feel, sense, or wonder about as you peruse the ideas reflected in the hard work of each of our authors. Your comments and feedback help us know what you like, what you want more of, what makes you think, and how we at *The Jury Expert* and the American Society of Trial Consultants can address issues to improve your own litigation advocacy. Comment on the web or drop me an email--we welcome your feedback.

-- [Rita R. Handrich, PhD](#)  
Editor, *The Jury Expert*



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