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<p>Enron to Broadcom: Defending Companies in Court After a Decade of Corporate Scandals An experienced trial consultant carefully examines attitudes toward corporations & offers <u>very</u> specific strategies for the defense case. Page 1</p>	<p>16 Simple Rules for Better Jury Selection An experienced criminal defense attorney offers his rules for jury selection & four experienced consultants react and contribute new rules of their own. Page 17</p>	<p>Damages: The Defense Attorney's Dilemma An experienced trial consultant has ideas on why the defense doesn't like to discuss damages & on how to do it effectively! Page 40</p>	<p>Law on Display A new book on visual display of evidence in court offers strategies for attorneys. Two experienced trial graphics consultants react and offer perspectives. Page 46</p>	<p>Considerations in Using a Trial Consultant for Witness Preparation Two experienced trial consultants examine the Cendant findings & make practice recommendations. Page 54</p>	<p>The "Prep" Question An experienced trial consultant further explores the witness preparation 'question' & gives language for response. Page 63</p>	<p>"Colorism" Lessons from workplace research are applied to the courtroom in responses from three experienced trial consultants. Page 67</p>	<p>Principles & Practice of Trial Consultation A new book by Stanley Brodsky is reviewed by Kevin Bouilly, Associate Editor of The Jury Expert Page 78</p>
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Enron to Broadcom: Defending Companies in Court After a Decade of Corporate Scandals

By Richard Gabriel

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*"It's the same thing going on with America these days. It's big business. They just don't care... It felt like they thought they were bigger than the law."
 - Juror in i4i v. Microsoft patent case – IP Law and Business*

The Knights of Columbus was founded by Father Michael J. McGivney in New Haven, Connecticut in 1882 with some of his Catholic parishioners to give financial aid to widows and orphans in case of the death of the breadwinner in the family. This evolved into a life insurance program with nearly 1.3 million members and more than \$70 billion in life insurance policies. In conjunction with the Marist College Institute of Public Opinion in New York, they conducted a survey in February and March of 2009 to study the issue of ethics in business, interviewing

over 2,000 Americans and 110 high-level business executives. In this poll, 88% of Americans say executives' ethics are poor or only fair. When the executives rated themselves on the same scale, 65% agreed that their own ethics were only poor or fair. When asked about the driving force behind the decision-making in a company, both the American public and executives themselves placed much more importance on company profit, career advancement and personal financial gain over the interests of the company's employees or the public good.

In this same poll, when asked about common practices in corporations, more than three quarters of both the public and the executives thought exaggerated claims about the company's products and services were common. A majority of both thought that dishonesty to employees, improper accounting practices and falsifying records were common practices and more than 40% of both groups believe that Bernard Madoff's illegal financial scheme reflects a general widespread practice in business.

Both Gallup Polling and Harris Interactive have been conducting similar polling for years. In Gallup's Dec. 9th poll, they asked the public to rate the honesty and ethics in different professions. The public viewed the ethics of business executives barely above car salespeople, advertisers, members of Congress and stockbrokers.

This remarkably negative public attitude would seem to presage a wave of plaintiff verdicts in cases against corporate defendants. While there has been no noticeable spike in plaintiff verdicts or damage award amounts, this negative view shapes how jurors view the conduct of corporations and the motive that jurors attribute to their actions. In our own research, a large majority of jurors see lawsuits as a means of regulating the business and ethical practices of large companies. Given the continually falling approval ratings of Congress, the "juror-as-regulator" role may gain added relevance.

What are the current trial dynamics that shape jurors' opinions about corporate defendants? How do we effectively represent corporations, given today's cynical jury pool?

A. Distinguish between generalized and specific anti-corporate attitudes

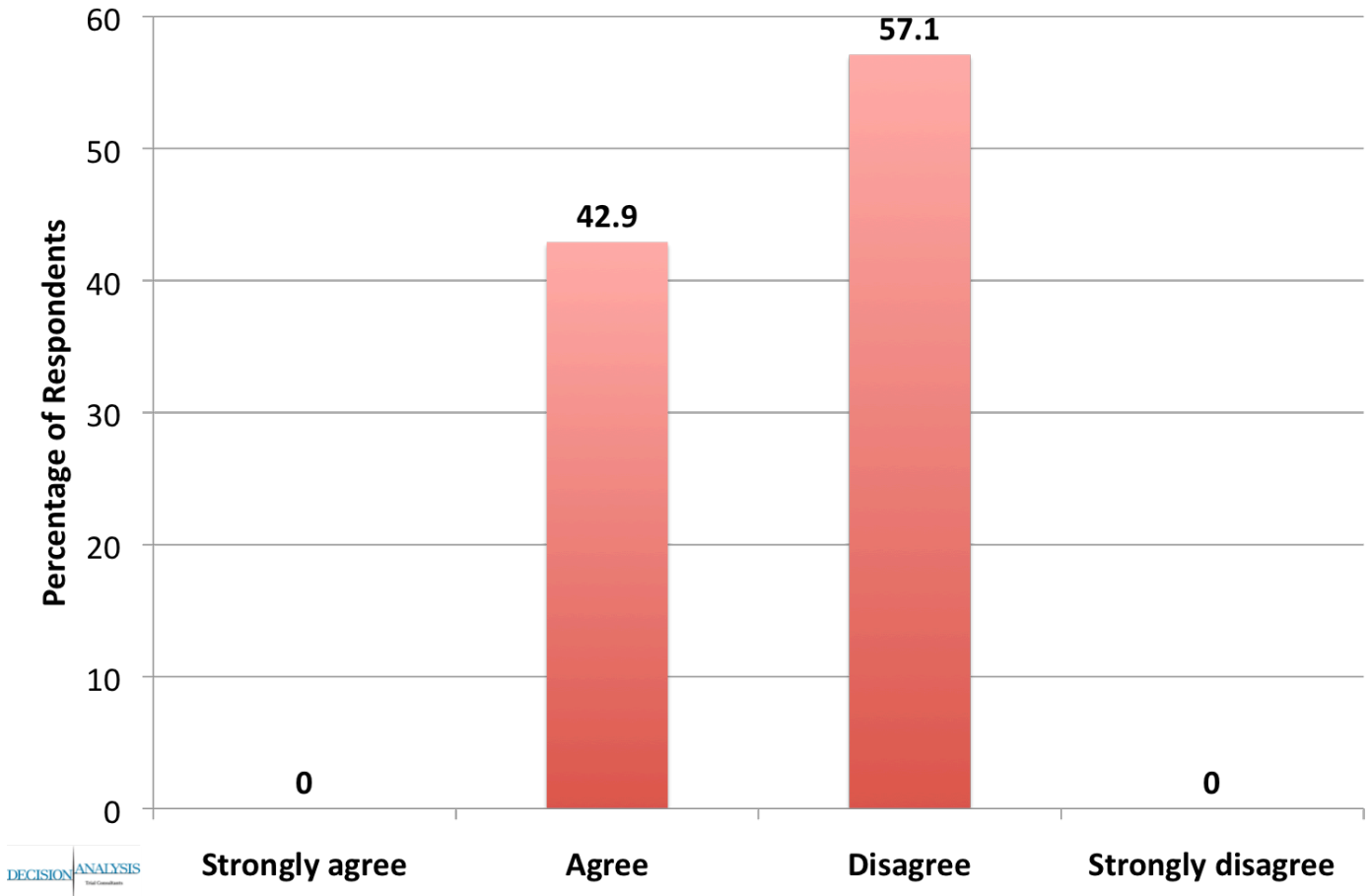
Given this hostile jury environment and depending on the facts of a case and venue, those who represent banks, brokerages, and health insurers think seriously about settling cases these days. For those who do go to trial, counsel may look at jurors who have anti-corporate attitudes and immediately target them with cause or peremptory challenges.

However, given the pervasiveness of these negative attitudes, a majority of jurors in your pool might hold the same opinions. You simply don't have enough peremptory strikes for all of these jurors. Also, there are many jurors who may hold anti-corporate attitudes, yet still be excellent jurors for your case. How do you tell the difference?

It is important to test the strength and specificity of the attitude the juror holds. For example, let's take the "profit over safety" attitude listed below. These charts came from questionnaire responses from a mock trial we did for a toxic tort product liability conference involving Benzene exposure.

¹ In this paper, I will speak mainly about jurors and juries. However, when discussing the positioning and presentation of cases, these same strategies are intended to be applied to judges, arbitrators and mediators as well.

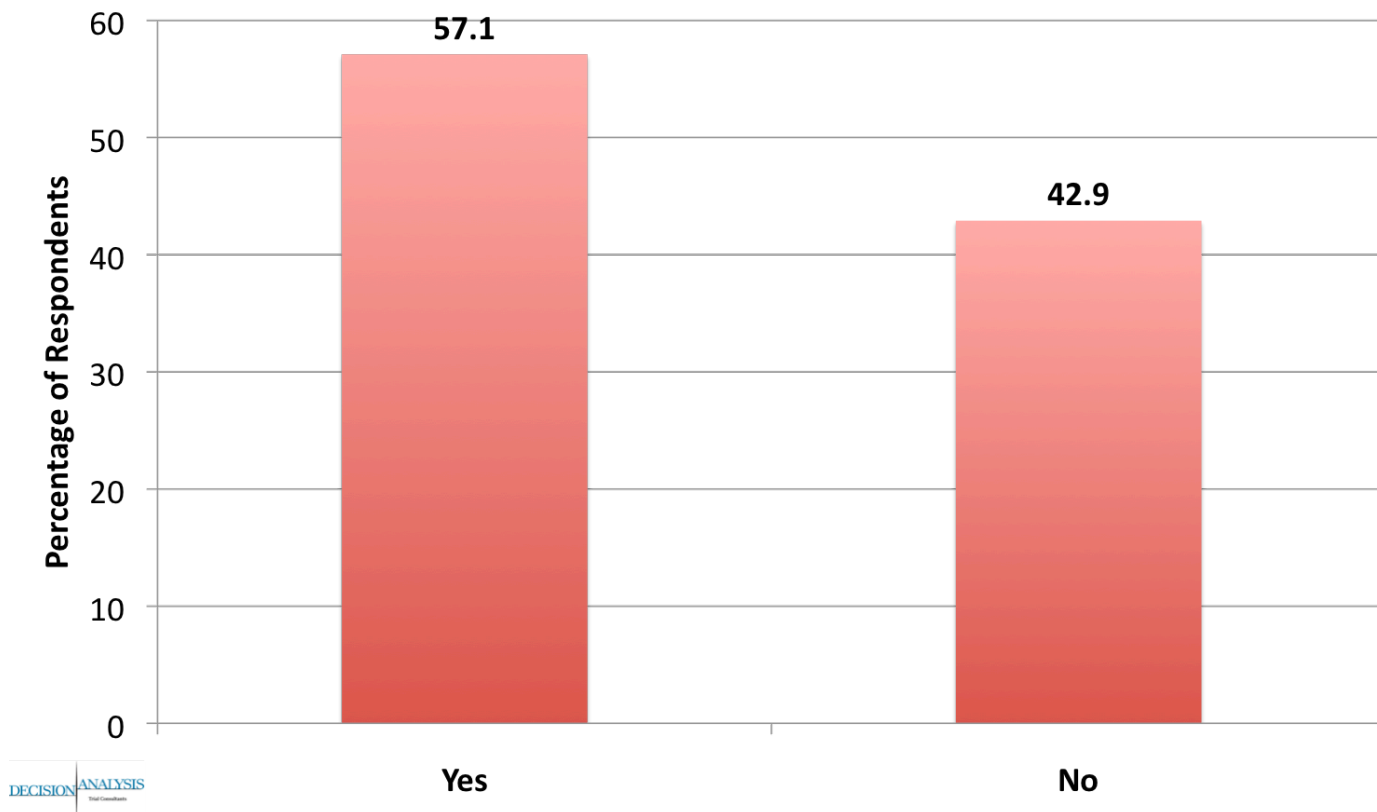
Companies routinely compromise safety in order to increase profits



Some jurors in that 43% column have heard the news stories in the media, read John Grisham books, and use these cultural references to form this belief. Some jurors in that 43% column have personalized this belief as a result of direct experience or their moral value system. Those who have personalized this attitude are more heavily invested in their belief because this belief has emotional roots. How do you tell the difference? You simply ask in voir dire, “Juror number 7, I noticed you agreed that companies routinely compromise safety for profit in your questionnaire. Tell me how you think about this issue.” (Note: “How” questions allow jurors to describe their thoughts while “why” questions ask jurors to justify their response, which may cause jurors to dilute their original response.)

If you get a response to this statement similar to one I have received in the past, “A company should take extra measures and extra precautions [beyond the legal requirements]” you know that this juror will be expecting a higher standard of conduct from the company. Similarly, you can take the “big corporations hide their bad deeds” question asked below and ask, “Tell me about your response to this statement.” and “How long have you felt this way?”

Do you think that large companies will try to conceal the fact that they may have produced a hazardous product in order to avoid responsibility for the harm their product may have caused?



If you get a response like, “*Big companies are always passing off something that is harmful as not harmful,*” you can note that the word “always” indicates a deep and significant bias. You also need to closely watch jurors’ nonverbal signals and listen to their tone of voice as they respond. Their voice and body language will carry important clues about the depth of their feeling about the issue.

Proposing and conducting mini-opening statements prior to voir dire will also allow you to determine whether jurors’ views are generic media-driven attitudes or are deeply embedded beliefs. This is a relatively recent jury innovation, where both sides deliver a three to five minute opening statement to the jury panel prior to voir dire. A simple question to ask jurors after these mini-openings is, “You have just heard the plaintiff’s basic allegations in the case. What do you think?” Then listen carefully to their words and their voice and watch their nonverbal signals as they talk about their impressions. The more deeply embedded the negative corporate attitude, the quicker jurors are to latch onto plaintiff claims of negligence or misconduct and the stronger their grip.

Employing these tools in voir dire will give you a better understanding of how to effectively identify your highest risk jurors.

B. Plan to defend against the “worst case” scenario

In preparing a case for trial, the defense often looks at the legal claims in the case and existing discovery. When you have lived with a case for months, if not years, you have developed strong factual and legal arguments that have been tested and vetted within the firm, with the client, and through pre-trial motions. As a result, it is easy to develop a “war room” mentality that minimizes the strength of the plaintiff’s case. When we are preparing for conducting focus groups or a mock trial and going over the proposed plaintiff presentation, we sometimes hear, “Oh, they don’t have the facts to support that allegation.” Or, “They would never make that argument!” Come trial, the argument is then made and is extremely effective. Since we did not test for it, we did not develop an effective counter-argument.

In constructing the plaintiff’s case for jury/judicial research or brainstorming purposes, it is important to anticipate adverse rulings by the judge as well as the strongest structure, sequence, and content in the plaintiff’s case, even if you think the arguments and factual construction of events is speculative and implausible. Remember, attorneys who predominantly handle plaintiff’s work (especially in the personal injury arena) have a different worldview than attorneys who predominantly handle corporate defense work. It is important to insert these different values into the plaintiff presentation because they activate different parts of a juror’s brain and decision-making. (A parallel of these different values can be seen in the work of George Lakoff in his analysis of the cognitive differences between liberals and conservatives.)

In preparing for the “worst case”, you are anticipating not only a plaintiff’s case presentation but a case that jurors may construct themselves in deliberations out of both side’s cases. The exercise of stepping into opposing counsel’s shoes and developing their strongest case is useful in the following ways:

- It allows you to more accurately respond to plaintiff’s allegations, especially ones you consider to be specious.
- It forces you to consider the emotional impact of some of the plaintiff’s arguments and intangible issues (presence of an injured plaintiff in court, adverse publicity, etc.).
- It allows you to consider whether you are properly allocating trial time to the most important jury issues.
- It allows you to anticipate and preempt some plaintiff arguments.

Finally, planning the “worst case” allows you to systematically evaluate and weigh trial risks. By playing out different plaintiff scenarios and potential defense responses, it gives a company a more accurate number of variables that can affect the outcome of the case. Thus, their risk analysis is more informed.

C. Translate that “worst case” scenario into a case narrative

When asked about the difficulties of taking a very vivid world that existed in his head and rendering it for an audience in his latest blockbuster *Avatar*, director James Cameron said, *“My challenge as director is to make it as real as possible for them. A 3-D film immerses you in the scene, with a greatly enhanced sense of physical presence and participation.”*

Most defense teams do not have a \$400 million budget to work with or a battery of CGI effects teams. But they do have a story. And part of the defense’s job in a trial is to put a jury into that world, to tell as vivid and real a story as possible and to let them understand what really happened in the case.

To understand the importance of case narrative in how the defense tells its story, let’s look at two exemplar structures.

Plaintiff Narrative Structure

1. Company X is a big company
2. They have a lot of money, experience, power, knowledge, expertise, etc.
3. Here's what they knew at the time the plaintiff was harmed by them
4. Here are the industry standards that they have to comply with
5. Here are the regulatory/legal standards they have to comply with
6. Here are Company X's own internal policies and procedures
7. Here is how Company X broke these industry/regulatory/legal standards
8. Here are the foreseeable and preventable problems about their product/service/promises
9. These same and foreseeable and preventable problem happened to this poor plaintiff
10. Here are all the defendant's inconsistencies, errors, and bad acts
11. Here is why they did it intentionally
12. Here is why you need to award a lot of money
13. Here is why the law tells you to find for the plaintiff

Now, this may not be a classic plaintiff outline, but plaintiffs have learned that starting their case by talking about their poor injured client and what happened that damaged their client only invites early scrutiny and criticism from the jury about what they should have done differently.

As a result, this structure emphasizes that the defendant company has the most power of the parties in litigation. By emphasizing the inequity in size and power, plaintiffs hope to raise the "standard of care" (even applied to cases where there is no legal standard of care requirement) by which the defendant is judged. They then seek to establish all the rules that govern the way that Company X should operate. Next, they show that there are recognized problems that should have been remedied by the defendant. Finally, they explain how these problems and rule violations caused damage to the plaintiffs. This immense amount of setup is intended to demonstrate that the defendant's foreknowledge either created a situation that the defendants knew was intentionally harmful or that they were recklessly indifferent to the potential harms of their actions.

Let's now look at how the defense instinctually wants to respond to this plaintiff structure:

Typical Narrative Structure of Defense Response

1. We are a really good company who does a lot of good things for our customers
2. Here is what really happened here
3. Here is what the real standards are (industry, regulatory/legal, etc.)
4. Here is what our internal policies or procedures really say
5. This case is not about
6. Our better experts and more prominent witnesses all say
7. Here is what the plaintiff did wrong
8. They were not harmed that badly
9. Here is why the plaintiff has not met their burden or the legal definitions

D. The Problem with Defense Mode

It is instinctual to respond to negative allegations about the character of the company by wanting to show the jury all of the positive things the company has done. But structurally, it can create some real problems for a defendant. First, jurors often are skeptical about the “good company” story, at best thinking that this story sounds like a commercial with little relevance and at worst thinking that the company is hiding something. Second, unless cross-examination has significantly damaged the plaintiff’s case, jurors are listening to the defense at the beginning of the case from a skeptical perspective.



The problem with jumping into a counter chronology of case events is that it presumes that jurors are keeping a neutral mind and holding the plaintiff’s version of events in a separate part of their brains while they listen to the defense’s case. The laws of primacy suggest that while jurors may not entirely adopt the plaintiff’s version of events at this point, they may very well have adopted the plaintiff’s frame of reference. Additionally, a counter chronology keeps the focus firmly on the conduct of the defendant. While jurors may be persuaded that the corporate picture is not as bleak as the plaintiffs portray, they are probably willing to believe that at least some of the allegations are true. The counter chronology sets the stage for jurors to negotiate in deliberations just how bad the defendant was.

“Just because it’s [a big chemical company] and they have money, they weren’t malicious. He [plaintiff] should get paid, but not millions.” - Juror in toxic tort mock trial

Plaintiffs also use the most obvious and common sense standards and policies to make the defense admit they are required to or at least ought to adhere to these standards. They then use the defendant’s conduct to show that they did not follow their own policies or violated a standard in some way. In response mode, the defense is put in the difficult position of either claiming they did not violate the standards or policies, or that these standards did not apply to this situation.

Finally, in response mode, the defense sometimes relies too heavily on PMK or expert witness testimony to deliver a persuasive version of events in the case. However, jurors often dismiss or discount these witnesses as delivering “the party line.” Moreover, jurors are more impressed by a witness’ involvement in the actual events of the case and their ability to communicate with the jury than by their resume credentials.

E. The Lure of Knowledge and Expertise

Most jury instructions contain language that instructs jurors to treat a corporation the same as an individual. However, this legal requirement is starkly contradicted by how jurors actually see corporations. In her excellent 2000 book *Business on Trial*, Valerie Hans demonstrates that around 60% of poll respondents and mock jurors and more than 40% of actual jurors believe that a corporation should be held to a higher standard of responsibility than an individual. Consider what this belief does to the burden of proof and the legal definition of negligence. If the measure of negligence is the failure of what a reasonable *individual* would or would not do in a similar circumstance, a *corporation* would obviously have to do or not do more to accomplish this standard. Say Acme Corporation is being sued for a product defect claim. If they have a higher standard of responsibility, they would be expected to go further to understand whether their product could be used or misused in a particular way - further than even their own engineers (as individuals) might go.

There are two fundamental issues that jurors investigate when they are looking at liability: 1) the ability of the defendant company to foresee harms it may cause and 2) their ability to prevent those harms. The greater the

knowledge, power, expertise and experience the defendant company is believed to have, the more the jury expects them to foresee and prevent potential harms. Jurors will bring a higher level of criticism against those that they perceive have the ability to control the final outcome.

This can create difficulties, especially when a great deal of defense strategy is based on establishing expertise. In many a defense camp, expertise is one of cornerstones of credibility. Yet, jurors use this same expertise to raise the standards for the defense and turn a more critical eye to the conduct of the defendant company.

So, given all of these fundamental problems with juror bias, typical defense responses, and expertise, how does a corporate defendant create an effective strategy for presenting their side of the story?

F. Do Not Tell the “Other Side” of the Story

It is common in voir dire or opening statements for the defense to ask jurors to “wait until they hear both sides of the story.” This phrase contains a risky concept for the defense. First, it presumes that jurors will wait to judge all the facts in a case. They don’t. More importantly, this statement presumes that there is really only one story with two sides. This invites the jurors to adopt facts from both sides and create a composite narrative of the case. Knowing that jurors often negotiate both liability and damages using facts and arguments from both sides, this supposes that jurors will find that the corporate defendant did something wrong, maybe just not as bad as the plaintiff alleges.

It is far more effective to tell a different story altogether. Instead of starting with “Here’s why what the plaintiffs say happened did not happen...”, thus emphasizing the plaintiff’s version of events a second time, it is better to reframe the case as “Here is what really happened in this case: here is the proper sequence of events, here is the proper cast of characters, here is what you need to know about our industry and corporate culture to understand what really happened here.”

I recently worked on a case where a fruit and vegetable processing company was accused of trespassing onto a neighboring property by allowing its irrigation water to flow onto that land, causing construction and building damages that delayed the expansion of their neighbor’s business operation. The initial instinct of the defense was to refute the plaintiff’s allegations by having their own witnesses and experts talk in-depth about the irrigation and water elimination system they had in place. After conducting research, we discovered that jurors faulted the plaintiff in how they built their plant. Thus, we shifted the focus of the case from water to “*how the plaintiffs caused their own damages through their own shoddy construction methods.*” The defendant company still prepared strong explanations for the water, it just became a secondary focus in the case. The jury came back with a defense verdict.

G. Focus on the Plaintiff

This shift in focus brings up another important strategy - constructing the case around the plaintiff’s choices: their inconsistencies, their failures, their mistakes, and their misrepresentations. This strategy can make a corporate defendant nervous, especially when the plaintiff is injured, an employee of the company, or the family of someone who died in an accident. The concern is that the defense will be “blaming the victim”, thus alienating the jury who may feel sympathy for the plaintiff.

To avoid the appearance of a personal attack, it is useful to frame the juror’s job as investigating the actions, conduct and intent of ALL of the parties in the case. Thus, the defense has the obligation to present everything needed for the jury to consider the credibility of the claims. This is mainly a shift in the tone and intent of the case presentation. Instead of the defense attacking the plaintiff, they are merely introducing the plaintiff’s actions and

representations for the jurors to consider. This may seem like semantic spin, but it is in fact an important distinction.

Instead of viewing jurors as neutral arbiters, it is better to think of them as critics - their job is to look for fault in all of the parties. The more time they spend finding fault with the plaintiff, the less time they have to attribute liability to a defendant.

The character of the plaintiff is important. We live in a culture that places a great deal of importance on personality. A UC Davis study recently reported that the Tiger Woods scandal has reportedly cost the shareholders of Nike, Gatorade and other sponsors between \$5 and \$12 billion. Jurors are armchair psychologists looking at the motivation and intent of the parties. Even with the most seemingly sympathetic plaintiff, jurors are tolerant and even desirous of aggressive defenses that probe into the character of an injured party.

I have done a lot of cases for state, county, and city agencies when they have been sued for defective road design in accidents where motorists have been injured or killed at an intersection or on a highway. While the temptation is to focus on defending the engineering of the road, this introduces complexity into the case and shifts the jurors' attention to what the agency did or did not do with their design. Having spent a lot of time in cars themselves, jurors find it much easier to simply to look at what the drivers did or did not do behind the wheel to prevent the accident. Jurors will put themselves literally in the driver's seat, second-guessing the decisions they made at the time of the accident.

To illustrate how dramatic this shift in focus can be, Merck, in defending itself against Vioxx product liability claims discovered that defending the science behind their drug was less effective than presenting the health and lifestyle factors of the plaintiff or decedent that contributed to their death or injury. While they sustained a couple of early losses in the Vioxx cases, many later trials returned defense verdicts.

One of the best ways to focus on the plaintiff is to use his or her own words and actions to prove your case. By using the plaintiff's own testimony, witnesses, and experts to create a series of minor or major concessions, you can whittle down the amount of disputed issues in the case in order to argue that the "plaintiff agrees with us on these points."

H. Establish the Role of Jurors Early

"We wanted to make a statement. We wanted to let all the companies know that they can't do this. It's not right. You can't hide information. You have to give all the information."

- Juror in Ernst v. Merck trial – CBS News

With the plummeting confidence ratings of Congress and politicians in general, jurors increasingly feel as if they have little say in effecting societal change through their vote. Mock jurors in our research projects routinely say that they view the courts as an effective system to regulate the practices of business. As jurors, they know their vote will be counted. This obviously can be problematic for a company defending itself in court. Jurors acting as regulators can use their verdict vote to correct what they see as problematic business practices, even if the practices do not meet the legal test of liability or contractual violations.

As a result, it is important to establish the correct role of the jury as early as possible in the case. This role establishment does not displace the Court's instruction. Rather, it is imposing how the defense sees the juror's role in relation to how they interpret the law and evidence in the case. This role does not have to be stated directly to the jury "Your job is...", but can be established by asking direct and cross-examination questions of the witnesses.

For example, in a bad faith insurance case, the traditional role established for the jury is to find whether the insurer was reasonable in how they handled the claim. However, this traditional role already has jurors looking for behavior they could consider *unreasonable*. Since both the insured and the insurer have a good faith obligation in the insurance contract, it is better for the insurer defendant to reframe the jury's role as investigating whether both the *insured* and insurer were reasonable in how they presented and handled the claim.

In establishing the jury's role, ask them to actively search for information that supports your case. Start by exploring the irrefutable facts that the plaintiff has to admit. In the insurance bad faith example, did the plaintiff provide their engineering or medical reports in a timely manner? Were they complete or was there missing information?

While plaintiffs have the burden of convincing the jury of their factual narrative, the defense's main goal is to have the jury question the evidence. This investigative role sets the stage for the corporate defendant to question the plaintiff's reasonableness and to plant the seeds of doubt that the burden of proof has been met.

Finally, role definition should come directly from the anticipated legal instructions in the case. Although many instructions are determined at the end of the case, there are also many instructions that are standard. For example, California jury instructions on product liability under the instruction on Causation: Substantial Factor has language that talks about whether the factor contributed to the harm and then says it has to be "*more than a remote or trivial factor*." This language can be incorporated into examinations, statements and arguments in characterizing the jury's investigative role.

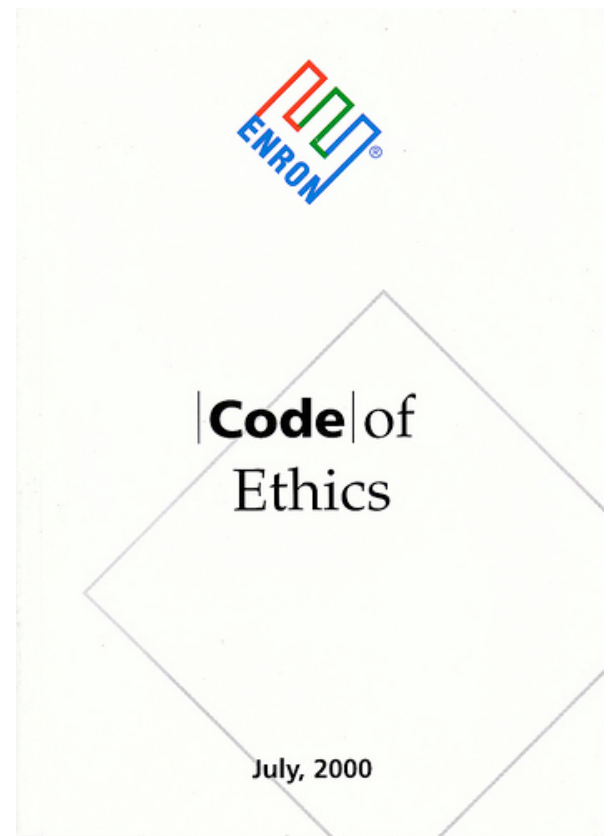
I. Set the Rules of the Game

After being sworn, jurors sit in their bleacher seats and wait for the game to start. However, they don't know if they are watching football, basketball, or cricket. Usually, it is cricket -- they have no idea how this game is played and what rules they need to know to judge the game. Rules are important for jurors to appreciate both the substantive and legal issues in the case. As a result, the first party to establish the "rules of the game" has an advantage.

When going through the evidence in the case, it is important for the defense to establish the real rules that manufacturers, suppliers, stores, insurers, and banks follow when conducting their business. For example, in the previous insurance case example, a rule to develop for the jury would be, "*In order to reasonably handle a claim, an insurer needs comprehensive information from doctors in order to thoroughly investigate and resolve the claim.*"

A second set of rules is determined by how the parties define the key definitions in a case. Thus, in a disability discrimination case, the party that better defines the term "reasonable accommodation" for jurors when describing how an employer dealt with a worker's disability will have a distinct advantage as they go through the evidence.

This is even more important in defining the legal concepts in the case. We too often wait until closing argument to explain legal terms the jurors will be using to answer the verdict questions in the case. Although the judge is charged with delivering the key legal definitions in jury instructions, it is important to develop the conceptual



framework for the underlying principles of “negligence” or “contract” in order to help jurors define and sort evidence as they are listening to testimony and arguments.

If possible, these substantive and legal rules should also be established graphically (preferably in board form) so they can become a reference for jurors throughout the case and in deliberations.

J. You are Who You Appear to Be

“I decided from looking at the paperwork they knew the problems this medication was causing and they hid it from us. Rather than telling us the good and the bad, they only told us the good.”

- Juror in Ernst v Merck trial - CBS News

“If I could say it in one word: hiding. Every time a question was asked, any one of [the Merck] witnesses circumvented the questions by going somewhere else. Just give us a straight answer.”

- Juror in Ernst v Merck trial – Wall Street Journal

When working on a trial, we tend to think that jurors will judge the alleged conduct based mainly on their historical analysis of the timeline of events in the case. In fact, jurors see the trial, to a certain extent, as the reenactment of the events of the case. Jurors also see the corporate representatives and witnesses as embodying the attitudes of the corporation. In evaluating a claim of employment discrimination, the demeanor of the witnesses both on and off the stand will tell jurors a lot about whether the company had a “hostile work environment.”

So what do jurors expect of a corporate defendant in litigation?

- a. Jurors would like companies to represent the concepts of Peter Drucker’s management model rather than those of economist Milton Friedman. Peter Drucker believed that a company’s primary responsibility is to serve its customers and profit was not the primary goal, but rather an essential condition for the company’s continued existence. Milton Friedman believed in a macroeconomic policy known as monetarism where a free market, profit, and a certain acceptable level of unemployment were all necessary and natural economic processes. (Despite these ideal expectations, jurors begrudgingly accept that most companies are more concerned with profit than service.)
- b. Jurors want corporations to care about their customers, clients, and employees.
- c. Jurors expect that corporations will continuously improve their products, services, and processes.
- d. Jurors expect that companies should not simply meet government standards for basic minimal requirements. Rather, they want companies to exceed government requirements. The bigger the company, the greater this expectation. In fact, jurors would like large corporations to lead the government in setting standards for an industry.
- e. Jurors would like a company to be loyal to its customers, clients, or employees. Many jurors these days do not believe that a company is obligated to be loyal, but they would prefer it was.
- f. Jurors expect companies to foresee most, if not all, problems associated with their products, services, contracts, etc. As a result, they expect a company to have a greater ability to prevent problems.
- g. Jurors expect a company to clearly communicate their policies, procedures, and processes in defending themselves.

Given jurors' high expectations and the negative attitudes described at the beginning of this article, how should a company present itself at trial?

1. Jurors often listen to the events of a case in a trial. (“Acme Corporation should have done X, they didn’t, here’s what they did do, the plaintiff was harmed...”) In order for jurors to stand in the company’s shoes, they want to know the decision-making process within the company. For example, in a wage and hour dispute, jurors want to know why the company has classified certain employees under a management or executive exemption. How did the company think about the work of these employees that made their discretionary and independent judgment important to their jobs? By having individual corporate representatives or PMKs walk through their thought processes (“At the time I was looking at this issue, here’s what I was thinking...”), jurors have a greater understanding of the decisions behind the actions. It also shows jurors that there is no collective conscience called the COMPANY. Rather, a company is made up of individuals making individual decisions, and those decisions are the result of a thoughtful process. Without the process, jurors are free to interpret the motivations of the company, and plaintiff allegations of greed make a rather compelling story.
2. Avoid presenting the “good company” story as a commercial. This will arouse suspicion and create automatic resistance from jurors. Good deeds such as charitable contributions and innovations that have helped customers should be discussed, but only by tagging them onto relevant subject matters. For example, in defending a patent infringement action, the company can discuss why they developed a product innovation to overcome a specific (and unique) problem their customers were having.
3. Jurors anthropomorphize companies. Jurors have a much better sense of the character of a company and its culture through small actions and deeds. Thus, talking about the weekly donut brainstorming sessions, the litter pick-up day at a local park, or Friday Guitar Hero competitions will tell jurors more about the company than its United Way campaign. The more that companies can show direct involvement, communication, and contact with their community, employees, and customers, the better.
4. Especially with large companies, there is a temptation to present uniformity and consistency in their policies and actions. However, this can paint the corporation with the shiny gloss of perfection and raise the standards by which they are judged. Given this, it is important to embrace some of the irregularities and inconsistencies (without admitting liability) within a company. In fact, it is important to represent the struggles and challenges a company strives to imperfectly overcome in order to accurately explain its actions. In defending the Board of Director’s decision to sell a company in a shareholder action, we spent time explaining the financial problems the company was having and the lack of suitable bidders to help jurors understand the painful process the Board undertook before making its recommendation to sell. No company is perfect, and human decision-making by definition, is an imperfect process. There are times it is appropriate for a company representative to say, “At the time, we were dealing with several challenges. In hindsight, we might have done a better job of communicating with our shareholders. But I still believe we made the right choice.” By admitting to inconsequential errors, this allows the jury to understand the challenges the company was attempting to solve. We need to keep reinforcing that the standard is reasonableness in most of these trials and not perfection.



5. Trials are often about putting the actions of the defendant company on trial. Yet jurors are often missing important context for the actions they are asked to judge. The historical background of an industry and a particular company within that industry can give needed context to the jury. In recent tobacco cases, Altria (formerly Phillip Morris) has brought in a cultural historian to testify about the pervasiveness of smoking in a given era as well as the warnings that smokers were aware of. Although a criminal case, the recently

dismissed trial of a Broadcom's CFO William Reuhle saw a great deal of defense testimony about the commonness of stock back-dating prior to rule changes in 2005.

"The defense was very, very selective. And they used a lot data and they construed their data the way that only went as far as they molded their opinion; they molded the facts."

- Mock juror in product liability case

6. Take and share responsibility. Trials often become a dispute about who had responsibility for what. Corporate defendants can get into trouble by issuing blanket denials of responsibility. Accept and even embrace responsibility for issues for which the company has a legal obligation, and issues for which company responsibility seems obvious. ("Of course we have a responsibility to keep our store premises in a reasonably safe condition.") Then switch the focus to the responsibilities the plaintiff has ("The plaintiff had a responsibility to be reasonable careful.")
7. Characterize the choices the parties made in the case. Here are two jurors' views of choices in product liability cases.

Plaintiff juror's view of choice

"I think the problem I had was not so much with the drug itself, but with the fact that all the information wasn't given to the people, so that they could make an educated decision on whether or not it was worth the risk for them to take that drug."

- Juror in Ernst v. Merck trial – CNN News

Defense juror's view of choice

People are going to do what they want. Okay? Maybe if they put a label on that said "could cause cancer." It still means could, could maybe not. You know, there are warnings on alcohol, but the people that manufacture the alcohol don't tell me how to use it. I choose what to do with it.

- Mock juror in Benzene case

Jurors will always speak about the choices the parties made in relation to the responsibility they should take for their actions. Since much of a plaintiff's case is based on the harm being caused to an unwitting and unknowing victim, it is important to show that the plaintiff is making clear choices in their actions.

8. Use corporate representatives closest to the incidents at issue. There are times when a company is accused of bad behavior and the temptation is to have a CEO or someone in the executive suite testify at trial. Although jurors always want to hear from these high stature people (see juror quotes below), this testimony poses a couple of risks. First, these executives may know little, if anything, about the disputed issue. They tend to have no first hand knowledge of the issues, and they are then forced to explain to the jury why they don't know all of the specifics involved in the issue. Unfortunately, jurors expect most corporate representatives who testify to have a good working knowledge, if not direct involvement, in the litigated issues. Jurors universally dislike continuous responses of "I don't know." or "I don't recall." At the very least, jurors want to know why the inquiry is outside the witness' knowledge. Second, the higher up the executive, the more the jury will impart knowledge of the "problem" at the highest levels of the company. If they believe the "higher-ups" knew about the problem, they will also believe that something should have been done about the problem sooner.

More than the title of the executive testifying, jurors really want to see or hear someone from the company that they feel has some accountability for the company. Whether it is a PMK, percipient company witness, or senior executives, jurors want to know that these representatives have a say in how the company deals with the litigated issues.

“Every life counts to us. If they care, then show it. Not one bigwig from Merck came down. Not one of them took the time. One death in my life would make a difference. Why wouldn't it make a difference to them?”

– Juror in Ernst v Merck trial – Wall Street Journal

“I think a lot of the jurors, we all thought if this was that big a deal to Microsoft, they might have had some of their more executive-type people present. I think a lot of the jurors, we all thought if this was that big a deal to Microsoft, they might have had some of their more executive-type people present.”

- Juror in i4i v. Microsoft patent case – IP Law and Business

9. There is a tendency to take some of the plaintiff’s allegations and be instantly dismissive. From a defense standpoint, some of the charges can seem so preposterous that the initial thought is that they do not even dignify a response, or should be waved off as insignificant. The problem is that jurors don’t know the law, they don’t know the industry, and they don’t know the company. Jurors want to know that the company has closely looked at the alleged behavior and given it careful consideration before disregarding the complaints. It’s like a customer complaint. If we call our wireless carrier to complain about charges on our cell phone bill, we would be incensed if the customer service rep said to us, “Why are you calling us? Those charges are spelled out very clearly on page three of your bill.” Instead, most reps are now trained to say, “Let’s look at this together. What are the charges you don’t understand? Oh, here they are on page three. I can see how you might have missed those. Do you understand the charges now?” This careful consideration communicates both respect and responsibility.
10. Show neutral third party involvement. Since plaintiffs typically try to establish that the defendant company has all of the knowledge and power in a market, it is useful to establish that the company was in compliance with government regulations. Not only do jurors see this as a valid technical defense, but it minimizes a company’s power by showing that it is regulated by one or more agencies. The company’s compliance to PTO, OSHA, EEOC or FDIC regulations can give a neutral third party stamp of approval to the company’s actions.

“At first, I was for the plaintiff also, and I was sympathetic for this man. But the chemical companies, you know, they did a great job of protecting themselves. They were within guidelines and there was no -- there was no decisive studies and no solid proof that, you know, that benzene caused this man's lymphoma. So how can you rightfully say, legally blame the chemical company when there's no proof?”

- Juror in toxic tort mock trial

11. Don’t get married to the timeline. The defense in many cases puts together a chronology of events in the case. This becomes the de facto organization of trial events. In fact, a timeline can serve to undermine certain defenses by showing more extensive company knowledge or involvement prior to the events in dispute. Timelines can be effective if they illustrate only the events you want to highlight. Consider creating separate timelines for only the periods that serve your story of the case.
12. Teach the jury about the industry, the market, and the company. It is important to create basic tutorials to establish definitions, standards, and norms for the jury to measure both the defendant’s and the plaintiff’s conduct. Because of defense counsel’s and a company’s immersion in a case over a number of years, they become so familiar with the terminology, concepts, and acronyms that they forget that the jury is hearing this for the very first time. As long as the intention is to teach the jury and take them inside the world of

the company, it is almost impossible to be too basic. Too often we will communicate to a jury that the case is complicated and hard to understand. We then throw up our hands at the end of the case when they have not understood what we thought was obvious. This means we have to break down the industry, the market, the company, and the case into small blocks and build it back up, piece by piece.

While some of these tutorials can be presented by company witnesses, most of this burden is carried by the hired experts. These tutorials can actually help bolster the expert's credibility. Whether it is a witness or an attorney, jurors automatically give credence to those individuals who are better able to help them understand the case.

13. Plaintiff's cases often carry (either directly or indirectly) hidden assumptions about the evidence or the parties in the case. In closing argument (and in preparing witnesses for cross-examination), it can be effective to enumerate these assumptions in order to correct them before they are used by jurors in deliberations. For example, in a pharmaceutical product case, counsel might state, "Plaintiffs would have you believe that it is the obligation of our company to anticipate ALL the possible side effects of this drug. That is neither medically possible or required by the law."
14. Finally, in presenting the case, we cannot underestimate the importance of demonstrative or graphic evidence. This does not mean just developing a plan for using Trial Director or Sanction to bring up and illustrate documents. This does not mean developing a really good timeline or PowerPoint presentations. A comprehensive presentation plan needs to be developed that goes through the evidence and stops frequently to ask, "How important is this? Will a jury understand it?" Then ask, "What would best illustrate this point?" and "What is the best media (board, flipchart, animation, document treatment, PowerPoint) to communicate this point?"

Hollywood directors and their Directors of Photography spend an inordinate amount of time storyboarding their movies. This helps them plan their shots and decide how to direct their audience's attention. In many cases, we will actually storyboard the case, planning which case evidence and testimony needs to be rendered into visual form in order to clarify or add impact.

K. The Power of Uncertainty

I have spent a great deal of time in this article discussing affirmative defense strategies in telling the company story. However, jurors' evaluation of liability and their assessment of damages both decline the more uncertain they are about what really happened in the case, what really caused harm to the plaintiff, and the extent of that harm. We often hear that jurors want evidence to convince them "beyond a reasonable doubt" in a civil case. Some plaintiffs have started asking voir dire questions and asking for cause challenges on jurors who are uncomfortable with the preponderance "tipping of the scales" burden. When jurors are making what they consider to be important decisions about the lives and money of companies and individuals, they want to be sure of their decision. The less certain they are, the less likely they are to find for the plaintiff.

Most of this uncertainty is developed through cross-examination in the plaintiff's case in chief. However, the more the defense can introduce outside variables that contributed to the plaintiff's harm, the more uncertain the jury will be that the defendant company's actions caused the plaintiff's harms.

"The plaintiffs didn't present a case that says, 'Your product really made him sick.' They presented a case that said, 'Your product's got something to do with it.' But it wasn't good enough."

– Juror in product liability mock trial

L. Representing Powerful or Unpopular Companies

As a special note, those representing certain industries like health insurers, oil and gas concerns, and chemical, pharmaceutical, or tobacco companies obviously can face a much more hostile audience these days. Here are few bullet points on defending companies in these specific industries.

What Not to Do

- Don't tell jurors to ignore or put aside their bias.
- Don't try and instruct away their bias.
- Don't try and sell the jury on all the good things the company does.
- Don't tell them to only look at the facts and the law.

What to Do

- Confront juror biases head on by acknowledging they may exist.
- Create context by establishing the history and development of the industry.
- Establish and embrace the company's culture and values.
- Establish expertise in the company's core competencies.
- Establish the chief challenges, risks, and vulnerabilities the industry and company has and continues to face.
- Establish the creativity, innovation, and valid strategies the company has employed to overcome these challenges.
- Establish links and partnerships with reputable or familiar institutions.
- Embrace the company's business motive.
- *Sincerely* acknowledge the harms that have befallen the plaintiff (if not disputed).
- Call jurors' attention to the emotional pulls in the case and spotlight the bias.
- Highlight the temptation to use these emotional pulls or biases to decide the case.

Conclusion

The number of corporate scandals over the last decade has significantly changed jurors' view of how American business is conducted. This has made defending and representing corporations in trial much more complicated. However, with careful thought and planning, companies can take a jury inside their world, helping them understand how they operate. More importantly, by employing careful trial strategies, defense counsel can control and define the focus of the litigation.

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16 Simple Rules for Better Jury Selection

by Mark Bennett

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When a lawyer screws up jury selection, there is little hope for the rest of the trial.

After watching many inauspicious jury selection efforts by prosecutors and criminal defense lawyers, I realized that I might be able to contribute to the state of practitioners' jury selection art by codifying a few of the things I've learned in fourteen years of trying cases and many hours of extracurricular study.

Simple Rule Zero: One Rule to Rule Them All

Jury selection is not only—nor even mostly—about selecting (or deselecting) jurors. Your objectives in jury selection are: 1) to build rapport with the jurors, forming a group to include you; 2) to educate the jurors, or to help them educate each other, about the issues in your case; and 3) to find and eliminate unfavorable jurors. If you use voir dire simply to find the jurors whom you want to strike, you're missing out on most of the value of jury selection.

Simple Rule 1: The Nike Rule

Just do it. This is a rule on three levels.

First, the view from 30,000 feet: without picking juries, you will never learn how to pick a jury. Reading about jury selection is better than asking other people for their scripts, and watching jury selection (good, bad, or ugly) is better than reading about it, but there's no substitute for getting up in front of 24 or 60 people¹ and trying to get them talking about what they feel and believe. Better that you should do all three—study, watch, and do—but if you have to choose one, just do it.

The second part of the Nike Rule, in the downwind leg: if you're going to trial in a court (like most federal courts) that doesn't



allow the lawyers to talk to the potential jurors, figure out a way to get permission. A judge doesn't share the lawyers' three jury-selection objectives; the judge's objective in jury selection is simply to get twelve people who can promise to follow the law.

This was powerfully illustrated in a cocaine case that I helped try in U.S. District court in Houston. The first time we picked a jury, the judge brought in 45 or 50 people and gave each lawyer 40 minutes to talk. My colleague busted the panel—there weren't enough potential jurors who could commit to being fair, after he had talked with them for 40 minutes, to allow the parties to use their peremptory challenges and still get a 12-person jury. The next day Judge Atlas brought in another 45 or 50-person panel and did all of the questioning herself. She asked the typical U.S. District Judge questions—"Can you be fair?"; "This is the law; will you follow it?"—and there were more than 24 people left after we lawyers had exercised our 16 peremptory challenges—with the same facts, same law, same lawyers, and same judge.

Was the second panel intrinsically fairer than the first? That's unlikely. Demographically, it was much older, whiter, and otherwise less likely to favor our client than the first.

The difference between the two jury selections was that the lawyers' questioning was designed to get people to reveal things about themselves, and the judge's questioning was designed to get people to agree with the law. Even the best-intentioned questioner sitting up high in a black robe is never going to get the frank answers that a mere human can get, so get the judge to let you question the jury, if possible. (And if do you get to question the panel in a jurisdiction where it's usually not allowed, don't bust the panel unless you must.)

The third part of the Nike Rule comes into play on final approach, when you get up to start talking. Don't worry, don't think about it, don't plan your next question. Forget your script, forget the prosecutor, forget the judge, and talk with the people. The time for worrying and thinking and planning, for scripts and prosecutors and judges, is past. There is nothing more that you can do to be prepared for this moment.

Just do it.

Simple Rule 2: The Blind Date Rule

You may have noticed that people don't like lawyers very much. Or rather, they don't like people acting like lawyers very much. Once they get to know them, they like the human beings behind the label just fine, but it's not the jurors' job to go behind the label, and if you label yourself, "Big Important Attorney" they're not going to try to go behind that label. So Rule 2 of the Simple Rules for Better Jury Selection was originally The First Date Rule:

Treat jury selection like a first date with everybody on the jury panel.

But "blind date" is a better metaphor, since the parties to a non-blind date have presumably each chosen the other, or at least formed first impressions. In jury selection, neither the lawyer nor the jurors have exercised any selection before arriving in a room together.

So: *Treat jury selection like a blind date with everybody on the jury panel.*

How is jury selection like a blind date with 60 people?

Someone, thinking they might be a match, has put two parties in a room together. One party—the lawyer—has some desire to be there and some idea of a desired outcome. Neither party knows much about the other. The lawyer wants to learn about each juror (to find out if he or she is a suitable mate) while persuading him or her that the lawyer is likable, and thus a suitable match as well. It's not a perfect metaphor, but it steers us toward what should ideally be an unlawyerly way of dealing with those 60 human beings.

In a blind date, lecturing is out of the question. You can achieve neither of your two immediate goals (learning about your potential mate, and appearing not to be a creep) by lecturing. People feel appreciated when they are listened to. So you can achieve both of your immediate goals by listening to the jurors' answers.

The jurors' answers to what? To your questions, sure, but the questions are secondary; it's the answers that are important. If you could get your jurors talking without asking any questions, and then just listen, you'd be winning.

If you have to ask questions, what kind of questions? Yes-or-no questions can feel like an interrogation; open-ended questions might feel a little more comfortable.

Questions about facts, or about feelings? A little bit of both—either can get intrusive—but since jurors decide cases on feelings, and then use facts to justify their decisions, fact questions are most useful when they are introductions or shortcuts to the feeling questions.

Note that it's not 60 blind dates. It's one blind date with 60 people. Those 60 people have formed a group in the hours that they've been processed through the courthouse to sit before you. They know each other's names, they have a pecking order, they have inside jokes. If you treat one of them without the proper respect you can offend all of them. (If, on the other hand, you show respect for one of them, they'll all appreciate it.) Before you shut one of them down, you'd better be sure that you're culling an outcast.

If you're good, you'll wind up with six or 12 people who like you enough to want to spend a couple of days in trial with you and who you know enough about that you are comfortable returning the feeling. If you're very lucky, your adversary will have demonstrated her big-important-lawyerness to the jury, and the your jury won't feel the same way about her.

Simple Rule 3: The Shrek Rule



They are walking through the forest. Shrek belches.

DONKEY: Shrek!

SHREK: What? It's a compliment. Better out than in, I always say. (laughs)

DONKEY: Well, it's no way to behave in front of a princess.

Fiona belches.

Rule 3, the Shrek Rule, is this: *Better out than in*. It's related to the "hair in the food" rule. If there's a hair in your food (and you should always assume that there is), better that you should find it; if your jurors have unpleasant or frightening ideas (and they always do), better that they should reveal them in jury selection than conceal them until deliberation.

In jury selection, all untruthful answers are bad. If there are bad truthful answers, though, they are not what most trial lawyers are used to thinking of as bad. A truthful "I think the government is always right," for example, might be a terrible answer . . . for the government, for the same reason that it's a great answer for the defense: it allows the defense to identify, isolate, and strike a raging pro-government juror who, if he'd kept his mouth shut through jury selection, might have carried his views into the jury room. (It also gives the defense a convenient foil for uniting the reasonable remainder of the panel against such loony notions.)

Sometimes lawyers are concerned about these jurors "poisoning the entire jury panel." Except where jurors reveal prejudicial facts that won't be part of the case, I don't buy it. People leave jury selection believing what they believed going in. The juror with off-the-wall opinions might push other jurors to entrench their contrary views, but she is no more likely to change her fellow jurors' minds in an hour of jury selection than the lawyer is.

The Shrek Rule dictates that the lawyer should, rather than shutting down (or not listening to) the potential juror who has views that would be unhelpful in the jury room, draw that person out and encourage him to share and expand upon his views.

How? Listen attentively and actively, thank him, and ask how many others agree. The more people agree with him, the better: *Better out than in*.

Simple Rule 4: The 90/10 Rule

We lawyers love to hear ourselves talk; that can be the death of a jury selection. In a good voir dire, the jurors do most of the talking. Even if I can't hear what the lawyer and jurors are saying, I can tell a good voir dire from a bad one by listening, as long as I can tell who is talking. Lawyer talking most of the time? Bad. Jurors talking most of the time? Good.

So the fourth Simple Rule for Better Jury Selection is the 90/10 Rule: *Let the jurors talk 90 percent of the time (or more) in voir dire.*

Try to find a way to elicit more information with fewer words (more about that later, especially in Rules 8 and 11). If you have a brilliant defense, try to find a way to get one of your jurors to come up with it. If a juror or your adversary says something that must be refuted, let your jurors refute it (if, given the choice, none of them refute it, it's probably not worth refuting). Among the many benefits of talking less, you'll learn more, the jurors will like you more (or at worst dislike you less), and the judge will be more reluctant to limit your time. Get them talking, and keep them talking.

Simple Rule 5: The MacCarthy's Bar Rule

To the lawyer who identifies himself as “attorney” and “Esquire,” and wants people know that he has a law degree and is therefore superior: This one is for you.

The fifth Simple Rule for Better Jury Selection is blatantly stolen from and therefore named in honor of Chicago federal public defender Terry MacCarthy, who likes to say, “Talk in a courtroom like you would talk in a barroom.”

The MacCarthy's Bar Rule is: *Talk in jury selection like you would talk in a barroom.*

This rule is in part a matter of word choice: don't use lawyerly words. If you might have to define a word for the jury, find some substitute that you won't have to define. For example, this process that we're studying is not “voir dire” but “jury selection.” “Credibility” becomes “believability.” The “jury charge” becomes “the judge's written instructions to you at the end of the case.” And so forth.

It is also in part a matter of tone: don't condescend. You may think you're better than some of those 60 people, but you're not. More importantly, if it seems to those 60 people that you think you're better than any of them, they're going to punish you for it. But don't grovel, either. Nobody likes a groveler.

We could discuss word choice and tone, but it comes down to status. Jury duty is the ultimate leveler. You can play higher status than your jurors, talking down to them. They might nod, smile, and humor you, but they'll dislike you, and when they get out of your control (that is, back in the jury room) they're going to show you who is in fact boss—probably to your client's chagrin.

Or you can follow MacCarthy's Bar Rule, treating the jurors like equals whom you need to like and understand you. They won't bow and scrape to your superiority, but they will understand you more, like you more, and communicate with you better.

Talk in jury selection like you would talk in a barroom.

Simple Rule 6: Improv Rule I

Rules 6 and 7 are timely, come from days of intensive improvisational theatre training at Bay Area Theater Sports in San Francisco.

The first rule from improv, Simple Rule 6, is: *No scripts.*

Voir dire scripts don't work. You're not going to get very much information if you walk the jury through your list of questions. If you have a list of questions, you're not ready for the unsettling answers.

More than a few times I've heard a potential juror tell a lawyer that the juror lost a family member to a drunk driver, only to have the lawyer make a note on a piece of paper and move on to the next question. If someone tells you his brother was killed by a drunk driver, there is a correct response, and it's not written there in your list of voir dire questions.

This is related to the Blind Date Rule as well: if you show up for your blind date with a list of questions, you'll be seen as creepy, and rightly so.

Most trials boil down to only one or two issues. When you go into jury selection, have a few subjects you want to discuss with the jurors. Figure out a few ways to get the jurors talking about each of these subjects, then stand up and do it.

No scripts.

Simple Rule 7: Improv Rule II

Rule 7, also from improvisational theatre, is: *Don't block.*

In improv, blocking is when you take another actor's idea, and negate it:

"It sure is quiet here on the moon."

"No, this is the bottom of the sea."

Your partner looks bad, and you've killed a scene. In improv, if your partner says you're on the moon, you're on the moon.

You may not like hearing them (see The Shrek Rule), but the jurors' ideas are their ideas, and are true to them. If a juror says something that makes you uncomfortable ("Anyone who doesn't testify must be guilty"), don't argue with it, deny it, or otherwise block it. Instead mentally stick "in my world," on the beginning, and deal with it as a belief that is sincerely held at least at the moment of its revelation. Then turn it to your advantage. "How many of you feel the same way? Do any of you feel differently? Why?" (Notice the difference in wording between the first and second question. We'll talk about that in Rule 16.)

If a juror says something that makes you uncomfortable and you ignore it, or browbeat the juror, or argue, you cut off the flow of information not only from that juror, but also from every other juror. You will probably win the argument, but you make yourself less likable and detach yourself from the group that you are trying to form with the jury. In other words, you make it impossible to accomplish the major goals of jury selection.

So don't block.

Simple Rule 8: The Shrink Rule

We lawyers are analytical creatures. The LSAT doesn't include a section of intuition puzzles. So Simple Rule 8 for Better Jury Selection is The Shrink (as in therapist) Rule: *How Do You Feel About That?*



Jurors decide cases based on their guts, then look for intellectual reasons to support their emotional decisions. As a result of confirmation bias they might not see, might disregard, or might discount all facts that don't support their (gut) preconceptions.

If you want a really hard job, try to win your case beginning with the presentation of evidence. It's not always impossible, but it's not nearly as easy as using the evidence to confirm what your jurors already believe.

Can you talk with (or to) the jury about ideas and things, and trigger a discussion of their emotions? Not likely. Can you talk with them about ideas and things, and influence their emotions? Sure, but it's an unnecessarily roundabout approach.

Here are some possible ways of finding out jurors' views on one of the issues in your case:

- Bad jury selection question: “[Proposition you'd like your jurors to accept.] Who disagrees?” (Followed, for the lawyerly coup de grace, by “I take it by your silence that you agree.”)
- Better jury selection question: “What do you think about [issue]?”
- Even better jury selection question: “How do you feel about [issue]?”

If you want to know what people's guts say, you can't ask them what their brains say.

How do you feel about that?

Simple Rule 9: The Beer Pong Rule

In Beer Pong, “the ball is always in play. If the ball hits the floor, ceiling, wall or even leaves the room it can still be, and should be, hit back in the direction of the table.”²

So it is in jury selection, except that “the ball” is the conversation and “the table” is the case. Almost anything that any potential juror says can be hit back toward another juror.

Simple Rule 9, The Beer Pong Rule: *The ball is always in play.*

For example, Mr. Jones says that he thinks your client is guilty because she is charged with a crime. You could flinch, make a note, and try to move on, or you could hit the ball back:

“How many of you agree with Mr. Jones?”

“Who disagrees with Mr. Jones?”

“Ms. Smith, how do you feel about what Mr. Jones just said?”

“Ms. Leonard, Mr. Jones says that my client is guilty because she’s charged. What are we doing here, then?”

or

“Mr. Brown, I see you sadly shaking your head and fighting back bitter tears. What’s going on with you?”

Even when a particular topic is exhausted, you can keep the ball in play: “Who thinks it’s time to move on to another subject?” Let the jury help you decide. (This is an idea that I hope runs through these rules: that jury selection is a game played with, and not against, the jurors.)

Sometimes someone (a juror? the judge? you?) steps on the ball and it won’t bounce anymore. Then it’s your job to find another ball and serve it.

Until then, though, *the ball is always in play.*

Simple Rule 10: The Marathon Rule

I do not do foolish things like play beer pong or run marathons. Instead, I draw inspiration from the foolish things that others do. So the next Simple Rule for Better Jury Selection is The Marathon Rule: *Save something for the end.*

In jury selection there’s the possibility that, while the game is still afoot, the court will try to artificially limit your time. Or, if the judge doesn’t limit your time, when you’re conducting an organic unscripted jury selection, you and the jury will at some point all just run out of steam—endings are difficult to improvise.

In the first situation, a little more than an “out” is called for. So have some lawyerly yes-or-no questions to toss into the mix in case a curmudgeonly judge starts grumbling while you’re engaging the jury with open-ended questions. “Mr. Gonzalez says that he’ll assume that Fred is guilty if Fred doesn’t testify; that reminds me: how many of you have been witnesses in criminal cases?” or “Ms. Berg has told us that she is married to a police officer. How many of you have close relationships with cops?” Those are the kinds of questions that the judge is used to hearing lawyers ask, and they might buy you a little more time to ask questions that will do your client some good.

Whether the judge finally decides that the jury has had enough jury selection goodness or you realize that the game is over, it's good to have an "out"—one final unifying question to ask the entire panel, so that you can sit down on a high note.

This one question should be designed to get all of the potential jurors to agree on some fundamental proposition favorable to your case, and therefore will violate most of these rules. For example, "Can we all agree to wait till all of the evidence is in before deciding this case?" or "Raise your hand if you promise to give Fred a fair shake."

Think of a question you like. *Save something for the end.*

Simple Rule 11: The Playing Doctor Rule

So you're in jury selection, and you want to get the jurors talking about things that they're not used to discussing in front of 60 near-strangers. What do you do?

Well, everyone knows The Playing Doctor Rule: I'll show you mine if you show me yours. That's our 11th Simple Rule for Better Jury selection: *If you want to see theirs, show them yours.*

In jury selection, show them what? Whatsoever a man soweth, that shall he also reap. You want truth? Tell them the truth—if you lie to your jury, they'll lie to you. You want depth? Go deep—if you only talk to the jury about shallow things, they'll do the same.

If you want your jurors to talk about their prejudices against the minority group your client belongs to, what do you need to talk about? Your own prejudices.

Everyone has prejudices. It's entirely natural; we're hardwired by natural selection to prefer members of the group we identify with over members of other groups. We can overcome our hardwiring, but not by pretending the hardwiring doesn't exist.

If you haven't committed the introspection necessary to acknowledge your prejudices, you're not dealing with them. More to the point here, you can't expect your jurors to do any more than you're willing to do yourself. Imagine: you get up and say, "I don't have any prejudices. Do any of you?"

What are your personal issues in your client's case? When you first heard about the case, what was your "yeah, but . . .,"?

"Yeah, but he shouldn't have been there in the first place"?

"Yeah, but he's a gang member"?

"Yeah, but this is his third DWI"?

This "yeah, but," is probably a good place to start showing the jury yours. Why? Several reasons, but this should suffice: Because your "yeah, but" is probably their strongest "yeah, but" and if you can at least mitigate (if not eliminate) that factor before the prosecutor gets up to make his opening statement, there's a chance that the presumption of innocence will last at least until you get up to make yours.

How do you show them yours? However you're uncomfortable doing it. You're going to ask the jury to do something uncomfortable, sharing intimate truths with strangers; you can't expect them to do that if you remain within your comfort zone. Push a little bit farther than is easy for you. And please tell them the truth: this is not a time to be making up cute little stories.

If the truth is that your client's tattoos made you nervous, tell the jurors that. If that's easy for you, tell them more specifically how the tattoos made you feel—in danger, frightened. If that's easy, push a little farther out—talk about what, when you saw the tattoos, you imagined about your client that frightened you. It's okay to show that you don't feel the same way any more (by sitting close to your client, touching him), but don't talk about how you got over it—you want jurors to tell you how they are going to get over it.

Do you have the audacity to tell the 12 people who will be deciding your client's fate that you found him scary? If you don't, why would they admit to you that they find him scary?

Show them yours. They'll show you theirs.

Simple Rule 12: The Field Trip Rule

In The Blind Date Rule, I pointed out that the 60 potential jurors, by the time they reach the courtroom, are no longer strangers to each other; they have formed a group.

When you get up to talk to them, what's your relationship to the group? You're an outsider. You are not someone who they are eager to follow. In the best-case scenario, your opposing counsel has gone before you and acted like Big Important Lawyer, and the jury is expecting more of the same from you (in the worst-case scenario, your opposing counsel has found a place in the group).

So Rule 12, The Field Trip Rule, is: *Stay with the group!*

You have plans for voir dire, and places you want to go—a story to tell, compelling arguments to make, information to discover. But you've got to go there with the group.



You will find friends on the jury panel—characters who seem simpático and bright, and understand what you're trying to convey. Don't go off and chat with these friends; if you do, you're not staying with the group. Your friends are the first people the other side is going to strike, and if you've spent all your time chatting with the

people with whom you're most comfortable, you'll be left with twelve jurors with whom you haven't talked. Jury selection is not a time to stick with what is comfortable.

Like people, groups have personality and character. They also have rhythm. If you are talking with Mr. Jones about guns and Mr. Jones is done with the topic, it doesn't mean that you are done because the rest of the group might not be. You have some authority, because of the situation, to choose what the group talks about, but staying with the group means making sure the group is ready for you to move on to the next topic, and knowing when the group is ready for you to quit.

As you observe the group (from the moment they enter the courtroom), you'll start to see some of the group's internal divisions and relationships. Ms. Gonzalez and Mr. Moncriffe definitely get along, but Ms. Gonzalez does not care for Ms. Gupta. Mr. Stanley has strong definite feelings about drugs; Ms. Anderson rolls her eyes at him. And so forth. The twelve jurors that wind up in the box are going to form their own group, and its dynamics are going to be based on the dynamics of the larger group.

It's all about the group. *Stay with the group.*

Simple Rule 13: The Undertow Rule

The group of The Field Trip Rule has 60 heads and 60 bodies, each one of which is throwing off communications cues every second. It is impossible for any lawyer, talking to 60 people, to listen to and record what one person says and how she says it while tracking the nonverbal communication provided by the other 59.

So The Undertow Rule is: *Never swim alone.* Get someone on your team to pick the jury. It doesn't have to be a jury consultant. Second-chair jury selection is an excellent assignment for a young lawyer seeking trial experience, but your assistant doesn't even have to be a lawyer. You want someone at your side to notice that Mr. Bryant was looking crosswise at you while Ms. Velasquez was hanging on both lawyers' every word. All socially-competent people are experts at reading faces and body language.

You have your client, but his position as the guest of honor—especially in a criminal trial—suggests that he might not be entirely socially competent (not that he's necessarily guilty, but people rarely wind up charged with crimes because they've made all the right decisions). Besides, this is a situation in which four eyes is good, but six eyes is better.

Never swim alone.

Simple Rule 14: The Atticus Finch Rule

Recall the scene near the end of *To Kill a Mocking Bird* in which Atticus Finch, having lost the case, wearily packs up his things to leave the courtroom. As he's preparing to leave, the blacks in the gallery stand up for him; Reverend Sykes tells Scout, "Miss Jean Louise? Miss Jean Louise, stand up! Your father's passin'."

Why did they stand up for Atticus Finch? Because he was an upright, honest man fighting for what he—and they—knew was right.

Simple Rule 14: The Atticus Finch Rule: *Be the lawyer they want to stand up for.*

Simple, right? Not easy, in some cases maybe not even possible, but simple. Atticus Finch acted with courtesy and dignity. He didn't lie, cheat, or rant.

Even in the worst case for the defense, there are human beings on the other side. The jury panel is watching us and listening; they see how we behave toward the judge, witnesses, court staff, prosecutors, and most particularly them. How we treat other people reflects on us and on our clients.

This doesn't mean we have to be meek. Sometimes in the course of battle feelings get bruised; the jurors know that. They will forgive us our zealous advocacy, but they won't forgive us our rudeness.

Nor will they forgive us if they catch us lying, or cheating, or pretending to be something we aren't. And since they can't punish us except through our clients, that is what they will do.

So don't be rude. Don't lie. Don't cheat. Don't pretend to be something you aren't (unless you're a rude lying cheater—then *pretend with all your might*). Say “ma'am” and “sir” and “please” and “thank you,” and listen when someone else is speaking. At least until the jury has given you permission to do otherwise, treat everyone in the courtroom with courtesy and dignity.

Be the lawyer they want to stand up for.

Simple Rule 15: The Bat Rule



This probably should have received much higher ranking. The Bat Rule: *Ping, then listen. Or fail.*

Bats use echolocation: *ping!* and detect food and obstacles by the signal that bounces back. A bat that doesn't ping doesn't eat, but neither does a bat that doesn't listen.

Your ping is a question. You have to ping. If you don't ask any questions, you don't get any information. But if you ping and then immediately start thinking about your next ping instead of listening to the signal that comes back to you, why ping at all?

You don't get any information by asking questions.

Ping, then listen. Or fail.

Simple Rule 16: The Herd Rule

I've talked about how the jury panel is a group and the jury is a group. Why? Because people like to be in groups. Most people will, given a choice between being in a big group and being in a small group, choose the big group. A relic of evolution? I think probably so. If I stay with the bigger group, we'll all be safer from predators.

So Simple Rule 16, The Herd Rule, is: *Remember that you are dealing with herd animals.*

I've given examples of questions for the jury panel in other simple rules:

“Do any of you {whatever}?” versus “How many of you {whatever}?”

The second question presumes that there are some people who {whatever} and is therefore (because of our preference for larger groups) more likely to get responses than the first question, which doesn't contain the same presumption.

If you want to find as many people as possible who share some opinion that won't be helpful if it gets carried into the jury room, or if you want the jurors to commit to a basic and uncontroversial principle, ask the question the second way: “How many of you agree with Mr. Jones that Fred is probably guilty?”

If, on the other hand, you want the people who share Mr. Jones's opinion to keep their mouths shut about it, ask the question the first way: “Do any of you (or does anyone) agree with Mr. Jones that the government should be held to a higher standard than beyond a reasonable doubt?”

Herd animals don't want to be cut out from the herd; they want to blend in. The jury panel is a group, and the group is a herd. When you are picking a jury, *remember that you are dealing with herd animals.*

As a criminal defense lawyer, my attitude toward rules is flexible: rules are made to be bent. These rules are not canonical—there will be occasions on which some of them cannot be applied, and I hope that the jury consultants responding to this piece will have discovered many more that I never thought of. But any rule from this list, applied singly, will improve any jury selection; combined, the rules are powerful and versatile tools for forming a better jury.

Endnotes

¹ In the Texas state courts where I try most of my cases, most voir dire is conducted in open court with the entire panel.

² Beer Pong: <http://www.beergood.com/pong.asp?menublock=beerpong>

We asked four experienced trial consultants to respond to Mark Bennett's Simple Rules and we asked each of them to come up with a new 'simple rule' of their own based on their individual experiences in jury selection. On the following pages, Andrea Blount, Ron Matlon, Beth Bochnak and Paul Soptur bring their individual backgrounds and ideas to bear in their responses to Mark Bennett's practical voir dire/jury selection 'rules'.

Response to Mark Bennett's 16 Simple Rules to Better Jury Selection: A Verdict Takes a Group

By Andrea Blount

Andrea Blount, Ph.D. (ablount@dbhjury.com) is a Psychologist, Trial Consultant and Partner with Dodge Blount & Hunter, LLP based in Seattle, WA. She applies her understanding of the interaction between psychology and the law within her practice in civil cases.

As a trial consultant, during jury selection my entire focus is on trying to predict the behavior of the jurors and how they ultimately will influence each other within the jury group. In contrast, attorneys have a different perspective and additional tasks during jury selection – they must stand up before the court, ask the right questions, respond in the moment, and begin to establish rapport with the jury. Thus, as I reflect on Mr. Bennett's "16 Simple Rules for Better Jury Selection," I am struck that his rules appropriately focus on advice for how one effectively conducts voir dire – how to phrase the questions, listening more than talking, sharing your own biases so others will be more likely to share their own, and treating the potential jurors with respect.

Although there are numerous avenues one could take in responding to this article, I have opted to focus on one aspect that stood out to me because it is rarely discussed regarding jury selection – the group factor. More often than not we talk about individualistic components of jury selection: the juror profile, which individuals to strike, individual challenges for cause. Thus, it was refreshing to see Mr. Bennett address the role of groups because jury selection is, at its core, the selection of a small group of individuals (the jury) from a larger group (the venire). Through the process of striking individual jurors, we are creating a group that will decide the case.

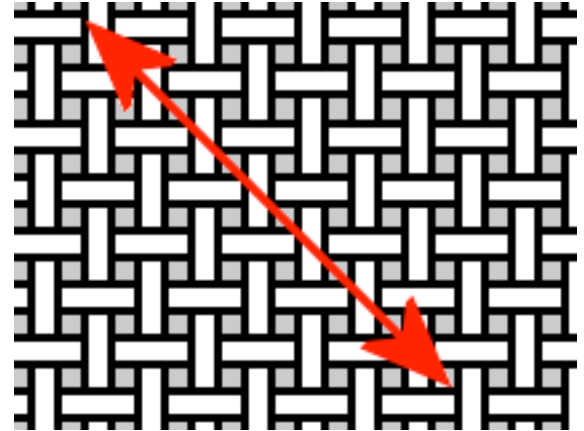
Setting Group Rules in Voir Dire

Although individuals in the venire have widely disparate personal objectives (some may want to be on the jury, many do not want to sit on a jury, others may be interested observers), they are united as a group in that they are separate and distinct from the judge, attorneys and parties in the case. Whatever individual jurors' goals may be, for those in the venire it is "us" and "them." As the basis of his 16 Rules, in Rule Zero: One Rule to Rule Them All, Bennett states that the venire is a group and the objective in jury selection is to form a group "to include you." I have a different perspective and believe that the attorney should establish rapport and mutual respect with the jurors but an attorney cannot, and should not, become part of the group. Because the jury and the attorney have different roles, objectives, and rules, the distinction between "us" (the jury) and "them" (the attorneys) can be lessened through rapport but it will never disappear. Courts have multiple rules in place to keep the attorneys distinctly separate from the jury.

Nevertheless, attorneys have an important role in establishing the social rules, or norms, of the venire. At the beginning of jury selection in any courtroom cross the country, there are several safe assumptions about most people in the venire: (1) they have little, if any, experience in a courtroom; (2) they will feel intimidated by the setting, the attorneys and the judge; (3) they will be afraid of speaking in public, and (4) they believe that admitting you are biased or cannot be fair and follow the law is a bad, bad, bad thing. When we are in strange and anxiety-provoking situations, most people will watch others to see how they should act. Few will risk making themselves stand out from the crowd because no one knows what will happen. The result is dozens of people sitting quietly, waiting and watching to see what will happen.

In order for voir dire to be successful, those in the venire need to learn what is expected of them, that nothing bad will happen to them if they speak up and that it is good, even honorable, to admit that they may not be the most objective juror for this particular case. Thus, a primary rule of jury selection is to establish group norms so those in the venire are encouraged to share their experiences, admit their strong opinions and indicate their biases. Mr. Bennett's Rules do a great job of explaining how attorneys can easily adjust the group norms and create a comfortable environment for jurors to talk openly. Treating voir dire more like a casual conversation than a cross-examination (e.g., The Blind Date Rule), listening to what jurors are saying (e.g., The 90/10 Rule) and effectively following up on jurors' comments to gather more information (e.g., The Shrink Rule and the Beer Pong Rule) all help establish by example that it is safe and good for jurors to speak up in the group.

In terms of showing jurors that it is good to admit biases, however, one rule deserves a little more attention. Rule 11: Playing Doctor Rule suggests attorneys should share their own prejudices related to their client so jurors will be more likely to do the same. Sharing an example of one's own prejudices, however, does not have to be limited to your client. Since we want jurors to talk about their personal experiences and attitudes that will make them predisposed to find against you, we need jurors to admit that they would not be a good juror for this case. This works best when jurors understand that having a particular bias related to this case does not make them a bad person or generally unable to be fair. So, when attorneys admit that there are some cases that even they would have a hard time being fair on, jurors see that it is okay for them as well. For example, the attorney could say that as a child, her dog was run over by a teenage driver and to this day she completely distrusts teenage drivers. So, if she had to sit on a jury involving a 17 year old driver she could not be fair; that would not be the best case for her to be a juror.



Follow-up on this personal example, and create a role model for other jurors, by calling on a talkative juror. Ask this juror if he can think of any examples of a type of case where he might not be a good juror, even if it is not related to this case. Then, using the Beer Pong method, open it up to the venire and ask if there is anyone who believes *this case* might not be the best one for them. Setting the stage in this way also gives the attorney language to use when attempting to secure a cause challenge (i.e., "So, is this case for you like the teen driver case for me? Would it be difficult for you to put your personal experiences aside?")

New Rule: A Verdict Takes a Group

When attorneys follow Mark Bennett's rules during voir dire, chances are great that they will have unearthed many more people in the venire with relevant experiences and biases than they will be able to strike from the jury. With luck, some of these high-risk jurors will be eliminated for hardship. With skill, a good judge and a little more luck, a few more will be stricken for cause. More often than not, we are left with at least twice as many high-risk jurors as strikes. What to do?

Both sides in a jury trial want to win. The ultimate objective in jury selection is not to make the jurors like you, but to choose a group that is most likely to rule in your favor. In other words, the goal is to not only predict how jurors will likely receive your case story, but to also predict the different ways in which jurors will interact, what relationships will form between them and what sub-groups will develop within the jury. These sub-groups can have considerable impact on the direction that the overall group takes. To reach this goal, we need to anticipate how each person on the venire will interrelate with the group – how will they affect the group and what impact will the group have on them? Thus, the most general rule I can offer on how to decide which jurors to strike is to remember that *no juror reaches a verdict alone, a verdict takes a group.*

These predictions are based on a variety of information obtained during voir dire. Obviously, we want to know which individuals have strong attitudes against our client and we want to know how people are likely to act within a group. Who was comfortable speaking up in a crowd? Who rolled their eyes when the other side was talking (or when you were)? Who has a leadership role within their job or community? Who dropped out of high school? Who rarely makes eye contact or acts exceptionally shy? Who seems to easily annoy those sitting around them? Who smokes (and will share smoke breaks with other jurors who smoke)? All of these factors shed important information to help prioritize the strike list because we want to know who the social leaders will be, who the followers will be and who will likely form sub-groups within the jury.

Imagine you have one strike left and your high-risk jurors include a retired military officer, a mid-level bank manager, an outgoing soccer mom and an artsy-hippie. Which of these individuals has the most leadership potential (and would thus pose the most risk to leave on the jury)? The answer to which of these hypothetical jurors has the most leadership potential depends on the venue, the type of case and the other people on the jury panel. Each of these jurors has leadership potential, some of which may be more obvious than others.

For example, the retired military officer clearly has leadership potential and has advanced professionally because of it. If this person sits on a jury in a military-friendly venue where other jurors are likely to have military experience such as San Diego, CA he will likely be respected and looked up to as a social leader because of his military experience. However, if the same person was on a jury in Berkley, CA his military background and leadership approach would not have the same effect and his role within a group would likely be more of an outsider than social leader. But, venue does not control everything, the case issues matter as well. Even in a military-friendly venue, the mid-level bank manager might be a more important group leader than the retired officer if the case involves accounting fraud.

When might the outgoing soccer mom have the most leadership potential and thus be the biggest threat? She would rise to the top of the strike list if she has personal experience, either herself or someone close to her, related to the case or if she will have a calming influence on the other members of the group. For instance, a jury made up of a many different strong personalities will often turn to a mother figure to help keep everyone in line. The group role of the artsy-hippie person or the talkative retail clerk depends on the venue and who else is in the group. Are there other people like them? Are they likely to form sub-groups (increasing their leadership potential)? Or are they likely to be loners in the group (and thus not a risk to keep on the panel)? This is why the seemingly “nutty” people in a venire rarely concern me – they are likely to have little influence on the group. Who wants to align themselves with the nutty person in the group?

The points to remember are that (1) a person’ ability to affect others is determined by the other members of the group and (2) like attracts like. So, if there are multiple people on the jury panel who are similar to one another they will likely form a sub-group and increase their influence over the group much more than they would as single individuals. The decision of who to strike is based on the prediction of the impact each person will have socially. So, when it is time to name your strikes remember that *no individual person reaches a verdict alone, it takes a group.*

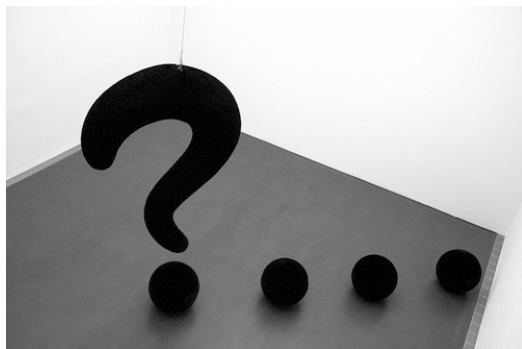
Response to Mark Bennett's 16 Simple Rules for Better Jury Selection

by Ronald J. Matlon

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Mark Bennett clearly demonstrates how astute he obviously is during jury selection. His “rules” make good sense especially from an effective communication standpoint.

There are two rules that I would put at the top of the list as most important. The first one is #4. I am not sure the formula is necessarily 90/10 but listening to what the jurors say is paramount. After a juror answers, good listening should prompt you, the attorney, to give positive feedback to what was said. Then, if pertinent, ask follow-up questions.



Bennett's #8 is the other very important rule. Bennett appropriately suggests that a “how do you feel about that” question is good in order to get a juror self-disclosure. Sometimes, you might even get others on the panel to comment on what the talking juror just said. Let me elaborate on this rule because I think much more can be said beyond the “how do you feel” question. Other types of open-ended questions are possible too.

There should be a good blend of close-ended and open-ended questions. Here is how that blend might appear to ensure as much juror candor as possible. Close-ended questions can precede open-ended questions.

Those are questions that can be easily answered with a “yes” or “no” answer, or by raised hands. Close-ended questions can identify juror experiences. For example, “Have you, or has anyone close to you, ever been on kidney dialysis?” For those who respond affirmatively, the open-ended request to ask of them is: “Please tell us about that experience.” Or, in another kind of case, one might ask: “How do you feel about the dissemination of sexually explicit videos to adults?” Even if the answer is: “I have no strong feelings,” an appropriate probe would be: “Well, then, what are your feelings even though they are not strong?”

Open-ended questions such as those above allow prospective jurors to do most of the talking, and this gives you a good opportunity to learn what you need to know. Listening to jurors reply to the open-ended request is the best way to detect juror bias in voir dire. As probable jurors are allowed to talk, their attitudes will be on display. Additional follow-up open-ended questions beginning with “how,” “why,” and “what” can go far in helping you identify bias (e.g., “Why did you find the services received by your mother's home health care provider to be insufficient?”). Consider this list as a series of well-constructed close-ended (experience) and open-ended (attitude) questions:

- Have you or has anyone close to you ever been seriously injured or killed in a vehicle accident?
- If yes, please describe the circumstances. (Follow-up probes may be necessary.)
- Was a complaint, lawsuit, or claim of some sort made about this?

- If yes, please explain. (Follow-up probes may be necessary.)
- How was the complaint or claim resolved?
- How did you feel about this resolution?
- Is there any reason why any of you who remained silent during this last set of questions chose to do so? (Follow-up probes may be necessary.)

The reason this is a good series of questions is because it follows an experience-attitude-bias continuum.

Another rather important Bennett rule is #13 (the undertow). I think it is best for the lawyer who is asking the questions not to take notes. You should have someone sitting at or near counsel table make all the observations and take thorough notes. It should be someone who has experience in jury selection and is relying on a jury profile prepared in advance. That profile identifies the riskiest jurors for your particular case. Rely on that person's advice when de-selecting your jurors.

The only rule I take some exception to is #6 (improvisation). Certainly a verbatim script that you read from is not a good idea. But, I do recommend that you have a list of topics in front of you to be sure you cover everything. Bennett's comparison to a blind date is simply not appropriate here. A casual conversation on a date is not a formal, legalistic setting at all.

Unfortunately, many of Bennett's "rules" are not applicable in states like mine (Maryland). Nor are they applicable in most federal courts where attorneys get almost no chance to build rapport with jurors. Nor do they get a chance to educate jurors about the case. Why? Because judges do most of the questioning with only occasional follow-up by counsel. It is often impossible to get jurors talking during a judge-conducted voir dire.

So, for jurisdictions where jury selection is more limiting, I am going to add one more rule to Bennett's list. However, I am going to call it a "recommendation." I make this recommendation wholeheartedly and in view of a substantial body of relevant jury research conducted over several years.

That recommendation is to have supplemental juror questionnaires widely adopted in trials where voir dire is limited. The use of such questionnaires allows prospective jurors to answer voir dire questions in writing. "Well-formulated juror questionnaires can provide counsel with a substantial amount of information about prospective jurors ... especially in jurisdictions where the scope of attorney-conducted voir dire is limited or judge-conducted questioning is the mainstay" (Heaney, 2000, p. 3). Sample supplemental juror questionnaires are available from this author upon request.

There are many advantages to questionnaires. First, you can get an overview of possible bias from the entire venire, not just the people seated in the box. Second, because answers are provided in writing rather than orally, there is more candor and more assurance of identifying bias with questionnaires than having voir dire be entirely an open court oral experience. Third, questionnaires actually save court time inasmuch as judges and lawyers need not be present when this information is gathered. They need only be present for follow-up oral questions based on the questionnaire answers. Fourth, jurors appreciate the privacy of this activity. "Filling out the questionnaire is often less fraught with anxiety than answering questions out loud in front of an audience" (Heaney, 3). Fifth, questionnaires "can quickly pinpoint the specific areas that require individual follow-up questioning" (Hans & Jehle, 2000, p.1198).

To effectively use supplemental juror questionnaires, give careful thought to their preparation. Develop a good blend of close-ended and open-ended questions before sending a questionnaire to the other side and the judge

for review. Furthermore, prospective jurors should be given sufficient time to complete the questionnaires. You should arrange for duplication of the questionnaires, and time must be allowed for a thorough review and analysis of the data.

Supplemental juror questionnaires have received ringing endorsements. The American Bar Association has asked that courts consider using a specialized questionnaire addressing particular issues and permitting the parties to submit proposed questionnaires (American Bar Association American Jury Project). Even here in Maryland, the Council on Jury Use and Management concluded: “Advance written questionnaires for jury panels should be utilized. Questionnaires can provide information in a more efficient form and with less invasion of juror privacy. ... Advance written questionnaires can be especially useful in protracted or complex cases where jury selection will require prospective jurors to answer many questions. They may also be useful in more routine cases where jurors are asked certain standard questions.” (Council on Jury Use and Management, 2000, p. 6).

While supplemental juror questionnaires do not solve all the problems inherent in places where there is limited voir dire, they go a long way toward doing a better job of uncovering juror bias over the present system. Since the goal of voir dire is to help both judge and counsel identify bias that can taint jury deliberations, this recommendation should be implemented. I'll call it Bennett's Rule #17 if you like.

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Response to Mark Bennett's 16 Simple Rules for Jury Selection

by Beth Bochnak

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I am a fan of Mark Bennett's blog and was pleased to see that our rules for jury selection are pretty much the same. However, to paraphrase a standard survey answer, when he says, “Jury selection is not only—nor even mostly—about selecting (or deselecting) jurors,” I agree somewhat and disagree somewhat.

I believe jury selection is about de-selection. You *should* use voir dire to find the jurors you need to strike. However, this does not preclude you from bonding with those you hope to keep. It's a matter of how you go about it. You can build rapport by having an honest discussion with them about the issues in your case. But if you are spending your limited voir dire time talking to them, rather than listening to them, you've wasted the only opportunity you have to learn their opinions until they announce their verdict. The more you get them to talk, the more you learn, plus, if it is interesting, the judge is more likely to let you continue.

Building rapport is a process. It begins with jury selection and continues throughout the trial. You don't need to tell the jurors about yourself, although you should tell them about your client. The jurors will have ample opportunity to get to know you. They will consider your clothes, your shoes, and all your mannerisms and speech habits. They will speculate about your home life. The question is, what will you have learned about them?

The best way to get good information from jurors is to engage them in conversation - one where they do most of the talking. Ask open-ended questions – that is questions that can't be answered by “yes” or “no.” In a group voir dire, you can ask a question of the group, “how many of you think a defendant should take the stand and testify on his own behalf?” Then follow it up individually with those who have raised their hands. You can ask why those people feel that way, and you can ask those who didn't raise their hands why they didn't. You can ask if anyone can think of a reason why a defendant might not testify. There are usually a variety of reasons. In asking the questions, it is important to keep in mind that most jurors have not spent any time thinking about the issues in your case. Therefore, it may take 30 seconds or so before anyone responds. Please be patient and resist the temptation to start providing the answers yourself. You don't learn much from multiple choice questions either. Acknowledge that you realize this is new to them, and you want them to think about their answers.

You build rapport by paying attention to jurors, valuing what they say, noting who is shaking her head and who is nodding agreement with what another juror says. Get them to talk to each other. Be pleased when a juror says something terrible, appreciate his honesty. "Thank you, Mr. O'Brien, I'm sure you are not the only one who feels that way. Who else in this room believes defense attorneys should only represent people who are innocent?" Then you can ask people what they understand the burden of proof to be and whose burden it is. You can discuss "innocent" versus "not proven."

Getting useful information from jurors is a matter of asking the question the right way. Attorneys often ask jurors what their verdict will be if the state doesn't prove its case, expecting each to say "Not Guilty." Most will, because they know that's the right answer. Recently, we tried asking this question another way. We asked jurors if, at the end of the trial, they could vote not guilty if they weren't sure whether or not the defendant was guilty. Almost a third of them indicated that if they thought the defendant was guilty but it was not proved by the prosecution, they would be unable to acquit. Even after the defense attorney said the judge would instruct them that if they had a reasonable doubt they would *have* to acquit, many continued to say they would not feel comfortable doing so.

We already know there is no presumption of innocence, so any opportunity you have to get jurors to talk to you about this gives you another chance to educate them about it or use a cause challenge on those who cannot accept it. When I say "educate them," I don't mean lecture. The defense attorney's job in voir dire should be that of a facilitator. Ideally, you are facilitating a discussion among several jurors with different views about the presumption of innocence and the role of the defense. You can say, "Her honor will tell you that it is the prosecutor's job to prove the defendant is guilty of the crime charged. What do you think my job is?" Most jurors we've come across think your job is to prove the defendant is not guilty. "Well, suppose we get to the end of the trial, the defense doesn't put on any witnesses, the defendant doesn't testify, and you're not sure what happened?" Again, the most common answer is "I'm not sure." If you ask, "how many of you think you should vote not guilty if you're not sure?" Probably the best you are going to get is a few hands, but you will have had a good discussion, and a pretty good idea of who should not stay on the jury.

I have been asked to provide only one rule for jury selection. It's tough to narrow them down.

1. It takes a village to make a juror.

You definitely want to know what each juror thinks about the key issues in your case, especially the "bad facts." But keep in mind that jurors don't live in a vacuum. Jurors, their families, their close friends and associates have varied life experiences. Maybe your juror has never been the victim of a crime - however his sister was, and she told her brother how scared she was and how awful the experience was and this has had a huge impact on him. In fact, he now feels anyone who uses a gun in the commission of a crime should get life in prison. The life experiences of a spouse, co-workers, parents, friends, old boyfriends, poker buddies and so on will have an impact on your juror's attitudes toward the issues in your case. That's why it isn't enough to ask, "has ___ ever happened to you," or even, "have you or anyone in your family ever ____." You want to know if the jurors or anyone close to them - family or friends - ever experienced_____.

After you find out, you want to know what impact it may have had on him. Ask if that person ever talked about it with the juror, and how that has affected your juror. Has it changed the way they behave? Do they have strong feelings about the use of a weapon? Has the juror expressed an opinion about perpetrators in general to the friend or to others? How does the juror think his sister's experience might affect him in *this* case? Often a juror will say ":Oh that has nothing to do with *this* case. It wouldn't affect me at all." And then you can be the judge of whether he is telling the truth or is in touch with his feelings about what happened. Of course if he says it will affect him a great deal, you can excuse him for cause, after asking, "and an experience like that, so traumatic, isn't the kind of thing you can just eliminate from you mind, is it." (Notice no question mark. You don't want a long answer, just a "No it isn't.")

Part of your prospective jurors' village are people of other races (or a lack of them). It is important to know what your jurors think and feel about them. Therefore, your job is to find out what experiences, especially negative ones, your jurors have had with someone of another race, ethnic group, or other outgroup. You also want to ask how much contact they have had, because sometimes, the reason they say they've never had a negative experience is because they have lived their life in such a way to avoid contact with people of other races. So in addition to asking how often (and where) they come in contact with people not of their race (be specific as to the race/ethnic group), you want to know how that contact went. "Have you or anyone close to you had a negative experience with an African American?" (Or white person, gay person, Muslim, etc depending on the race/ethnicity of your client and the race of your juror.) Generally jurors think of themselves as fair minded unbiased people, especially when asked by a judge if they can be fair. However, many jurors, or people close to them, have had a bad or unpleasant experience - real or imagined - with someone of another race. If you ask them, they will tell you about it.

It could be as a crime victim, but often it is something in their everyday lives. Such as when their children were in school and were called names; or they were walking down the street and felt threatened; or at work when a person of color was promoted over them. They may have sold a car to someone who didn't make payments on time; or their sister was married to a Muslim and they don't like the way Muslims treat women. These are examples you want to hear about during voir dire, not when asking about the verdict after the trial.

Find out what happened, and when it happened. Sometimes people are harboring resentments over things that happened to them in 3rd grade (meaningful in itself). If it seems that an experience that has stayed with them, follow up, acknowledging their feelings. "I'm sorry to hear that. How do you feel about

that now?" If they seem to be reliving it, ask, "Do you think you might start remembering that when hearing the evidence/seeing the defendant in this case?" Find out what the outcome was. "Was anyone arrested/hurt/questioned about this?" And how they felt about the outcome. Sometimes the outcome is a good one or the way they describe the incident shows they have processed it in a way that has neutralized the experience. Obviously, if in any way it resembles the crime charged in your case, or they are obviously holding a grudge you will want to follow up in greater detail.

After hearing about it from the juror, and seeing who else on the panel had a similar experience, you want to know how this has affected each of them. Again, they may say not at all. You be the judge of this. As with all voir dire questions, if you don't ask, you will never know.

Response to Mark Bennett's Simple Rules by Paul Sceptur

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Mark Bennett gives us 16 rules for better jury selection. Most of these rules are practical rules and hopefully should be known to most trial lawyers by now. Although I agree with many in principle, I disagree with some points and would also like to add several rules of my own.

Bennett seems to have one rule to rule them all and states that as his simple rule zero: One rule to rule them all. He sets forth three objectives in jury selection, and I must disagree with his objectives in principle. Jury selection is about identifying unfavorable jurors and deselecting them. It is also about building rapport, but I really think the day of educating jurors about your case in voir dire is over. Jury selection is all about finding out what jurors think. It is about finding their biases, their prejudices and determining how they will affect your case. It used to be about educating jurors, but not anymore.

A case in point: Last summer, I was chosen for jury duty. Being the good citizen that I am, I did not try to get out of it and in fact, went down and reported to do my duty. I might add that this was much different than when I was 18 and Uncle Sam wanted me to fight in his army. At any rate, I was seated in the jury box prepared to express my opinions, attitudes and biases about anything and everything. Imagine my surprise when I, along with everyone else, was simply asked one question by the plaintiff's lawyer. The case involved a dog bite, and the question was along the lines of "Do you agree that the owner of a dog should be responsible if it bites a person"? Well, that is sort of a no-brainer but as I sat there listening to the same question over and over, I became frustrated. Why? Because that lawyer did not know what I thought. He didn't know what I thought about insurance companies, he didn't know what I thought about people who get bit by dogs, he didn't know what I thought about caps on damages, he didn't know what I thought about anything other than should the owner of a dog be responsible if it bites somebody? Not only did he not know what I thought, but he also didn't know what anyone else on that panel thought about anything other than that one simple question.

Jury selection is primarily about finding out what jurors think. Only when we know what they think can we then deselect.

I do agree that building rapport is important, but we have to do this in a way in which we do not come off as lawyer man and lawyer woman. One of the best voir dieres I ever had was in a dental malpractice case. After

voir dire, the defense lawyer came over and said, “If you were any closer to the jury, they’d be inviting you over to their house for dinner.” I took that as a compliment.

Bennett does hit some important points in his rules. He emphasizes that good voir dire is jury talking and bad voir dire is lawyer talking. I don’t know that it is 90/10 as he indicates, but voir dire is primarily the jurors talking and responding to open-ended questions. One of his important points is, “People leave jury selection believing what they believed going in”. That is very true. Greg Cusimano, a trial lawyer and jury consultant from Gadsden, Alabama, has a phrase that I have always remembered: “A man convinced against his will is of the same opinion still.” We find in focus groups and jury trials that this is true.



Lastly, Bennett makes an extremely important point. That is to listen to what the jurors are telling you. Many times, I have seen lawyers already thinking about the next question, reading notes, doing anything but listening to the answer and communicating with the juror. We need to be genuinely interested in the answer in order to effectively communicate and connect with the jury pool.

I would like to add several rules of my own. The first rule is to talk to everyone. When I do voir dire, I have someone sitting at counsel table with me, and they make sure that I have talked to everyone on that panel. If I have unintentionally omitted someone from the discussion, I am politely and gently reminded that I have not talked to juror number 14. I then go and talk to juror 14 to make sure that they are engaged in the process and not feeling left out.

The other rule I would like to share is “It’s not what you say, it’s what they hear.” We have to make sure that we understand the message that we are trying to get across and the information that the prospective jurors are receiving. This was brought home to me clearly in a recent trial. As I do in every case, I talked to the potential jurors about money. One of my standard questions goes along the lines of this: “At the end of this case, I will be required by the evidence to ask you for money for my client. Some of you may think it is too much, some of you may think it is too little, but one of my jobs is to ask you for money for my client at the end of the case. How do you feel about that?” At this point, a young man raised his hand. I thanked him for raising his hand and asked him how he felt about giving money to my client. “I just have a question because I want to make sure I understand”, he responded. I said, “Sure, what is your question?” He said, “I just want to make sure I understand, at the end of the case, you’re going to ask us to give money to your client.” “Yes”, I responded. He said, “Well, I just have one problem.” I said, “Go on.” He said, “I don’t have a lot of money!”

Clearly, I was not communicating very well with that young man, and I accept full responsibility for that. Remember, it’s not what you say, it’s what they hear. Make sure that what they hear is what you mean to say.

Mr. Bennett has given us some good rules to follow in voir dire but like all rules, they are simply tools that we can utilize when communicating with the jury in voir dire. Remember, it’s a discussion, and the lawyer is simply a facilitator of the discussion.

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DAMAGES: THE DEFENSE ATTORNEY'S DILEMMA

by Jeri Kagel

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Dilemma: a situation in which a difficult choice has to be made between two or more alternatives, especially undesirable ones. (Oxford American Dictionaries)

In every serious injury or death case, defense counsel faces the dilemma of whether, and how, to confront the issue of damages. Talking to the jury about gruesome injuries or the death of a loved one taps into every defense attorney's fear of appearing callous or cold-hearted.

Defense attorneys most often prefer juries to decide in favor of their client on issues of liability. Consequently, many believe that they are ceding liability if they talk about damages. Even in cases where defense counsel concedes liability, either by admission or tacitly, and damages take center stage, defense counsel often tread lightly on the issue of money out of a fear of appearing insensitive.

While I understand these fears, shying away from damages in catastrophic cases – or even in smaller cases – gives far too much power to the Plaintiff over the seminal issue in a case. Because of defense counsel's reluctance to argue damages, the only "damage story" jurors get to hear and evaluate is plaintiff's story. It is critical that defense counsel make damages part of their story and talk directly to the jury about money. With the right tools, defense counsel can openly discuss the issues of damages with integrity and compassion at the same time he or she convinces the jury to award less money or none at all.

Imagine for a moment that you are counsel for the defense in a personal injury case. It may be a vehicular accident, a medical malpractice case, product liability or simple negligence. The plaintiff has been injured or killed. The parties have been unable to reach a settlement and as a result, the case is going to be tried. Perhaps you have even done a mock trial or focus group to learn what does and does not matter to people whose attitudes reflect those of jurors likely to hear this case. At issue are your client's liability, the plaintiff's alleged injury, and the amount of damages the jury might award should there be a plaintiff's verdict.

Plaintiff's counsel will argue all issues, including damages, through creative voir dire questions, a strong heartfelt opening statement and thorough, passionate closing argument. Plaintiff's attorney does all this to register to jurors why their client deserves a lot of money and to insure, as best he or she can, that jurors understand the importance and reasonableness of what they are being asked to decide – including damages.

What's a defense attorney to do?



Over the last twenty years, I have heard a host of reasons defense attorneys choose NOT to argue damages, including:

“If I start talking to the jury about money, they’ll think I’ve ceded liability!”

“Won’t I be ‘devaluing’ the plaintiff’s injury if I argue money? What will the jury think of me? If they think I’m heartless, won’t they attribute that to my client as well?”

“It’s too dangerous. Once I talk about damages, that’s all the jury will think about and it will take away my credibility on liability.”

“I don’t want to suggest what a ‘reasonable amount of damages’ is when I think we have a strong case on liability and I don’t think the jury should get to damages at all.”

However, countless juries have proven these assumptions wrong. They are common misconceptions grounded in fears that may have sprouted from other lawyers’ “war stories,” personal experiences or even a plot on a TV legal drama. There may be a grain of truth in these fears. It may be that what did not work for another attorney will not work for you; it may be that there are dangerous ways to talk about damages; it might even be true that sometimes jurors will not resonate with your argument on damages. However, these same “truths” are also true when it comes to arguing liability. Some jurors will accept what you have to say, some won’t, and some others may strongly disagree. Yet defense attorneys going to trial work to overcome those obstacles everyday. On liability.

Defense attorneys figure out ways to maneuver around possible negative juror reactions to their ideas about liability. They advocate for their clients even if theirs is a difficult story to tell or a difficult defendant to represent.

The same does not hold true for damages. With damages, defense attorneys are more comfortable opting out. It is my belief, and it has been my experience, that defense attorneys are *not at risk* if they argue damages, even dollar amounts. As we poll jurors, we learn that defense attorneys who confront the issue of damages head-on, and in ways I will talk about below, successfully obtain defense verdicts or significantly reduce the amount of money awarded *without alienating the jury*. In fact, jurors have often told us that they feel grateful to defense attorneys who have helped them put a voice to, and a “vote” for, their own discomfort with awarding either the amount plaintiffs were asking for, or any money at all. Once defense attorneys are willing to act differently by confronting the issue of “how much money,” then our discussion moves from “whether to do it” to “how to do it.”

We know a variety of ways that people (jurors) digest, comprehend and incorporate information provided to them generally and at trial more specifically. We know about the “primacy-recency” effect; we know about the importance of “repetition;” the importance of acknowledging ‘the grain of truth’ in your opponent’s argument before debunking its most troubling aspects, and finally we know the importance of using the tools of good storytellers to engage jurors’ hearts and minds. These and other communication skills work. Their importance is paramount when deciding how to present your case.

These tools, important when arguing liability, remain critical – and effective - when defense attorneys decide to address damages. This article explores four opportunities for defense counsel to address damages: Voir Dire, Opening Statements, Witness Testimony and Closing Arguments.

Start Addressing Damages In Voir Dire

Local rules often restrain attorneys' first interactions with jurors and each individual judge may have a unique way of structuring voir dire, including the kinds of questions and the amount of follow-up questions allowed. Still, voir dire is the first time that you, as defense counsel, can begin to build a rapport with the jury. Building a rapport translates into jurors trusting what the attorney says, his or her interpretation of facts and events, and believing that the attorney has cause to question an opposing witness's testimony. Good will toward defense counsel can also transfer (to some degree) back to the defendant. During voir dire, building a relationship with the jury is as important as uncovering bias and educating them about your case.

Many of us are familiar with, and use, voir dire questions designed to discover the "punitive damage juror," questions to find jurors who are more likely to demonstrate sympathy for an injured plaintiff or the family of the deceased, and/or questions drafted to find those people more likely to decide against your client, whether it is because they are a corporate defendant, government agency or member of a despised industry. These questions, rightly so, are asked to uncover jurors' attitudes and/or life experiences.

Talking directly about money is an uncomfortable topic – between friends, family and certainly strangers. In addition to the issues just described, here are two additional ways of using jury selection as an opportunity to begin to educate your jury about damages.

Voir Dire Quick Tips:

1. ASK THE PLAINTIFF'S OPPOSITE

It is always important to listen to the plaintiff attorney's voir dire questions. When plaintiffs ask voir dire questions designed to identify those jurors who are going to be less likely to award a large sum of money with questions such as, "How many of you have an amount of money – a ceiling – beyond which you would not award my client," then you ask, "Plaintiff asked you whether you had a ceiling above which you wouldn't award damages. I need to ask you the opposite - How many of you have an amount of money that you wouldn't go below?" Asked another way, "How many of you will award damages just because the plaintiff was injured?"

Similarly, it makes sense to think about asking "opposite questions" to plaintiff's attempts to malign your client, your client's industry or only put responsibility on your client. A question like, "How many of you believe that manufacturer's are more concerned with profits than protecting consumers," can be followed with the opposite, such as, "How many of you think that in order for manufacturers to make a profit, their products need to be safe enough for people to buy them?" or a question that, instead of focusing on the defendant, focuses on the plaintiff, "How many of you think that a manufacturer cannot guarantee how a consumer might decide to use their products? That there are times that consumers operate products in ways that are not safe?"

2. SPEAK YOUR TRUTH

It may sound hokey but it works. When asking direct questions about money or a person's attitude toward awarding money makes you uncomfortable, it is important to remember that the jury is not your enemy. When you are willing to display some vulnerability, jurors often are open to responding more genuinely. Incorporate your discomfort into your voir dire, by asking, in some form, "The plaintiff suffered a bad injury/plaintiff's son died. I know that you are all good people and likely to feel compassion for each of them. I need to know if you think you can walk out of this courtroom at the end of this trial and not give any money to plaintiffs if the evidence shows that my client, ABC corporation, did not cause plaintiffs' accident?"

Create a Map In Opening Statements

An attorney I worked with years ago gave me an analogy for opening statements: “Jurors are like people suddenly dropped in the middle of a strange forest; they do not know how to get out. Suddenly from the left appears someone who says, “Follow me through the forest. I’ll get you out of here.” They listen and begin to walk in that direction. Then, from the right, appears another stranger who says, “No, don’t follow in that direction. I know a better way out of here. Follow me through the forest. I’ll get you to the end.”

In my opinion, the map/story/directions presented by the defense during opening statement should be complete. You cannot take your jurors through the “forest” of liability issues, only to leave them to fend for themselves about damages. Just as the defense wants to highlight its slant on the facts, so it is important to provide the jury with some guidance about how to think about, and even decide, damages.

Opening statement is the time to be forthright; it is time to teach.

Opening Statement Quick Tips:

1. BE AS FORTHRIGHT AS POSSIBLE

Every defense attorney will have to decide for him or herself what they are most comfortable saying to the jury. My advice is to begin by telling the jury what you know they are facing and what you are truly asking them to do. Below is a sample opening for a defendant corporation or government entity. The same can be used for individual defendants. For openings similar to this, jurors have told us they thought the opening “helped them out,” and “was persuasive, yet compassionate and understanding.” Defense counsel begins,

“We are here today because of a tragic accident that occurred at 2:30 in the morning on Oak Road. The driver, Bob, was killed and his passenger, Jim suffered, as Ms. Smith told you, a traumatic brain injury. Understandably, everyone here sympathizes with Bob’s parents who are here today. And everyone commiserates with Jim and his wife for the injury he continues to live with.

But – as jurors – you are not being called upon to decide if this was a bad accident. You are not here to decide if these plaintiffs deserve your sympathy. You are here today to decide whether my client, ABC and the men and women who “built” this (product) are responsible for this accident and whether ABC should be obligated to pay millions of dollar to Jim for his injuries and the Brown family millions of dollars for their son’s death.

I am proud to stand in front of you and represent the men and women who work for the ABC and I want you to know that on their behalf, I am asking you to understand the pain and suffering plaintiffs have suffered. But, I’m also asking you to walk out of this courtroom without giving either plaintiff any money. That is a hard thing to do – to sympathize, to understand their pain and their desire to blame someone, but to not give them any money. But the evidence will show, as you will learn over the next week, that is the right thing to do because my client, ABC did not cause this accident, should not be blamed for it, nor forced to pay.”

Then, tell your story.

Follow Through With Witnesses

Most defense attorneys with whom I have worked are comfortable making decisions about damage testimony. Their decisions about using their own damage witnesses (lay and/or expert) as witnesses or as “off stage” consultants, as well as how to cross examine plaintiff’s damages witnesses (lay and/or expert) have been aptly based on how any particular witness or testimony best fits into their overall defense story.

My recommendations regarding witnesses and damages tend to be much more case-specific than more general teachings for voir dire, opening statements and closing arguments. However, the similarity that runs through my suggestions for all aspects of a trial is to allow for the possibility of presenting damages information to the jury and to work on “how” to do it, rather than questioning whether to do it at all.



Structure Your Closing Arguments Effectively

Defense attorneys fear that presenting an alternative dollar amount to jurors in closing argument conveys that there should be an award of damages and the award should be in the range between the defendant’s low number and the plaintiff’s high one. In addition, as with their objections to talking about damages in their openings, many defense attorneys fear that giving a low dollar amount in closing will appear callous or coldhearted. While that argument makes some sense, omitting any mention of money leaves the jury with only plaintiff’s number from which to calculate a damage award, should they believe there is some liability on the part of your client. That gives the plaintiff the power to define and instruct jurors what to do about damages.

Closing Argument Quick Tips:

1. *TEACH ABOUT YOUR DISCOMFORT WHILE DECONSTRUCTING PLAINTIFF’S DAMAGES ARGUMENT*

Defense attorneys do not have to give the plaintiff the last word on damages. They can teach the jury why to distrust plaintiff’s damages position, how to think about damages, and how, for the defense, arguing damages is a necessity.

We have found that the most successful closing arguments begin with arguing liability, followed by arguing damages and coming full circle and ending on liability. Although each case is going to have its own unique arguments, one successful structure for closing arguments follows the pattern set out here.

* Start with liability. Your liability argument forms the basis of the attorney’s closing, lays the groundwork for what follows, and creates the chorus/repetition from which the jury digests information.

*After arguing liability, talk about damages.

“I don’t think you ever reach the question of damages, for all the reasons I have just stated. But plaintiff has spent a good portion of this trial and his closing argument talking about plaintiff’s injuries and the money they are asking you to award. I don’t think you ever reach the issues of deciding damages, but I wouldn’t be doing my job for ABC if I did not address this issue at all. And so, let’s talk ... (this portion of your argument can capture any of a variety of issues – plaintiff has made a good recovery, plaintiff had pre-existing injuries or similar shortcomings, etc. before this incident, the expense of the life care or rehabilitation plans, reasons to discount aspects of plaintiff’s damages (expert or lay) witnesses, etc.)

*Then, back to liability.

“But again, I don’t think you ever have to reach these issues. “

Repeat your strongest liability arguments.

*Finish with what you said in your opening. Acknowledge that what you are asking the jury to do (walk out without giving the plaintiff any money) may be hard, but ...

*Finally, ask for a defense verdict.

Choice: The act of selecting or making a decision when confronted with two or more possibilities. The right or ability to make such a selection. (Oxford American Dictionary)

Damages may be a dilemma for defense attorneys. However, there are ways to address damages over the course of a trial that are definitely effective and worthwhile. Understanding and becoming adept at making these choices provides defense counsel with several strong arguments and often leads to significantly reducing a plaintiff’s damage award or strengthening the chances of a defense verdict.

Asking defense counsel to choose to talk about damages is akin to asking jurors to leave the courtroom without awarding any damages to plaintiff. It is difficult to do. Make this difficult choice. The defense attorney who confronts this dilemma and chooses to do what is difficult is actually helping his or her jury make their difficult choice.

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LAW ON DISPLAY

by Neal Feigenson and Christina Spiesel

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Christina Spiesel [christina.spiesel@yale.edu] is a Senior Research Scholar at Yale Law School and Adjunct Professor of Law at Quinnipiac University School of Law and New York Law School. She co-teaches *Visual Persuasion in the Law* and researches the impact of pictures in law and legal culture and how digital technology influences the practice of law and how it is perceived in the wider culture.

Law has traditionally been about words: trial testimony and oral argument, statutes and judicial opinions, negotiations and jury deliberations. Now, as never before, it's also about pictures displayed on screens: dashboard camera videotapes, digitally enhanced photos, computer animations, and multimedia displays combining photos and videos, drawings and diagrams, and more. Law's incorporation of digital visuals and multimedia is advancing rapidly and continuously taking new forms; 3-D virtual reality evidence is on the horizon and, thanks to videoconferencing technology and the internet, entire legal proceedings may soon go online.

This is a major change in legal culture. Thinking with pictures—looking at them, trying to interpret them, and using them to reach decisions—is very different from thinking with words alone. Understanding visual communication requires new skills. That's unsettling to many lawyers and judges; law school doesn't train them to deal with pictures and their experiences in practice may not have prepared them well either. The change is also unsettling to jurors. Digital technologies promise jurors unprecedented access to the facts with which they must make decisions; think of a brain scan image that reveals otherwise hidden injuries. But jurors also know that digital pictures can be manipulated to show practically anything the presenter wants, and this suspicion conflicts with their intuitive belief in the truth of what they see. It troubles the public, too, to imagine that judgments of guilt or innocence may turn on the kinds of audiovisual displays that they're used to seeing in movies and advertisements. How can justice be done in this new environment?

We wrote [*Law on Display: The Digital Transformation of Legal Persuasion and Judgment*](#) (NYU Press, 2009) to explore these and other issues arising from the proliferation of digital pictures and multimedia in law. Through detailed case studies of visual evidence and argument in actual trials, we analyze the evidentiary, rhetorical, psychological, and cultural dimensions of law's digital visual transformation. *Law on Display* is not a "how to" book; we don't teach readers how to use particular trial presentation systems or even how to construct persuasive visual arguments in general (for examples of this, see, e.g., Ritter, 2004, 2009). But lawyers can readily glean from the case studies ideas about different visual strategies that they might employ in their own work. The following case description demonstrates how digital visual technologies can be used at trial.

The case of *State v. Murtha* illustrates the persuasive benefits and judgmental risks of new digital visual technologies. In October, 2006, Hartford, Connecticut Police



Law on Display

The Digital Transformation
of Legal Persuasion
and Judgment

NEAL FEIGENSON and CHRISTINA SPIESEL

Officer Robert Murtha was acquitted on charges including first-degree assault arising from his January, 2003 shooting of a suspect attempting to flee in a stolen car. Murtha had chased the other car in his police cruiser until the driver stopped his car on a snowy bank on the side of the road. As Murtha got out of his cruiser and approached the other car, the suspect pulled back onto the road and sped away. Murtha fired several shots at the driver's side window, striking and injuring the driver (who kept on going). In his original incident report, Murtha asserted that the suspect's car had hit him before pulling away, prompting him to shoot in self-defense. But Murtha changed his story when he became aware that a video from another police cruiser following the chase showed not only that the other car had not hit Murtha, but that Murtha had run after the car and fired at the driver as the car sped away. At trial, Murtha claimed that in the stress of the moment, he *thought* that the car was headed straight toward him when the driver first pulled back onto the road, and that this reasonable (albeit mistaken) perception justified his use of deadly force in self-defense.

The prosecution showed the jury the dashboard camera video from the other police cruiser, depicting the chase and the shooting. (See the [Murtha video](#).) Defense attorney Hugh Keefe recognized that he needed something visual to counter this credible and compelling state's evidence—something to show the incident from Murtha's perspective. Legal visual consultant Jeffrey Taylor, working closely with Murtha, produced a visual display of the shooting from Murtha's point of view. It begins with a clip from the police dashcam video as the camera mounted in the trailing cruiser approaches to within about twenty feet of Murtha's cruiser, which is stopped on the left side of the road with its lights flashing, and the suspect's car, stopped in the snow on the right side of the road. As the suspect begins to pull back onto the road, the action “freezes” and the video changes into an animation. The virtual camera's (and our) point of view rises up and rotates to the left around Murtha's cruiser, coming to rest behind a digital Officer Murtha as he stands, outstretched arm holding his gun, confronting the car. The viewer is now just behind Murtha, sharing his point of view in the moment of action: The bright headlights of the suspect's car flash in our eyes, the left front headlight seemingly only a few feet away. Because the scene is frozen, the car could, based on what we see, be headed right at us. The animation holds this shot for a moment, then pulls away, up, back, and around again to the point of view from the dashcam video, and we see the suspect's car continue down the road, away from us. (See the [Murtha animation](#).)

Prosecutor James Thomas objected to the animation, contending that the animation was argumentative and inaccurate—not a fair representation of reality as indicated by the video. Trial Judge Christine Keller reviewed the animation-plus-video several times and found that the animation was a reasonably fair and accurate depiction of what it purported to show: what Murtha thought he saw. The judge also found that the display did not reflect any exaggeration or “artistic embellishment.” Accordingly, she allowed the jury to see the entire display, subject to a limiting instruction that the animation was not being presented as a precise reenactment of the incident, but only to illustrate Murtha's testimony as to what he honestly believed was happening at the time.

The reality that mattered in this case was, as it often is in trials, a hybrid of the objective and the subjective. The defendant was justified in shooting the fleeing driver if he reasonably believed that he needed to defend himself. The animation-plus-video offered jurors a visualization that integrated the defendant's subjective truth – what he thought was happening at the critical moment – with the “objective truth” as represented by the dashboard camera's seemingly neutral report. The medium is perfectly suited to the message; to show a hybrid kind of truth, the defense used a visual hybrid. The montage of animation and video clip bolsters the animation's credibility by grounding it in the presumptive truthfulness of the video. The transition from video to animation folds the two into the same level of represented reality: By starting with the dashboard camera's point of view and swinging around to the defendant's, the animation implicitly claims that both the defendant and the camera were “looking at the same reality.” Connecting the animation to the video in this way also normalizes the more novel medium of animation by associating it with the very familiar (and presumptively reliable) medium of automatically recorded video—an implicit version of what media theorists call *remediation* (Bolter & Grusin, 1999). In addition, by associating Murtha's point of view with that of the video taken by the camera in the other

police cruiser, the video-animation montage implicitly associates Murtha with those other “good” officers rather than singling him out as a renegade shooter.

Are these kinds of visual rhetorical effects reasons to welcome the video-plus-animation display in *Murtha* or are they grounds for concern? Jurors may have perceived the animation to be more credible simply because they tend to associate the medium of computer-generated graphics with (presumptively credible) scientific knowledge and expert scientific testimony. Furthermore, precisely what makes the animation probative for its ostensible purpose—showing the crucial events from the defendant’s point of view—also threatens to cause viewers to attribute *less* responsibility to the actor whose point of view the animation leads them to adopt and *more* responsibility to other actors or to the circumstances, a phenomenon known as the *actor-observer effect* (Jones, E., & Nisbett, R., 1971). Jurors watching the animation stand with Murtha as he faces the threat of the (seemingly) oncoming car, and any sympathy they feel for Murtha could also bias their judgment.

There are, moreover, several discrepancies between the animated portion of the display and the video. For instance, the video makes it clear that Murtha was never standing in front of the suspect’s car. In the animation, however, the suspect’s car re-enters the road from the snow bank at a much sharper angle than seen in the unedited video, so that when the animation “freezes” the scene and the camera rotates to show Murtha standing still in the middle of the road, he appears partly in front of the suspect’s car, his arm holding the gun already extended at the car’s windshield. And when the animation concludes as the suspect drives off, Murtha is depicted walking slowly alongside as he squeezes off three shots. In the unedited video, by contrast, Murtha is seen emerging from his cruiser only as the suspect’s car regains the road and then running alongside and even approaching the suspect’s car as he shoots repeatedly into the driver’s side window. Judges exclude from evidence computer simulations that are offered as substantive depictions of reality but are not adequately supported by other reliable evidence. Is it an adequate response in *Murtha* to say that the animation fairly and accurately represents only what the defendant *thought* he saw, when the implicit visual rhetorical strategy depends, as we have argued, on encouraging viewers to merge his subjective account with objective reality?

One of the great benefits of digitization is that digital pictures and multimedia can so easily be changed. The trial judge might have obtained the probative benefits of the defendant’s video-plus-animation with fewer of the judgmental risks by asking defense lawyers to insert a slug (a bit of black video) between the dashcam video and the animation or to label the respective components “dashcam” and “animation.” Either change would have made jurors less prone to elide the difference between the two modes of visual representation. For jurors to learn as much as they can from digital displays without being confused or misled, however, opposing counsel and judges must be ready, even in the heat of trial, to identify and evaluate those displays’ multiple meanings and effects, and be familiar enough with the technologies at hand to know what remedial measures, if any, are feasible.

In addition to this and other case studies of how digital visuals and multimedia are being deployed in courtrooms today, *Law on Display* discusses more broadly how the lawyers and the legal system should respond to this changing environment. We recommend a set of “best practices” for those who use pictures in and out of court and a variety of procedural reforms. And while evidence and argument are increasingly being presented on screens in court, so too is law increasingly moving onto computer screens. The book tracks the growth of online dispute resolution and the possible future of virtual adjudication, alerting readers to issues of computer security, privacy, and reliability that must be considered if any system of online justice is to deserve our confidence and respect. Most importantly, we explain and illustrate the need for all participants in the legal system to enhance their digital visual literacy so the law can get the most out of new media while reducing the risks they pose to good and fair judgment.

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We asked three experienced trial graphics consultants to comment on this article and the increasing use of images in the courtroom. Their thoughts are on the following pages. First Jason Barnes & Brian Patterson collaborate on a response and then Ted Brooks offers his reactions.

Jason Barnes & Brian Patterson respond to Law on Display

Jason Barnes, a.k.a. "The Graphics Guy" [jbarnes@barnesandroberts.com] is a graphic designer and trial consultant based in Dallas, Texas. He has been practicing visual advocacy since 1990 and has worked in venues across the country specializing in intellectual property and complex business litigation cases.

Brian Patterson (bpatterson@barnesandroberts.com) is a multimedia designer with Barnes & Roberts in Dallas, Texas and has worked in litigation communications since 1999.

Mr. Feigenson and Ms. Speisel's article raises valid points about the increasing use of digital visuals and multimedia in law. From the graphics and animation currently used in courtrooms, to a future where some proceedings may occur online, Feigenson and Speisel see this as a major change, fraught with ethical quandaries. We want to address just three of the issues they discuss in this article.

1. Are jurors unsettled by the shift from words to images? The authors begin their article by proclaiming that the change from words to images as the basis for evidence and argument is "unsettling to juries" and that it "troubles the public." However, the remainder of the article goes on to demonstrate just the opposite: jurors eagerly accept the visuals and find the party utilizing graphics credible and sympathetic. This mirrors our own experience of ready jury acceptance of image-based evidence.

Most people serving on a jury are doing so for the first time and are likely to expect courtroom presentation to have kept up with the technology that they recognize from outside the courtroom. Jurors' experiences with computer generated graphics similar to those used in the courtroom come mostly from newscasts and scientific or educational television, and understand that visuals are there to help explain complicated information. They trust that opposing counsel and the court will not allow highly prejudicial or misleading visuals to be presented, and are sophisticated enough to be discerning about what does get shown.

In fact, it seems the players most unsettled by the evolution away from words and towards imagery are attorneys and judges. Their legal education is deeply rooted in the meaning of words and included little to no instruction in the complexities of visual advocacy. Such a situation requires a reeducation of the players. Attorneys should seek

out consultants in the field including experts in design, marketing, advertising, learning, psychology, photography, radio/television/film and creative writing.

2. Was the exemplar animation handled by the parties (prosecution, defendant and judge) correctly? Much of Feigenson and Speisel's article deals with an animation used in the first degree assault case of Police Officer Robert Murtha, wherein Murtha shot a fleeing suspect during a high speed chase. The graphic in question transitioned from the dashboard video of a police cruiser to a created animation in a manner that could be cause for concern, and in fact drew objection from the Prosecution, but was ultimately admitted. The authors correctly point out that "opposing counsel and judges must be ready, even in the heat of trial, to identify and evaluate those displays' multiple meanings and effects, and be familiar enough with the technologies at hand to know what remedial measures, if any, are feasible." It is our opinion that each party could have done better.

The defendant's animation transitioned from the video at the wrong time and in the wrong way. Since the point of the animation is to put the jury in the mind of the defendant, the transition should have been made much earlier in the sequence—as far back as possible. If this were a movie we would see several cuts between three perspectives: starting from the dashcam video, cutting to an interior shot of the defendant's car such that we see the suspect's vehicle and perhaps the side of the defendant's face (as if we are perched upon his shoulder), and finally, cutting to a view through the eyes of the defendant.

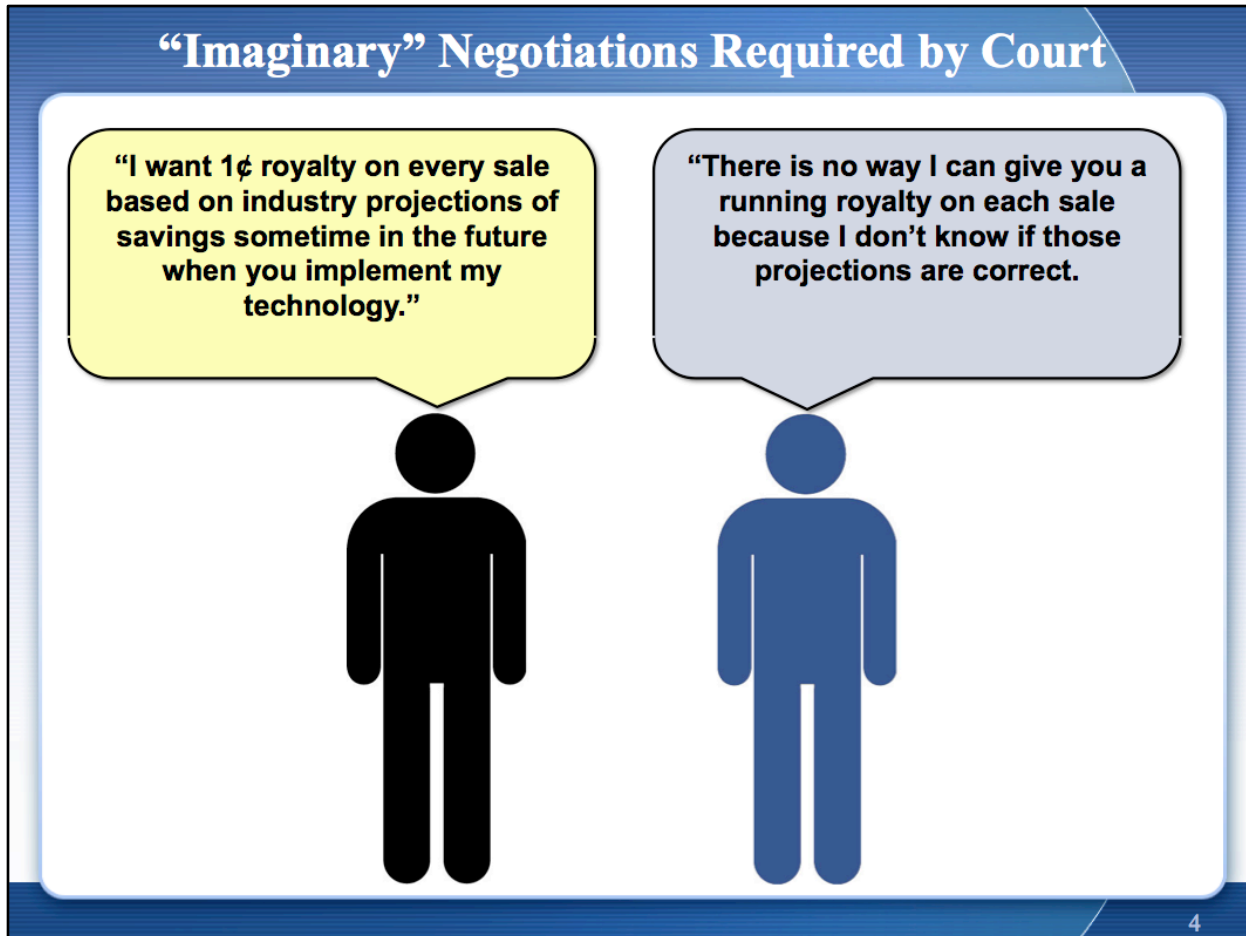
If such a long sequence is cost prohibitive, implementing a change in the short version would be helpful. First, the transition that fades from the video to the animation is deeply flawed. Fading from one to the other only highlights the very obvious discrepancy in the position of the suspect vehicle. It is a red flag warning that everything after this is fiction. Why highlight the fact that the objective truth of the video is so different from the subjective truth of the defendant's experience of the event? A straight cut from the video to the animation, seen from the eyes of the defendant, would eliminate the shifting position of the suspect vehicle. The second problem with the transition is the freeze-and-roll camera move. This gives jurors a false sense of time—remember that we are trying to get them to experience this event for themselves in real time. It also dissolves the sense of urgency which has been building. A straight cut eliminates both issues.

From the description of events, it seems that the prosecution also made some errors in their response to the sequence. Having lost on their appeal to have the animation barred, the prosecution should relentlessly attack the "blatant disregard for the truth and constantly changing story of the defendant." The transition from video to animation shows a very different car position—the freeze-and-roll camera move only highlights the difference. It may be effective to isolate these few seconds and show them over and over. As the sponsoring witness, the officer would be open to questioning on why the transition was done that way. Which, we suspect, he would be unable to answer satisfactorily.

Another tactic for the prosecutors would be to present a demonstrative of their own. It need not be an expensive animation. In fact, a low cost, straightforward diagram depicting the scene from above would be best. Showing the scene from above would clearly demonstrate that the suspect's vehicle was never pointed at the defendant and that the defendant was a safe distance from the vehicle at all times. It appears from the video that the officer fired through the side window of the automobile, not the windshield, which could also be highlighted on the diagram.

One might assume the role of the court and ask whether another response to the objections of the prosecution would have been better. We agree with the author that clearly labeling the different points of view and the insertion of a black slug would be a step in the right direction. However, in most situations, the court will not issue orders like this *sua sponte*. The objecting party must expose the problem and propose the solution. This highlights the need for (re)educating attorneys or for retaining experts in the production of graphic displays.

3. Is the "actor-observer effect" real, and if so, how do you effectively utilize it? We have been preaching the power of this phenomenon for many years. Some examples include the traditional (at least in patent cases) "hypothetical negotiation" graphic. The classic example of this graphic is shown below:

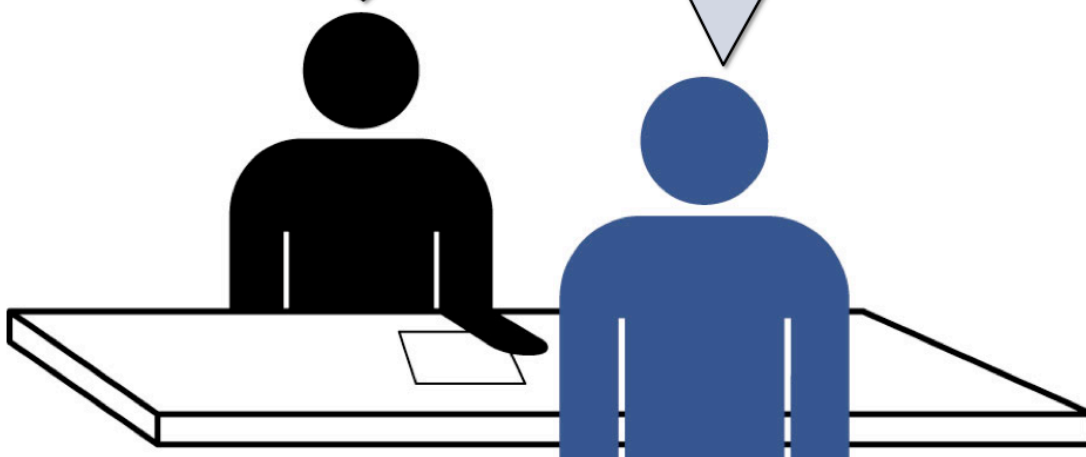


As you see, both parties are equal. Can you tell which party we represent? Can you tell which party we want you to sympathize with? Of course not. One can argue which side, left or right, each party should appear on. A better question is: Which side of the table should the jurors sit on? They should stand shoulder to shoulder with our client, of course. An example of third-person perspective rendering of this graphic is shown below.

“Imaginary” Negotiations Required by Court

“I want 1¢ royalty on every sale based on industry projections of savings sometime in the future when you implement my technology.”

“There is no way I can give you a running royalty on each sale because I don’t know if those projections are correct.”



3

Though mentioned by Feigenson and Speisel only briefly, the actor-observer effect is intriguing and, we believe, worthy of further discussion.

Feigenson and Speisel’s article touches on some ethical questions attorneys and multimedia designers face when preparing a case for a jury, and does a good job of answering some of those questions. We look forward to reading their book in hopes of finding a deeper discussion of these issues, and considering their prescriptions for those of us in the industry.

Ted Brooks responds to Law on Display

Ted Brooks is one of the most widely-recognized figures in the Trial Presentation and Technology Consulting field. He is a successful high-profile Trial Consultant, popular author and speaker, President of [Litigation-Tech LLC](#) and author of the [Court and Trial Technology Blog](#).

While the majority of jurors may indeed understand the relative ease in manipulation of visual evidence, they also tend to trust the court to locate and weed out evidence which is not acceptable for consideration, often seeing this process happen during trial. They are also generally instructed about specific issues in which something might be used purely for demonstrative purposes, and not for the truth of the matter. Any questionable exhibits (and their sponsoring experts) which are about to be displayed to the jury should be soundly attacked by opposing counsel and their expert witnesses. It is far better to have something such as this excluded for being more prejudiced than probative than to later be forced to look for ways to un-ring the bell or convincingly refute the evidence.

In the example shared in this article, it is something that should not have made it into evidence, nor even shown to the jury without editing. When viewed by jurors, many will indeed seam the two formats together in their mind, accepting that the animation is no less accurate or truthful than the actual video footage, and they can adopt the resulting perspective as their own. The delay in time as described offers a false sense of reality, as the jurors have much longer to view and “experience” selected parts of the events than they would have, had they actually been at the scene. If the timing of events has been altered, it is no longer representative of the facts, and has become argumentative. Although I have seen things like this get into evidence (even by our own experts), it is far less probative than prejudiced.

One method that might be used to successfully get something like this excluded in a 402 hearing (we just did this in a recent case) is to attack the data behind the animation. If the witness cannot demonstrate how the animation was created and clearly offer the data behind it, there is reasonable doubt as to its accuracy. In the example given in this article, the delay in time would be a good place to begin. Had the prosecution properly attacked this one small issue, the entire animation may have been excluded – or at least might have resulted in an instruction with a little more punch than that which was given. I would guess that had Mr. Thomas engaged an expert (or at least someone more knowledgeable than he) in animations and their use in trial, this would not have been admitted.

I don't necessarily believe the judge erred in her decision, but had the defense been forced to show the “nuts and bolts” of how this prejudicial presentation was intentionally created and manipulated, showing the headlights as they were aimed at the viewer for a disproportionately long period of time, clearly showing the software application data and deliberate manipulation of timing (underlying data), I believe she may have ruled differently. The moral of this story: Don't hesitate to call in assistance at the first sign it appears you may be in over your head. Cases can be won or lost over such issues.



The defense in this case apparently did an excellent job with their preparation and presentation of the evidence, no doubt with substantial assistance (and expense) from their experts. There are definitely holes in the animation which were neither properly uncovered nor exposed. To simply argue this without referring to the underlying data (or lack thereof) is to roar like a lion with no teeth.

I have learned in my experience that the meanest insult that can be hurled at the expert witness without the data to back it up is to call it a “cartoon” – just in case you ever get the chance...

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Out and Proud: Ethical and Legal Considerations in Retaining a Trial Consultant to Assist with Witness Preparation

by David A. Perrott and Daniel Wolfe

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Daniel Wolfe, J.D., Ph.D., dwolfe@trialgraphix.com is director of jury consulting for [Kroll Ontrack/TrialGraphix](#) where he provides research-based and experiential data analysis to trial teams nationwide and oversees the standards in practice of the trial consulting department.

During cross-examination, a key witness in a recent securities fraud trial was grilled:

Q. How about your jury consultant, the consultant that you described, the jury consultant, is he here now?

A. Yes.

Q. Where?

A. In the back [of the] room.

Q. Man with the gray beard?

A. Sorry?

Q. This gentleman right here?

A. With the white ---

Q. Has he been here throughout your testimony?

A. No.

Q. He has been here several times for your testimony, though, correct?

A. Correct.¹

This was not the first reference to the defense's involvement of a trial consultant² in witness preparation. Earlier questions were peppered across 100 or so lines of transcript and included inquiries into the duration of the witness preparation sessions, whether any non-lawyers were present, whether the witness met with a consultant – whose name the witness volunteered in response – and the purpose of the consultant's involvement in the preparation session.

Given that witness preparation assistance is a staple trial consultant service offering, such outings are relatively rare.³ But they dramatically raise the specter of the discoverability of a trial consultant's involvement in witness preparation and also the uncertainties regarding the perceived legitimacy of such involvement in the eyes of the judge or jury.

The American Society of Trial Consultants ("ASTC") prescribes that trial consultants have a duty to discuss the limitations on confidentiality in the provision of witness preparation services with their clients.⁴ This article aims to shed light on this important topic for the benefit of trial consultants and the attorneys who retain them. First, we address ethical issues that have been raised when counsel retains a trial consultant to assist with witness preparation, and second, the legal protections and limitations on confidentiality in doing so.

The Ethics of Trial Consultant-Assisted Witness Preparation⁵



What professional guidance is provided to counsel and trial consultants to ensure that witness preparation is conducted ethically? The American Bar Association's Model Rules of Professional Conduct⁶ is the primary source of ethical guidance for attorneys. The Rules broadly prohibit attorneys from falsifying evidence or assisting witnesses to testify untruthfully. But they do not provide specific guidance as to how to stay on the right side of the line between "discussing testimony and seeking to improperly influence it."⁷

The ASTC's Practice Guidelines on Witness Preparation describe the goals of a trial consultant in assisting counsel with witness preparation. These goals essentially are to increase the witness's understanding, comfort and confidence in the process of testifying, and improve their ability to present testimony truthfully and clearly.⁸ In practice, trial consultants assist with various facets of counsel's preparation of a witness. These facets include going over case facts and reviewing relevant documents with the witness, conducting informal conversations about procedure and the process of testifying, advising on attire and behavioral presentation, reviewing the attorney's questions and witness's answers, explaining applicable law, explaining how a witness's testimony fits into the factual context of the case, clarifying important points, exposing or resolving misperceptions, and organizing the presentation of the case.⁹ The potential benefits of using a trial consultant to prepare a witness include enhancing the accuracy of testimony and the efficiency with which it is conveyed, and minimizing the impact of negative stereotypes and mental shortcuts on jurors' evaluation of witnesses. Examples of the latter include mistaking general anxiety about testifying as signs that a witness is lying, or making false snap judgments about character from stereotypes about appearance.¹⁰

Ethical concerns expressed regarding the use of trial consultants in witness preparation liken to visions of the Wild West, where trial consultant-assisted witness preparation is an "anything goes" arena, where consultants are not bound by the same ethical rules as attorneys, and where the ASTC Practice Guidelines are vague, unenforceable, provide minimal controls and are not intended to define a standard of care.¹¹ These concerns, however, have tended to be potential rather than actual. In researching this article, no horror stories about unethical trial consultant behavior were unearthed. Although the underlying observations are arguably true, it is also true that witness preparation is typically conducted as an adjunct to counsel's own witness preparation and in counsel's presence to maximize protection against discoverability. Because of counsel's own ethical duty, motivation to achieve a good client outcome, and desire to preserve confidentiality, it would in practice be highly unusual for an attorney to create or turn a blind eye to a situation where a trial consultant could breach those same ethical duties. Moreover, the ABA Rules extend by way of principal-agent relationship the rules against attorney

misconduct to non-lawyers retained by or under the direct supervisory control of the attorney.¹² Further, strong market forces inhibit unethical behavior by trial consultants. Trial consulting is an industry where there is a choice of providers, where information is easily exchanged via the Internet and attorney networks, and where business is won by reputation and word of mouth.

In sum, retaining a trial consultant to assist with witness preparation can enhance the accuracy and efficiency of the witness's testimony, and does not in practice open a door to unethical behavior as counsel is vicariously responsible for ensuring that the trial consultant follows the same rules of conduct as attorneys.

Legal Considerations: What Is Discoverable?

The fundamental answer to date regarding what is discoverable, with several caveats and nuances, is that the substance of a trial consultant's advice is strongly protected as opinion work product, but not the fact that a trial consultant was used. The leading authority on this point is the seminal 2003 decision of the U.S. Court of Appeals for the Third Circuit in the *In re Cendant*¹³ matter. The Third Circuit encompasses Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands.

The backdrop to the discovery dispute in *Cendant* was a federal securities class action alleging fraud in Cendant Corporation's accounting. Dr. Phillip McGraw (aka "Dr. Phil") had assisted counsel with preparing a former Ernst & Young auditor for his deposition by Cendant's counsel. During the deposition, Cendant's counsel sought to explore details of Dr. Phil's deposition preparation process and advice. Ernst & Young's counsel asserted that this was privileged information under both the work product and attorney-client privilege doctrines, because the preparation work took place in the presence of counsel in the context of private communications between client, attorney and consultant, for the purpose of assisting counsel in rendering legal advice.¹⁴

In the first instance, the Special Discovery Master determined that the content of Dr. Phil's guidance was protected under the attorney work product doctrine. The work product doctrine's intent is to establish a "zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."¹⁵

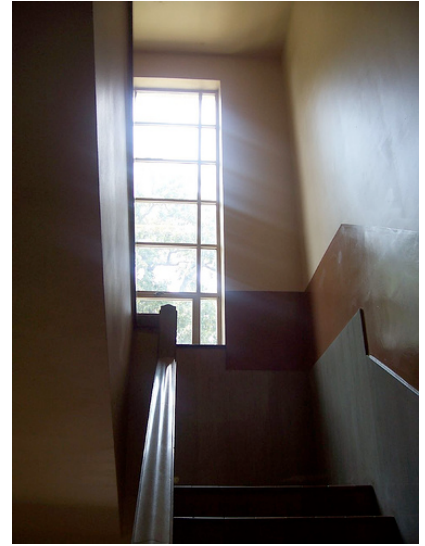
The Special Discovery Master's determination was overruled by the District Court, whose decision was then reversed by the Court of Appeals, which almost fully agreed with the Special Discovery Master's analysis that the attorney work product doctrine (specifically, Fed. R. Civ. P. 26(b)(3)) protected the content of the trial consultant's guidance as opinion work product, but not the fact that a trial consultant was used. Accordingly, opposing counsel would have to show "rare and exceptional circumstances" in order for the content of a trial consultant's witness preparation guidance to be discoverable. This is a far higher hurdle for opposing counsel to overcome than that to override the lower tier of protection accorded to factual work product (as specified in Fed. R. Civ. P. 26(b)(3)). Rather, this lower tier requires a showing of a substantial need for the materials for opposing counsel to prepare its case, and that opposing counsel cannot, without undue hardship, obtain their substantial equivalent by other means. The Court of Appeals in *Cendant* did not rule either way as to whether the doctrine of attorney-client privilege also accorded protection.¹⁶

Although the *Cendant* decision was based on Fed. R. Civ. P. 26(b)(3), there is another rule – Fed. R. Civ. P. 26(b)(4)(B) – that provides a "safe harbor" whereby the opinions of consulting experts who are not testifying are shielded from discovery, except upon a showing of "exceptional circumstances."¹⁷ There is a distinction, both in practice and legal protection, between a "consulting" expert and a "testifying" expert. Following *Cendant*, the "consulting" expert is afforded the protection of the work product doctrine whereas this protection does not necessarily extend to a testifying expert. The "testifying" expert's reliance on any witness preparation session with a trial consultant may be discoverable to the extent the expert either relies on any of the information in forming an opinion or expressed any opinions publicly that may have been recorded in a videotape of the session or mock trial. The court in *Cendant* ruled that Rule 26(b)(3) provides work product protection independently of Rule 26(b)(4)(B), and did not make a determination as to the degree of protection accorded by Rule 26(b)(4)(B).¹⁸

What Opposing Counsel May Not Ask Your Witness

Following *Cendant*, specific elements of a trial consultant's assistance to counsel with witness preparation are protected as opinion work product:

- Documents given to the trial consultant by counsel that reflect counsel's mental impressions, opinions, conclusions and legal theories.
- The actual witness preparation advice given by the trial consultant (at least as in *Cendant*, while counsel was present).
- Whether the witness took notes during the preparation session, and the contents of those notes.
- Whether any part of the preparation session was audio- or videotaped.¹⁹
- Whether the trial consultant took preparatory notes or notes during the preparation session and the content of those notes (where those notes reflect the trial consultant's mental impressions, opinions or conclusions).
- Whether the trial consultant gave the witness any documents reflecting the trial consultant's mental impressions, opinions or conclusions (at least as in *Cendant*, while counsel was present).



Where documents given by the attorney or trial consultant to the witness do not contain genuine mental impressions, opinions, conclusions or legal theories prepared in anticipation of litigation or for trial, but are instead mere summaries of publicly available information (or information reasonably discoverable through independent means), those notes may be discoverable. For instance, in *Auscape Int'l, et al. v. National Geographic Soc'y, et al.*, 2002 U.S. Dist. LEXIS 19428 (S.D. N.Y. 2002), a summary of the complaint, which counsel prepared for and gave to witnesses to assist with their preparation, was ordered to be produced. Even though the summary contained attorney opinion, it did not contain information not already contained in the complaint. Similarly, although we have not seen a ruling on this issue, trial consultants should be cautious about providing a witness with documents containing practice pointers that are generic or already published elsewhere as they are arguably not mental impressions, opinions or conclusions prepared in anticipation of litigation or for trial. The more specific and tailored the recommendations are to the particular witness the more likely the recommendations will be protected.

What Opposing Counsel is Permitted to Ask Your Witness

Following *Cendant*, a witness may be asked:

- Whether the anticipated testimony was practiced or rehearsed (this questioning must, however, be circumscribed).
- Date and duration of witness preparation meetings.
- Names of others present during those meetings.
- Purpose of the meeting.
- Whether the deponent or witness met with a trial consultant.



What About When Counsel Is Not Present?

What protection is accorded to advice given directly by a retained trial consultant to a witness while counsel is not present (or not copied on an e-mail)? The *Cendant* court did not explicitly address this issue. In the case of oral communications between a trial consultant (acting as a party's representative, in anticipation of litigation or for trial) and a witness, as long as those communications are the trial consultant's mental impressions, opinions or conclusions, it is arguable that they should be protected following *Cendant*, even if counsel was not directly part of the communication. E-mail, documents or other "tangible things" a trial consultant gives to a witness outside counsel's presence but in anticipation of litigation or for trial, while acting as a party's representative, should arguably be protected as at least factual work product (following Fed. R. Civ. P. Rule 26(b)(3)(A)).

This issue arose in Martha Stewart's trial,²⁰ where Martha forwarded her daughter an e-mail that she had previously sent to her attorney containing information about a stock sale that was relevant to the government's fraud case against her. The government argued this waived attorney-client privilege. The court agreed, but held that the communication was nevertheless protected by the work product doctrine as it was prepared for trial – Martha would not have forwarded the e-mail otherwise – and her daughter was acting as her confidential consultant.

Thus some protection arguably may be accorded to communications between a trial consultant and witness outside counsel's presence, but the issue is not settled – suggesting that it is prudent to avoid this scenario where possible. ASTC Practice Guideline III(A)(5) for witness preparation recognizes that counsel's presence during the trial consultant's communications with a witness may provide an extra layer of protection.

What About Jurisdictions Outside the Third Circuit?

The *Cendant* decision was issued by the Court of Appeals for the Third Circuit, so is binding precedent in those member districts, namely, Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands. However, the status of the protection accorded to witness preparation work performed by a trial consultant elsewhere in the U.S. is not resolved, in large part due to the paucity of reported opinions on this issue.²¹

One reported case subsequent to *Cendant*, in the Northern District of California, directly followed the *Cendant* ruling. In *Hynix Semiconductor Inc. v. Rambus Inc.*²² the defendants moved to preclude questions regarding trial consultants, specifically to prevent counsel from asking a witness about meeting with trial consultants in preparation for trial. The court adopted the reasoning of the Third Circuit and held that the parties could only cross-examine the witnesses regarding whether a meeting with a trial consultant took place, the date, duration and purpose of such meeting, and whether the testimony was rehearsed. Further, the court specifically forbade questions regarding counsel's or the consultant's views on important facts of the case, trial themes or strategy, strengths or weaknesses of the witness, or advice to the witness regarding appearance or credibility.

A series of cases addressing the issue of whether a consultant can also serve as an expert witness and to what extent the work product privilege applies also appear to advocate the assumption that the substance of a trial consultant's witness preparation work is protected by the privilege. In *SEC v. Reyes*²³, also in the Northern District of California, the court was faced with the question of whether "a litigant forfeit[s] the privilege that would otherwise attach to a litigation consultant's work when he offers that expert as a testifying witness." The court relied on a series of decisions from the Southern District of New York, which acknowledged that the privilege as it applies to consultants may still be asserted, but only over materials

pertaining uniquely to the expert's role as consultant.²⁴ These cases presume that consultants do, at least in part, have the protection of the work product privilege.

What Protection Does Attorney-Client Privilege Accord?

Attorney-client privilege is currently a weaker basis for protection of a trial consultant's witness preparation work against discovery. In order for attorney-client privilege to be triggered, there must be a communication between counsel and client intended to obtain or provide legal advice confidentially and which is kept confidential.²⁵ The first thorny issue is that when a trial consultant is present, the communication between attorney and client becomes three-way, which arguably is inconsistent with the intent that the attorney-client communication remains "confidential." The second thorny issue is whether the purpose of the trial consultant's communication is to assist with provision of counsel's own legal advice, or to give the trial consultant's own advice.

The D.C. District Court²⁶ considered this issue in the context of a defamation action. This action was brought against Matt Drudge in 1996 by former White House Assistant Sydney Blumenthal and his wife for statements published about them in a Drudge Report. The court reasoned that attorney-client privilege may, within the narrowest possible limits, be extended to non-lawyers employed to assist counsel to render legal services where the communication was confidential and for the purposes of obtaining legal advice from the lawyer. But the court declined to apply the doctrine in the factual scenario before it, reasoning that the litigation consultant was instead retained for the value of his own advice.

In 2003 in *Cendant*, Judge Garth concurred with the Chief Justice's opinion in that case that the work product doctrine does provide protection. But, he went one step further and argued that the doctrine of attorney-client privilege also provided protection, on the basis that the three-way communications between attorney, client and trial consultant could not be parsed into privileged and non-privileged components.²⁷ At the same time, Judge Garth acknowledged that the doctrine of attorney-client privilege is narrower in scope than the work product doctrine. His opinion did not approach the issue from the context of whether Dr. Phil's communications were for the purpose of assisting counsel to provide legal advice versus for the value of his own advice. Rather, Judge Garth applied the analysis of Davis and Beisecker (1994)²⁸ that ordinarily in a witness preparation session, attorney-client communications that ought to be protected are inextricably intertwined with the client's responses to mock questions and the consultant's reactions thereto.

The case law in favor of protecting a trial consultant's involvement in witness preparation from discoverability via attorney-client privilege is thus considerably weaker than that for the work product doctrine. It remains to be seen whether Judge Garth's line of reasoning is adopted in future cases.



Practice Guidelines in Light of *In re Cendant*

In light of what *Cendant* does and does not protect, some extra precautions in using a trial consultant to assist with witness preparation include the following:

- Do not formally introduce the trial consultant to the witness by full name and title or exchange business cards; rather, just use first names and introduce the trial consultant as "part of the trial team" or "someone who is assisting counsel with preparing the witness for trial."

- Trial consultants should avoid giving the witness documents to keep (e.g., notes containing advice) unless necessary, and should avoid giving documents that contain information that is publicly available or published elsewhere (e.g., generic witness preparation pointers). If pointers or recommendations are given in writing, protection will be enhanced to the extent that they are positioned as mental impressions, opinions and conclusions that are specific and tailored to the witness.
- Caution the witness not to bring any notes taken during the preparation session(s) when they testify, unless they have been issued a subpoena *duces tecum* requiring them to do so.
- The trial consultant should minimize purely two-way communications with the witness, i.e., when the attorney is not present.
- At the end of the witness preparation session, review the witness's testimony related to questions that opposing counsel is permitted to ask regarding the trial consultant's involvement.
- Advise the witness that the purpose of the preparation session is not to practice or rehearse testimony, but to review the witness's testimony and *prepare* the witness for trial.
- If opposing counsel discovers that a trial consultant assisted with witness preparation, submit a motion *in limine* to exclude from trial evidence regarding this fact (i.e., the questioning *Cendant* would otherwise permit).

Does “Outing” A Trial Consultant Affect Witness Credibility?

Aside from the issue of opinion work product confidentiality, a common concern of counsel is the reaction of jurors at trial should they learn that a trial consultant assisted with witness preparation – as described anecdotally above. Given that the concept of “tampering with the witness” has been dramatized in courtroom movies and TV shows over the years, there is a sense in the legal community – fortunately diminishing – in which using a trial consultant to assist with witness preparation is counsel's “dirty little secret” to be protected from the jury.

Empirical data suggest that these fears may be unfounded. A national survey of over 500 jury-eligible adults conducted by ASTC members found that almost three-quarters of respondents believed that preparing witnesses to testify is a good idea, with less than fifteen percent believing that witnesses who practice their testimony have something to hide.²⁹ More to the point, in a national survey of over 4,000 jury-eligible adults by TrialGraphix over the past five years, about 60 percent of respondents indicated (in the abstract) that it would have no impact on a witness's credibility if they learned that a communication expert helped prepare a witness prior to testifying. In fact, approximately a fifth of respondents said that knowing this would lead them to find the witness *more* credible, with only a fifth reporting that knowing this would decrease that witness's credibility.

Of course, there may well be a detrimental impact on credibility should jurors learn the fact of a trial consultant's involvement via a dramatic “outing” by opposing counsel during cross examination – especially where this is achieved by parading into the gallery to single out the “man with the gray beard” sitting in the back of the court. If you suspect that opposing counsel is very likely to exercise his or her “right” under *Cendant* in this way, the empirical data on jurors' bland reactions thereto imply it may be prudent to steal opposing counsel's thunder by pre-empting or direct the fact that a trial consultant was used, but in a circumscribed manner so as not to waive the opinion work-product privilege.

Endnotes

¹ *In re Vivendi Universal, S.A. Securities Litigation*, 4551:23 - 4552:12

² We use the term “trial consultant” in this article instead of jury consultant, for consistency with the American Society of Trial Consultant’s usage of that term to denote the profession. The terms are largely interchangeable, although “trial” consultant more readily encompasses the notion that the profession also assists with preparation of witnesses for bench trials and other nonjury hearings.

³ A similar famous “outing” occurred a few years ago during the cross-examination of Jeffrey Skilling in the Enron-related fraud litigation, *United States of America v. Jeffrey K Skilling*.

⁴ ASTC Professional Code, Witness Preparation: Professional Standard II(C), Practice Guideline 6, p.31.

⁵ For purposes of this article, we use the term “witness preparation” to refer equally to preparing a deponent to be deposed and preparing a witness to testify at trial. There is no material distinction in terms of the ethical and legal considerations we discuss.

⁶ For online version, see http://www.abanet.org/cpr/mrpc/mrpc_toc.html, especially Rule 1.1 Competence, Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client and Lawyer, Rule 3.3 Candor Toward The Tribunal, Rule 3.4 Fairness to Opposing Party and Counsel, Rule 4.1 Truthfulness In Statements to Others, Rule 5.3 Responsibilities Regarding Nonlawyer Assistant, and Rule 8.4 Misconduct. See also associated Comments to the respective Rules.

⁷ *Geders v. United States*, 425 U.S. 80, 89 n.3 (1976), as cited in Small, D. (2004). *Preparing Witnesses A Practical Guide for Lawyers and Their Clients*. 2nd Ed. American Bar Association Publishing, p.134.

⁸ ASTC Professional Code, Practice Area B Witness Preparation, p.30. (October 2008 version)

⁹ *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979); Wydick, R. "The Ethics of Witness Coaching." *Cardozo Law Review* 17, no. 1 (1995): 12-13.; LeGrande, N., and Kathleen M. "Witness Preparation and the Trial Consulting Industry." *Georgetown Journal of Legal Ethics* 17 (2004): 947-960. Small, D. (2004). *Preparing Witnesses A Practical Guide for Lawyers and Their Clients*. 2nd Ed. American Bar Association Publishing. Note that explanation of the applicable law is somewhat a gray area, e.g., see *Ibarra v. Baker*, 2009 U.S. App. LEXIS 16753 (5th Cir. July 28, 2009), where an award of sanctions was upheld against counsel for allegedly using an expert witness to indirectly “plant” two new terms of art into the testimony of two fact witnesses, a communication which was not protected from discovery.

¹⁰ New, C., Schwartz, S., and Giewat, G. (2006). *Witness Preparation by Trial Consultants: Competitive Advantage or Invitation to Discoverability*. Washington State Bar Association Bar New, May 2006 (<http://www.wsba.org/media/publications/barnews/may06-new-schwartz-giewat.htm>)

¹¹ LeGrande, N., and Kathleen, M. "Witness Preparation and the Trial Consulting Industry." *Georgetown Journal of Legal Ethics* 17 (2004): 947-960.

¹² See Rule 8.4 and Cmt. 1 to Rule 8.4; see also Rule 5.3. For online version, see http://www.abanet.org/cpr/mrpc/mrpc_toc.html.



- ¹³ *In re Cendant Corp. Securities Litigation*, 3d Cir., No. 02-4386, 9/16/2003.
- ¹⁴ ABA/BNA Lawyers' Manual on Professional Conduct – Current Reports, Vol. 19 No. 20, September 24, 2003.
- ¹⁵ *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995)
- ¹⁶ As discussed below, however, the concurring opinion of Judge Garth did opine on this issue, finding that the doctrine of attorney-client privilege also accorded protection.
- ¹⁷ Fed. R. Civ. P. 26(b)(4)(B); *Plymovent Corp. v Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007).
- ¹⁸ The full panoply of this discussion is beyond the scope and length of this article.
- ¹⁹ The ASTC Professional Code Practice Guidelines for Witness Preparation III (Methods) (A)(3) suggests that if audio- or videotaping is used, that the attorney make a statement on that recording indicating that it is covered by the work produce doctrine.
- ²⁰ *United States v. Stewart*, 287 F. Supp, 2d 461 (S.D.N.Y. 2003).
- ²¹ See, e.g., ASTC Professional Code, Practice Area B Witness Preparation: Commentary.
- ²² *Hynix Semiconductor Inc. v. Rambus Inc.*, WL 397350 (N.D. Cal. 2008).
- ²³ *SEC v. Reyes*, WL 963422 (N.D.Cal. 2007).
- ²⁴ *B.C.F. Oil Refining, Inc. v. Consol. Edison co. of New York*, 171 F.R.D. 57, 61-62 (S.D.N.Y. 1997); *Grace A. Detwiler Trust v. Offenbecher*, 124 F.R.D. 545, 546 (S.D.N.Y. 1989).
- ²⁵ *Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990).
- ²⁶ *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999).
- ²⁷ ABA/BNA Lawyers' Manual on Professional Conduct – Current Reports, Vol. 19 No. 20, September 24, 2003.
- ²⁸ David, S., and Beisecker, T. *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 Am. J. Trial Advoc. 581, 626-27 (1994).
- ²⁹ New, C., Schwartz, S., and Giewat, G. (2005). Lay Perceptions of Witness Preparation. Presentation at the Annual Conference of the American Society of Trial Consultants, Philadelphia, PA; as summarized in New, C., Schwartz, S., and Giewat, G. (2006). Witness Preparation by Trial Consultants: Competitive Advantage or Invitation to Discoverability. Washington State Bar Association Bar New, May 2006 (<http://www.wsba.org/media/publications/barnews/mayo6-new-schwartz-giewat.htm>)

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Editor Note: As a means of illustrating specifically ‘how’ to prepare a witness for the ‘prep’ question, Bill Grimes offers this brief practice-oriented piece.

The “Prep” Question

by Bill Grimes

Bill Grimes (BGrimes@ZMF.COM) has been a litigation consultant since 1990. Prior to that he was a journalist. Among the services Bill provides are jury research, witness preparation, jury selection, trial strategy and post trial interviews. He is with Chicago-based, [Zagnoli McEvoy Foley](#) Litigation Consulting.

Despite the exposing of Jeff Skilling’s jury consultant while he was on the stand in his 2006 Enron fraud trial¹, and a federal judge’s ruling in California in 2008 that an expert witness can be cross-examined about being prepped by a jury consultant², the following remains a common reaction from attorneys: “The witness doesn’t have to prepare for that. I’ll never let it get that far.” While it is probably true most of the time that cross-examining a witness about preparing with a jury consultant would be successfully objected to as violating attorney-client privilege or attorney work product, it is obviously not true *all* of the time.

Prepping witnesses for the “prep” line of questioning has become a standard part of the witness preparation process for many jury consultants. While attorneys remain apprehensive about the jury ever finding out that a jury consultant was present at witness prep, and many attorneys don’t even want to discuss it, there is evidence that jurors finding out about the presence of a consultant has little affect on how believable jurors think the witness is. According to Ken Broda-Bahm of Denver-based *Persuasion Strategies*, a 2008 survey³ by his firm found “no significant differences” between a group of people who read a fraud case scenario and were told a key witness met with a jury consultant who “...helped him practice his testimony...” and a group of people who read the same scenario with no mention of a jury consultant.

As the Jeff Skilling experience showed however, what can be a problem is *how* being prepped by a jury consultant is revealed to a jury. It doesn’t help if the witness stammers, stutters and stalls when cross-examined about a witness prep session. The startling revelation that Skilling’s trial consultant was in the courtroom while he was testifying created drama Skilling didn’t need. So, it’s prudent for witnesses to be prepared for worst case scenarios, one of which is an attempt by opposing counsel to have the jury believe the witness was “coached” about what to say. Consider this exchange:

Q. Mr. Corrigan, please state your name and job title.

A. Michael A. Corrigan. I’m chief operating officer for Midwest Fabricating.

Q. Midwest Fabricating is the defendant in this case, is that correct?

A. Yes, that's true.

Q. How did you prepare for your testimony today?

A. I met with our attorneys a couple times, and reviewed my deposition.

Q. Was anyone else there besides your attorneys?



Where does your witness go from here, assuming the judge overrules the attorney's objection? Tell the truth, of course. Think about that for a moment. If a jury consultant was there, a simple "Yes" is truthful. Also true is, "Yes, a jury consultant was there." This is also an opportunity for the witness to say why a jury consultant was there. For example, "I've never testified in front of a jury before, so yes, there was someone there to help me be as clear as possible."⁴ The latter response not only diffuses the situation, it may score points with the jury. If the witness simply responds, "Yes, a jury consultant was there," the cross-examining attorney may end the line of questioning right there, leaving the jury to ponder the witness' need to have a consultant "prepare" him or her. The opportunity for the witness to give a perfectly legitimate reason for prepping with a jury consultant is missed.

The advantage of explaining why a jury consultant was present rather than just acknowledging that one was there is also borne out in a survey by Chicago-based Zagnoli McEvoy Foley Litigation Consulting in 2008. All 221 jury-eligible people presented with a short negligence litigation scenario knew a jury consultant helped prepare a key witness for the defense. Roughly half the group read Testimony-A which ended:

(Attorney): *Did you practice your testimony?*

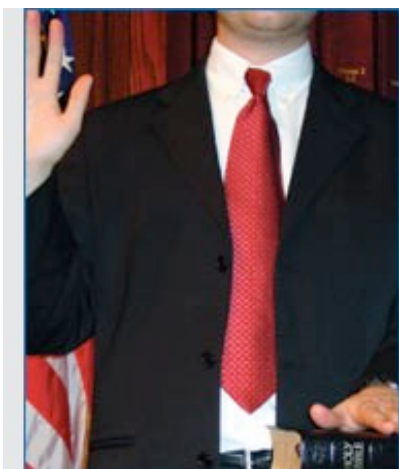
(Witness): Yes.

The other half read Testimony-B which ended:

(Attorney): *Did you practice your testimony?*

(Witness): *I've never testified in court before, so yes, we talked about what I probably would be asked and how I would answer.*

When asked directly about the presence of a jury consultant (keep in mind there was no discussion of the context of the case), a majority of respondents expressed skepticism that a witness would need such assistance. Those who read the explanatory response from Testimony-B, however, were less likely to believe a witness was "coached" and more accepting of a jury consultant helping prepare the witness than those who read the limited response of Testimony-A.



Every situation and every witness is different. It is important during the practice session to help the witness articulate for themselves the benefit of preparing with a communication expert. Have them talk about what they are getting out of the exercise. What were their concerns before the session started? How is the session helping? It is important to have the witness come up with the explanation in their own words. Pat McEvoy, a founding partner of Zagnoli McEvoy Foley, does not believe jurors would object to a witness offering a comment such as:

"I have never testified in court before, and I wanted to know what to expect."

Ken Broda-Bahm says much the same if a witness said on the stand something along these lines:

"I really appreciated having someone there who could help me understand what the lawyers are doing."

Chris Dominic, President of Tsongas Litigation Consulting, a Seattle-based firm, says appearing nervous when asked on the witness stand about prepping with a communication expert can create a negative impression with jurors. Dominic says it's important to convey to the witness during the prep session that "there is nothing to hide."

Witness preparation sessions routinely include role playing of a likely direct and cross-examination – what the witness can expect to be asked and how he or she would answer. Preparation and practice for any important exercise makes sense. Why should preparing for the high stakes, adversarial exchange of cross-examination be any different? If given the opportunity to convey that to a jury, a witness should take advantage of it.

Endnotes

¹ Jeff Skilling’s jury consultant, Reiko Hasuike, was identified in court by prosecutor Sean Berkowitz while he was examining Skilling.

² Judge Ronald M. Whyte, *Hynix Semiconductor Inc. v. Rambus Inc.*, U.S. District Court for the Northern District of California, February 8, 2008.

³ Five hundred respondents nationwide were presented with a fraud case scenario. Half of them were told a key witness met with a jury consultant who “*helped him practice his testimony.*” The other half was not given that information. All were asked about the believability of the witness.

⁴ The American Society of Trial Consultants’ (ASTC) *Witness Preparation: Practice Guidelines* expressly state, “Trial consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome.”

Citation for this article: *The Jury Expert*, 2010, 22(1), 63-65.



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January 2010's Favorite Thing

Every issue of *The Jury Expert* features a “favorite thing” from an ASTC member. We look for things we think would be useful (or that we have found useful) in litigation advocacy. A “favorite thing” is freely available on the internet and is practical, relevant or just plain fun. This month is no exception. We offer a favorite thing for your exploration--provided this month by Ellen Finlay.

Ellen Finlay, J.D., a 1986 graduate of the University of Texas School of Law, practiced as a trial lawyer in Houston, Texas for twelve years before forming Jury Focus www.juryfocus.com, a jury consulting firm that provides trial consulting services across the United States.



Here's what Ellen says:

I love www.epodunk.com. It provides me a quick read on venues all over the U.S. But what I really love are all the links to relevant sites that may help me obtain the info I need to accomplish whatever task I have undertaken. You can punch in cities or counties in its search engine. If it is a county, you can find access to info on the cities or communities in that county. It is so easy to use and seems to be up to date. It is my number two bookmark after the [US Quickfacts](#) census info.

Citation for this article: *The Jury Expert*, 2010, 22(1), 66.

Colorism: The Often Un-discussed “-ism” in America’s Workforce

by Matthew S. Harrison

Matthew S. Harrison, PhD [msharris@uga.edu] serves as an adjunct professor within the Department of Psychology at The University of Georgia. Dr. Harrison’s primary research focus is in the area of workplace diversity (specifically, colorism, racial identity, and affirmative action). Dr. Harrison also currently works at Manheim Corporate Services, Inc. as an Organizational Effectiveness Consultant.

Due to the number of organizations beginning to see the value in a diverse workforce, more and more organizations are employing affirmative action policies. Of course, with the employment of such practices, issues of race and racial discrimination are becoming much more prevalent. As a result, a surge of research studies have examined issues of racial discrimination in the workplace. While this research is both valuable and necessary, it suffers the same limitation as other social science research that looks at race relations—it groups all Blacks and all Whites together, looking at the two groups in binary opposition to one another. While meaningful data can be obtained from such studies, it overlooks a prevalent issue that has long existed in our society—colorism. This article focuses on this phenomenon, and in particular, inspects skin color’s role in favorability for Black applicants in the workplace.

Racial Discrimination in the Workplace

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees (or potential employees) on the basis of race, color, religion, sex, or national origin (APA, 1996). Typically, however, the primary areas given attention are religion, sex, and race, with race being the most prominent. And likely due to the longstanding history of race and race relations in our country—beginning with the transatlantic slave trade—race relations in America are most commonly considered in terms of Black versus White. Most research examining racial preference in the workplace generally focuses on how Whites are favored over Blacks (Deitch et al., 2003). More specifically, studies have shown Blacks are twice as likely than Whites to be unemployed (Brief, Butz, & Dietch, 2005).

There are a number of potential explanations for this finding. First, employers’ recruitment processes could be attributing to the inequity. Frequently, specific neighborhoods are targeted when it comes to the distribution of information surrounding a job opening; or in many cases, recruitment is done by word of mouth from current employees (Brief et al., 2005). With either method, Blacks are likely at a disadvantage. Very rarely (if ever) are the targeted neighborhoods predominately populated with Blacks, and in most cases most current employees are White who are telling other Whites about the availability of jobs at their current place of employment.

Even if the recruitment process is not racially-skewed, the *application* and *selection* process often are. The Fair Employment Council (FEC) found that employers are likely to treat Black applicants less favorably than White applicants even when they are equally matched in terms of credentials, qualifications, and interviewing abilities (Brief et al., 2005). Additionally, companies often use racially biased selection tools during the application process. Many times the organization will claim the selection tool (oftentimes in the form of a cognitive ability test) was not created to yield more acceptable White applicants, but was used to attain the most qualified individual for the role, who happens to be White (Terpstra & Kethley, 2002). As long as disparate treatment or adverse impact is not found, companies can easily hide behind such claims. The interview process, however, does not allow for the same camouflaging. An applicant’s race (and skin color) is inescapable at this point in the selection process, and likely, many people of color who may have been top contenders for a position are denied once their race is known. This is not at all to suggest that every White individual who is hired over a Black is hired solely because of their race, but it would be naïve to believe that it has never happened, as previous research has

indicated quite the contrary (Dovidio & Gartner, 2004; Dovidio, Gartner, & Pearson, 2005; Gartner & Dovidio, 2005).

The purpose of this article, though, is to go a bit deeper with regard to selection preference in America, and to actually look at one of the other areas protected under Title VII—color. Though it is likely commonly linked to race, skin color is a completely different physical attribute, where even greater differentiation is present within racial groups. While Blacks may be at a disadvantage when going through the application process, perhaps the level of inequity is unbalanced amongst Blacks themselves. Whereby, a Black applicant is not solely discriminated against because they are Black, but rather, the level of acceptability they receive is highly contingent on how light or dark their skin color is.

History of Colorism

Commonly referred to as the “light versus dark skin issue,” colorism within the Black race dates back to slavery in America, where the skin color of slaves was used as the determinant of work chores assigned (Hunter, 2002). Dark-skinned slaves, who were likely of pure African ancestry, were given the more physically demanding tasks in the fields, while lighter skinned slaves (who had lighter skin because of their biracial status, as it was common for slave masters to have nonconsensual and consensual sexual relationships with their female slaves) were given more enviable and esteemed positions (Keith & Herring, 1991). This visible division created friction amongst slaves, and supported the idea that one was better off if one had a lighter complexion (Ross, 1997).

This mindset was ingrained in the minds of Blacks, and once emancipation occurred, Blacks began buying into and creating their own social divides based on skin tone. For example, Blacks created “blue vein” societies where other Blacks were admitted only if their skin tone was light enough that their veins were visible. In addition, the first Black schools, as well as fraternities and sororities, employed the “paper bag test” as a means of admission; if your skin tone was not equal to or lighter than a paper bag, admission was not granted. These skin color-based assessments, created by Blacks themselves, not only illustrate the power of prejudice and stereotypes (in that the very group being discriminated against buys into the system to such a degree that they begin using it to discriminate against themselves), but in many ways helped to substantiate and further expand on notions of colorism for the general public. If Blacks themselves were willing to openly convey their preference for light skin, what is the purpose of suggesting to Whites that they should not continue to believe that a light-skinned Black person was “better” than a dark-skinned one?

This notion of betterment still seems to hold true today given a 1990 study by Hughes and Hertel. Their findings showed that lighter skinned Blacks were more likely to have greater years of education, higher salaries, and more prominent jobs than their darker skinned counterparts. They even found that the gap in educational attainment and socioeconomic status between light- and dark-skinned Blacks is equivalent to the gap between Whites and all Blacks in general. These findings alone illustrate the importance and prevalence of colorism, and further depict the pervasiveness of color-based preference in our society (Hill, 2000). In other words, lighter skinned Blacks are at an advantage when it comes to educational and occupational opportunities, and are more likely to experience discrimination to a lesser degree than those who have darker skin (Seltzer & Smith, 1991; Udry, Bauman, & Chase, 1971). These social advantages afforded to lighter skinned Blacks represent a preferential system in our society that favors light skin over dark skin—this being the basic definition of *colorism* (Hunter, 2002).

Colorism in the Workplace and Related Media Implications

With regard to Hughes and Hertel’s (1990) findings, it should be assumed that colorism has significant implications in the workplace. If an individual associates light skin more so with White skin, and White skin is thereby associated with higher levels of competence and ability, then lighter skinned Blacks are viewed as being much more appealing applicants and employees to White employers (Hunter, 2002). Though not widely stated, it

was once even considered to be “better business” for a White employer to hire lighter Black workers (Ross, 1997). This business practice not only substantiates the notions of colorism, but it also lends support to why Hughes and Hertel had such findings in their research.

A more recent study found similar results. Harrison and Thomas (2009) looked at preference in the hiring process amongst Black applicants. For males, a darker-skinned Black male with higher levels of education and past work experience was significantly less preferred than a lighter-skinned Black male with less education and work experience. For females, skin tone was not as salient as education and work experience, but when both were held constant, skin tone was a determining factor in regard to preference—where the lighter-skinned female was preferred.

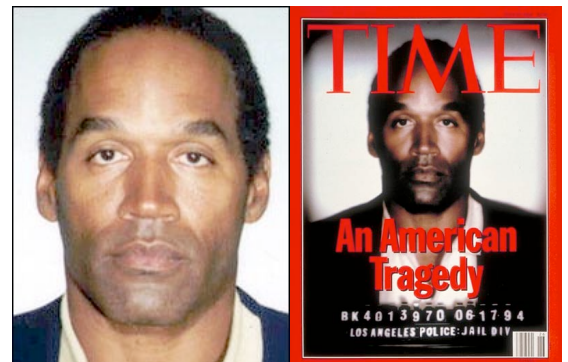
The preferential treatment found in the workplace for Black males and females is quite disturbing, but given media representations, it really should not be all that surprising. The media plays quite a substantial role in the thoughts many of us have about skin color. The implications, however, differ for males and females. For females, colorism plays a role in the workplace and in the media due to ideologies surrounding attractiveness. Research studies show positive correlations between levels of attractiveness and perceived ability and intelligence (Umberson & Hughes, 1987). It is not farfetched to assume that the more attractive an employer deems an applicant to be, the more likely they are to think that applicant can successfully perform the job they are trying to fill.



Among colorism’s basic principles is the belief that Blacks are perceived as being more attractive when they have physical features (e.g., hair texture, nose shape, lip size, eye color, etc.) that are more Eurocentric rather than aligned with African ancestry (Fears, 1998; Maddox & Gray, 2002; Oliver, Jackson, Moses, & Dangerfield, 2004). From Vanessa Williams being crowned the first Black Miss America to the disproportionate number of light-skinned Black females being featured in PEOPLE magazine’s annual “Most Beautiful” list, the pervasiveness of light skin being equated to beauty is apparent in the media. This distorted representation is not unseen, and is translated into the workplace. Hiring managers generally have a different perception of a light-skinned Black female applicant who has straight hair, gray eyes, a pointy nose and thin lips, compared to a dark-skinned Black female applicant with dreadlocks, dark brown eyes, a bulbous nose and thick lips. Therefore, it is not surprising that lighter skinned Black women tend to have higher salaries than darker skinned Black women with very similar credentials (Hunter, 2002).

A 2001 study (Catalyst, 2001) found that light-skinned Black women, who were regarded as being “less ethnic” were more likely to be satisfied with their jobs in regards to pay and advancement opportunities than their darker-skinned Black female co-workers. Some researchers even term dark-skinned Black women as being in a “triple-jeopardy” situation because of their gender, race, and skin tone, where all three aspects can have negative and harmful implications on their occupational opportunities, not to mention, overall feelings of competency (Thompson & Keith, 2001).

For men, darker-skinned Black males are often portrayed in the media as being more violent and threatening, which influences the same perception by the general public (Hall, 1995). Because dark-skinned Black males are more commonly linked with incivility, crime, and misconduct, many people have automatic preconceived notions about Black men who are also dark skinned (Hall, 1995). This was evident with the infamous TIME magazine cover of O. J. Simpson during his highly-televised murder trial in the 1990s. When a dark-skinned Black male goes into an interview, he may be at an automatic disadvantage. Depending on the interviewer’s racial identity and level of exposure



with Blacks, he or she is likely to have higher levels of discomfort interviewing a darker skinned Black male applicant than when interviewing a light-skinned Black male applicant (or White applicant for that matter).

Whether based on perceptions of attractiveness or feelings of comfort, skin color likely plays a substantial role on the acceptability of Blacks in the workplace. Skin color may be so salient that it is even regarded to a greater degree than an applicant's or employee's actual credentials and ability.

Implications & Future Research Needs

The purpose of this article is to emphasize the need for greater discussion and research examining within-race selection preference—an area that most discrimination literature has long overlooked due to typical dichotomous comparisons of Blacks and Whites as homogenous groups. The ever growing population of bi- and multi-racial Americans is reason alone for more research of this nature to be performed, so individuals can be made more aware of the prevalence of skin color bias. Far too often in America privilege is automatically linked to race and Whiteness. Results from studies pertaining to colorism seem to suggest that possibly privilege extends beyond race and into skin color, where lighter skin equals a greater number of privileges.

This system of privilege would make sense and would be in alignment with Byrne's (1971) similarity attraction theory, which states that people tend to be more comfortable around and attracted to other individuals who are similar to themselves. Therefore, it is not surprising that lighter skinned Black applicants would be preferred to a greater degree, because Whites view light-skinned Blacks as being a little more similar to themselves than a Black individual with darker skin. Byrne's theory makes perfect sense and has seemed to play itself out in society when looking at Blacks who have been "first" both in the media and politics—Dorothy Dandridge, Vanessa Williams, Halle Berry, Thurgood Marshall, Colin Powell, Barack Obama—just to name a few. Not at all to suggest that any of these individuals were not credible or worthy of the esteem, recognition, and/or awards/jobs they have earned, but it seems that for a Black to first be granted a position, or given a particular award or title, that Black must be light-skinned.

This is yet another reason for the need for greater research around this topic. As more and more organizations begin to employ affirmative action policies, more and more people of color are being hired and considered for positions in upper-level management—positions where they are likely to be considered a "pioneer" for someone of their race. Organizations must be more cognizant of the prevalence of colorism as it may relate to many of their human resource-related procedures. Given that colorism is a global phenomenon present in every racial group where there is skin tone variation, training (with an emphasis on skin-tone preference) should be paired with diversity recruitment, selection, and employee development efforts. While the statistics of corporate America may illustrate a rise in the number of minorities, one has to question—what percentage of those minorities are light- versus dark-skinned?

Bringing to light and openly discussing the inequalities that are a result from the colorism phenomenon is the first step in eradicating its very presence. If the media continues to portray attractive Black women as solely being light-skinned, and violent, menacing Black men as only being dark-skinned, and we all continue to buy into and accept it as truth, then nothing will change. Challenging these images and shedding light on their inaccuracies will encourage the eradication of these false perceptions. Perhaps then, "color" as it relates to its inclusion in Title VII of the Civil Rights Act of 1964 will not be overlooked because it is presumed to be synonymous with race, but it will be overlooked because it will no longer be relevant.

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We asked three experienced trial consultants to review Matthew Harrison's article and apply it to litigation advocacy in the courtroom setting. Marjorie Fargo, Sean Overland and Karen Lisko offer their perspectives on the following pages.

Response to Harrison by Marjorie S. Fargo

Marjorie S. Fargo, (mfargo@juryservicesinc.com) is President of Jury Services, Inc. of the National Capital Area and a senior trial consultant who has worked in both criminal and civil trials since 1973.

In this article Matthew Harrison provides a brief history of colorism and clarifies that “though... commonly linked to race, skin color is a completely different physical attribute where even greater differentiation is present within racial groups.” Discrimination exists as a result of skin tone differences separate from traditional discrimination by race. He references the 1990 work of Hughes and Hertel that showed within the black population lighter skinned blacks were more likely to have more education, greater wealth and higher status jobs than darker skinned blacks. He notes that similar results were confirmed by a recent study by Harris and Thomas in 2009 indicating that especially for black men being dark skinned significantly decreased the chance of being hired regardless of higher education level and past work experience.

Harrison also briefly summarizes a variety of studies of blacks and the media that provide evidence for the conclusion that lighter skinned blacks are more likely to be viewed as more attractive to a white majority in film, sports and politics. He notes that some researchers have even deemed dark skinned black women as being in “triple jeopardy” because gender, race and skin tone have negative impact on occupational opportunity and self image. He also points to studies that have concluded that darker skinned black men are often viewed as more violent and associated with criminality.



All these factors lead Harrison to conclude that skin tone variation among all minority groups given our increasingly multi-ethnic population is likely to be a more important factor than race alone in the workplace in terms of hiring and promotion especially in upper level management. He calls for greater awareness of the colorism issue, sensitivity training to these issues in the workplace, challenging media stereotypes and inaccuracies as a means to ensure that the discrimination by “color” provided by Title VII of the Civil Rights Act of 1964 not be overlooked or subsumed by prohibition of discrimination on the basis of race or national origin.

Harrison’s article on “colorism” deals primarily with the role of discrimination by skin tone in the workplace. However, for a more comprehensive look at the issue of colorism and its impact in multiple arenas, see Evelyn Nakano Glenn. *Shades of difference: why skin color matters*. Stanford University Press, 2009; especially, Taunya Lovell Banks, Chapter 12 “Multilayered Racism: Courts’ Continued Resistance to Colorism Claims, pp. 213-222; as well as Angela P. Harris, (2008) “From Color Line to Color Chart: Racism and Colorism in the New Century.” *Berkeley Journal of African American Law & Policy*, 10, 52 – 69.

Matthew S. Harrison calls for “greater discussion and research around within-race selection preference” in the area of employment discrimination and affirmative action policy. However, the issues raised by Mathew Harrison’s article also should serve as motivation for jury researchers to take a deeper look into the role of skin color and its effects on jury decision making. Do the courts and jurors differentiate between issues of race and issues of skin tone in decision making? What is the literature with respect to the role of skin color and jury decision making? In attempting to explore the topic of “colorism” and juror decision making I found little research specifically examining differences in jury verdict outcomes based on skin color of the litigants even in the area of race discrimination cases.

Only a few cases where people have filed workplace discrimination lawsuits alleging skin-tone prejudice based on the 1964 Civil Rights Act have prevailed in court. A dark skinned black employee of Applebee’s restaurant prevailed in a discrimination claim against a light skinned black supervisor. (U.S. Equal Opportunity Commission, “EEOC Settles Color Harassment Lawsuit with Applebee’s Neighborhood Bar & Grill.” Available at <http://www.eeoc.gov/press/8-07-03.html>.) In another case a dark skinned Latino who was denied rental housing prevailed on a claim of skin color discrimination by a Latino of light complexion. (See *Rodriguez v. Guttoso*, 795 F. Suppl. 860, 865 (N.D. Ill. 1992).

With respect to criminal cases Jennifer L. Hochschild and Vesta Weaver (2007) reported that among 66,927 male felons incarcerated for their first offense in Georgia between 1995 and 2002, the dark skinned defendants received significantly longer prison sentences.¹ Among this population white’s sentences averaged 2,689 days and blacks were longer by 378 days. Within the population of black first time convicted felons those with the lightest skin received prison sentences averaging three and a half months longer than white felons. Medium skinned black felons received the average for all black felons and a year more than white felons. Dark skinned black felons received the longest sentences of all felons, 3,250 days, a full year and a half longer than whites. The researchers controlled for type of offense, SES and demographic indicators and found that light skinned black male felons incarcerated for the first offense during this time frame received sentences indistinguishable from white felons but dark skinned black first time felons received 2.7 % longer sentences.

In a similar study of convicted felons in Florida social psychologist Irene Blair (2004) using a photographic database and controlling for crime charged and criminal history compared the length of sentence by race and physical features comparing “Afro-centric” features (dark skin, wide nose and full lips) with Eurocentric features. She found no racial differences between blacks and whites, but she did find significant differences in sentence among black felons with those with more Afro-centric features receiving longer sentences.²

With regard to capital murder cases Jennifer Eberhardt and colleagues (2006) report in “Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital – Sentencing Outcomes” that black

defendants convicted of murder in capital cases with white victims are twice as likely to receive death if they have dark skin and more Afro centric facial features.³

With respect to the association of dark skin tonality and crime Keith Maddox and Travis Dixon (2005) in an experimental study showed respondents a news program which included a short story about the murder of a police officer in which the researchers digitally manipulated the skin tone of the accused in one of four conditions: white, or light, medium, or dark skinned black. Those viewing the dark skinned alleged cop-killer were one third more likely to report crime concerns than those viewing the white accused. They found no differences between reactions to lighter skinned black and white accused.⁴

With respect to skin tone and its role in relationship to Batson challenges in the exercise of peremptory challenges John Terrance A. Rosenthal (2002) recounts a Federal criminal case in which the trial judge was quizzing jurors and asked whether they could be impartial given the defendant was a black man.⁵ In his remarks to the panel the judge observed that only one juror “appeared to be African American.” Apparently another juror volunteered that she wanted the judge to know she was an African American. Responding to this juror’s statement the judge remarked on the record that he would not have recognized her as African American and he believed many others including the lawyers would not have either. Later the prosecution used a peremptory challenge against the “visibly” black juror but not the ambiguous looking African American juror. The defense made a Batson challenge and it was sustained. After a weekend recess, the prosecutor challenged for “cause” the ambiguous looking African American juror based on her brother’s prosecution by a member of the US attorneys’ office (information previously known to the prosecution). The defense objected and asserted that the prosecution was attempting to strike all blacks from the jury; the judge agreed and denied the prosecutor’s challenge.

But what if the ambiguous African American juror had not taken the initiative to clarify her race? Would the prosecutor have tried to remove the ambiguous juror, if she had not self identified her race? This situation points to the difficulty in identifying race by simple visual observation of skin tone, emphasizes the need for race of jurors to be actually identified either through inclusion of this information in a juror questionnaire or by oral response in voir dire in order to accurately determine whether race impermissibly has been a factor in the peremptory challenge. Using this case example Taunya Lovell Banks asks whether automatic stereotyping process based on “colorism” needs to be specifically addressed by the court with respect to the exercise of peremptory challenge.⁶

My take-away from Harrison’s article and the apparent dearth of studies evaluating the role of skin color and jury deliberation studies and related jury selection issues is that this is an area than needs further systematic research and analysis. Increasingly, the U.S. population is composed of multiracial individuals. Stereotyping by skin tone as discussed by Harrison and the other referenced authors shows that in order for all individuals to receive fair treatment in the courts, more needs to be done to evaluate the impact of skin color bias in the court system and to sensitize all parties in the criminal justice system—courts, attorneys, litigants, jurors as well as trial consultants to the very real issue of skin color bias in order to reduce the impact of such bias may present in securing a fair trial for all.

Endnotes

¹ Hochschild, J.L. and Weaver, V. (2007) “The Skin Color Paradox and the American Racial Order” *Social Forces*, 86: 2, December.

² Blair, I.V., Judd, C.M. and Chapleau, K.M. (2004) “The influence of Afro centric facial features in criminal sentencing.” *Psychological Science*, 15, 674-679.

³ Eberhardt, Jennifer, Paul Davies, Valerie Pardie-Vaughns and Sheri Johnson. (2006). “Looking Death worthy: Preconceived Stereo typicality of Black Defendants Predicts Capital – Sentencing Outcomes.” *Psychological Sciences* 17 (5): 383-86.

⁴ Dixon, T. L. and Maddox, K.B. (2005). “Skin tone, crime news and social reality judgments: priming the schema of the dark and dangerous Black criminal.” *Journal of Applied Social Psychology* 35, 1555 -1570.

⁵ John Terrance A. Rosenthal (2002) “Batson Revisited in America’s “New Era” of Multiracial Persons.” 33 *Seton Hall Law Review*, 67.

⁶ Banks, *op cit.*, p. 221.

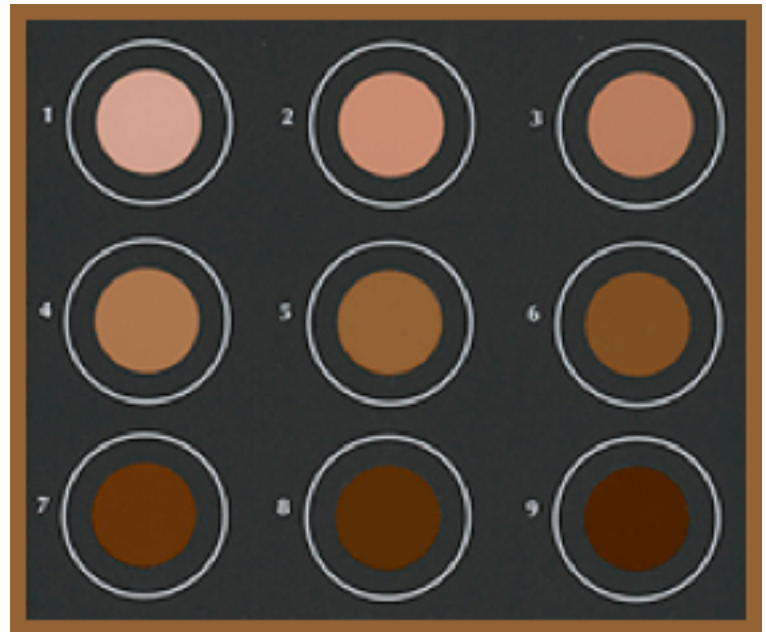
Colorism and Civil Justice: Sean Overland Responds to Harrison

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Matthew Harrison has written a very interesting piece on an important but under-studied cleavage in American society: color. He cites studies showing that discrimination based on skin darkness, or colorism, can affect a person’s work prospects. He also demonstrates that media portrayals of skin color have reinforced negative attitudes toward dark-skinned people. For trial consultants and litigators, Harrison’s article challenges us to think about social differences and the determinants of human behavior in terms beyond the standard racial categories.

Colorism is not the same as racism. Harrison shows that colorism is trans-racial; both blacks and whites have a history of harboring “anti-dark” attitudes. Instead of relying on the “black” versus “white” dichotomy, Harrison describes a system of social hierarchy based on the spectrum of skin color. In so doing, he looks beyond our increasingly-blurry racial categories and recognizes that the dynamics of color can also affect how people perceive (and are perceived by) our society.

Harrison’s article has a special significance for trial consultants and attorneys. Many trial consultants, particularly those of us who rely on quantitative social science methods, often include race as a predictive variable in models of juror decision-making. (In the interests of full disclosure, I do too, although I see race as a rather weak and imprecise predictor of juror behavior in most circumstances.) Harrison’s article suggests that skin color may also affect juror behavior and trial dynamics, above and beyond any effects of race. The potential effects of colorism ought to be considered when preparing certain types of cases. For those of us wedded to our statistical models, trying to include skin color as a quantifiable variable seems a daunting, if not impossible, task. Perhaps that’s not a bad thing. It reminds us that just because you can’t count something, doesn’t mean it doesn’t count. And as Harrison convincingly shows, color counts.



Response to Harrison's Article on Colorism

by Karen Lisko

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Dr. Harrison does a nice job moving one level deeper into questions regarding the effect of race on people's perceptions by focusing on colorism within race. The vast majority of research on race lumps together all gradations of color within African Americans. He reminds us to reconsider such a generic view of this or any other race by pointing to "colorism" which he defines as the "light versus dark skin issue."¹ The focus of Harrison's work is on the effect of skin tones of Black applicants in the workplace. So how does it translate to the courtroom setting? At this stage in the academic literature, very little has been published about the effect of colorism on jury verdicts, save for some research in the criminal arena.²

Harrison's colorism research consistently concludes that lighter skinned African Americans are viewed as more attractive and more credible than darker skinned African Americans. This focus on attractiveness creates a provocative (if tenuous) bridge to jury decision making. Courtroom research abounds that concludes that more attractive criminal defendants are judged favorably more often than are unattractive criminal defendants.³ Can we, therefore, conclude that lighter skinned African Americans might be viewed more positively in the courtroom than darker skinned African Americans? Perhaps. But, then again, perhaps not.

Scale of Skin Color Darkness



It may all depend on the particular juror. In the late 1990s, two researchers investigated juror perceptions of expert witnesses and varied the race and gender of those experts.⁴ Interestingly, they found that African American jurors rated the African American expert *more negatively* than did Caucasian jurors. To be clear, the researchers did not vary skin tones (light versus dark) within the experts nor did they collect

that data about their African American research subjects. However, again within the land of inference, their research findings suggest that there may be a level of complexity not yet defined in the courtroom setting that does not so easily translate from Harrison's research in the workplace. If the workplace research was so easily transferred to the courtroom setting, we would expect to have seen African American jurors rate the African American expert more positively according to Byrne's similarity attraction theory dating back to the 1960s that has found that people like and are attracted to those most similar to them.⁵

Other courtroom research has found that similarity of jurors to key witnesses can actually be a detriment to that witness. Some research has found that medical doctors can be harder on doctor

defendants in medical malpractice cases than are non-medical jurors.⁶ In the criminal arena, it has long been held that female jurors can be more skeptical of female accusers in rape trials.⁷ This provides more evidence that the questions regarding similarities and differences between fact finders and witnesses remain many. So, back to courtroom research (or lack thereof) regarding the influence of skin tones on jury perceptions. More specifically, it would be meaningful to understand how the skin tones of both jurors and parties to litigation interact. Sounds like a perfect study for one among us . . .

Endnotes

¹ Other research has looked at colorism in other settings. For example, see, Hall, R.E. (1992). Bias among African-Americans regarding skin color: Implications for social work practice. *Research on Social Work Practice*, 2(4), 479-486. See also Keith, V.M. & Herring, C. (1991). Skin tone and stratification in the black community. *The American Journal of Sociology*, 97(3), 760-778.

² Dixon, T. L. & Maddox, K.B. (2005). Skin tone, crime news and social reality judgments: Priming the schema of the dark and dangerous black criminal. *Journal of Applied Social Psychology*, 35, 1555-1570.

³ See, for example, Stewart, J.E. (1980). Defendants attractiveness as a factor in the outcome of criminal trials: An observational study. *Journal of Applied Psychology*, 10(4), 348-361.

⁴ Memon, A., and Shuman, D.W. (1998). Juror perceptions of experts in civil disputes: The role of race and gender. *Law and Psychology Review*, 22, 179.

⁵ Byrne, D. (1971). *The attraction paradigm*. New York: Academic Press.

⁶ Vidmar, N. & Landau, D. (1994). What animates jury awards for pain and suffering in medical and automobile negligence cases? An empirical study. *Presented at the annual meeting of the Law & Society Association, Phoenix, Arizona*.

⁷ Lerner, M.J. & Miller, D.T. (1978). Just world research and the attribution process: Looking back and ahead. *Psychological Bulletin*, 85(5), 1030 – 1051.

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Book Review:

[Principles and Practice of Trial Consultation,](#) by Stanley L. Brodsky

written by Kevin Bouly

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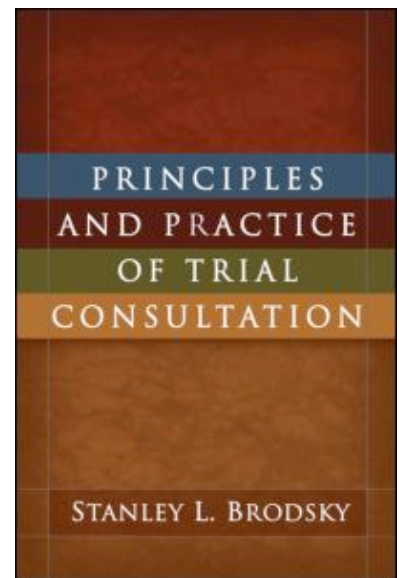
“[Trial] consultants are best understood as allied with attorneys, avidly pursuing the goals of the side that has retained them.”

Dr. Brodsky allies trial consultants and attorneys at the outset of this straightforward text in his attempt to discourage stereotypes and affirmatively describe who trial consultants are and (some of) what they do. Generally speaking, it works. Brodsky’s textbook-style exposition successfully disengages some of the stereotypical beliefs about trial consultation and addresses its critics, particularly those critical of the perceived unfairness trial consultation may help create. In his words, “Promoting a good adversarial position is what attorneys and consultants do.” It is a simple but apt observation given an insightful voice in this book.

Brodsky takes a unique approach to revealing the principles and practices of trial consultation that can impact trial outcomes – namely by purposefully omitting the outcomes of any and every case example he uses to demonstrate the value of three primary practices – witness preparation, jury selection assistance, and change of venue research. Brodsky walks the walk by arguing the value of consultant work is separate from trial outcomes and eliminating outcomes from his illustrative examples. This approach is more valuable than you might expect. Far from a stereotypical war story litany, Brodsky’s professional approach focuses the audience on the value of the practice and process rather than the outcome.

While undoubtedly strong, Brodsky’s framing of consulting work within a larger adversarial system is more complete than the array of consulting practices he describes in this text. The content focuses primarily on witness preparation, jury selection (supplemental jury questionnaires and oral voir dire) and community attitude research – and to a much lesser extent on case narrative and storytelling. Within each topic, Brodsky addresses applied principles as well as research foundations – usually in that order. (For instance, the witness preparation chapters are: Chapter 4, Witness Preparation for Testifying in Court; Chapter 5, Preparation and Examination of Expert Witnesses; and Chapter 6, Witness Preparation: Findings From the Lab.)

Brodsky’s governing principle is a gem, particularly for beginning consultants and attorneys looking to take a more jury-centered and strategic approach to each case. His distillation of a consultant’s “organizing construct” is “case conceptualization” – the application of theory, research and experience to specific and novel case challenges. In essence, the consultant applies hearty social science research and practical experience in similar cases in order to identify key polarizing issues and provide the attorney “clarity and sharp, explicit, well-defined



perspectives about what to do.” Be patient with “case conceptualization.” For many readers it may start out as a nebulous abstraction, but by the end of the text Brodsky has supplied sufficient examples to get a clear grasp of what it is and what it can mean for your next case. Experienced readers will be familiar with the concept even if they know it by another name.

Overall, *Principles* is a quick read, a great outlet for the consulting profession, and a useful reference. It may leave you wanting in only a few small ways:

First, the text only covers in any depth the topics of witness preparation, jury selection and change of venue studies/community attitude surveys. Case strategy employing Brodsky’s “case conceptualization” is not thoroughly explored outside these main areas. While it is done well in those areas – the concluding section on witness preparation states, “The practical knowledge is seated in the behavior science conceptualizations of problems in the witnesses’ self-presentation, and then developed by taking steps in the form of behavior rehearsals and direct feedback to correct those problems” – readers would benefit from greater application in more consulting areas – particularly in terms of strategic attorney argument. Other than a brief discussion of the importance of narrative and story, the text generally does not address case strategy and case conceptualization in opening statement and closing arguments. Be aware, oral argument is certainly one aspect of trial consultation that is not directly covered in this book.

Brodsky’s examples are plentiful and relevant, but the majority concern criminal cases and not surprisingly (due to Brodsky’s background) contain elements of psychology/psychiatry. While civil litigation is not ignored (Chapter 14 is dedicated to developing examples in eminent domain cases), the text highlights criminal cases and calls civil litigation an example of the “broad scope of trial consultation.” You will not find extensive application to civil litigation here. To be fair, Brodsky clearly articulates the fact that the covered techniques and approaches function across all types of litigation – criminal examples simply outnumber civil ones.

Importantly, much of this book is more appropriate for students and beginning consultants rather than experienced trial attorneys and consultants (particularly those with social science backgrounds). Many of the practices and resources (e.g. attitudinal scales) will be familiar to consultants with social science backgrounds and the text certainly has a bias toward social science paradigms. Attorneys without social science education may need a translator at times, and some approaches by consultants from other backgrounds – and there are many – are not sufficiently represented in this book. Still, Brodsky does us all a favor to include many useful scales and put so many resources in the same place.

Finally, Brodsky is open about his limited experience with small group research and appropriately resists the temptation to include much about small group research in this book. Simply put, you will not find much in the way of principles or practices for small group jury research – a significant part of at least some trial consultants’ work.

Despite the above, this book is a worthy read for trial attorneys and consultants. Some additional astute and useful highlights include the following:

- This book has a handful of excellent and practical insights into effective consultation. For instance citing Diane Wyzga’s useful [Story Spine](#) to help create case narratives, and a focus on “deselection” questions in both jury questionnaires and oral voir dire.
- Brodsky provides a unique but important chapter on “reversals” or non-obvious findings about potential jurors in a particular case that provide “compelling reasons to deselect exactly the jurors one would want to keep in conventional trials.”

- There are unknowns in trial consulting's future. This book includes an intriguing consideration of emerging consulting trends and challenges such as the impending difficulty of valid telephone surveys in the cell-phone age.
- Brodsky's tone is reflective and refreshing. You will appreciate his voice.

While attorney readers may not immediately recognize it, [Principles and Practice of Trial Consultation](#) is a valuable addition to the trial advocacy library. It clearly answers critical questions directed to the trial consulting field while simultaneously providing practical guidance for working consultants and trial attorneys. Whether you have personally fielded critics' questions and concerns about consultant roles in the system or not, consultants *and* attorneys should welcome Dr. Brodsky's thoughtful and clear address on the role of trial consultation in today's legal system. Consultants are lucky to have someone cover these criticisms so comprehensively and with such a credible and insightful voice.

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Editor's Note

Wow. Every issue I say to myself "This is our best issue yet!". I'm saying it again. It's amazing to watch an issue come together and I am grateful to all our authors, consultant-authors and consultant-respondents for contributing to yet another terrific issue of *The Jury Expert*.

We have articles on corporate defense strategies after a decade of corporate malfeasance, how to use simple rules for better jury selection, the legal and ethical implications of using trial consultants for witness preparation, specifics on how to prepare your witness to answer the "were you prepared" question, implications of the heightened use of images/graphics in the courtroom, skin color bias, and how defense attorneys can present damages issues effectively. Eighty-one pages of awesomeness!

I hope you find this issue useful AND if you do, please comment on our website. I know (courtesy of Google Analytics) how many of you read every issue. Comment! Or blog. And if you blog, let me know so I can link to your blog. Think of it as a small thing you can do to thank the authors who work hard to give us practical, relevant ideas to improve your litigation advocacy.

Happy January! And for those of you in snow-bound places--spring is a LONG ways away. So make some hot chocolate and hunker down and read *The Jury Expert*.

Rita R. Handrich, Ph.D., Editor

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